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Breaking the Silence:

Enhancing the whistleblowing policies and
culture in the Western Balkans and Moldova



REGIONAL
ANTI-CORRUPTION
INITIATIVE



**Gap Analysis of Whistleblower Protection Laws
in the Western Balkans and Moldova**



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LIST OF ACRONYMS

APC	Agency for the Prevention of Corruption of Montenegro
APIK	Agency for the Prevention of Corruption and Coordination of the Fight Against Corruption of Bosnia and Herzegovina
BiH	Bosnia and Herzegovina
CoE	Council of Europe
CoE Recommendation	Recommendation CM/Rec(2014)7 on Protection of Whistleblowers
CSOs	Civil Society Organizations
EU	European Union
EU Directive	Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law
FBiH	Federation of Bosnia and Herzegovina
GRECO	Group of States against Corruption
HIDAACI	High Inspectorate for the Declaration and Audit of Assets and Conflict of Interest of Albania
ICJ	International Court of Justice
NGOs	Non-Governmental Organizations
OECD	Organization for Economic Co-operation and Development
RAI	Regional Anti-corruption Initiative
SCPC	State Commission for the Prevention of Corruption of North Macedonia
SEE	Southeast Europe
UNSCR	United Nations Security Council Resolution

FOREWORD

According to international monitoring mechanisms, reports of non-governmental organizations, public opinion surveys, as well as the rhetoric used in political party campaigns, corruption in the Western Balkans and Moldova is widespread.

Where there is corruption there is a deficiency in rule of law, democracy, economic and social prosperity. Additionally, corruption is considered to be one of the biggest obstacles the Western Balkans and Moldova face on the EU integration path.

Consequently, in the last decade the government; the non-governmental sector; media; international organizations; and the general public have been increasingly treating the fight against corruption in the Western Balkans and Moldova as a top priority.

Investigative journalists have been reporting that corruption cases predominantly go unpunished, due to the absence of effective investigations and prosecutions. When asked about reasons for such ineffectiveness, law enforcement agencies complain about a small number of reports of corruption and their poor quality.

With that in mind, international organizations and NGOs engaged in talks with government institutions on the need to regulate whistleblowing as one of the most effective means of exposing and combating corruption. They pointed out that, in order to maximize the benefits of whistleblowing, comprehensive laws must be brought in place to provide whistleblowers with reliable avenues to disclose corruption, and mechanisms to protect them from retaliation. It was under such circumstances that a collaboration between government institutions, international organizations and NGOs was established in the Western Balkans and Moldova to develop whistleblower protection laws, most of which were adopted during the period between 2014 and 2019.

More importantly, once adopted, whistleblower protection laws have been reviewed for their effectiveness through monitoring of their implementation by media, NGOs and international organizations. One such report was developed by the RAI Secretariat in partnership with Blueprint for Free Speech titled 'Whistleblower protection in Southeast Europe: An overview of Laws, Practice and Recent Initiatives'¹ (2015).

The adoption, in 2019, of the European Union (EU) Directive on the Protection of Persons who Report Breaches of Union Law provided a fresh impetus for effective whistleblower protection also in SEE. As a contribution to this process, the RAI Secretariat conducted a *Gap Analysis of Whistleblower Protection Laws in the Western Balkans and Moldova* (hereinafter: Gap Analysis), which examines whether and to what extent EU Directive standards are incorporated in whistleblower protection laws of these jurisdictions.

The RAI Secretariat conducted the Gap Analysis under its EU-funded regional project titled '*Breaking the Silence: Enhancing the whistleblowing policies and culture in the Western Balkans and Moldova*' (April 2020 – March 2023). Through this project, the RAI Secretariat and its partners continue to examine and address needs and gaps of the whistleblower protection systems in SEE, by looking both at legislation and institutional arrangements, building capacity, as well as providing opportunities for regional peer-to-peer and cross-sectoral exchanges between public institutions and CSOs.

¹ See at: <http://rai-see.org/wp-content/uploads/2017/09/Protecting-Whistleblowers-in-SE-Europe.pdf>



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Last but not least, the RAI Secretariat and its partners work to raise public awareness about the importance of whistleblowing in combating corruption, and to educate the public about whistleblower disclosure channels and protection mechanisms.

The Gap Analysis was conducted by whistleblowing experts Mr. Tom Devine and Mr. Mark Worth. In order to achieve long-term impact and sustainability of effort, the process of the development of the Gap Analysis was highly consultative, with inputs provided by representatives of public institutions. The combination of expertise and experiences thus secured resulted in constructive and practical recommendations for the improvement of whistleblower protection laws in the Western Balkans and Moldova, which will serve as basis for subsequent advocacy, capacity building and public education activities of the RAI Secretariat and its partners.

Desislava Gotskova

Head of RAI Secretariat



Executive Summary: Strengths and Weaknesses of Whistleblower Protection Laws in the Western Balkans and Moldova

As part of the project *Breaking the Silence: Enhancing the whistleblowing policies and culture in the Western Balkans and Moldova*, nine whistleblower protection laws in seven jurisdictions were compared to the two predominant legal instruments in Europe: the 2014 Council of Europe Recommendation on Protection of Whistleblowers² (hereinafter: CoE Recommendation) and the 2019 European Union (EU) Directive on the Protection of Persons who Report Breaches of Union Law³ (hereinafter: EU Directive).

The seven jurisdictions whose laws were assessed are: Albania, Bosnia and Herzegovina⁴ (BiH), Kosovo*, Moldova, Montenegro, North Macedonia and Serbia.

For this study, 21 key standards that represent the basic elements of a whistleblower protection system were condensed from the CoE Recommendation and the EU Directive (see Annex 1). This assessment examines whether and to what extent each standard is incorporated into each jurisdiction's law. The assessment does not examine the impact of the implementation of laws. Through this assessment, general and specific gaps in statutory provisions are identified, and recommendations for improvement have been developed for each jurisdiction.

The results for each jurisdiction are presented in separate sections. For each jurisdiction, the 21 standards are listed with an associated analysis assessing compliance. If a certain standard is substantially included or missing, this is simply stated. If a standard is partially included or improperly reflected, there is an explanation as to which elements are missing or improperly reflected. In some instances, the potential negative effects of these shortcomings are explained.

At the conclusion for each jurisdiction, we have included a summary assessment – 1) whether the law reflects full substantial, partial or inadequate compliance with standards; and 2) summarized recommendations to achieve full compliance.

The purpose of this gap analysis is to assist jurisdictions in reviewing and improving their whistleblower legislation to be in line with the EU Directive. However, it is up to the jurisdictions to evaluate whether amendments are necessary or to implement the recommendations otherwise, and to decide the sequence of these actions. The implementation of recommendations may be adapted to each jurisdiction's specific circumstances.

Stakeholder consultations with anti-corruption agencies and other institutions were carried out to verify the legislative assessment. The assessment will serve as a basis for dialogues in the jurisdictions, with the purpose of advocating for the translation of the recommendations into action, leading to better whistleblower protection for citizens.

Input was received from public institutions of the beneficiary jurisdictions, which was included in the Gap Analysis. Given the importance of stakeholder consultations, outreach to public institutions will continue in the next phases of the project.

¹ Recommendation CM/Rec(2014)7 on Protection of Whistleblowers, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5.

² Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>

³ For Bosnia and Herzegovina, all three current whistleblower protection laws were assessed: the Law on Whistleblower Protection in the Institutions of Bosnia and Herzegovina, the Law on the Protection of Persons who Report Corruption of Brčko District and the Law on the Protection of Persons who Report Corruption of Republika Srpska.



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The results of the assessment are presented in a manner to facilitate the consideration of amendments to the laws, if a jurisdiction so chooses. Overall, two whistleblower protection laws reflected substantial compliance with consensus standards – the laws of Kosovo* and Serbia. Four reflected partial compliance with consensus standards - the laws of Albania, Montenegro, North Macedonia, and the BiH entity of Republika Srpska. Three whistleblower protection laws had inadequate compliance - the state law of BiH, the law of Brčko District of BiH, and the law of Moldova.

Overall, areas in which laws consistently incorporate the 21 standards include:

- a broad statement of whistleblower rights;
- broad scope of protection from all forms of harassment that could have a “chilling effect” on the ability and willingness of employees and citizens to report misconduct;
- designated reporting channels;
- designated persons to receive and investigate reports and retaliation complaints;
- guarantee of whistleblower confidentiality.

Overall, areas in which laws repeatedly do not adequately incorporate the 21 standards include:

- failure to include the “reasonable belief” standard for disclosures;
- including the presence of “good faith” or other tests of the whistleblower’s motives as a prerequisite for protection;
- failure to protect public freedom of expression (disclosures made to the public);
- failure to include a burden of proof on employers to show actions taken against employees are not linked to whistleblowing;
- inadequate scope of protection for all potential whistleblowers with significant evidence;
- lack of clarity and accessibility for anti-retaliation protection;
- inadequate relief through legal remedies;
- limitations on the types of misconduct that may be reported under the law;
- inadequate penalties for retaliation and other actions;
- failure to protect against civil and criminal liability;
- standards for credible reporting channels that enfranchise whistleblowers to follow up on reports;
- lack of transparency of the law’s results, in terms of impact from whistleblowing reports and effectiveness against retaliation.

The methodology of the Gap Analysis, agreed upon with representatives of public institutions of beneficiary jurisdictions, is provided in Annex 1; the Council of Europe Recommendation is in Annex 2; a summary of the EU Directive is in Annex 3; and a Glossary of Terms is in Annex 4.

ALBANIA

Law on Whistleblowing and the Protection of Whistleblowers (2016)

1) *The law applies to all public and private sector employees and workers, including contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and management body members.*⁵

The law covers employees in the public and private sectors. This is defined as people who have “entered in a labor relation regardless of the nature of employment or its duration.” This includes not-paid workers, people who have applied for employment, and former employees.

Though the law states that it applies to people regardless of the nature of their employment relationship, the law does not state specifically that it applies to contractors, trainees or management body members.

Unfortunately, there are gaps in protection even for employees the law covers. First, it does not explicitly protect those who assist the whistleblower to make the report, or are associated with the whistleblower. Often it takes a team effort to make a responsible, evidenced whistleblowing report. If there only is protection for the final messenger who makes the formal report, others essential to expose misconduct will be legally defenseless. However, they may be indispensable sources of supporting research, corroboration, or subject matter expertise. Further, any suspected whistleblower will be isolated at the workplace. Without protecting the whole team, there will be a severe chilling effect, lower quality reports and more retaliation.

The law also does not explicitly protect those who are “about to” blow the whistle (conducting the research necessary for a disclosure that reflects a reasonable belief), or are (mistakenly) “suspected” of blowing the whistle. This omission leaves vulnerability to preemptive strikes that create a significant chilling effect.

Perhaps the most significant omission in the scope of covered employee protection is the failure explicitly to protect “duty speech” – communicating protected information through an organization’s chain of command as part of job responsibilities. This is the most significant context for communication of protected information. Only a small percentage of whistleblowing is communicated as dissent. Every organization needs complete, accurate information for responsible judgments and decisions, and for its institutional checks and balances to operate effectively. This loophole also must be closed for compliance with the EU Directive.

Recommendation: The scope should be clarified to protect from retaliation persons who assist or are associated with a whistleblower; or are perceived as about to blow the whistle (conducting the research necessary for a disclosure that reflects a reasonable belief), or being a whistleblower, even if mistaken. It should be expanded to cover all reports communicating protected information, regardless of whether the communication is formal, pursuant to rules for written reports; or informal, such as protesting misconduct during a meeting. There should be no doubt that protection extends to communicating information about misconduct through the exercise of job duties, such as reporting problems to a supervisor, and when a report is an allegation or a job responsibility.

⁵ CoE Recommendation Principles 3-6; EU Directive, Articles 4, 9.2 and 12.2. These references for uniform standards in the report will not be repeated in sections on other jurisdictions.



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2) Whistleblowing includes corruption; bribery; violation of public law; human rights violations; financial crime and fraud; risks to consumers, public health, safety and environment; and other misconduct and risks that threaten or concern the public interest.⁶

The law defines whistleblowing as a report on a “suspected corruption act or practice,” specifically active or passive corruption, abuse of duties, illegal exercise of influence, misuse of public funds, illegal benefits, bribery and “any other similar act.”

Some of the misconduct categories, such as abuse of duties, are relatively broad. However, the types of misconduct that can be reported under the law do not specifically include all recommended categories of crime, misconduct or public health threats. The law should not be limited to corruption-related misconduct. The phrase “any other similar act” is vague and should be clearly defined, consistent with the principle of betraying an organization's responsibilities to the public. The EU Directive explains that threats to the public interest are those which “create significant risks for the welfare of society.”⁷

Even for corruption, the scope of protected speech is incomplete. Contrary to the EU Directive's guidance, it does not explicitly protect acts or omissions that have not yet occurred. Similarly, it fails to specify that whistleblowing about concerns for which there is a reasonable basis can be protected despite a lack of evidence.

Recommendation: The law's scope should be expanded beyond corruption to cover all the public interest categories of misconduct in this standard. The law should be clarified to protect disclosures of misconduct that has not yet occurred, as well as concerns supported by a reasonable belief despite the lack of evidence.

3) To qualify for protection, a person must have a reasonable belief, suspicion or grounds to believe the information reported is accurate. Whistleblowers shall not be subject to “good faith” or “motivation” tests. A person is not required to prove a violation has occurred, nor must an investigation, prosecution or other procedure result from the person's report.⁸

On this point, the law is potentially very problematic. The law properly states a person shall not lose protections if he or she did not know, or had no “objective means” to know, that the report was inaccurate, or if an investigation into the report concluded no crime was committed. However, the law includes an explicit “good faith” motivation test that could unfairly deprive people of protection and deter them from making reports.

The law defines “good faith” as a report that “was not based on motives of abuse or defamation,” or if the person did not make a report “for deception motives.” This means the whistleblower's motives will be put on trial. However, motives are irrelevant except for the whistleblower's credibility as a witness. Some of the most significant witnesses in history were criminals testifying under immunity or for a reduced sentence. While their motives were purely self-interest, their evidence was critical in prosecuting organized crime or other serious offenses. All that should be relevant is the quality of the evidence. Further, abuse, defamation and deception are vague, subjective terms that open up a person's entire life, intentions and state of mind to inappropriate, unfair and chilling scrutiny. As a qualifier, the law does place the burden of proof on the party alleging bad faith.

Recommendation: The motive-based “good faith” test should be removed. The only threshold should be whether the person had a reasonable belief, suspicion or grounds to believe the information reported was accurate, which is an objective standard.

⁶ CoE Recommendation Principles 1, 2 and 7; EU Directive Article 2.

⁷ EU Directive Recital Paragraph 3.

⁸ CoE Recommendation Principle 22; EU Directive Recital Paragraph 22, Article 6.1.

4) Protection is not lost for inaccurate reports if the person was honestly mistaken and had a reasonable belief the information was accurate. People are presumed to have a reasonable belief unless demonstrably shown otherwise.⁹

The law states that a person shall not lose protections if he or she did not know, or had no “objective means” to know, that the report was inaccurate, or if an investigation into the report concluded that no crime was committed. A person is presumed to have acted in good faith “until the contrary is proved.”

Recommendation: No modifications are necessary. The law complies with this standard.

5) Clear reporting channels, designated contact persons, and specified follow-up procedures must be in place within private¹⁰ and public sector workplaces (internal reporting) and public institutions (external reporting). People have the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.¹¹

For internal disclosures (within the workplace), the law requires public authorities with more than 80 employees, and private entities with more than 100 employees, to assign a “responsible unit” to record, investigate and examine reports. This is contrary to the standard in the EU Directive that requires internal channels when there are 50 or more employees. People within the unit “may” be trained in whistleblower protection, according to regulations from the Council of Ministers (for public authorities) and the High Inspectorate for the Declaration and Audit of Assets and Conflict of Interest (HIDAACI; for the private sector). However, there is no requirement for the responsible unit to have structural independence or to be free from conflict of interest. There is no requirement that the institutional chief receive or have any responsibility to act on the responsible unit's findings. But these best practices are necessary for the law to meet the criteria in the EU Directive.

There are multiple outlets for whistleblowing disclosures to government enforcement agencies. For external disclosures, a person may file a report directly with HIDAACI only if:

- the employer does not have a responsible unit;
- the responsible unit does not start an investigation or improperly dismisses the case;
- people within the responsible unit are directly or indirectly involved with the alleged misconduct;
- there are other reasonable grounds to doubt the integrity and impartiality of the responsible unit;
- evidence can be erased or destroyed.

The EU Directive strongly encourages whistleblowers first to report through credible internal channels. However, the Directive also is clear that they have the choice whether to make their initial report internally (employer) or externally (government enforcement agency). This law does not comply with the EU Directive on this point. Whistleblowers do not have the unqualified right to choose between internal and external channels. There is a significant chilling effect by forcing whistleblowers to guess whether their external report to a government enforcement agency qualifies for an exception.

There is no requirement that the institutional chief receive or have any responsibility to act on the responsible unit's findings. But these best practices are necessary for the law to meet the criteria in the EU Directive.

⁹ CoE Recommendation Principle 22: EU Directive Recital Paragraph 24.

¹⁰ Companies over a certain threshold. Article 8(3) of the EU Directive requires internal reporting channels for entities with 50 or more workers. This reference will not be repeated.

¹¹ CoE Recommendation Principles 12-17, EU Directive Recital Paragraphs 32, 34-5, Articles 9(c), 10



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Recommendation: Internal or external units should be guaranteed adequate resources and training. For compliance with the EU Directive, whistleblowers must have the right to freely choose between internal and external channels for their initial disclosure.

6) People have the option to report publicly (e.g. via media, NGOs, public meetings, online outlets) under reasonable circumstances that do not place undue restrictions on the person, or that have the effect of blocking the release of information that requires investigation and corrective action to protect the public interest. These circumstances include but are not limited to:

- *inaction for more than 6 months on an internal disclosure or 3 months on an external disclosure*
- *reasonable belief in a conflict of interest, collusion or the destruction of evidence*
- *reasonable belief of imminent danger to public health or safety, emergency or irreversible damage*
- *retaliation likely would result if institutional channels are used.*¹²

The law does not permit public disclosures under any circumstance: “In case the whistleblower announces publicly the reported alleged act or practice of corruption, he/she will lose the right to protection under this law.” This contradicts a major premise of the EU Directive – public freedom of expression under specified circumstances.

Recommendation: The law should protect disclosures to the public, consistent with its current criteria for eligibility to make initial external disclosures to the government.

*7) Whistleblowers are entitled to confidentiality of their identity and all identifying information, except when waived by their prior written consent or if required by official investigations or judicial proceedings.*¹³

The law requires responsible units and HIDAACI to maintain the confidentiality of whistleblowers and the evidence in whistleblower reports. This can only be waived via written consent of the whistleblower, or “for the purpose of the fulfilment of a legal obligation.” In those instances, the whistleblower has the right to advance notice that identifying information will be released. Responsible units and HIDAACI may only share whistleblower information with people assigned to handle or investigate cases, and all people who receive confidential information are bound to honor that restriction.

Recommendation: No modifications are necessary, as the law complies with this standard.

*8) Protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent.*¹⁴

The law recognizes the right to make an anonymous report under “legitimate circumstances.” Anonymous reports are “accepted” only if the responsible unit or HIDAACI deems the reasons for anonymity to be justified, and if the person would face “real, immediate and irreparable damage” by including his or her name in the report. This implies a person would have to explain the reason or reasons for remaining anonymous. Giving responsible units at private companies the authority to decide whether an employee’s anonymity is justified opens opportunities for abuse by the companies. A company could determine anonymity was unjustified and thus refuse to accept the report.

¹² CoE Recommendation Principle 14; EU Directive Article 16.

¹³ CoE Recommendation Principle 18; EU Directive Articles 9(a), 12(a), 16, 17.

¹⁴ CoE Recommendations, Explanatory Memorandum at 15; EU Directive, Recital Paragraph 34.

The law does not state whether an anonymous whistleblower will be protected if his/her identifying information becomes known. The law does not state whether anonymous reports containing bona fide information will be investigated, or whether they would be investigated if it were determined the person did not have a legitimate reason for remaining anonymous.

Anonymous disclosures can include valuable leads or evidence, often at a higher volume than other channels. People who file an anonymous report or make a public disclosure anonymously should be protected if they are subsequently identified and are retaliated against.

Recommendation: The law should be modified to pursue any credible evidence received, whether or not anonymously, and to protect anonymous whistleblowers who are identified.

9) Reports shall be investigated promptly, and employees shall be informed of investigations and actions taken in response to their report within a reasonable amount of time.¹⁵

The law states that responsible units and HIDAACI should carry out investigations honestly, impartially, efficiently, confidentially, in consideration of the whistleblower, independently from political or other influences, and without conflicts of interest. The law requires responsible units and HIDAACI to conduct investigations according to procedures in the law. Investigations of reports must be completed within 40 days unless more time is needed. While this schedule is expeditious, it does not commit to the EU Directive's requirement that investigations must be completed within 3-6 months. Each party involved in the investigation is guaranteed due process, may provide information, may consult the investigation file, and has the right to present claims.

Responsible units and HIDAACI must notify whistleblowers on measures taken in response to their reports, and provide answers to whistleblowers' requests for information, within 30 days from when the report was filed. HIDAACI and the organization, in cooperation with the HIDAACI, take immediate measures to prevent or halt the ongoing harmful effects of the alleged corruption act or practice reported by the whistleblower. This structure provides transparency, but only about the investigation's progress. The whistleblower does not have the right to rebut denials by alleged wrongdoers, even though the whistleblower has the burden to prove alleged wrongdoing, nor is there any right to comment on the unit's final report, or even see it. Similarly, there is no transparency for the public to see the results.

Responsible units and HIDAACI have the right not to initiate or to terminate an investigation if:

- the whistleblower did not follow the procedures for a written report;
- the whistleblower did not correct any "deficiencies" with the report within seven days;
- the report includes information not within the definition of "corruption";
- there is no evidence of a crime or violation;
- the whistleblower did not act in "good faith";
- initial investigation shows that the allegations in the whistleblower report of the alleged corruption act or practice are grounded, in which case HIDAACI refers the case to the prosecution office or the state police;
- "the report includes facts and circumstances that are not included within the scope of this law ..."

These exceptions include vague, highly subjective justifications to reject investigating almost any report. They institutionalize judgment calls about the whistleblower's motives as a prerequisite. Investigations of valid evidence should not be disqualified because of extraneous, non-relevant issues.

¹⁵ CoE Recommendation Principles 19-21; EU Directive Articles 9, 11 and 12



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Recommendations: The law should require that HIDAACI investigate or undertakes other follow-up upon all credible evidence of all forms of misconduct, regardless of the whether a person followed the procedures correctly, whether the person acted in “good faith,” or whether the evidence is about corruption or other violations.

10) Whistleblowers shall be protected from all forms of retaliation, including but not limited to dismissal, suspension, demotion, punitive transfer, negative performance assessment or employment reference, pay reduction, harassment, blacklisting, and psychiatric or medical referral.¹⁶

The scope of protection for workplace retaliation is comprehensive. The law defines retaliation as “any action, direct or indirect, or a threat...of discriminatory nature, disciplinary or, in any other unfair form” that “harms the whistleblower’s legitimate interests and that results from whistleblowing.” This includes dismissal, suspension, transfer, demotion, salary reduction, loss of status and privileges, withholding of promotion or training and negative performance assessments.

Recommendation: No modifications are necessary. The law complies with this standard.

11) The burden of proof is on the employer to show any actions taken against an employee were not associated with or motivated by the employee having made a report, considered making a report, or assisted a person in making a report. Employees are not required to establish a link between making a report and actions taken against them.¹⁷

If an employee applies to HIDAACI for protection, the employer must prove that any actions taken against the employee were not directly or indirectly related to the employee having made a report.

Recommendation: No modifications are necessary. The law meets this standard.

12) Liability for civil, criminal or administrative actions is waived for people who make a report in accordance with the law.¹⁸

The law does not specifically address this issue, which must be added for compliance with the EU Directive. Criminal or civil liability can have a far greater chilling effect than workplace harassment.

Recommendation: A provision should be added providing an affirmative defense to civil or criminal liability for reports the whistleblower “had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing” misconduct covered by the law. This is the requirement of the EU Directive.

¹⁶ CoE Recommendation Principles 10 and 21; EU Directive Article 19.

¹⁷ CoE Recommendation Principle 25; EU Directive Recital Paragraph 53, Article 21.5.

¹⁸ CoE Recommendation Principle 23; EU Directive Articles 21.2, 21.3, 21.7.

13) Whistleblowers have the right to effective remedy and fair trial, presumption of innocence, and the rights of defense, including the right to be heard and the right to access files.¹⁹

Employees may apply to the responsible unit for protection. If the responsible unit does not take “immediate measures” to remedy the retaliation, the employee may apply to HIDAACI, which begins an investigation. HIDAACI must tell the employee the status of the complaint within 10 days, and complete the investigation within 30 days. If HIDAACI determines retaliation occurred, HIDAACI will call on the employer to take all measures to remedy retaliation. However, there is no authority for temporary relief. This can be essential to sustain the whistleblower’s professional and financial survival during protracted proceedings, and is an incentive to constructively resolve unnecessary conflict. If the retaliation is not remedied, the employee may file a court action. The employee also may approach a court for compensation for damages.

Recommendation: The law should be modified to provide authority for HIDAACI to order interim relief.

14) Rights and remedies cannot be waived or limited by any agreement or condition of employment, including pre-dispute arbitration agreement. Employment contracts may not be used to prevent employees from making or discussing a report.²⁰

The law adopts this principle completely, stating, “Any rules or private agreement, under which the rights and protection of the whistleblower by this law are excluded or limited, is invalidated. Whistleblowing rights take precedence over confidentiality agreements.”

Recommendation: No modifications are necessary. The law meets this standard.

15) Penalties shall apply for hindering or attempting to hinder reporting; retaliating or threatening to retaliate against a whistleblower; encouraging or condoning retaliation; bringing vexatious proceedings or actions against a whistleblower; violating a whistleblower’s confidentiality; and knowingly reporting and/or publicly disclosing false information.²¹

The law includes monetary fines for administrative offenses:

- failure to establish a responsible unit within an organization – 100,000 lek (€800);
- any act of retaliation as defined under the law, or refusal to grant a transfer to a whistleblower – 300,000 to 500,000 lek (€2,400 to €4,000);
- violating the principles of investigating a whistleblower case – 100,000 to 300,000 lek (€800 to €2,400);
- violating a whistleblower’s confidentiality and/or personal data – 150,000 to 300,000 lek (€1,200 to €2,400).

HIDAACI has authority to decide on violation and fines. The decisions may be appealed under the Law on Administrative Offenses.

Recommendation: No modifications are needed. The law meets this standard.

¹⁹ CoE Recommendation Principles 23 and 26; EU Directive Article 21.6.

²⁰ CoE Recommendation Principles 11 and 17; EU Directive Articles 21.2, 21.7.

²¹ EU Directive Article 33.



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16) People harmed or affected by reports shown to be knowingly inaccurate shall have access to remedies.²²

The law does not specifically address this issue.

Recommendation: The law should be modified to specify that it does not provide a legal defense to liability for knowingly false statements.

17) A designated agency shall promote whistleblower systems in order to nurture positive public attitudes and facilitate reporting.²³

HIDAACI's tasks include increasing public awareness and cultural acceptance of whistleblowing.

Recommendation: No modifications are necessary. The law complies with this standard.

18) A designated agency shall provide assistance for disclosures and retaliation protection through free-of-charge information and advice on rights, reporting channels, contact persons, procedures, remedies and retaliation protection.²⁴

HIDAACI's responsibilities include offering advice and support regarding whistleblower protection.

Recommendation: No modifications are necessary. The law complies with this standard.

19) Legal aid is available in retaliation protection proceedings, criminal proceedings, and cross-border civil proceedings.²⁵

The law does not specifically address this issue, or the alternative of reimbursement for attorney fees when retaliation is proved. The effect is that many whistleblowers will be unable to afford to exercise their rights.

Recommendation: The law should be modified to provide legal assistance, and attorney fees paid by the defendant in proceedings where the whistleblower obtains relief.

20) A designated agency shall provide oversight of whistleblower disclosure and protection mechanisms; identify and seek to remedy any shortcomings or inefficiencies; and maintain and annually release anonymized data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes, including the estimated financial damage and the amounts recovered following investigations and proceedings related to the breaches reported.²⁶

²² CoE Recommendation Principle 10; EU Directive Articles 22, 23.2

²³ CoE Recommendation Principle 27.

²⁴ CoE Recommendation Principle 28; EU Directive Article 20.

²⁵ EU Directive Article 20.1©.

²⁶ CoE Recommendation Principle 29; EU Directive Article 27.

HIDAACI's tasks include:

- receiving and investigating requests for retaliation protection;
- guaranteeing whistleblower protection;
- assessing and making recommendations on whistleblower protection practices;
- monitoring and issuing instructions on internal and external reporting mechanisms;
- annually receiving, from responsible units, information on whistleblower reports, investigations and retaliation protection;
- submitting a report on whistleblower practices to the Assembly every two years;
- annually publishing a report with information including the number of whistleblower reports, case outcomes, and the degree of public awareness and confidence in the system.

Recommendation: While the oversight and transparency provision is sound, it should be expanded to include financial consequences from reported misconduct, and recoveries from associated whistleblower reports.

21) A public, transparent review of laws and policies shall be conducted, and any needed reforms made, at least every three years.²⁷

The law does not specifically address this issue. However, HIDAACI has extensive review responsibilities, with regular reports and recommendations on the law's implementation.

Recommendation: Every three years, HIDAACI should be required to report on the qualitative effectiveness of the law in meeting its objectives, with any necessary policy or procedural recommendations.

²⁷ CoE Recommendation Principle 29; EU Directive Article 27.



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SUMMARY

Albania is in partial compliance with consensus standards for whistleblower rights.

The law contains a number of positive features, including:

- a requirement for all major organizations to have designated whistleblower reporting channels;
- broad scope of protection against all forms of workplace retaliation;
- protection for honest mistakes;
- protection against nondisclosure policies that would override the law's whistleblowing rights;
- best practice confidentiality protection;
- reverse burden of proof on employers as the standard to judge retaliation complaints;
- access to administrative and judicial remedies to seek relief;
- disciplinary penalties for retaliation or noncompliance;
- an agency responsible to promote whistleblower rights, as well as to provide guidance and assistance to whistleblowers; and
- transparency for the law's track record.

However, the law is out of compliance with consensus standards due to omissions and weaknesses, such as:

- failure to cover misconduct beyond corruption;
- significant omissions in the scope and context of those protected by the law, including those who help prepare a report, those who disclose protected information as part of job duties, anyone making an oral disclosure, and anyone engaging in freedom of expression;
- subjecting whistleblowers to the good faith test of their motives;
- inadequate channels for anonymous whistleblowers;
- insufficiently clear grounds to not investigate any whistleblower report;
- absence of a shield against civil and criminal liability;
- absence of authority for interim relief; and
- failure to provide legal aid or attorney fees for prevailing whistleblowers.

BOSNIA AND HERZEGOVINA

This section provides an assessment of three whistleblower protection laws in Bosnia and Herzegovina²⁸ (BiH): the Law on Whistleblower Protection in the Institutions of Bosnia and Herzegovina; the Law on the Protection of Persons who Report Corruption of Brčko District; and the Law on the Protection of Persons who Report Corruption of Republika Srpska. At the time of the writing of this assessment, a whistleblower protection law of the Federation of Bosnia and Herzegovina (FBiH) was not adopted, leaving unregulated the whistleblower reporting channels and protection mechanisms for employees in the FBiH entity, which in itself presents a gap.

Law on Whistleblower Protection in the Institutions of Bosnia and Herzegovina (2013)

1) The law applies to all public and private sector employees and workers, including contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and management body members.

The law only applies to people employed in BiH government institutions and in legal entities established by BiH institutions. This has been estimated to be approximately 22,000 people. The law does not apply to any other portions of the public sector, or to any portions of the private sector. The law does not specify that it applies to contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and members of management bodies.

Even for those covered, there are significant loopholes. The law does not explicitly protect those who assist the whistleblower to make the report, or are associated with the whistleblower. However, often it takes a team effort to make a responsible whistleblowing disclosure supported by credible evidence. If there only is protection for the final messenger who makes the formal report, those essential sources of support will dry up. Further, any suspected whistleblower will be isolated at the workplace. Without protecting the whole team, there will be a severe chilling effect, lower quality reports and more retaliation.

The law also does not explicitly protect those who are “about to” blow the whistle (conducting the research necessary for a disclosure that reflects a reasonable belief), or are (mistakenly) “suspected” of blowing the whistle. This omission leaves vulnerability to preemptive strikes and isolation that create a significant chilling effect.

Perhaps the most significant omission in the scope of covered employee protection is the failure explicitly to protect “duty speech” – communicating protected information through the chain of command as part of job responsibilities. This overwhelmingly is the most significant context for communication of protected information. Only a small percentage of whistleblowing is communicated as dissent. Every organization needs complete, accurate information for responsible judgments and decisions, and for its institutional checks and balances to operate effectively. The law does permit a whistleblower to communicate with the manager based on concerns with the authorized person in the formal whistleblower channel. However, this is as an alternate option to file formal allegations, not a job duty. This loophole also must be closed for compliance with the EU Directive.

²⁸ The Constitution sets out the internal structure of the country as a state consisting of two entities, the Federation of Bosnia and Herzegovina and Republika Srpska, as well as the Brčko District.



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Recommendation: The law should be expanded to cover all citizens in an employment context, not just certain government employees. It should guard against pre-emptive strikes against those “about to” engage in protected speech (conducting the research necessary for a disclosure that reflects a reasonable belief). It should protect all those associated with the whistleblower, or who assist in preparing a report. The scope should be clarified to cover all reports supported by a reasonable belief that communicate protected information, regardless of whether the communication is formal, pursuant to rules for written reports; or informal, such as protesting misconduct during a meeting. There should be no doubt that protection extends to communicating information about misconduct through the exercise of job duties, such as reporting problems to a supervisor, and when a report is an allegation or a job responsibility.

2) Whistleblowing includes corruption; bribery; violation of public law; human rights violations; financial crime and fraud; risks to consumers, public health, safety and environment; and other misconduct and risks that threatened or concern the public interest.

The law applies to “reporting acts of corruption.” Corruption is defined as abuse of power by a public employee or official for private gain to that person, or to a domestic or foreign person or legal entity. This includes bribery, and “violation of the law, other regulations” and “irregularity related to work and frauds that indicate existence of corruption.”

The law's text could mean that it covers all illegality. This would eliminate subject matter restrictions. However, the text is unclear whether illegality only is relevant if the misconduct concerns “work and frauds that indicate existence of corruption.” Further, the law does not even arguably protect non-corruption related disclosures of waste, abuse of authority, mismanagement or a substantial and specific threat to public health and safety unless they are technically illegal.

Further, the law is incomplete even for topics covered. Contrary to the EU Directive's guidance, it fails to explicitly protect acts or omissions that have not yet occurred. Similarly, it fails to specify that whistleblowing about concerns for which there is a reasonable basis can be protected despite a lack of evidence.

Recommendation: The law should be expanded beyond corruption to also protect against all reports that expose any illegality or abuse of authority, as well as waste, mismanagement and threats to public health or safety. The law should be explicitly clarified to protect disclosures of misconduct that has not yet occurred, as well as concerns supported by a reasonable belief despite the lack of evidence.

3) To qualify for protection, a person must have a reasonable belief, suspicion or grounds to believe the information reported is accurate. Whistleblowers shall not be subject to “good faith” or “motivation” tests. A person is not required to prove a violation has occurred, nor must an investigation, prosecution or other procedure result from the person's report.

The law provides protection to a person who has information he or she “deems to be true.” The law defines this as “good faith.” This definition technically eliminates concerns of putting the whistleblower's motives on trial. However, the language could be confusing, because the definition is inconsistent with common interpretations of good faith.

Recommendation: The phrase “good faith” should be replaced with “a reasonable belief that the information was accurate at the time it was reported.” “Good faith” should be removed, because despite the definition it could be misconstrued as a motives test – whether the person had a proper or pure intention to make a report.

4) Protection is not lost for inaccurate reports if the person was honestly mistaken and had a reasonable belief the information was accurate. People are presumed to have a reasonable belief unless demonstrably shown otherwise.

The law does not specifically state that protection remains if a person made an inaccurate report in honest error – that the person was not aware that the information was not accurate.

Recommendation: The laws should clarify that a whistleblower still has protection for a report that is mistaken but based on a reasonable belief.

5) Clear reporting channels, designated contact persons, and specified follow-up procedures must be in place within private and public sector workplaces (internal reporting) and public institutions (external reporting). People have the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.

For internal reporting, people employed in BiH institutions may make reports to their superiors, compliance officials, or supervision or audit officials. However, as a rule internal disclosure must be made to an authorized person in accordance with internal bylaws. The other audiences are available in the absence of a bylaw procedure, or if there are justified concerns about the authorized person's credibility. Institution directors are subject to a misdemeanor fine from 10,000 KM to 20,000 KM for failing to issue bylaws for internal reporting.

For external reporting, channels include criminal investigation and prosecution authorities, and the Agency for the Prevention of Corruption and Coordination of Fight Against Corruption (APIK).

People working in BiH institutions do not have the unqualified right to choose between internal and external channels, for their initial disclosure, as required by the EU Directive. While contrary to cultural tradition, there is a significant chilling effect by forcing whistleblowers to guess whether their external report to a government enforcement agency qualifies for an exception. A person is protected for making an external disclosure only if the internal reporting procedure takes longer than 15 days, the procedure has been irregular, or the person believes the manager or person authorized to receive reports is associated with corruption.

The law allows APIK 30 days to decide whether to grant whistleblower status to a person. Unfortunately, the guidance stops there. The law does not specify the process and procedures and rules to investigate reports of alleged misconduct. There are no designated external channels to submit a report. Nor is there an overall agency with authority to receive and investigate reports.

Recommendations: The law should grant people the unqualified right to choose between internal and external channels, and include specific procedures for following up and investigating reports of alleged misconduct and public health threats. If there is no centralized agency, for consistency with the EU Directive the law should clarify those reports can be made to agencies competent for the alleged misconduct under statutory procedures, including designated judicial, regulatory or supervisory bodies. The best practice would be to channel disclosures to competent authorities through a designated specialized agency for implementation of the law. Authorized persons should be guaranteed adequate resources, training, structural independence and freedom from conflicts of interest. For compliance with the EU Directive, whistleblowers must have the right to freely choose between internal and external audiences for their initial disclosure.



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6) People have the option to report publicly (e.g., via media, NGOs, public meetings, online outlets) under reasonable circumstances that do not place undue restrictions on the person, or that have the effect of blocking the release of information that requires investigation and corrective action to protect the public interest. These circumstances include but are not limited to:

- inaction for more than 6 months on an internal disclosure or 3 months on an external disclosure
- a reasonable belief in a conflict of interest or the destruction of evidence
- a reasonable belief of an imminent danger to public health or safety
- retaliation likely would result if institutional channels are used.

The law partially meets this standard. A person is protected for making a public disclosure:

- if he/she suspects he/she will be subjected to detrimental action, or
- if he/she made a report to a competent authority and there will be no appropriate action taken, or evidence will be concealed or destroyed, or
- if he/she made a report to a competent authority and no appropriate action was taken within the legal timeline – provided the person considered possible damage caused by making a public disclosure.

The law does not provide a sufficient opportunity for a person to make a public disclosure. The most specific barrier is “possible damage” from the public disclosure that could disqualify protection. This is highly subjective, and there will be a significant chilling effect if whistleblowers must guess whether a competent authority agrees with their assessment of possible damage. Further, the law does not permit public disclosures of misconduct that the whistleblower reasonably believes “may constitute an ... emergency situation or a risk of irreversible damage,” as required by Article 15.1(b) of the EU Directive.

Recommendation: The law should be expanded to permit public disclosures when misconduct may constitute an imminent or manifest danger to the public interest, emergency, risk of irreversible damage, or where the internal and external authority may be in collusion with or involved with the alleged misconduct. The current conditions in the law unfairly and improperly restrict public disclosures.

7) Whistleblowers are entitled to confidentiality of their identity and all identifying information, except when waived by their prior written consent or if required by official investigations or judicial proceedings.

The law does not specifically address confidentiality and the protection of a whistleblower's identity and identifying information. This is a basic requirement of the EU Directive, and an essential condition for any legitimate whistleblower law. For many employees, exposure of their identity has an inherent chilling effect.

Recommendation: For legitimacy, the law must protect confidentiality when requested. The proper structure is to require the whistleblower's written consent prior to any discretionary release of identity or identifying information. If release of required information is required by law, such as with a court order, the whistleblower must receive timely advance notice. Provisions for data protection in the internal provisions should be codified in the whistleblower law.

8) *Protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent.*

The law does not specifically address anonymous reporting or the protection of an anonymous whistleblower's identity and identifying information if it becomes known. Anonymous disclosures can include valuable leads or evidence, often at a higher volume than other channels. People who file an anonymous report or make a public disclosure anonymously should be protected if they are subsequently identified and are retaliated against.

Recommendation: The law should be modified to pursue any credible evidence received, whether or not anonymously, and to protect anonymous whistleblowers who are identified at a later point, either with or without their consent.

9) *Reports shall be investigated promptly, and employees shall be informed of investigations and actions taken in response to their report within a reasonable amount of time.*

The law does not specifically include whistleblowers in the process to investigate and act on their reports. It does not require notice or status reports, or timely action. These omissions create a chilling effect due to cynicism, i.e., lack of confidence in the utility of reporting. Studies conclude there is a greater chilling effect from cynicism than fear of retaliation. There is also no commitment to complete the investigation within 3-6 months, as required by the EU Directive.

Recommendation: The law should be modified so that whistleblowers receive notice that their reports are being investigated, status reports on the investigation's status, an opportunity to rebut denials of their charges, and a schedule for final action. The report with the whistleblower's comments should be in the official record. The law should require completion of whistleblower investigations within 3-6 months.

10) *Whistleblowers shall be protected from all forms of retaliation, including but not limited to dismissal, suspension, demotion, punitive transfer, negative performance assessment or employment reference, pay reduction, harassment, blacklisting, and psychiatric or medical referral.*

The law specifically includes most of these forms of retaliation. It defines "detrimental action" as harm to the employee by terminating his/her employment, cancelling an employment contract, suspension, demotion, dismissal via redundancy, initiating disciplinary actions, blackmailing, giving a negative work appraisal, creating hostile work environment, withholding work assignments. Any other relevant specifics are included due to provisions that prohibit any other actions that create a chilling effect which deters protected speech.

Recommendation: No modifications are necessary. The law complies with this standard.



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11) The burden of proof is on the employer to show any actions taken against an employee were not associated with or motivated by the employee having made a report, considered making a report, or assisted a person in making a report. Employees are not required to establish a link between making a report and actions taken against them.

The law states that if an institution director claims the same action would have been taken against an employee if he/she had not made a report, the director is required to prove this. The law does not state what burden of proof, if any, the employee has to demonstrate retaliation. The EU Directive's standard for an employee's burden of proof is – 1) establishing protected conduct through a report covered by the law; and 2) a subsequent prejudicial action. It requires that the employer's burden is to prove that whistleblowing did not affect the decision in any way. These specifics make a significant difference, because they establish what each party must prove to prevail.

Recommendation: For consistency with the EU Directive, there should be a burden of proof for the employee to – 1) demonstrate protected speech; and 2) demonstrate that a prejudicial act subsequently occurred. It should require the employer to prove that whistleblowing did not affect the decision on actions taken against the whistleblower in any way.

12) Liability for civil, criminal or administrative actions is waived for people who make a report in accordance with the law.

The law does not specifically address this issue, except to shield whistleblowers from criminal liability for disclosing official secrets to competent authorities. The liability shield is a basic requirement of the EU Directive. Criminal or civil liability can have a far greater chilling effect than workplace harassment.

Recommendation: A provision should be added providing an affirmative defense to civil or criminal liability for any reports where the whistleblower “had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing” misconduct covered by the law.³⁰

13) Whistleblowers have the right to effective remedy and fair trial, presumption of innocence, and the rights of defense, including the right to be heard and the right to access files.

The law does not specifically address this issue beyond giving courts the authority to issue enforcement orders for administrative relief. Credible due process is the foundation for protection in the EU Directive and all legitimate whistleblower laws.

Recommendation: If whistleblowers do not obtain administrative relief, the law should be clarified in such a way that they can seek it from court to eliminate all the direct or indirect effects of retaliation.

14) Rights and remedies cannot be waived or limited by any agreement or condition of employment, including pre-dispute arbitration agreement. Employment contracts may not be used to prevent employees from making or discussing a report.

The law does not specifically address this issue. Without this provision, the law is vulnerable to being overridden by conflicting laws or organizational gag orders. Signing Nondisclosure Agreements commonly is a job prerequisite. “Anti-gag” provisions are mandatory for credible rights, and required by the EU Directive.

³⁰ See Article 21.7 of the EU Directive

Recommendation: This law should be expanded to include a provision that without specific repeal through a new law, its rights cannot be overridden or affected by any other rule, policy, or agreement.

15) Penalties shall apply for hindering or attempting to hinder reporting; retaliating or threatening to retaliate against a whistleblower; encouraging or condoning retaliation; bringing vexatious proceedings or actions against a whistleblower; and violating a whistleblower's confidentiality.

The law includes misdemeanor fines for institution directors who do not comply with instructions from APIK to remedy retaliation (10,000 KM - 20,000 KM); institution directors who do not issue bylaws for internal disclosures (10,000 KM - 20,000 KM); and people who knowingly submit a false corruption report (1,000 KM - 10,000 KM). Unfortunately, it does not include accountability for obstructing reporting, retaliation, vexatious legal proceedings, or breaching confidentiality. Those are the specific sanctioning requirements in the EU Directive.

Recommendation: The law should include penalties for all other misconduct listed in the EU Directive, including obstruction of reports, retaliation, vexatious legal proceedings, and breaches of confidentiality.

16) People harmed or affected by reports shown to be knowingly inaccurate shall have access to remedies.

The law does not specifically address this issue.

Recommendation: The law should be modified to include this provision.

17) A designated agency shall promote whistleblower systems in order to nurture positive public attitudes and facilitate reporting.

The law does not specifically address this issue, which is essential for the public to be aware of rights. Whistleblower laws commonly are dormant or severely underutilized, in part because the public is unaware of their existence and in part because they contradict ingrained cultural traditions. An ambitious public education campaign is a prerequisite for the law to achieve its objectives.

Recommendation: The law should be expanded to include a dedicated public education campaign on the nature of whistleblower rights, and how they can benefit the public.

18) A designated agency shall provide assistance for disclosures and retaliation protection through free-of-charge information and advice on rights, reporting channels, contact persons, procedures, remedies and retaliation protection.

APIK has the legal authority and responsibility to receive and investigate whistleblower retaliation complaints. The law does not specifically include the provision of assistance or advice to employees.³¹ Ignorance of how to use the law can create as significant a chilling effect as ignorance of its existence.

Recommendation: The law should be modified to expand APIK's duties, or create a new agency, to provide guidance for whistleblowers on the nature of their rights and how to exercise them fully.

³¹ APIK has carried out a range of public information efforts, including publishing the whistleblower law on its website; maintaining an anti-corruption hotline; distributing leaflets on whistleblower protection and procedures in cooperation with Analitika–Center for Social Research; and enabling citizens to e-mail questions and comments.



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19) Legal aid is available in retaliation protection proceedings, criminal proceedings, and cross-border civil proceedings.

The law does not specifically address this issue, which means that many unemployed whistleblowers will be unable to afford action on their rights, or even an independent source of guidance in the absence of a dedicated government agency.

Recommendation: The law should be modified to provide legal assistance, and attorney fees paid by the defendant in court proceedings where the whistleblower obtains relief.

20) A designated agency shall provide oversight of whistleblower disclosure and protection mechanisms; identify and seek to remedy any shortcomings or inefficiencies; and maintain and annually release anonymized data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes.

APIK and the Ministry of Justice's Administrative Inspectorate shall oversee enforcement of the law. It requires APIK annually to publish a list of institutions and entities where corruption was reported, and information on retaliation and corrective actions. While broad in scope, the duty needs to be specified with respect to specific reporting requirements.

Recommendation: The law should specify that APIK's annual reporting requirements specifically include data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes, as well as an analysis of its weaknesses based on experience to date.

21) A public, transparent review of laws and policies shall be conducted, and any needed reforms made, at least every three years.

The law does not specifically address this issue, which is essential because it is unrealistic to perfect laws without the lessons learned from experience with their application.

Recommendation: Every three years APIK should be required to report on the law's effectiveness in meeting its objectives, including by providing recommendations for improvements to the law.

SUMMARY

The assessment for Bosnia and Herzegovina's whistleblower law is "inadequate compliance with EU Directive and CoE standards." The only standard in place is coverage against the full scope of workplace harassment. There also is a crude reverse burden of proof, but it will not be reliable until the specifics of the EU Directive are added. The law calls for transparency of results in principle but there are no specifics. No other standards are in compliance, and most are not addressed.

Law on the Protection of Persons who Report Corruption of Brčko District of Bosnia and Herzegovina (2018)

1) The law applies to all public and private sector employees and workers, including contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and management body members.

The law defines a whistleblower as a person who is employed in “public administration bodies and institutions, public companies, institutions and other legal entities” established by the Brčko District, as well as in “legal entities” and “entrepreneurs.” If “legal entities” refers to private sector companies, and if “entrepreneurs” refers to individual business owners in the private sector, then the law should state this with more clarity. The law should specify which, if any, private sector employees are covered by the law and are eligible for protection.

The law applies to employees “regardless of [their] employment status.” Though this provision could be construed to include all categories of employment, the law should specify whether it includes contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees, and management body members.

There are significant holes in protection even for employees the law covers. First, it does not explicitly protect those who assist the whistleblower to make the report, or are associated with the whistleblower. Often it takes a team effort to make a responsible, evidenced whistleblowing disclosure. If there only is protection for the final messenger who makes the formal report, those essential sources of support will dry up. Further, any suspected whistleblower will be isolated at the workplace. Without protecting the whole team, there will be a severe chilling effect, lower quality reports and more retaliation.

The law also does not explicitly protect those who are “about to” blow the whistle (conducting the research necessary for a disclosure that reflects a reasonable belief), or are (mistakenly) “suspected” of blowing the whistle. This omission leaves vulnerability to preemptive strikes that create a significant chilling effect.

Perhaps the most significant omission in the scope of covered employee protection is the failure explicitly to protect “duty speech” – communicating protected information through the chain of command as part of job responsibilities. This is the most significant context for communication of protected information whose free flow as the life blood for institutional checks and balances is the law's purpose. This loophole also must be closed for compliance with the EU Directive.

Recommendation: The law should clarify that it covers all the employment-related categories specified in the EU Directive, whether government or corporate, and regardless of formality or current status. It should guard against pre-emptive strikes that harass those “about to” engage in protected speech (conducting the research necessary for a disclosure that reflects a reasonable belief). It should protect all those associated with the whistleblower, or who assist in preparing a report. The scope should be clarified to cover all reports supported by a reasonable belief that communicate protected information, regardless of whether the communication is formal, pursuant to rules for written reports; or informal, such as protesting misconduct during a meeting. There should be no doubt that protection extends to communicating information about misconduct through the exercise of job duties, such as reporting problems to a supervisor, and when a report is an allegation or a job responsibility.



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2) Whistleblowing includes corruption; bribery; violation of public law; human rights violations; financial crime and fraud; risks to consumers, public health, safety and environment; and other misconduct and risks that threaten or concern the public interest.

The law applies to reporting “corruption,” which Article 2(a) defines as “any abuse of power entrusted to a civil servant, employee, to an advisor, elected or appointed person in the legislative, executive or judicial branch of Brčko District,” as well as public enterprises, institutions and other legal entities established by the district, and to the employer and employee” that “may lead to private benefits.” This includes bribery and illicit advantages.

The types of misconduct that can be reported under the law do not include all recommended categories of crime, misconduct or public health threats. The law should not be limited to corruption and bribery. Part of the problem may be a lack of specificity. The phrases “and to the employer and employee” and “any abuse of power” are unclear and should be specifically defined. In particular, with modifications, so that “abuse of power” only includes, rather than is limited to, bribery and personal gain, that term can sweep in public health and safety, environmental or any broader concerns. There should not be confusion whether they are covered.

Even for topics covered, the scope of protected speech is incomplete. Contrary to the EU Directive's guidance, the law fails to explicitly protect acts or omissions that have not yet occurred. Similarly, it fails to specify that whistleblowing about concerns for which there is a reasonable basis can be protected despite a lack of evidence.

Finally, it is unclear to what extent – or whether – the law applies to misconduct committed by or within private sectors entities.

Recommendation: The law's scope should be expanded from corruption to cover all the public interest categories of misconduct in this standard, whether committed by public or private institutions. The law should be clarified to protect disclosures of misconduct that has not yet occurred, as well as concerns supported by a reasonable belief despite a lack of evidence.

3) To qualify for protection, a person must have a reasonable belief, suspicion or grounds to believe the information reported is accurate. Whistleblowers shall not be subject to “good faith” or “motivation” tests. A person is not required to prove a violation has occurred, nor must an investigation, prosecution or other procedure result from the person's report.

In order to qualify for protection, the law states that a person must have “justified suspicions or circumstances of the existence of corruption in good faith” that the employee “reasonably believes to represent corruption.”

The phrase “good faith” could be construed as a motives test – whether the person had a proper or pure intention to make a report. This means the whistleblower's motives will be put on trial. However, motives are irrelevant except for the whistleblower's credibility as a witness. Some of the most significant witnesses in history were criminals testifying under immunity or for a reduced sentence. While their motives were purely self-interest, their evidence was critical in prosecuting organized crime or other serious offenses. All that should be relevant is the quality of the evidence. Further, 'abuse of the right to report' corruption is a vague, subjective term which opens up a person's entire life, intentions and state of mind to inappropriate, unfair and chilling scrutiny.

Recommendation: The motive-based “good faith” test should be removed. The only threshold should be whether the person had a reasonable belief, suspicion or grounds to believe the information reported was accurate, which is an objective standard.

4) Protection is not lost for inaccurate reports if the person was honestly mistaken and had a reasonable belief the information was accurate. People are presumed to have a reasonable belief unless demonstrably shown otherwise.

The law does not specifically state that protection remains if a person made an inaccurate report in honest error – that the person was not aware that the information was not accurate.

Recommendation: The laws should clarify that a whistleblower still has protection for a report that is mistaken but based on a reasonable belief.

5) Clear reporting channels, designated contact persons, and specified follow-up procedures must be in place within private³² and public sector workplaces (internal reporting) and public institutions (external reporting). People have the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.

For internal reporting, those employed in Brčko District institutions may make reports to superiors, legal officials, or supervision or audit officials, but only through a formal application. Internal disclosures must be submitted in accordance with internal bylaws, which the law states must have been adopted within 90 days after the law took effect, and which “must be prominently displayed on premises and on the Internet page of each public institution.” The law states the same for “legal entities” and “entrepreneurs.” If this refers to private sector companies and business owners, respectively, then the law should state this with more clarity.

For external reporting, channels include criminal investigation and prosecution authorities, and the District Office for Prevention of Corruption and Coordination of Anti-Corruption Activities. Employees do not have the unqualified right to choose between internal and external channels. A person is protected for making an external disclosure only if the internal reporting procedure takes longer than 15 days; the procedure was irregular; the person believes the manager or person authorized to receive reports is associated with corruption; or if there is an immediate danger or misconduct of “wider social significance.” This is inconsistent with the EU Directive, which gives employees the choice between internal and external channels. While contrary to cultural tradition, there is a significant chilling effect by forcing whistleblowers to guess whether their external report to a government enforcement agency qualifies for an exception.

The law does not include specific provisions for the conduct of investigations. The District Office for Prevention of Corruption and Coordination of Anti-Corruption Activities has complete discretion, within 30 days, to decide whether to grant whistleblower status to a person.

Recommendation: For compliance with the EU Directive, the law should grant people the unqualified right to choose between internal and external channels, and include specific procedures for following up and investigating reports of alleged misconduct and public health threats. Bylaws for internal channels should require that units have adequate resources, training, structural independence and freedom from conflicts of interest.

³² Companies over a certain staff number threshold.



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6) People have the option to report publicly (e.g., via media, NGOs, public meetings, online outlets) under reasonable circumstances that do not place undue restrictions on the person, or that have the effect of blocking the release of information that requires investigation and corrective action to protect the public interest. These circumstances include but are not limited to:

- inaction for more than 6 months on an internal disclosure or 3 months on an external disclosure;
- a reasonable belief in a conflict of interest or the destruction of evidence;
- a reasonable belief of an imminent danger to public health or safety;
- retaliation likely would result if institutional channels are used.

The law partially meets this standard. A person is protected for making a public disclosure:

- if he/she suspects he/she will be subjected to detrimental action, or
- if he/she made a report to a competent authority and there will be no appropriate action taken, or evidence will be concealed or destroyed, or
- if he/she made a report to a competent authority and no appropriate action was taken within the legal timeline – provided the person considered possible damage caused by making a public disclosure.

In light of the above provision, the conclusion is that the law does not provide sufficient opportunities for a person to make a public disclosure.

Additionally, a person should not be required to consider “possible damage” from making a public disclosure. Crime witnesses typically do not have to meet this requirement. Among the concerns are:

- How can a person anticipate the effects of making a public disclosure? Why should a person be responsible for any possible effects?
- It is not realistically possible to determine whether, and to measure to what extent, a person made such a consideration.
- Who determines whether such a consideration by a person is sufficient?
- How is “damage” defined and measured? Who or what would be damaged by a public disclosure?

Recommendation: The law should be expanded to permit public disclosures when misconduct may constitute an imminent or manifest danger to the public interest, emergency, risk of irreversible damage, or where the internal and external authority may be in collusion with or involved with the alleged misconduct. The law only should require the whistleblower to have a reasonable belief for any of the listed grounds permitting public disclosures.

7) Whistleblowers are entitled to confidentiality of their identity and all identifying information, except when waived by their prior written consent or if required by official investigations or judicial proceedings.

The law does not specifically address confidentiality and the protection of a whistleblower's identity and identifying information. This is a basic requirement of the EU Directive, and an essential condition for any legitimate whistleblower law. For many employees, exposure of their identity has an inherent chilling effect.

Recommendation: For legitimacy, the law must protect confidentiality when requested. The proper structure is to require the whistleblower's written consent prior to any discretionary release of identity or identifying information. If release of required information is required by law, such as with a court order, the whistleblower must receive timely advance notice.

8) Protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent.

The law does not specifically address anonymous reporting or the protection of an anonymous whistleblower's identity and identifying information if it becomes known. Anonymous disclosures can include valuable leads or evidence, often at a higher volume than other channels. People who file an anonymous report or make a public disclosure anonymously should be protected if they are subsequently identified and are retaliated against.

Recommendation: The law should be modified to pursue any credible evidence received, whether or not anonymously, and to protect anonymous whistleblowers who are identified.

9) Reports shall be investigated promptly, and employees shall be informed of investigations and actions taken in response to their report within a reasonable amount of time.

The law does not specifically address the investigation of reports of misconduct or public safety threats. As a result, it skips the primary purpose of whistleblower laws – making a difference against corruption or other abuses of power, and which is the reason why whistleblowers risk retaliation to make reports. These omissions create a chilling effect due to cynicism, i.e., lack of confidence in the utility of reporting. Studies conclude there is a greater chilling effect from cynicism than fear of retaliation.

Recommendation: The law should be expanded to create a structure for investigation and corrective action of reports, with provisions for meaningful participation by the whistleblowers, such as status reports, an opportunity to rebut denials of alleged misconduct and transparency by placing the final report in the official record.

10) Whistleblowers shall be protected from all forms of retaliation, including but not limited to dismissal, suspension, demotion, punitive transfer, negative performance assessment or employment reference, pay reduction, harassment, blacklisting, and psychiatric or medical referral.

The law includes these forms of workplace retaliation. It defines “detrimental action” as harm to the employee by terminating his/her employment, cancelling an employment contract, suspension, demotion, dismissal via redundancy, initiating disciplinary actions, blackmailing, giving a negative work appraisal, creating a hostile work environment, withholding work assignments, deterring an employee from making a protected disclosure, and/or “actions representing a retaliation.”

Recommendation: No modifications are necessary on this issue. The law fully complies with this standard.



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11) The burden of proof is on the employer to show any actions taken against an employee were not associated with or motivated by the employee having made a report, considered making a report, or assisted a person in making a report. Employees are not required to establish a link between making a report and actions taken against them.

The law states that the whistleblower must provide proof that it is “probable” there is a causal link between reporting corruption or being victimized by the report and the alleged retaliation. If an institution director claims the same action would have been taken against an employee if he/she had not made a report, the director is required to prove this defense. The EU Directive's standard for an employee's burden of proof is – 1) establishing protected conduct through a report covered by the law; and 2) a subsequent prejudicial action. It requires that the employer's burden is to prove that whistleblowing did not affect the decision in any way. These specifics make a significant difference, because they establish what each party must prove to prevail.

Recommendation: For consistency with the EU Directive, there should be a burden of proof for the employee to – 1) demonstrate protected speech; and 2) demonstrate that a prejudicial act subsequently occurred. It should require the employer to prove that whistleblowing did not affect the decision on actions taken against the whistleblower in any way.

12) Liability for civil, criminal or administrative actions is waived for people who make a report in accordance with the law.

The law states that a whistleblower shall not face material, criminal or disciplinary liability for transmitting trade secrets in the course of reporting corruption to competent authorities. This, however, fails to cover the full scope of the threat from civil and criminal liability, such as charges of defamation or theft of the employer's property for possessing the evidence that proves misconduct. The liability shield is a basic requirement of the EU Directive. Criminal or civil liability can have a far greater chilling effect than workplace harassment.

Recommendation: A provision should be added providing an affirmative defense to civil or criminal liability for any reports where the whistleblower “had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing” misconduct covered by the law.³³

13) Whistleblowers have the right to effective remedy and fair trial, presumption of innocence, and the rights of defense, including the right to be heard and the right to access files.

The law does not specifically address this issue. The law only provides an administrative investigative remedy, without due process, including discretion to close the case without appeal. Credible due process is the foundation for protection in the EU Directive and all legitimate whistleblower laws.

Recommendation: If whistleblowers do not obtain administrative relief, the law should be clarified so that they can seek it from court for full relief from all the direct or indirect effects of retaliation.

³³ See Article 21.7 of the EU Directive

14) Rights and remedies cannot be waived or limited by any agreement or condition of employment, including pre-dispute arbitration agreement. Employment contracts may not be used to prevent employees from making or discussing a report.

The law does not specifically address this issue. Without this provision, the law is vulnerable to being overridden by conflicting laws or organizational gag orders. Signing nondisclosure agreements commonly is a job prerequisite. "Anti-gag" provisions are mandatory for credible rights, and required by the EU Directive.

Recommendation: This law is in basic compliance, but should be expanded to include a provision that without specific repeal through a new law, its rights cannot be overridden or affected by any other rule, policy or agreement.

15) Penalties shall apply for hindering or attempting to hinder reporting; retaliating or threatening to retaliate against a whistleblower; encouraging or condoning retaliation; bringing vexatious proceedings or actions against a whistleblower; violating a whistleblower's confidentiality; and knowingly reporting and/or publicly disclosing false information.

The law includes misdemeanor fines for directors who do not comply with instructions from the District Office for Prevention of Corruption and Coordination of Anti-Corruption Activities to remedy retaliation (1,000 KM - 3,000 KM); directors who do not issue bylaws for internal disclosures (500 KM - 2,000 KM); and people who knowingly submit a false corruption report 500 KM - 1,500 KM). Unfortunately, it does not include accountability for obstructing reporting; retaliation; vexatious legal proceedings; or breaching confidentiality. Those are the specific disciplinary requirements in the EU Directive.

Recommendation: The law should include penalties for all other misconduct listed in the EU Directive, including obstruction of reports; retaliation; vexatious legal proceedings; and breaches of confidentiality.

16) People harmed or affected by reports shown to be knowingly inaccurate shall have access to remedies.

The law does not specifically address this issue, but the EU Directive removes any protection for knowingly false statements.

Recommendation: The law should be modified to specify that it does not provide a legal defense to liability for knowingly false statements.

17) A designated agency shall promote whistleblower systems in order to nurture positive public attitudes and facilitate reporting.

The law does not specifically address this issue, which is essential for the public to be aware of rights. Whistleblower laws commonly are dormant or severely underutilized, in part because the public is unaware of their existence and in part because they contradict ingrained cultural traditions. An ambitious public education campaign is a prerequisite for the law to achieve its objectives.

Recommendation: The law should be expanded to include a dedicated public education campaign on the nature of whistleblower rights, and how they can benefit the public.



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18) A designated agency shall provide assistance for disclosures and retaliation protection through free-of-charge information and advice on rights, reporting channels, contact persons, procedures, remedies and retaliation protection.

The District Office for Prevention of Corruption and Coordination of Anti-Corruption Activities has the legal authority and responsibility to receive and investigate whistleblower retaliation complaints. The law does not specifically include the provision of assistance or advice to employees. This means they may well not be aware of the existence of their rights, or how to exercise them properly. Ignorance of how to use the law can create as significant a chilling effect as ignorance of its existence.

Recommendation: The law should be modified to expand the District Office for Prevention of Corruption and Coordination of Anti-Corruption Activities' duties to provide guidance for whistleblowers on the nature of their rights and how to exercise them fully.

19) Legal aid is available in retaliation protection proceedings, criminal proceedings, and cross-border civil proceedings.

The law does not specifically address this issue, which means that many unemployed whistleblowers will be unable to afford action on their rights, or even an independent source of guidance in the absence of a dedicated government agency.

Recommendation: The law should be modified to provide legal assistance, and attorney fees paid by the defendant in proceedings where the whistleblower obtains relief.

20) A designated agency shall provide oversight of whistleblower disclosure and protection mechanisms; identify and seek to remedy any shortcomings or inefficiencies; and maintain and annually release anonymized data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes.

The Administrative Inspection of the District Government supervises the law's implementation. "Exceptionally," the law states, the Judicial Commission will supervise the law's implementation. The law does not explain the specific authorities of the Administrative Inspection and Judicial Commission. "Exceptionally" is not defined. Meaningful duties need to be specified with respect to specific reporting requirements for these agencies.

The law also states that the District Office for Prevention of Corruption and Coordination of Anti-Corruption Activities annually shall publish a list of institutions and entities where corruption was reported, and information on retaliation and corrective actions.

Recommendation: One of the three oversight bodies should be responsible to compile annual reports that specifically include data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes, as well as an analysis of the weaknesses of the whistleblower reporting channels and protection mechanisms based on experience to date. The reports also should be expanded to include financial consequences from reported misconduct, and recoveries from associated whistleblower reports.

21) *A public, transparent review of laws and policies shall be conducted, and any needed reforms made, at least every three years.*

The law does not specifically address this issue, which is essential because it is unrealistic to perfect laws without the lessons learned from experience with their application.

Recommendation: Every three years, the District Office for Prevention of Corruption and Coordination of Anti-Corruption Activities should be required to report on the law's effectiveness in meeting its objectives, including recommendations for improvements to the law.

SUMMARY:

The assessment for Brčko District's whistleblower law is "inadequate compliance with EU Directive and Council of Europe standards." The only standard in coverage is the standard against the full scope of workplace harassment. There also is a crude reverse burden of proof, but it will not be reliable until the specifics of the EU Directive are added to the law. The law calls for transparency of results of whistleblowing in principle, but there are no specifics on what data should be reported, and no designated agency with overall oversight and public reporting responsibility. No other standards are in compliance, and most are not addressed.

Law on the Protection of Persons who Report Corruption of Republika Srpska (2017)

1) *The law applies to all public and private sector employees and workers, including contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and management body members.*

Without exception, the law covers any natural or legal person who reports "any form of corruption in the public or private sector." The law defines employment as an employment relationship, work outside the employment relationship, performing a function, volunteering, and any other actual work for the employer. However, there is no indication that the scope of the law and its remedies are limited to workplace-related harassment. Its remedies cover retaliation against corruption victims who report misconduct. Within the workplace, it protects those who communicate protected information as part of their job duties, although it does not explicitly protect those "about to" blow the whistle (conducting the research necessary for a disclosure that reflects a reasonable belief). That omission creates vulnerability to preemptive strikes. In every context, it protects those who are connected with the whistleblower, or wrongly identified as one.

Recommendation: The only modification necessary is to protect those retaliated against due to a perception that they are about to blow the whistle (conducting the research necessary for a disclosure that reflects a reasonable belief).

2) *Whistleblowing includes corruption; bribery; violation of public law; human rights violations; financial crime and fraud; risks to consumers, public health, safety and environment; and other misconduct and risks that threaten or concern the public interest.*

The law covers the reporting of "any form of corruption in the public or private sector of which he or she becomes aware." "Corruption" is defined as abusing official authority or an official position for private purposes, or illegally acquiring property or benefits for oneself or others. The law says that these acts must be "undertaken by a responsible person or a person employed in the public or private sector."



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The law is limited to acts of corruption. This will severely limit the ability of people to report misconduct and public health threats, and the ability of authorities to investigate, remedy and prosecute wrongdoing.

Even for topics covered, the scope of protected speech is incomplete. Contrary to the EU Directive's guidance, the law fails to explicitly protect acts or omissions that have not yet occurred. Similarly, it fails to specify that whistleblowing about concerns for which there is a reasonable basis can be protected despite a lack of evidence.

Finally, it is unclear to what extent – or whether – the law applies to misconduct committed by or within private sectors entities.

Recommendation: The law's scope should be expanded from corruption to cover all the public interest categories of misconduct in this standard. The law should be clarified to protect disclosures of misconduct that has not yet occurred, as well as concerns supported by a reasonable belief despite the lack of evidence.

3) To qualify for protection, a person must have a reasonable belief, suspicion or grounds to believe the information reported is accurate. Whistleblowers shall not be subject to "good faith" or "motivation" tests. A person is not required to prove a violation has occurred, nor must an investigation, prosecution or other procedure result from the person's report.

The law states that in order to be protected from retaliation, a person must make a report "in good faith." This is defined as a person who "suspects that corruption has been attempted or committed, about which he/she has his own knowledge and which he/she considers to be true, with the obligation to refrain from abusing the report."

In terms of fighting corruption, whistleblowers' motives only are relevant for credibility. There will be a debilitating chilling effect if judgments about their motives for providing credible evidence determines whether they have any legal rights against retaliation. Whether a person had a proper or pure intention to make a report should not be a basis for granting or denying legal protections.

Recommendation: The only threshold for receiving protection should be whether the person had a reasonable belief, suspicion or grounds to believe the information was accurate at the time it was reported. To avoid confusion and the introduction of irrelevant motivation tests, the phrase "good faith" should be removed. It is not in compliance with the EU Directive and the Council of Europe Recommendation.

4) Protection is not lost for inaccurate reports if the person was honestly mistaken and had a reasonable belief the information was accurate. People are presumed to have a reasonable belief unless demonstrably shown otherwise.

The law states protections are not lost "even if it is determined that the allegations made in good faith are not true." This provision adopts the standard in principle, but with the good faith standard instead of the reasonable belief test for protected speech.

Recommendation: The law should be modified to protect reports that are mistaken but supported by a reasonable belief.

5) *Clear reporting channels, designated contact persons, and specified follow-up procedures must be in place within private³⁴ and public sector workplaces (internal reporting) and public institutions (external reporting). People have the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.*

The law permits internal and external reporting – to “responsible persons” within private companies (internal reporting) and public institutions (external reporting). External reporting channels include internal affairs bodies or the prosecutor’s office. Designated responsible persons have extensive duties to protect whistleblowers while investigating their evidence.

There are no restrictions on whistleblowers’ right to choose between internal or external channels for their initial reports, as required by the EU Directive. However, the directive also is clear that they have the choice whether to make their initial report internally (employer) or externally (government enforcement agency). This law does not explicitly comply with the EU Directive.

Recommendation: The law should be clarified to provide whistleblowers the unqualified choice between internal and external options for initial reports. It should include specific procedures for following up and investigating reports of alleged misconduct and public health threats. Responsible persons should require that units have adequate resources, training, structural independence and freedom from conflicts of interest.

6) *People have the option to report publicly (e.g., via media, NGOs, public meetings, online outlets) under reasonable circumstances that do not place undue restrictions on the person, or that have the effect of blocking the release of information that requires investigation and corrective action to protect the public interest. These circumstances include but are not limited to:*

- *inaction for more than 6 months on an internal disclosure or 3 months on an external disclosure;*
- *a reasonable belief in a conflict of interest or the destruction of evidence;*
- *a reasonable belief of an imminent danger to public health or safety;*
- *a reasonable belief that retaliation likely would result if institutional channels are used.*

The law permits reporting to civil society organizations “dealing with the protection of human rights and the fight against corruption.”

This provision is lacking in several ways:

- The law does not state whether and under what circumstances a person can bypass internal and external channels and report to civil society organizations – and if so, under what conditions.
- The law does not include a process by which it can be determined whether a particular civil society organization deals with human rights and anti-corruption.
- It is unclear whether the media qualifies as a civil society organization covered by the law.

Recommendation: The law should be amended to comply with the EU Directive and the Council of Europe Recommendation by permitting public disclosures to any audience when there has been inaction on internal or external reports, or when the whistleblower has a reasonable belief of conflict of interest, destruction of evidence, retaliation, or imminent threat to public health or safety.

³⁴ Companies over a certain threshold.



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7) Whistleblowers are entitled to confidentiality of their identity and all identifying information, except when waived by their prior written consent or if required by official investigations or judicial proceedings.

The law states the “anonymity” and “personal data” of whistleblowers should be protected, unless the person explicitly waives the shield. It is assumed that this covers requests for confidentiality (identity is shielded) rather than anonymity (identity is unknown), if whistleblowers are providing personal data. The law complies with confidentiality protection in principle. However, specific provisions are lacking for enforcement. For example, it does not shield identifiable information which can be traced back to reveal the whistleblower’s identity indirectly; nor does it provide timely advance notice when exposure is mandatory, such as from a court order.

Recommendation: The law should be expanded so that identity protection is expanded to cover all identifiable information, as well as advance notice of any identifying releases.

8) Protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent.

Beyond the generalized principle referenced above, the law does not specifically address this issue. Anonymous disclosures can include valuable leads or evidence, often at a higher volume than other channels. People who file an anonymous report or make a public disclosure anonymously should be protected if they are subsequently identified and are retaliated against.

Recommendation: The law should make clear that its provisions apply to anonymous whistleblowers, both to investigate reports and to provide rights against retaliation if they are identified.

9) Reports shall be investigated promptly, and employees shall be informed of investigations and actions taken in response to their report within a reasonable amount of time.

The law states that “responsible persons” within workplaces shall detect, prevent, suppress and punish corruption, and protect people who report corruption internally.

Specifically, responsible persons within workplaces are required to:

- enable the filing reports in a visible place accessible to all employees and citizens
- receive reports;
- protect personal data and anonymity;
- act upon reports, including working to detect, prevent, suppress and punish corrupt acts within seven days from receiving a report;
- stop retaliation of people who make reports and protect their rights;
- inform whistleblowers of measures taken in response to their response within 15 days
- inform whistleblowers of outcomes within eight days;
- forward reports on suspected criminal offenses without delay the Ministry of Justice and other relevant public authorities.

Responsible persons who manage at least 15 employees are required to issue instructions on how to deal with corruption reports and ensure the protection of whistleblowers.

Unfortunately, the law lacks any structure to assure the responsible person's legitimacy. To illustrate –

- There is no authority for the responsible person's access to information.
- There is no structural independence for the responsible person, or any requirement to be free from conflicts of interest.
- There is no requirement for the responsible person to report to the institutional chief.
- Other than receiving notice of results, there is no enfranchisement for the whistleblower to provide rebuttal testimony or comment on the responsible person's report.
- There is no provision for the responsible person's findings to be on a public record.

Recommendation: While responsible officials have a comprehensive mandate, structural safeguards are necessary for whistleblowers to have confidence working with them. The law should be modified so that responsible officials have necessary authority, structural independence, controls on conflicts of interest and access to leadership. The whistleblower should be enfranchised to participate in the investigation, and the results should be in the official record.

10) Whistleblowers shall be protected from all forms of retaliation, including but not limited to dismissal, suspension, demotion, punitive transfer, negative performance assessment or employment reference, pay reduction, harassment, blacklisting, and psychiatric or medical referral.

The law defines retaliation as “harmful consequences” that endanger or violate a person's rights, or places a person in a “less favorable position.” This includes:

- mobbing, harassment or threats;
- creating bad interpersonal relations in the workplace;
- bringing a person into an illegal, unfavorable, unequal or unfair position regarding access to:
 - education;
 - health care;
 - pension and disability insurance;
 - social protection;
 - use of public services;
 - employment:
 - acquiring the status of trainee or volunteer;
 - work outside employment;
 - training or professional development;
 - promotion or appraisal at work;
 - acquisition or loss of a title;
 - disciplinary measures and penalties;
 - working conditions;
 - termination of employment;
 - salary and other compensations based on work;
 - payment of bonus or severance pay;
 - reassignment or transfer;
 - public procurement;
 - sport, science or culture;
- any other endangerment or violation of rights, freedoms and interests guaranteed by the Constitution and the law.

Recommendation: The comprehensive scope of this laws requires no modification. It fully complies with the standard.



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11) The burden of proof is on the employer to show any actions taken against an employee were not associated with or motivated by the employee having made a report, considered making a report, or assisted a person in making a report. Employees are not required to establish a link between making a report and actions taken against them.

The law states that in order to qualify for protection, harmful actions taken against an employee must be “causally related” to the employee having made a report, and that there must be a “cause-and-effect relationship.” Another provision requires the defendant to prove its stated independent, non-retaliatory reason for an action against the whistleblower.

These provisions place employees at a significant disadvantage and cannot co-exist with standards in the EU Directive and the Council of Europe Recommendation. The Directive does not require that the employee prove a causal link. It is sufficient to demonstrate protected speech and a subsequent prejudicial action. Then the employer must prove that the action was not connected “in any way” with whistleblowing.

Recommendation: For consistency with the EU Directive, there should be a burden of proof for the employee to – 1) demonstrate protected speech; and 2) demonstrate that a prejudicial act subsequently occurred. It should require the employer to prove that whistleblowing did not affect the decision against the whistleblower in any way.

12) Liability for civil, criminal or administrative actions is waived for people who make a report in accordance with the law.

The law does not specifically address this issue, although arguably it is covered by the catch-all prohibition against “any other endangerment or violation of rights, freedoms and interests guaranteed by the Constitution and the law.” The liability shield is a basic requirement of the EU Directive. Criminal or civil liability can have a far greater chilling effect than workplace harassment.

Recommendation: A provision should be added providing an affirmative defense to civil or criminal liability for any reports where the whistleblower “had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing” misconduct covered by the law.³⁵

13) Whistleblowers have the right to effective remedy and fair trial, presumption of innocence, and the rights of defense, including the right to be heard and the right to access files.

The law places the responsibility of “internal protection” within the workplace with responsible persons designated by employers, and the responsibility of “external protection” with the courts. Employees have the right to compensation and the right for protection procedures to be carried out urgently and without delay.

The provisions on judicial relief require the whistleblower to seek prior administrative protection from the responsible person, unless the government takes its own action on the whistleblower's case. The law states:

- Before seeking relief in court, an employee first must be “not satisfied” with the decision of a responsible person who responds to an internal report.
- A “prosecutor” may request external (judicial) protection even though the whistleblower has not requested internal protection.
- A judicial action is not permitted if an internal protection procedure is in progress.

³⁵ See Article 21.7 of the EU Directive

While exhausting administrative remedies is a common prerequisite for court access, this structure is biased and unclear. The whistleblower must reveal his or her arguments and evidence first to an employee of the institution that allegedly engaged in retaliation. That gives the employer an unfair advantage before even going to court. Any administrative proceedings should be conducted in an independent setting, not one controlled by the institution that allegedly engaged in retaliation.

Relief that an employee can seek via the courts includes:

- annulling or eliminating retaliation in the workplace, including reinstatement,
- compensation for material and non-material damages from the defendant, and
- publication of the judgment in the media, at the expense of the defendant.

Recommendation: The law should be modified to provide an administrative remedy independent of the institution that allegedly engaged in retaliation.

14) Rights and remedies cannot be waived or limited by any agreement or condition of employment, including pre-dispute arbitration agreement. Employment contracts may not be used to prevent employees from making or discussing a report.

The law prohibits the prevention of filing reports, and declares invalid any provision of a general or individual act that prevents filing a report.

Recommendation: No modification is necessary. The law complies with this standard

15) Penalties shall apply for hindering or attempting to hinder reporting; retaliating or threatening to retaliate against a whistleblower; encouraging or condoning retaliation; bringing vexatious proceedings or actions against a whistleblower; violating a whistleblower's confidentiality; and knowingly reporting and/or publicly disclosing false information.

With regard to internal reports, the law stipulates violations and fines of 5,000 KM to 15,000 KM for responsible persons who:

- refuse to receive a report of corruption;
- do not respond to reports in a timely manner;
- do not ensure the protection of personal data;
- fail to properly protect whistleblower rights;
- fail to properly investigate evidence of corruption;
- fail to timely inform the applicant of the outcome of the submitted application;
- fail to issue internal procedures.

With regard to external reports, the law stipulates a violation and fine of 5,000 KM to 15,000 KM for responsible persons who do not properly eliminate harmful consequences in compliance with a court judgment.

The law stipulates a violation and fine of 5,000 KM to 15,000 KM for “abuse of reporting.”

Recommendation: No modifications are necessary. The law complies with this standard.



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16) People harmed or affected by reports shown to be knowingly inaccurate shall have access to remedies.

The law imposes fines for knowingly false reports as “abuse of reporting corruption.”

Recommendation: No modifications are necessary. The law complies with this standard.

17) A designated agency shall promote whistleblower systems in order to nurture positive public attitudes and facilitate reporting.

The law does not specifically address this issue. Experience has demonstrated that without an effective public outreach and education campaign, whistleblower laws remain unused and dormant. An agency promoting the values of whistleblowing also can be essential to overcome engrained cultural bias and stereotypes.

Recommendation: The law should be expanded to designate an agency responsible for public education and outreach on the importance and benefits of whistleblower rights.

18) A designated agency shall provide assistance for disclosures and retaliation protection through free-of-charge information and advice on rights, reporting channels, contact persons, procedures, remedies and retaliation protection.

The law does not specifically address this issue. If whistleblowers cannot obtain guidance on how to use their rights effectively, it is unlikely the law will make a difference. Further, they may inadvertently incur liability or lose protection, because they do not understand its provisions and boundaries.

Recommendation: The law should be expanded so that a designated agency will provide guidance on the law's provisions and how to exercise them properly.

19) Legal aid is available in retaliation protection proceedings, criminal proceedings, and cross-border civil proceedings.

The law states that people have the right to free legal aid from the “body responsible for providing that assistance.”

Recommendation: No modifications are necessary. The law complies with this standard.

20) A designated agency shall provide oversight of whistleblower disclosure and protection mechanisms; identify and seek to remedy any shortcomings or inefficiencies; and maintain and annually release anonymized data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes.

The Republic Administration for Inspection Activities is responsible for overseeing the role of responsible persons in implementing internal and external protection measures.

Responsible persons and courts are required to submit an annual report to the Ministry of Justice on protection procedures and the number and outcome of whistleblower reports. The Ministry of Justice is required to publish this data on its website and submit it to the Commission for the Implementation of the Anti-Corruption Strategy. This Commission is required to submit an annual report on protection procedures and the number and outcome of whistleblower reports to the National Assembly and the Government.

Recommendation: The law should clarify that data must be submitted for retaliation cases and outcomes, in addition to whistleblower reports.

21) A public, transparent review of laws and policies shall be conducted, and any needed reforms made, at least every three years.

The law does not specifically address this issue, which is essential because it is unrealistic to perfect laws without the lessons learned from experience with their application.

Recommendation: Every three years, the law should require that the Republic Administration for Inspection Activities submit a report on the law's effectiveness in meeting its objectives, including recommendations for improvements to the law.

SUMMARY:

The Republika Srpska law is in partial compliance with consensus standards for whistleblower rights. The law contains a number of positive features, including:

- protection beyond employees to cover all persons who blow the whistle, are connected with a whistleblower, or mistakenly believed to be a whistleblower;
- protection for communicating protected information as part of job duties;
- protection for mistaken reports;
- protection against all forms of retaliation, not merely workplace harassment;
- protection against nondisclosure policies that would override the law's whistleblowing rights;
- remedies providing damages and reinstatement;
- provision for temporary relief and other security measures while a case is pending;
- disciplinary accountability for retaliation or noncompliance;
- accountability for abuse of reporting; and
- entitlement to legal aid for the whistleblower.

However, the law is not in compliance with consensus standards due to omissions and weaknesses, such as:

- failure to cover misconduct beyond corruption;
- reliance on the good faith standard as a prerequisite for protection;
- inadequate opportunity for public freedom of expression;
- lack of structure for the authority and integrity of responsible persons;
- inadequate scope and specific controls for identity protection;
- a burden of proof that requires the whistleblower to prove a causal connection between the report and alleged retaliation;
- the provision of administrative remedy by the institution that allegedly engaged in retaliation rather than an independent administrative body;
- absence of a designated agency to promote the law or provide guidance on its usage; and
- absence of periodic review on the law's effectiveness and recommendations to act on lessons learned.



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KOSOVO*

Law on Protection of Whistleblowers (2018)

1) The law applies to all public and private sector employees and workers, including contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and management body members.

The law covers employees in the public and private sectors. This is defined as people who have had an “employment relationship with a public institution or private entity regardless of the nature of the relationship, its duration or payment.” This includes external or occasional associates, volunteers, interns, trainees, job candidates, contractors and subcontractors.

The law protects those associated with the whistleblower. However, several coverage gaps remain. It does not explicitly protect those who are “about to” blow the whistle (conducting the research necessary for a disclosure that reflects a reasonable belief), or who are (mistakenly) “suspected” of blowing the whistle. These omissions fail to protect all those necessary for effective, responsible whistleblowing reports; and they leave vulnerability to pre-emptive strikes that create a significant chilling effect.

Perhaps the most significant omission in the scope of covered employee protection is the failure explicitly to protect “duty speech” – communicating protected information through an organization’s chain of command as part of job responsibilities. However, this is the most significant context for communication of protected information. Only a small percentage of protected whistleblowing information is communicated as dissent. Every organization needs complete, accurate information for responsible judgments and decisions, and for its institutional checks and balances to operate effectively. This loophole also must be closed for compliance with the EU Directive.

With respect to duty speech, Article 11 of the Law on Protection of Whistleblowers offers comprehensive protection, without any such loophole. That broad scope should be clarified, or else many employees may be afraid to communicate whistleblowing information as part of their job duties, where it is needed most.

Recommendation: With very minor refinements, the law will be in substantial compliance. The scope should be clarified to protect from retaliation persons who are perceived as about to blow the whistle (conducting the research necessary for a disclosure that reflects a reasonable belief), or being a whistleblower, even if mistaken. The law should be clarified to explain that the unrestricted scope of Article 11 for all reports communicating protected information includes formal or informal communications in connection with job duties, such as reporting problems to a supervisor, and when a report is an allegation or a job responsibility.

2) Whistleblowing includes corruption; bribery; violation of public law; human rights violations; financial crime and fraud; risks to consumers, public health, safety and environment; and other misconduct and risks that threaten or concern the public interest.

The law defines whistleblowing as “reporting or disclosure of information on acts or omissions that pose a threat or damage to the public interest.” This includes acts or omissions that have been, are being, or are likely to be committed. The law states that there is no obligation to provide evidence, and a newly enacted bylaw specifies that the whistleblower must not prove the report’s reliability or veracity. A report is presumed to be in the public interest unless the contrary is proven.

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.



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Specific misconduct includes:

- failure to comply with a legal obligation;
- miscarriage of justice;
- endangering the health or safety of any person;
- damage to the environment;
- misuse of official duty or authority, public money or public resources;
- discriminatory, oppressive or grossly negligent actions, or serious mismanagement by a public institution.

Recommendation: The law complies with this standard. It should be clarified to specify that its broad categories encompass all the specific misconduct enumerated in the EU Directive and the Council of Europe Recommendation.

3) To qualify for protection, a person must have a reasonable belief, suspicion or grounds to believe the information reported is accurate. Whistleblowers shall not be subject to "good faith" or "motivation" tests. A person is not required to prove a violation has occurred, nor must an investigation, prosecution or other procedure result from the person's report.

The law requires that a whistleblower "reasonably believes" the information reported is true. The person is "not obliged to prove the good faith and authenticity" of the information. A person does not lose protection if the report does not actually indicate a threat or damage to the public interest. It explicitly bans consideration of the whistleblower's motives.

Recommendation: No modifications are necessary. The law complies with this standard.

4) Protection is not lost for inaccurate reports if the person was honestly mistaken and had a reasonable belief the information was accurate. People are presumed to have a reasonable belief unless demonstrably shown otherwise.

The law protects all whistleblowers who have a reasonable belief, and states a person must not prove the good faith or "authenticity" of a report to have protection. It also states, "The protection guaranteed to the whistleblower under this law should not be prejudiced if the alleged threat or damage to the public interest has not been materialized." To prevent confusion and to protect all people who make a report supported by a reasonable belief, the law should state specifically that protection is not lost for inaccurate or incomplete mistaken reports that were made in honest error, supported by a reasonable belief. The phrase "good faith" should be removed from the law, even though the law does not require a person to prove he or she acted in good faith. The phrase itself is very commonly a source of motivation tests.

Recommendation: The law is in compliance with this standard. However, to prevent confusion and to protect all people who make a report supported by a reasonable belief, the law should state specifically that protection is not lost for inaccurate or incomplete mistaken reports that were made in honest error, supported by a reasonable belief. The phrase "good faith" should be removed from the law, even though the law does not require a person to prove he or she acted in good faith, because the phrase itself is very commonly a source of motivation tests.

5) *Clear reporting channels, designated contact persons, and specified follow-up procedures must be in place within private³⁶ and public sector workplaces (internal reporting) and public institutions (external reporting). People have the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.*

According to the law, employers must provide employees with written instructions on whistleblower procedures. These must be published, regularly updated, and distributed in the workplace and on the employer's website (if technically possible).

For internal disclosures (within the workplace), the law requires public authorities with more than 15 employees, and private entities with more than 50 employees, to assign a "responsible official" to record, investigate and examine reports.

A recently enacted bylaw provides detailed, comprehensive standards to enforce this requirement. Overall, the internal and external whistleblower reporting authorities now are entitled to sufficient resources and their staff receives mandatory training on the whistleblower law. According to the bylaw, the responsible official conducts administrative investigations with access to information and witnesses, and prepares associated reports with corrective action and disciplinary recommendations for the institutional head. Finally, according to the bylaw, the whistleblower has access to the case file.

This is a comprehensive bylaw, which requires some modest refinement to achieve its objective. While implied, there is no requirement for the responsible official to have structural independence. While there is provision for adequate resources, there should be clarification that the responsible official has the authority to hire the staff necessary for investigation and processing of alleged misconduct. Realistically, the responsible official will not have sufficient resources or expertise to handle this broad mandate alone.

The only significant structural omission is a provision regulating conflicts of interest for responsible officials.

An employee may bypass the responsible official and file a report with a manager if:

- there is no responsible official;
- there are no internal whistleblower procedures;
- there is a reasonable suspicion that the responsible official may be involved or associated with the misconduct; or
- the internal whistleblowing procedures may not be effective.

Further, whistleblowers do not have the unqualified right to choose between internal and external channels. For external disclosures, a person may file a report initially with the Anti-Corruption Agency only if

- the report is related to the employer's manager;
- the misconduct has "an urgent character that is associated with serious and immediate danger or irreversible damage";
- the employee may suffer retaliation;
- evidence may be concealed or destroyed; or
- the internal whistleblower procedures may not be effective.

The two-tiered disclosure system is cumbersome and creates inherent delays acting on misconduct. It also is inconsistent with the EU Directive, which clearly states that whistleblowers have the choice between making their initial report internally (employer) or externally (government enforcement agency). This law does not comply with the EU Directive on this point. There is a significant chilling effect by forcing whistleblowers to guess whether their external report to a government enforcement agency qualifies for an exception.

³⁶ Companies over a certain staff number threshold.



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Recommendation: The law substantially complies with the first portion of this standard,. It should be reinforced with a provision which regulates conflicts of interest of responsible officials; a mandatory infrastructure to provide adequate resources for the Responsible Official's work; and structural independence. For compliance with the EU Directive, whistleblowers must have the absolute right to freely choose between internal and external audiences.

6) People have the option to report publicly (e.g. via media, NGOs, public meetings, online outlets) under reasonable circumstances that do not place undue restrictions on the person, or that have the effect of blocking the release of information that requires investigation and corrective action to protect the public interest. These circumstances include but are not limited to:

- *inaction for more than 6 months on an internal disclosure or 3 months on an external disclosure*
- *a reasonable belief in a conflict of interest or the destruction of evidence*
- *a reasonable belief of an imminent danger to public health or safety*
- *retaliation likely would result if institutional channels are used.*

According to the law, an employee will be protected for making a disclosure to the public if:

- he or she reasonably believes he or she would be punished for reporting internally or to authorities;
- he or she reasonably believes evidence is likely to be concealed or destroyed;
- there is an immediate threat to life, public health, safety, environment;
- large or irreparable damage is being caused;
- responsible officials and the Anti-Corruption Agency have not taken any "relevant action" within six months of when a report was filed.

In order to be protected, the law states that employees who make a public report must "respect the principle of presumption of innocence of the accused," respect the right to protect personal data, and not obstruct the operation of court proceedings.

While generally in compliance, clarification would be helpful. While the law applies the reasonable belief test to a majority of circumstances, there are significant exceptions. While likely intended, it does not explicitly apply to immediate threats to public health and safety or property, nor to large and irreparable damage.

Recommendation: To demonstrate full compliance with the EU Directive, the law should include protection for making a public disclosure if a person has a reasonable belief that there is an immediate threat to life, public health, safety, environment, or that large or irreparable damage is being caused.

7) Whistleblowers are entitled to confidentiality of their identity and all identifying information, except when waived by their prior written consent or if required by official investigations or judicial proceedings.

Whistleblowers have best practice rights for the protection of their identity. Responsible officers and all other people who accept or process reports are required to maintain confidentiality of the reported information, and only may reveal or transmit information to third parties with the whistleblower's written consent or to fulfil a legal obligation regarding the investigation of violations; preventing a serious risk to security, public health, public safety or the environment; preventing crime; or prosecuting a criminal offence. Whistleblowers shall be notified before their confidentiality is breached.

Recommendation: No modifications are necessary. The law is in compliance with this standard.

8) Protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent.

The law does not specifically address this issue. But this is a minimum requirement of credible whistleblower laws. Anonymous disclosures can include valuable leads or evidence, often at a higher volume than other channels. People who file an anonymous report or make a public disclosure anonymously should be protected if they are subsequently identified and are retaliated against.

Recommendation: The law should be modified to pursue any credible evidence received, whether or not anonymously, and to protect anonymous whistleblowers who are identified.

9) Reports shall be investigated promptly, and employees shall be informed of investigations and actions taken in response to their report within a reasonable amount of time.

The law states that responsible officials should carry out investigations honestly, impartially, efficiently, confidentially, in consideration of the whistleblower, independently from political or other influences, and without conflicts of interest.

The law requires responsible officials to conduct investigations according to procedures in the law. Investigations of internal reports must be completed within 45 days or, under the newly enacted bylaw, within a maximum of 90 days. The bylaw also requires notice to the whistleblower and the alleged wrongdoer of the results. Each party involved in the investigation is guaranteed due process, may provide information, may consult the investigation file, and has the right to present claims.

According to the law, institutions must take immediate measures to prevent or stop the harmful effects of the misconduct reported by the whistleblower, and must notify authorities if the misconduct could constitute a violation of law.

Recommendation: Reinforced by a newly enacted bylaw, the law complies with this standard. As discussed previously, the law should be modified so that responsible officials have necessary authority, structural independence, controls on conflicts of interest and access to leadership.

10) Whistleblowers shall be protected from all forms of retaliation, including but not limited to dismissal, suspension, demotion, punitive transfer, negative performance assessment or employment reference, pay reduction, harassment, blacklisting, and psychiatric or medical referral.

The law defines retaliation as any “action or omission that harms the legitimate interest” of an employee, or any person associated with a whistleblower, the latter of which is anyone who assists a whistleblower or provides evidence related to whistleblowing. The law also extends protections to responsible officials who receive and handle whistleblower reports.

Retaliation specifically includes dismissal, suspension, transfer, demotion, salary reduction, loss of status and privileges, denial of promotion or training, negative job appraisal, cancellation of a license or permit, termination of a contract for goods or services, and civil or criminal liability.

Recommendation: No modifications are necessary. The law is in compliance with this standard.



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11) *The burden of proof is on the employer to show any actions taken against an employee were not associated with or motivated by the employee having made a report, considered making a report, or assisted a person in making a report. Employees are not required to establish a link between making a report and actions taken against them.*

The law states that employers have the burden to prove any detrimental actions taken against an employee had no causal link with the person having made a report. While in compliance with the EU Directive text, the recital explains the full context for the scope of causation. In other words, it is not sufficient for the employer merely to show there was a different cause for the final decision. The ban on a causal link to whistleblowing applies to the whole process for an action, not merely the final result. As Paragraph 93 of the EU Directive Recital explains:

'...once the reporting person demonstrates prima facie that he or she reported breaches or made a public disclosure in accordance with this Directive and suffered a detriment, the burden of proof should shift to the person who took the detrimental action, who should then be required to demonstrate that the action taken was not linked in any way to the reporting or the public disclosure'.

The employer must show convincingly that any action against an employee was completely unrelated to the employee having made a disclosure.

Recommendation: The law is in substantial compliance with the EU Directive, and is intended to provide full compliance. To achieve that result, it should clarify the causal link's broad scope so that whistleblowing is "not linked in any way" with alleged retaliation.

12) *Liability for civil, criminal or administrative actions is waived for people who make a report in accordance with the law.*

People who make a report according to the law "cannot be subject to criminal or civil liability or disciplinary procedures."

Recommendation: No modifications are necessary. The law complies with this standard.

13) *Whistleblowers have the right to effective remedy and fair trial, presumption of innocence, and the rights of defense, including the right to be heard and the right to access files.*

According to the law, employees who have suffered retaliation may file a claim for compensation and "judicial protection" with the appropriate court. Civil servants must file claims with the Department for Administrative Issues at the Basic Court in Pristina. The person first needs not to "exhaust the internal legal remedies in the administrative procedure." Lawsuits must be filed no later than three years after the retaliation occurred. Judges may order a victimized whistleblower to be reinstated and compensated for damages, and may order the employer to "undertake certain actions." Whistleblower cases "shall be handled with priority by the Court."

This portion of the law contains certain provisions that should be clarified, such as "undertake certain actions" and "handled with priority." In general, the mechanisms for court-based protection are consistent with best practices for due process, but these mechanisms should be explained with more specificity in the whistleblower law. For example, there is no requirement in the whistleblower law itself that compensation or "certain actions" be sufficient for the whistleblower to be "made whole," neutralizing all the direct and indirect consequences of whistleblowing. This means the whistleblower could still "lose by winning."

This support is specified in other civil laws, which means that in practice, Kosovo* law is in full compliance with the EU Directive. But the law's text is not self-sufficient to communicate the full scope of whistleblowers' rights, and they are unlikely to know where to find additional benefits not listed.

Recommendation: The full scope of rights under the law complies with this standard. However, that will not make much of a difference if employees are not aware of ancillary provisions not referenced in the whistleblower law. To effectively communicate the full scope of its benefits, the provisions for remedies should provide notice to other authorities that relief eliminates the direct and indirect effects of retaliation.

14) Rights and remedies cannot be waived or limited by any agreement or condition of employment, including pre-dispute arbitration agreement. Employment contracts may not be used to prevent employees from making or discussing a report.

The law provides that any provision in an agreement is void if it purports to prohibit or restrict making a disclosure, interferes with the operation of the law, or precludes a person from bringing any proceedings under the law. While this is sufficient for a non-disclosure agreement, it does not shield against direct gag orders.

Recommendation: The law is in compliance with this standard. It should be clarified that it nullifies any policy, order or condition of employment that conflicts with whistleblower rights, including gag orders.

15) Penalties shall apply for hindering or attempting to hinder reporting; retaliating or threatening to retaliate against a whistleblower; encouraging or condoning retaliation; bringing vexatious proceedings or actions against a whistleblower; violating a whistleblower's confidentiality; and knowingly reporting and/or publicly disclosing false information.

The law states that any action or omission aimed to prevent whistleblowing may be criminally prosecuted. Courts can impose fines from €500 to €20,000 on public or private sector organizations, or responsible officials for:

- failing to protect a whistleblower from detriments;
- failing to undertake all necessary measures to terminate detriments;
- failing to notify all employees in writing of their rights under the law;
- failing to appoint a responsible official;
- failing to undertake actions in response to a disclosure within the deadline;
- failing to inform a whistleblower of an investigation's outcome within the deadline;
- failing to inform a whistleblower about the progress of and actions in a case taken in his or her case;
- failing to grant a whistleblower access to case files or participate in the case;
- precluding whistleblowing;
- failing to protect a whistleblower's confidentiality.

Notices of violations are filed with the court by the Anti-Corruption Agency for the public sector, and the Labor Inspectorate for the private sector. A whistleblower may file a notice with the competent court if these responsible institutions do not do so within 60 days. Fines may be doubled for repeat offenders.

In addition to the Law on Whistleblower Protection, Article 388 of the Criminal Code recognizes retaliation as a criminal offence, namely: "Whoever takes any action harmful to any person with the intent to retaliate for reporting or disclosing information for acts and omissions that pose a threat or violation of public interest shall be punished by fine or imprisonment of up to two (2) years."



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Recommendation: The law of Kosovo* is in compliance with this standard. However, because the criminal offense of whistleblower retaliation is included in the Criminal Code, it is recommended that the Law on Whistleblower Protection includes a reference to this additional protection, and that officials within the Anti-Corruption Agency, prosecutors' offices and other institutions that have a role in the whistleblower protection system specify this additional right in their education, outreach and training materials.

16) People harmed or affected by reports shown to be knowingly inaccurate shall have access to remedies.

The law does not specifically address this issue, but does say that the law's protections exclude whistleblowers who make knowingly false reports.

Recommendation: No recommendations are necessary, as the law complies with this standard.

17) A designated agency shall promote whistleblower systems in order to nurture positive public attitudes and facilitate reporting.

The law does not specifically address this issue, which is essential for the public to be aware of rights. Whistleblower laws commonly are dormant or severely underutilized, in part because the public is unaware of their existence and in part because they contradict ingrained cultural traditions. An ambitious public education campaign is a prerequisite for the law to achieve its objectives.

Significant training programs exist as a requirement for employers and a service of the Kosovo* Institute for Public Administration.

The recently enacted bylaw also prescribes the duty of the responsible official for actions to facilitate whistleblowing and a website to publicize results. The impact of this provision is so significant, however, that the commitment needs to be more than a brief item on a long list of duties. It needs to be fully explained what the introduction of this duty entails.

Recommendation: The law substantially complies with this standard. There should be a guarantee of adequate funding for the responsible authority to lead a dedicated public education campaign on the nature of whistleblower rights and how they can benefit the public.

18) A designated agency shall provide assistance for disclosures and retaliation protection through free-of-charge information and advice on rights, reporting channels, contact persons, procedures, remedies and retaliation protection.

The new bylaw stipulates that the responsible official, will among other things, facilitate whistleblower reporting and protection through free-of-charge information and advice on whistleblower rights, reporting channels and retaliation protection mechanisms.

Recommendation: Due to the new bylaw, the law fully complies with this standard.

19) Legal aid is available in retaliation protection proceedings, criminal proceedings, and cross-border civil proceedings.

The law does not specifically address this issue, nor the process by which legal fees shall be calculated and awarded to whistleblowers who win their cases. This means that many unemployed whistleblowers will be unable to afford action on their rights, or even an independent source of guidance in the absence of a dedicated government agency.

Recommendation: The law should be modified to provide legal assistance, and attorney fees paid by the defendant in proceedings where the whistleblower obtains relief.

20) A designated agency shall provide oversight of whistleblower disclosure and protection mechanisms; identify and seek to remedy any shortcomings or inefficiencies; and maintain and annually release anonymized data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes.

Public institutions, private entities and regulators must prepare an annual report and submit it to the Anti-Corruption Agency, which in turn must prepare its own annual report. These reports must contain the number of disclosures and actions taken in response.

Recommendation: The EU Directive directly requires only public reports for the number and results of whistleblowing disclosures. However, to comply with the EU Directive's requirement for periodic review of the law's effectiveness in whistleblower protection, it is essential to compile additional data to meet this criterion. Thus, the transparency provision should be expanded to include data on the number of retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes, as well as an analysis of its weaknesses based on experience to date.

21) A public, transparent review of laws and policies shall be conducted, and any needed reforms made, at least every three years.

The law does not specifically address this issue, although authority exists to initiate ex post facto reviews of the law and make associated recommendations. However, explicit provision for mandatory review is essential, because it is unrealistic to perfect laws without the lessons learned from experience with their application. The EU Directive specifically requires public authorities every three years to review their procedures for receiving and following up reports, take account of their experience, and adapt their procedures accordingly.

Recommendation: Every three years, the Anti-Corruption Agency or another designated agency with relevant expertise should be required to report on the law's effectiveness in meeting its objectives, and the report should include specific recommendations on improvements to the law.



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SUMMARY

Kosovo* is in substantial compliance with consensus standards for whistleblower rights. The law contains a number of positive features, including:

- a requirement for all major organizations to have designated whistleblower reporting channels;
- a broad scope of protection against all forms of workplace retaliation;
- protection for those who assist or are associated with whistleblowers;
- protection against retaliation for responsible officials acting on a whistleblower's report;
- a reasonable belief standard for protected speech, without a good faith qualifier;
- public freedom of expression;
- protection against all forms of employment retaliation;
- a shield against civil or criminal liability;
- protection against nondisclosure agreements that would override the law's whistleblowing rights;
- due process access to court;
- best practice confidentiality protection;
- the reverse burden of proof on employers;
- access to administrative and judicial remedies to seek relief;
- enfranchisement of whistleblowers into investigations of their reports;
- disciplinary penalties for noncompliance;
- an agency responsible to promote whistleblower rights, as well as to provide guidance and assistance to whistleblowers; and
- transparency for the law's track record.

However, the law is not fully compliant with consensus standards due to omissions and weaknesses, such as:

- lack of unqualified choice to make initial reports internally or externally;
- reverse burden of proof requirement for the employer limited to proving that whistleblowing did not cause the final decision, rather than not having any connection with the process of retaliation;
- absence of provisions through which protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent;
- failure to provide legal aid or attorney fees for prevailing whistleblowers; and
- absence of a mandatory periodic review of the whistleblower protection law.

MOLDOVA

Law on Whistleblowers (2018)

1) The law applies to all public and private sector employees and workers, including contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and management body members.

The law largely meets this standard. It applies to employees in the public and private sectors, defined as an “employee within the meaning of labor legislation,” trainees, volunteers and contractors who had these designations within the previous 12 months. The law also applies to judges and prosecutors, given that the Superior Council of Magistracy and the Superior Council of Prosecutors are being considered employers.

The law does not specifically state that it applies to part-time employees, temporary employees, job applicants, former employees or management body members.

There are significant holes in protection for employees the law covers. First, it does not explicitly protect those who assist the whistleblower to make the report, or are associated with the whistleblower. Often it takes a team effort to make a responsible, evidenced whistleblowing disclosure. If there only is protection for the final messenger who makes the formal report, those essential sources of support will dry up. Further, any suspected whistleblower will be isolated at the workplace. Without protecting the whole team, there will be a severe chilling effect, lower quality reports and more retaliation.

The law also does not explicitly protect those who are “about to” blow the whistle (conducting the research necessary for a disclosure that reflects a reasonable belief), or are (mistakenly) “suspected” of blowing the whistle. This omission leaves vulnerability to preemptive strikes that create a significant chilling effect.

Perhaps the most significant omission in the scope of covered employee protection is the failure explicitly to protect “duty speech” – communicating protected information through the chain of command as part of job responsibilities. However, this is the most significant context for communication of protected information. Only a small percentage of whistleblowing is communicated as dissent. Every organization needs complete, accurate information for responsible judgments and decisions, and for its institutional checks and balances to operate effectively. This loophole also must be closed for compliance with the EU Directive.

Recommendation: The scope should be clarified to prohibit retaliation because persons assist or are associated with a whistleblower; or are perceived as about to blow the whistle (conducting the research necessary for a disclosure that reflects a reasonable belief), or being a whistleblower, even if mistaken. It should be expanded to cover all reports communicating protected information, regardless of whether the communication is formal, pursuant to rules for written reports; or informal, such as protesting misconduct during a meeting. There should be no doubt that protection extends to communicating information about misconduct through the exercise of job duties, such as reporting problems to a supervisor, and when a report is an allegation or a job responsibility.

2) Whistleblowing includes corruption; bribery; violation of public law; human rights violations; financial crime and fraud; risks to consumers, public health, safety and environment; and other misconduct and risks that threaten or concern the public interest.

The law covers the disclosure of “illegal practices,” including corruption (as defined in Integrity Law no. 82/2017), environmental violations, violations of citizens' fundamental rights and freedoms, national security issues, and “other violations, actions or inactions that threaten or harm the public interest.”



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Though the law properly defines whistleblowing in the “public interest,” it does not include a comprehensive list of misconduct and public health threats as defined by the EU Directive and the Council of Europe Recommendation. Contrary to the EU Directive's guidance, it does not explicitly protect acts or omissions that have not yet occurred. Similarly, it fails to specify that whistleblowing about concerns for which there is a reasonable basis can be protected despite a lack of evidence.

Recommendation: While in substantial compliance, the law should reference or list the specific public interest categories of the EU Directive. The law should be clarified to protect disclosures of misconduct that has not yet occurred, as well as concerns supported by a reasonable belief despite the lack of evidence.

3) To qualify for protection, a person must have a reasonable belief, suspicion or grounds to believe the information reported is accurate. Whistleblowers shall not be subject to “good faith” or “motivation” tests. A person is not required to prove a violation has occurred, nor must an investigation, prosecution or other procedure result from the person's report.

On this point, the law is confusing and potentially very problematic. The law states that a person enjoys the “presumption of good faith” and that a person's disclosure is “presumed to be true until proven otherwise.” However, there are contradictory provisions on how to apply that principle. One provision defines “good faith” as the person having “a reasonable conviction that it is true and threatens or harms the public interest.” This definition limits good faith to normal boundaries, i.e., that the report is not reckless or knowingly inaccurate. However, another provision defines “good faith” as a “standard of conduct, expressed through fairness, honesty and responsibility.” That is a subjective, unlimited invitation to put the whistleblower's motives on trial.

However, motives are irrelevant except for the whistleblower's credibility as a witness. Some of the most significant witnesses in history were criminals testifying under immunity or for a reduced sentence. While their motives were purely self-interest, their evidence was critical in prosecuting organized crime or other serious offenses. All that should be relevant is the quality of the evidence. Further, fairness and responsibility are vague, subjective terms that open up a person's entire life, intentions and state of mind to inappropriate, unfair and chilling scrutiny.

Recommendation: References to good faith should be removed from the law. The only threshold should be whether the person had reasonable grounds to believe the information was true at the time it was reported or disclosed.

4) Protection is not lost for inaccurate reports if the person was honestly mistaken and had a reasonable belief the information was accurate. People are presumed to have a reasonable belief unless demonstrably shown otherwise.

The law does not specifically address this issue. The reasonable belief standard encompasses mistakes, because a whistleblower is only a witness rather than a legal decision-maker such as the court after a trial.

Recommendation: The law explicitly should protect whistleblowers whose reports are mistaken but based on a reasonable belief.

5) *Clear reporting channels, designated contact persons, and specified follow-up procedures must be in place within private³⁷ and public sector workplaces (internal reporting) and public institutions (external reporting). People have the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.*

For internal disclosures (within the workplace), employees may make signed reports in writing via an online system, or via an anti-corruption telephone line maintained by employers or public authorities. Employees are to use forms or telephone protocols included in annexes to the law. Employers and public authorities are required to enter reports in a "Register of Disclosures of Illegal Practices and Integrity Warnings," according to a form included in an annex to the law. Internal procedures for receiving and examining reports shall be based on the government's model. The law states that once a person's report is filed in the Register, he or she is granted "the status of whistleblower."

An employee may bypass internal channels and make a report to authorities (external disclosure) if:

- he/she considers that the employer could be involved in the misconduct;
- he/she considers that the employee's confidentiality could be violated;
- he/she considers that there is a risk of loss, disappearance or destruction of evidence; or
- the employer did not ensure the report was filed in the Register or did not inform the employee about the results of the examination within the legal timeframe (30 or 60 days).

For compliance with the EU Directive, there must be an unqualified right to choose between internal and external audiences. The directive strongly encourages whistleblowers first to report through credible internal channels. However, it also is clear that they have the choice whether to make their initial report internally (employer) or externally (government enforcement agency). This law does not comply with the EU Directive. Whistleblowers do not have the unqualified right to choose between internal and external channels. While contrary to cultural tradition, there is a significant chilling effect by forcing whistleblowers to consider or speculate whether their external report to a government enforcement agency qualifies for an exception.

While the law requires timely action on reports, it lacks necessary flexibility. The maximum time to investigate and report on a whistleblower's disclosure is 60 days. That may well be insufficient for complex crimes such as financial fraud or money laundering, and compares unfavorably with the EU Directive permitting three to six months.

Recommendation: For compliance with the EU Directive, whistleblowers must have the right to freely choose between internal and external channels for their initial disclosure. With the whistleblower's consent, public authorities and regulators should have the flexibility to extend an investigation beyond 60 days.

6) *People have the option to report publicly (e.g. via media, NGOs, public meetings, online outlets) under reasonable circumstances that do not place undue restrictions on the person, or that have the effect of blocking the release of information that requires investigation and corrective action to protect the public interest. These circumstances include but are not limited to:*

- *inaction for more than 6 months on an internal disclosure or 3 months on an external disclosure*
- *a reasonable belief in a conflict of interest or the destruction of evidence*
- *a reasonable belief of an imminent danger to public health or safety*
- *retaliation likely would result if institutional channels are used.*

³⁷ Companies over a certain staff number threshold.



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The law largely meets this standard. It provides the same circumstances for making an external disclosure (to authorities) as for disclosures directly to the public. An employee may bypass internal or external channels and make a report publicly if:

- he/she considers that the employer could be involved in the misconduct;
- he/she considers that the employee's confidentiality could be violated;
- he/she considers that there is a risk of loss, disappearance or destruction of evidence; or
- the employer did not ensure the report was filed in the Register or did not inform the employee about the results of the examination within the legal timeframe (between 30 and 60 days).

Recommendation: No modifications are necessary. The law meets this standard.

7) Whistleblowers are entitled to confidentiality of their identity and all identifying information, except when waived by their prior written consent or if required by official investigations or judicial proceedings.

The law bans an employee's identity from being disclosed or communicated to people suspected of misconduct without the employee's permission. There is only one stated exception. Confidentiality is involuntarily lost only for criminal proceedings initiated by a whistleblower's disclosure. In such cases, the employee may be eligible for witness protection.

While unqualified, the law does not include specificity necessary to establish the scope of protection. For example, it does not explicitly protect against release of "identifying" information; that which does not name, but includes facts traceable to the whistleblower. Similarly, it does not provide for advance notice when exposure is required for a criminal proceeding. Merely withholding a name can be ineffective to protect identity.

Recommendation: The law should be modified to clarify that it also protects against release of identifying information, and requires advance notice to the whistleblower if exposure is necessary.

8) Protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent.

The law explicitly fails this standard. In order for a report to be filed in the Register, the person must include his/her first and last name, place of work, contact details and signature (for written reports). The law does not state whether an anonymous whistleblower will be protected if his/her identifying information becomes known. The law does not state whether anonymous reports containing bona fide information will be investigated. Anonymous disclosures can include valuable leads or evidence, often at a higher volume than other channels. People who file an anonymous report or make a public disclosure anonymously should be protected if they are subsequently identified and retaliated against.

Recommendation: The law should be modified to cover anonymous whistleblowers, both for action on their reports and rights against retaliation if they are identified.

9) Reports shall be investigated promptly, and employees shall be informed of investigations and actions taken in response to their report within a reasonable amount of time.

The law states that public authorities “have the obligation to immediately take measures to prevent actions that may cause harm to the public interest,” and that they “shall, within the limits of their respective powers, order the suspension of those actions.”

Internal disclosures are processed under government regulations; if an internal disclosure “contains the constituent elements” of a crime or violation, the employer is required to inform the competent investigative authority. If a public disclosure “contains the constituent elements” of a crime or violation, the competent investigative authority will act ex officio. If a whistleblower’s report leads to a criminal trial, the employee is required to be informed that his or her report will be examined according to criminal laws.

While the statute assigns duties for public agencies, its provisions for internal disclosures do not contain any indication that those rules should include timely investigations, timely notice of results to whistleblowers, or any criteria for controls of the process. Nor are there any controls for external reports to government agencies.

Recommendation: Both for internal and external reports, the law should be modified so that whistleblowers receive notice that their reports are being investigated, status reports on the investigation’s status, an opportunity to rebut denials of their charges, and a schedule for final action. The law should require transmission of results to the whistleblower within 3 to 6 months.

10) Whistleblowers shall be protected from all forms of retaliation, including but not limited to dismissal, suspension, demotion, punitive transfer, negative performance assessment or employment reference, pay reduction, harassment, blacklisting, and psychiatric or medical referral.

The law meets this standard. It defines “retaliation” as “any form of pressure, disadvantage or discrimination in the workplace,” including dismissal, suspension, demotion, denial of promotion or training, repressive transfer, cancellation of bonuses or other benefits, harassment or other repressive treatment, as well as threats of these actions.

Recommendation: No modifications are necessary. The law complies with this standard.

11) The burden of proof is on the employer to show any actions taken against an employee were not associated with or motivated by the employee having made a report, considered making a report, or assisted a person in making a report. Employees are not required to establish a link between making a report and actions taken against them.

The law does not meet this standard. It does require employers to demonstrate that any actions taken against an employee were not related to the person filing a report or being involved with a whistleblower case. “Otherwise,” the law states, the employer’s actions “are considered revenge.”

However, the law also requires employees to establish a “causal link” between making a report and workplace actions taken against them. This requires the whistleblower to prove a retaliatory cause, or essentially win the case, before the employer has any burden of proof. It also is inconsistent with the EU Directive, which only requires the whistleblower to establish protected speech, and a subsequent prejudicial action. Then the burden of proof is reversed to the employer.



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Recommendation: For compliance with the EU Directive, when the whistleblower establishes protected speech and a subsequent prejudicial action, the employer should be required to prove that whistleblowing did not affect the decision in any way.

12) Liability for civil, criminal or administrative actions is waived for people who make a report in accordance with the law.

The law does not specifically address this issue. But the liability shield is a basic requirement of the EU Directive. Criminal or civil liability can have a far greater chilling effect than workplace harassment.

Recommendation: A provision should be added providing an affirmative defense to civil or criminal liability for any reports where the whistleblower “had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing” misconduct covered by the law.³⁸

13) Whistleblowers have the right to effective remedy and fair trial, presumption of innocence, and the rights of defense, including the right to be heard and the right to access files.

The law provides several avenues for remedies, but unlike corporate employees, there is no general guarantee of due process or court access for government workers. Their options are limited to petitioning authorities for a transfer, reversal of disciplinary actions, and material and moral damages. The People's Advocate (Ombudsman) is required to examine protection and other petitions “as a matter of priority” and respond within 15 days. However, decisions regarding the examination or rejection of protection requests by the People's Advocate may not be challenged.

Relevant decisions by public authorities and private sector authorities may be appealed or challenged via administrative or civil proceedings. Again, however, government workers have no control of their rights, which are at the discretion of the People's Advocate to litigate.

Recommendation: The law should extend due process access to court for government employees to challenge violations of their rights.

14) Rights and remedies cannot be waived or limited by any agreement or condition of employment, including pre-dispute arbitration agreement. Employment contracts may not be used to prevent employees from making or discussing a report.

The law provides that “confidentiality and professional secrecy clauses between employer and employee shall not prevent the disclosure of illegal practices.” While this neutralizes certain nondisclosure agreements, it will not shield against an employer's gag orders or policies.

Recommendation: The provision should be expanded to also shield against orders or policies that conflict with rights in the law.

³⁸ See Article 21.7 of the EU Directive

15) Penalties shall apply for hindering or attempting to hinder reporting; retaliating or threatening to retaliate against a whistleblower; encouraging or condoning retaliation; bringing vexatious proceedings or actions against a whistleblower; violating a whistleblower's confidentiality; and knowingly reporting and/or publicly disclosing false information.

The law lists as violations, misdemeanors or disciplinary liabilities:

- an employer's failure to enable the filing of internal reports;
- an employer's failure to maintain a whistleblower's confidentiality;
- an employer's failure to ensure measures to protect employees from retaliation;
- transmitting a whistleblower's identity to people involved with the alleged misconduct;
- failure to take measures to stop or prevent acts that harm the public interest;
- revenge taken against a whistleblower.

The law does not specify which laws, regulations or codes apply to these actions, or the associated criminal, civil or other penalties. As a result, the law only guarantees symbolic accountability.

Recommendation: The law must be expanded to provide specific penalties for listed violations, sufficiently severe to have a deterrent effect.

16) People harmed or affected by reports shown to be knowingly inaccurate shall have access to remedies.

The law does not specifically address this issue.

Recommendation: The law should be modified to specify that it is not a defense against liability for knowingly false statements.

17) A designated agency shall promote whistleblower systems in order to nurture positive public attitudes and facilitate reporting.

The law does not specifically address this issue, which is essential for the public to be aware of rights. Whistleblower laws commonly are dormant or severely underutilized, in part because the public is unaware of their existence and in part because they contradict ingrained cultural traditions. An ambitious public education campaign is a prerequisite for the law to achieve its objectives. The Anti-Corruption Education Division of the National Anti-Corruption Centre has carried out some of these activities via televised videos and training for public employees.

Recommendation: The law should be amended to specifically require dedicated public education campaigns on the nature of whistleblower rights, and how they can benefit the public.

18) A designated agency shall provide assistance for disclosures and retaliation protection through free-of-charge information and advice on rights, reporting channels, contact persons, procedures, remedies and retaliation protection.

The People's Advocate (Ombudsman) has the legal authority and responsibility to receive and investigate whistleblower retaliation complaints. The law does not specifically include the provision of assistance or advice to employees. This means they may well not be aware of the existence of their rights, or how to exercise them properly. Ignorance of how to use the law can create as significant a chilling effect as of its existence.



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Recommendation: The law should be modified to expand the People's Advocate's duties to provide guidance for whistleblowers on the nature of their rights and how to exercise them fully.

19) Legal aid is available in retaliation protection proceedings, criminal proceedings, and cross-border civil proceedings.

The law does not specifically address this issue, or the alternative of reimbursement for attorney fees when retaliation is proved. The effect is that many whistleblowers will be unable to afford to exercise their rights.

Recommendation: The law should be modified to provide legal assistance, and attorney fees paid by the defendant in proceedings where the whistleblower obtains relief.

20) A designated agency shall provide oversight of whistleblower disclosure and protection mechanisms; identify and seek to remedy any shortcomings or inefficiencies; and maintain and annually release anonymized data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes.

The law does not specifically address oversight of whistleblower mechanisms, or the public release of data and information on the whistleblower system. It is a fundamental omission not to have any transparency about the results of a transparency law. It means that there will be no public record to assess whether the law is being used, or is effective either against retaliation or abuses of power.

Recommendation: The law should require the People's Advocate to prepare an annual report that specifically includes data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes, the number of whistleblower reports and any positive effects, as well as an analysis of its weaknesses based on experience to date.

21) A public, transparent review of laws and policies shall be conducted, and any needed reforms made, at least every three years.

The law does not specifically address this issue, which is essential because it is unrealistic to perfect laws without the lessons learned from experience with their application.

Recommendation: Every three years, a public agency should be required to report on the law's effectiveness in meeting its objectives and the report should include specific recommendations on improvements to the law.

SUMMARY:

Moldova's whistleblower law is in inadequate compliance. It only meets three out of 21 standards – broad scope of subject matter for protected speech; broad scope of prohibited employment retaliation; and public freedom of expression.

MONTENEGRO

Law on Prevention of Corruption (2014)

1) The law applies to all public and private sector employees and workers, including contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and management body members.

The law does not specifically define a whistleblower as an employee. It defines “whistleblower” as “a natural or legal person” that files a corruption report in the public interest.

Montenegro's law provides broader protection than a law merely for employees, as required for this standard. It provides protection for institutions, as well as citizens who blow the whistle. Every legal or natural person who reports a threat to the public interest is in fact a whistleblower. This protection for citizen and institutional whistleblowers is broader and more fundamental than one merely for employees. In relation to whistleblowers who are legal entities, in practice, the law starts from the theoretical concept of a legal entity – as a social entity that is recognized as a subject of the law. Basically, the law does not make any difference whether the whistleblower is a natural or legal person.

However, the law should define and clarify the terms by:

- including explicit definitions for “legal person” and “natural person”, so that the law provides self-sufficient notice for its broad scope. To illustrate, Article 59 leaves questions about the status and rights of civil society organizations (CSOs) targeted with retaliation.
- clarifying how whistleblower protections, compensation and other provisions apply to people outside the workplace context, and to institutions such as corporations or CSOs. While their rights will be adjudicated on a case-by-case basis for remedies unique to most whistleblower laws, there should be a reference to the statutory provisions elsewhere which will govern the exercise of that discretion. In order to prevent arbitrary interpretations and communicate rights effectively, whistleblower laws should be self-sufficient and transparent about the full scope of authority.

Montenegro's law protects those “related to” the whistleblower by helping with the disclosure. However, it does not provide protection for those about to blow the whistle, or those mistakenly perceived as whistleblowers. It is limited to providing a causal link between a disclosure and alleged retaliation. With respect to advance research preparing for a disclosure, this omission leaves vulnerability to pre-emptive strikes that create a significant chilling effect. While more difficult to prove, advance research both is indispensable and dangerous to provide the evidence for a responsible whistleblowing report. Protection must extend to the research phase.

There is no disagreement that for protecting advance preparations it is harder to prove retaliation. However, that is no reason to make it impossible by denying the existence of necessary rights. Coverage in this context is not a technicality, and the loopholes must be closed for compliance with the EU Directive and best practices.

Perhaps the most significant omission in the scope of covered employee protection is the failure explicitly to protect “duty speech”— communicating protected information through an organization's chain of command as part of job responsibilities. However, this is the most significant context for communication of protected information. Only a small percentage of whistleblowing is communicated as dissent. Every organization



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needs complete, accurate information for responsible judgments and decisions, and for its institutional checks and balances to operate effectively. Although coverage could be inferred, protection must be explicit for compliance with the EU Directive.

Recommendation: The scope should be clarified to protect retaliation because persons are perceived as about to blow the whistle or being a whistleblower, even if mistaken. It should be expanded to cover all reports communicating protected information, regardless of formality and whether the report is an allegation or a job responsibility.

2) Whistleblowing includes corruption; bribery; violation of public law; human rights violations; financial crime and fraud; risks to consumers, public health, safety and environment; and other misconduct and risks that threaten or concern the public interest.

The law defines whistleblowing as “reporting threats to the public interest that indicate the existence of corruption.” Corruption is defined as “any abuse of official, business or social position or influence that is aimed at acquiring personal gain or for the benefit of another.” The law defines threats to the public interest as “a violation of regulations, ethical rules or the possibility of such a violation, which caused, causes or threatens to cause danger to life, health and safety of people and the environment, violation of human rights or material and non-material damage to the state or a legal or natural person, as well as an action that is aimed at preventing such a violation from being discovered.” The law further defines “public interest” as “the material and non-material interest for the good and prosperity of all citizens on equal terms.”

As written, with respect to the competencies of the Agency for the Prevention of Corruption (APC), the law only applies to public interest threats that involve corruption. This is necessary to preserve the APC's competencies for corruption-related misconduct, and to maintain boundaries with other agencies that have distinct competencies. This restriction could be used to exclude public interest threats that are due to incompetence, faulty data, mismanagement or other reasons beyond corruption. The restriction to corruption should be removed, and the types of misconduct that can be reported under the law should include all recommended categories of crime, misconduct or public health threats – regardless of whether corruption is an element.

While the APC forwards reports to relevant competent agencies for investigation, the significance here is that it is not clear whether the whistleblower is credited for protected speech and therefore has anti-retaliation rights unless disclosing corruption. Until that happens, this statute could be interpreted as an anti-corruption whistleblower law, rather than a national whistleblower law in compliance with the EU Directive.

Even for corruption, contrary to the EU Directive's guidance, the law does not explicitly protect acts or omissions that have not yet occurred. Similarly, it fails to specify that whistleblowing about concerns for which there is a reasonable basis can be protected despite a lack of evidence.

Recommendation: To establish protected speech and associated rights, the law's scope should be clarified so that protection against retaliation covers disclosures not only of corruption, but for all the public interest categories of misconduct in this standard. The law also should be clarified to protect disclosures of misconduct that has not yet occurred, as well as concerns supported by a reasonable belief despite the lack of evidence.

3) *To qualify for protection, a person must have a reasonable belief, suspicion or grounds to believe the information reported is accurate. Whistleblowers shall not be subject to “good faith” or “motivation” tests. A person is not required to prove a violation has occurred, nor must an investigation, prosecution or other procedure result from the person's report.*

The law requires that a whistleblower have “reasonable grounds to believe that there is a threat to the public interest that indicates the existence of corruption.” The law also states that people only will be protected if they make a report “in good faith.”

Unfortunately, while not part of the definition here, the good faith standard routinely has involved a consideration of motives. This phrase long has been construed as a motive or state-of-mind test – whether the person had a proper or pure intention to make a report. It is perilous to probe a person's motive. The only threshold should be whether the person had reasonable grounds to believe the information was accurate at the time it was reported.

The Law on Prevention of Corruption defines “good faith” through Article 58 paragraph 2 to take into account: the quality of information provided, the degree of the endangerment and the consequences that may occur. It follows from the above definition that the whistleblower motive is not examined in any way.

Recommendation: Remove the good faith term and other caveats and conditions, and rely solely on the reasonable belief definition. This prevents any slippage into a motives test. If the term remains, for compliance with the EU Directive, the statutory definition must have an explicit disclaimer that the whistleblower's motives are irrelevant. The only threshold should be whether the person had a reasonable belief, suspicion or grounds to believe the information reported was accurate, which is an objective standard.

4) *Protection is not lost for inaccurate reports if the person was honestly mistaken and had a reasonable belief the information was accurate. People are presumed to have a reasonable belief unless demonstrably shown otherwise.*

The law does not specifically state that protection remains if a person made an inaccurate report in honest error – that despite a reasonable belief the person was not aware the information was mistaken.

Despite the lack of specific statutory language, in practice Montenegro has been operating in compliance with this standard. Protection for mistaken reports is not excluded by the law. The Law on Prevention of Corruption clearly stipulates that a whistleblower has the right to protection if he/she has sustained damage, or if there is a possibility of damage due to submission of the report, without stating that he/she should wait for the outcome of the procedure after the report to assess the justification of protection. At the APC, the outcome of the procedure has never been considered when making a decision on a request for protection.³⁹

However, informal compliance does not go far enough for the all-context protection of disclosures supported by a reasonable belief test. To illustrate, the whistleblower's rights are uncertain if a competent agency declines to open an investigation.

Recommendation: The laws should clarify that a whistleblower still has protection for a report that is mistaken but based on a reasonable belief. The law needs to be clarified so that it explicitly complies with this standard, and so whistleblowers know they have the right to be mistaken.

³⁹ Per written comments provided by the representative of APC to the draft Gap Analysis during the stakeholder consultations process.



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5) *Clear reporting channels, designated contact persons, and specified follow-up procedures must be in place within private⁴⁰ and public sector workplaces (internal reporting) and public institutions (external reporting). People have the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.*

The law states, "Whistleblowers may file a report to an authority, company, other legal person or entrepreneur," each of which "shall designate a person for receiving and acting upon the report of whistleblowers." If the designated person identifies a threat to the public interest related to corruption, the person shall verify the report and propose measures to the head of organization. The internal unit must report the results to the whistleblower within 45 days. There is no stated flexibility for compliance with the EU Directive's standard providing at least three months for the process. The whistleblower also has the freedom of choice to file an external report initially.

More specifics should be included in the law about how reports are investigated and followed up. There is no requirement for any audience to have structural independence or be free from conflict of interest. There is no requirement that the receiving unit must comply with the EU Directive's standards for internal channels or has any responsibility to act on the report. This all has been relegated to future ministry regulations, but there are no criteria or standards for the regulations to be consistent with those principles. The APC has taken leadership here, and its initiatives should be codified in the law. During the five-year implementation of trainings for persons appointed to handle reports internally in other public and private sector bodies (trainings held for about 600 persons), APC recommended that detailed procedures regarding the procedure for internal application should be defined in more details in rule books and internal procedures.⁴¹

Recommendation: The APC's leadership should be developed by codifying that responsible units are guaranteed adequate resources, training, structural independence and freedom from conflicts of interest. The responsible units are the infrastructure for the law's intended implementation and should be governed by statutory controls that explicitly comply with EU Directive standards for reporting channels. For compliance with the EU Directive, the 45-day time limit should be extended to three months as necessary, with the whistleblower's consent.

6) *People have the option to report publicly (e.g., via media, NGOs, public meetings, online outlets) under reasonable circumstances that do not place undue restrictions on the person, or that have the effect of blocking the release of information that requires investigation and corrective action to protect the public interest. These circumstances include but are not limited to:*

- *inaction for more than 6 months on an internal disclosure or 3 months on an external disclosure*
- *a reasonable belief in a conflict of interest or the destruction of evidence*
- *a reasonable belief of an imminent danger to public health or safety*
- *retaliation likely would result if institutional channels are used.*

The law does not specifically address this issue, which is a cornerstone of rights in the EU Directive. Again, while the law's language is imprecise, it appears that Montenegro is respecting this principle in practice. The competent department has recognized and has already made proposals for the improvement of the Law on Prevention of Corruption in the part related to this issue. Also in practice, after the adoption of the EU Directive, the APC has already, in one case, granted protection to a whistleblower who, after the silence of the administration, disclosed the report to the media.

⁴⁰ Companies over a certain staff number threshold.

⁴¹ Per written comments provided by the representative of APC to the draft Gap Analysis during the stakeholder consultations process.

Recommendation: The law should explicitly protect disclosures to the public, consistent with its current criteria for eligibility to make initial external disclosures to competent public authorities. The recommendation and precedent certainly are in compliance with the EU Directive. The law needs to comply with the EU Directive as well. Otherwise, whistleblowers will have to guess whether they have the right to publicly disclose the wrongdoing. This is a basic cornerstone of the EU Directive, so the law must provide whistleblowers with clear notice of their explicit entitlement and associate rules to make protected public disclosures.

7) Whistleblowers are entitled to confidentiality of their identity and all identifying information, except when waived by their prior written consent or if required by official investigations or judicial proceedings.

The law requires that the confidentiality of a whistleblower be maintained, until the person “explicitly requests such data to be made available to the public.” Authorities, companies, other legal persons, entrepreneurs and the Agency for Prevention of Corruption are required to maintain “data confidentiality.” However, codified protections in the whistleblower law do not extend to identifying information. There is no provision for advance notice if the identity of the whistleblower must be revealed.

While specific details are lacking, Montenegro has adopted this principle overall. The APC and other competent authorities, when acting on an internal report, not only have the obligation to protect the identity of the whistleblower, but also all data from the report in the manner defined by the Article 56 of the Law on Data Confidentiality.

Recommendation: To communicate rights effectively, the whistleblower law should incorporate protections found in other statutes, such as controls on identifying information in the Law on Data Confidentiality. It is unlikely that whistleblowers will be aware of relevant sections in other ancillary laws. Compliance with the principle should be clarified to include specifics required by the EU Directive. The proper structure is to require the whistleblower's written consent prior to any discretionary release of identity or identifying information. If release of required information is required by law, such as with a court order, the whistleblower must receive timely advance notice. Confidentiality commitments should travel with the evidence, if another competent authority reviews or takes control of a whistleblower's disclosure.

8) Protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent.

The law does not specifically address this issue, but as stated by representatives of the APC, it is complied with and respected in practice. The only explicit provision in the law related to anonymity is one which states that a report must include a person's signature and personal information “if he/she does not want to be anonymous.” The inference of protection is supported in practice. Montenegro does not distinguish between anonymous whistleblowers and those who are not. Both are guaranteed protection in the same way.

However, the lack of explicit notice that anonymous whistleblowers have protection could create an unintended chilling effect that limits valuable disclosures. Anonymous disclosures can include valuable leads or evidence, often at a higher volume than other channels. Protection of anonymous whistleblowers is not a best practice, but a minimum standard of credible whistleblower laws.

Recommendation: To avoid confusion and provide whistleblowers with notice of their rights, the law should be clarified to codify the current practice of covering anonymous whistleblowers, both for action on their reports and rights against retaliation if they are identified.



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9) Reports shall be investigated promptly, and employees shall be informed of investigations and actions taken in response to their report within a reasonable amount of time.

The law requires authorities, companies, other legal persons and entrepreneurs to verify reports and take appropriate measures to prevent corruption-related threats to the public interest. These organizations are required to inform whistleblowers of any measures or their outcomes within 45 days from when the report was filed. Similar provisions apply for reports made to and investigated by the APC.

The Ministry of Justice also has adopted a Rulebook on the detailed procedure for dealing with internal whistleblower reports on endangering the public interest, including reports on corruption.

In accordance with the law, if an organization does not act on APC's recommendations within the deadline, or fails to inform the APC about actions it undertook, the APC is to inform the entity that supervises the organization, submit a special report to Parliament, and inform the public.

If an organization or the APC suspects a criminal offense has been committed, it is to forward evidence to the prosecution "without delay." If an authority or the APC has information about misconduct not within its jurisdiction, it is to forward this information to the competent authority, which is then required to inform the APC of any outcomes.

These provisions in the law related to investigations are overly complex, multi-layered and subject to abuse and inefficiency. Less authority should be given to organizations – private companies in particular – to investigate themselves. A more streamlined system should be developed for public authorities with relevant competence to receive, investigate and respond to reports. The law permits the involvement of parties with conflicts of interest, and contains too many stipulations as prerequisites that must be met before a report can be acted upon.

The whistleblower is entitled to notice and when checking the truthfulness of the allegations from the report, the APC collects the necessary documentation and the statement of the body to which the report refers. The APC also invites the whistleblower to give a statement on new circumstances. However, the whistleblower has no right to rebut the denials of allegedly corrupt officials, or to comment on the investigative report's findings and conclusions.

Recommendation: The law should be modified to streamline the investigation procedure, to ensure a more rapid response for the benefit of the whistleblower and to ensure misconduct ceases promptly. Less authority should be given to organizations – private companies, in particular – to investigate themselves. Whistleblowers should have the right to rebut the denials of allegedly corrupt officials, and to comment on the investigative report's findings and conclusions.

10) Whistleblowers shall be protected from all forms of retaliation, including but not limited to dismissal, suspension, demotion, punitive transfer, negative performance assessment or employment reference, pay reduction, harassment, blacklisting, and psychiatric or medical referral.

The law requires authorities, companies, other legal persons, entrepreneurs and the Agency for Prevention of Corruption to protect the rights of citizens who file reports and ensure they are not retaliated against.

The law defines retaliation as “inflicted damage” or “a possibility of damage” because a person made a report, including

- risk to life, health and assets;
- dismissal, redundancy or change of duties;
- disciplinary measures or proceedings;
- denial of access to data required for the performance of duties;
- deprivation of the means to work;
- withholding of promotion or professional development.

While the whistleblower law does not specifically include all recommended categories of retaliation, it is all-inclusive. Article 59 of the law covers all forms of retaliation, as well as the possibility of retaliation. The listed examples are not exhaustive, but they are priority cases in which the whistleblower especially has the right to protection, leaving room for the competent institution to determine all other cases of damage to whistleblowers as a consequence of the filed report.

In the course of determining whether a reporting person is entitled to and shall receive retaliation protection, the law states the Agency for Prevention of Corruption should engage in “assessing the good faith” of the reporting person. In conducting this assessment, the Agency “shall take into account the quality of the information provided, the degree of threats and effect that can occur due to threats to the public interest that indicate the existence of corruption.” This assessment readily can be used to deny rights and protections of people who make valid reports.

Neither the EU Directive nor the Council of Europe Recommendation includes a “good faith”, “quality” or “impact” test on the information that is reported by a person. The only criteria for receiving protection should be (1) whether the person had a reasonable belief the information on illegality or abuse of authority was true and (2) whether the person experienced adverse consequences that the employer could not prove were not associated with the person having made a report.

Recommendation: The law should specify that it protects against any discrimination and action that could have a chilling effect. The provision calling for the Agency to screen retaliation complaints based on good faith should be deleted.

11) The burden of proof is on the employer to show any actions taken against an employee were not associated with or motivated by the employee having made a report, considered making a report, or assisted a person in making a report. Employees are not required to establish a link between making a report and actions taken against them.

The law states that employers have the burden to prove any detrimental actions taken against an employee had no causal link with the person having made a report. While in partial compliance, the EU Directive requires a higher burden for the employer than merely rebutting a causal link. The action must be entirely independent of protected speech.

Recommendation: The language should be tightened so that whistleblowing is “not linked in any way” with alleged retaliation.



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12) Liability for civil, criminal or administrative actions is waived for people who make a report in accordance with the law.

The law does not specifically address this issue. But the liability shield is a basic requirement of the EU Directive. Criminal or civil liability can have a far greater chilling effect than workplace harassment.

Recommendation: A provision should be added providing an affirmative defense to civil or criminal liability for any reports where the whistleblower “had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing” misconduct covered by the law.⁴²

13) Whistleblowers have the right to effective remedy and fair trial, presumption of innocence, and the rights of defence, including the right to be heard and the right to access files.

In order to be eligible for protection, a person must apply to the APC within six months of when the retaliation occurred or the suspicion of retaliation began. The APC reviews the application and sends an opinion to the person's employer within 15 days of when the opinion was completed, while also notifying the applicant of the opinion.

If the APC finds retaliation has occurred or could occur, the opinion will include a recommendation and deadline to remedy or prevent the damage. The employer must send a report to the APC before the deadline. If the employer does not meet the deadline, the APC will inform the entity that supervises the organization, submit a special report to the Parliament, and inform the public.

Whistleblowers also are entitled to judicial protection against workplace discrimination and harassment under the appropriate laws.

Authorities, companies, other legal persons and entrepreneurs may reward a whistleblower whose report contributed to preventing corruption-related threats to the public interest. If the report led to the receipt of public revenue or company income, the whistleblower is entitled to a monetary reward from the organization that benefitted from the report. The whistleblower can apply to the organization and receive an award from 3 to 5 percent of the funds or property recovered.

The law's provisions on obtaining protection from retaliation are overly cumbersome, multi-layered and multi-stepped. A system with enforceable remedies at all levels, and explicit, clear due process rights is necessary. But, the APC cannot provide adequate administrative remedy, because it does not have the legal authority to order retaliation to stop, reverse the damaging effects of retaliation, or compensate a victimized whistleblower for damages. Informing authorities and the public about a case of whistleblower retaliation is only symbolic protection. Additionally, by the time the APC takes these steps, the retaliation may be in an advanced state that will be difficult to reverse and remedy.

Within its text, the law does not define what courts are competent for judicial protection, or explain the process by which a victimized whistleblower can seek relief. Similarly, the law itself does not have the basic right for remedies that make the whistleblower whole from the direct and indirect effects of retaliation.

⁴² See Article 21.7 of the EU Directive

In practice, the law provides for judicial protection. It is exercised in accordance with the law governing the prohibition of discrimination,⁴³ and the law governing the prohibition of harassment at work.⁴⁴ All further procedures, rights, obligations, responsibilities of the employee and the employer, the manner of filing a lawsuit are regulated by these laws. However, the Law on the Prevention of Corruption does not reference these authorities, and without legal counsel whistleblowers may be unaware of their options.

Recommendation: There should be an administrative remedy with authority to provide relief. The law should reference the other rights governing relief in specific courts, such as those pre-existing in discrimination or work harassment laws, if a whistleblower does not obtain it from administrative remedies. The law should specify that whistleblowers who prove illegal retaliation either through an administrative or judicial procedure are entitled to all relief necessary to eliminate the direct and indirect effects of the retaliation.

14) Rights and remedies cannot be waived or limited by any agreement or condition of employment, including pre-dispute arbitration agreement. Employment contracts may not be used to prevent employees from making or discussing a report.

The law does not specifically address this issue. However, without this provision, the law is vulnerable to being overridden by conflicting laws or organizational gag orders. While signing non-disclosure agreements commonly is a job prerequisite, “anti-gag” provisions are mandatory for credible rights, and required by the EU Directive.

Recommendation: This law is in basic compliance, but should be expanded to include a provision that without specific repeal through a new law, its rights cannot be overridden or affected by any other rule, policy or agreement. Without this provision, the law is vulnerable to being overridden by conflicting laws or organizational gag orders. Signing non-disclosure agreements commonly is a job prerequisite. However, “anti-gag” provisions are mandatory for credible rights, and required by the EU Directive.

15) Penalties shall apply for hindering or attempting to hinder reporting; retaliating or threatening to retaliate against a whistleblower; encouraging or condoning retaliation; bringing vexatious proceedings or actions against a whistleblower; violating a whistleblower's confidentiality; and knowingly reporting and/or publicly disclosing false information.

Legal persons may be fined from 1,000 EUR up to 20,000 EUR for misdemeanors, including:

- failing to designate a person to receive and act upon reports;
- failing to inform whistleblowers of measures taken and outcomes with 45 days (a fine of from 500 EUR up to 6,000 EUR for entrepreneurs);
- failing to submit to the Agency for Prevention of Corruption within the deadline a report on actions in response to the Agency's recommendations (a fine from 500 EUR up to 6,000 EUR for entrepreneurs);
- failing to protect a whistleblower's confidentiality (a fine from 500 EUR up to 6,000 EUR for entrepreneurs);
- failing to protect a whistleblower from all forms of retaliation (a fine from 500 EUR up to 6,000 EUR for entrepreneurs).

In addition to misdemeanor liability for a legal entity, the law also includes a misdemeanor penalty for a responsible person in a legal entity, state body, state administration body, local government body and local self-government in the amount of 500 EUR to 2,000 EUR.

⁴³ <https://www.paragraf.me/propisi-crnegore/zakon-o-zabrani-diskriminacije.html>

⁴⁴ <http://www.amrrs.gov.me/zakon-o-zabrani-zlostavljanja-na-radu>



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There also are alternate channels for accountability. Employment discipline is implemented by the body where the disciplinary offense was committed, and criminal responsibility can be determined by the competent prosecutor's office and the court in criminal proceedings.

While the items on the list are sound, it does not include the most basic offense for which accountability is required – engaging in retaliation.

Recommendation: The law should be expanded so there is accountability for engaging in retaliation.

16) People harmed or affected by reports shown to be knowingly inaccurate shall have access to remedies.

The law does not specifically address this issue, but the EU Directive removes protection for knowingly false reports.

Recommendation: The law should be modified so that it is not a defense against liability for knowingly false statements.

17) A designated agency shall promote whistleblower systems in order to nurture positive public attitudes and facilitate reporting.

The law does not specifically address this issue, although Article 78 of the law references that the APC conducts educational, research and other preventive anti-corruption activities. This is supported by the fact that there is a department at APC that deals with education and campaigns – the Department for Education, Research Campaigns and Analytics.

While helpful, the scope of the task requires a clear statutory mandate. A department with subject-matter competence is insufficient to overcome deeply-ingrained cultural resistance and gain public support for whistleblower rights. A primary benefit of whistleblower laws is leadership to reverse cultural bias and stereotypes. That requires transparency of results, for protection but most significantly for how the law is making a difference in lives of citizens. Experience has demonstrated that without an effective public outreach and education campaign, whistleblower laws remain unused and dormant.

Recommendation: The law should be expanded to designate an agency responsible for public education and outreach on the importance and benefits of whistleblower rights. The law should instruct the APC to prepare annual reports and maintain an education program that, through training and public education, informs citizens about the importance of whistleblowing in preventing and fighting corruption, as well as about whistleblower rights.

18) A designated agency shall provide assistance for disclosures and retaliation protection through free-of-charge information and advice on rights, reporting channels, contact persons, procedures, remedies and retaliation protection.

The law does not specifically address this issue, but the APC prepares extensive information materials and conducts trainings. It also provides extensive outreach materials on reporting corruption, through billboards, flyers, brochures, and information notices.

However, these active outreach efforts do not guide a whistleblower how to operate within the legal procedures and act within the scope of their anti-retaliation rights. In most cases, non-lawyer whistleblowers need direct guidance to understand the extent of their rights and how to use them effectively. Without that resource, the law will not provide protection. Further, whistleblowers may inadvertently incur liability or lose protection, because they do not understand its provisions and boundaries.

Past experience has demonstrated that training to understand new whistleblower laws is one of the most significant factors for their impact. While the APC conducts interactive trainings, the law should make training in its provisions a mandatory requirement for all officials exercising enforcement authority, from authorized persons to law enforcement officials.

Recommendation: The law should be expanded so that a designated agency will provide guidance to whistleblowers seeking help to understand the law's provisions and how to exercise their rights properly, as well as to provide comprehensive training for all with responsibilities to administer or enforce these rights.

19) Legal aid is available in retaliation protection proceedings, criminal proceedings, and cross-border civil proceedings.

The law states that the Agency for Prevention of Corruption shall provide “necessary expert assistance” to a whistleblower in a judicial process, but only to prove the causal connection between making a report and suffering retaliation. That leaves the whistleblower without assistance against the employer's reverse burden of proof. Further, expert advice is not a substitute for legal representation. Whistleblowers need counsel for their rights to be realized in practice. The effect is that many whistleblowers will be unable to afford to exercise their rights. In the absence of attorney fee awards for prevailing whistleblowers, states are encouraged to provide legal assistance. However, it means the law may not be financially available for whistleblower without additional legislation. The law's mandate should be self-sufficient.

Recommendation: The law should be modified to provide legal assistance, and attorney fees paid by the defendant in proceedings where the whistleblower obtains relief.

20) A designated agency shall provide oversight of whistleblower disclosure and protection mechanisms; identify and seek to remedy any shortcomings or inefficiencies; and maintain and annually release anonymized data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes.

The Agency for Prevention of Corruption has the authority and duty to:

- give opinions and make recommendations to prevent corruption-related public interest threats;
- cooperate with authorities, higher education institutions, research organizations and other stakeholders;
- conduct educational, research and other preventive anti-corruption activities;
- submit an annual report on the Agency's activities to Parliament;
- notify the citizens about its work through public outreach materials.

The Agency is required to maintain complete records on whistleblower reports and protection requests, including the person's identity (if given), employer, description of the report, and measures taken in response to the report. Personal information is not permitted to be released to the public.

Recommendation: No modifications are necessary. The law complies with this standard.



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21) A public, transparent review of laws and policies shall be conducted, and any needed reforms made, at least every three years.

The Agency for Prevention of Corruption is required to initiate amendments to laws and regulations in order to eliminate corruption risks or to bring them in line with international standards. The Agency also prepares an annual report on its work no later than March 31 to cover the previous year. In addition, Article 98 of the law provides for the obligation to publish this report on the official website of the Agency.

Recommendation: The law as implemented is in substantial compliance with this standard, but the current process should be institutionalized in the law.

SUMMARY:

Montenegro's law is in partial compliance with consensus standards. It protects all citizens rather than just employees, which is a significant strength. The law also fully or partially complies with standards for confidentiality; full scope of harassment; transparency and review. Informally, it applies consistent standards to qualify for protected speech, and acts on anonymous disclosures, in addition to providing judicial due process through ancillary laws. For transparency and accountability, these informal or indirect rights should be made explicit in the law.

NORTH MACEDONIA

Law on the Protection of Whistleblowers (2015; amended 2018, 2020)

1) *The law applies to all public and private sector employees and workers, including contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and management body members.*

The law covers people working in the public and private sectors, including:

- people employed for an indefinite or definite period;
- job candidates, volunteers and trainees;
- people hired for “doing a job on whatever ground”;
- people with a “business relation or another form of collaboration”, including
- a person who used an organization's services.

The law attempts to have a broad coverage. In one respect, it goes beyond the EU Directive's minimum requirements, because it also covers *“a person who has or used to have a business relation or another form of collaboration with an institution, that is, a legal entity about which he/she blows the whistle; [and] a person who uses or has used services of an institution, that is, a legal entity in the public or the private sector about which he/she blows the whistle.”*

Although it is not explicit, persons assisting the whistleblower should be considered as persons close to the whistleblower and thus to be covered by the protection in accordance with the provisions of the law.

However, failure to explicitly consider common, specific retaliation scenarios can create confusion about who has rights and create unintended qualifiers. For example, the law leaves it up to the whistleblower to credit those who assisted as being close persons. If there is a conflict and the whistleblower does not designate a current or prior resource as a close person, that individual could be left defenseless. Often it takes a team effort to make a responsible, evidenced whistleblowing report. If there only is protection for the final messenger who makes the formal report, others essential to expose misconduct likely will not assist. However, they may be indispensable sources of supporting research, corroboration, or subject-matter expertise. Further, any suspected whistleblower will be isolated at the workplace. Without protecting the whole team, there will be a severe chilling effect, lower quality reports and more retaliation. As a result, the law should conform to best practices that routinely, explicitly protect those associated with or assisting the whistleblower based on objective facts, rather than the whistleblower's judgment.

The law protects people who are (mistakenly) “suspected” of blowing the whistle. In accordance with Article 8 (4), the right to protection covers persons who are able to create the probability that the person subject of the disclosure could suspect that such persons have made disclosures against him/her.

Perhaps the most significant omission in the scope of covered employee protection is the failure explicitly to protect “duty speech” – communicating protected information through an organization's chain of command as part of job responsibilities. This loophole also must be closed for compliance with the EU Directive.

However, adequate provisions that address this are within the Law on Prevention of Corruption and Conflict of Interest, which states that the whistleblower law applies to officials who have acted in accordance with the duty to report requests to act contrary to the Constitution, law or other regulation. However, this is the most significant context for communication of protected information. Only a small percentage of whistleblowing is communicated as dissent. Every organization needs complete, accurate information for responsible judgments and decisions, and for its institutional checks and balances to operate effectively.



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Recommendation: The scope should be clarified explicitly to protect all persons who assist or are associated with a whistleblower. It should be expanded to cover all reports communicating protected information, regardless of whether the communication is formal, pursuant to rules for written reports; or informal, such as protesting misconduct during a meeting. There should be no doubt that protection extends to communicating information about misconduct through the exercise of job duties, such as reporting problems to a supervisor, and when a report is an allegation or a job responsibility, such as required by the Law on Prevention of Corruption and Conflicts of Interest. The protection should be repeated or at least referenced in the whistleblower law. It is a challenge to educate employees on the whistleblower law itself, which has been largely dormant. It is unrealistic to expect that they also will be aware of relevant rights contained only in other related laws.

2) Whistleblowing includes corruption; bribery; violation of public law; human rights violations; financial crime and fraud; risks to consumers, public health, safety and environment; and other misconduct and risks that threaten or concern the public interest.

The law covers reports concerning “punishable, unethical or other unlawful or impermissible acts that infringe or jeopardize the public interest.” It includes acts that are likely to be committed.

The law defines “public interest” as:

- fundamental human rights and freedoms recognized by international law and the Constitution of North Macedonia;
- risks to health, defense and security;
- environment and nature;
- protection of property;
- freedom of the market and entrepreneurship;
- rule of law;
- prevention of crime and corruption.

Recommendation: The law provides an equivalent scope of protected subjects. It complies with this standard and does not require further modification.

3) To qualify for protection, a person must have a reasonable belief, suspicion or grounds to believe the information reported is accurate. Whistleblowers shall not be subject to “good faith” or “motivation” tests. A person is not required to prove a violation has occurred, nor must an investigation, prosecution or other procedure result from the person’s report.

The law states that in order to be protected, a person must make a report in good faith and based on reasonable confidence, at the time of reporting, that the information contained in the report is true. Under the law, people are not required to prove they acted in good faith and that their report is true. The law also requires the whistleblower to act “with due attention and conscientiously.”

These requirements all are highly subjective, inherently at risk of abuse. “Good faith” is not defined in the law, which readily opens the door to motives tests, and denying protection and rights to bona fide whistleblowers. The inclusion of “due attention” and “conscientiously” opens the door to analyzing a person’s intention and state of mind. This clearly is irrelevant, not in keeping with the EU Directive and the Council of Europe Recommendation, and is nearly impossible to implement in real-life situations.

While the law does not require the whistleblower to prove good faith, it permits the employer to attack and base their defense around that issue, turning the anti-retaliation law case into a trial of the whistleblower's motives. The "good faith" test can be and is construed as a motives test, i.e. a test of whether the person had a proper or pure intention to make a report. However, motives are irrelevant except for the whistleblower's credibility as a witness. All that should be relevant is the quality of the evidence. Further, abuse, defamation and deception are vague, subjective terms that open up a person's entire life, intentions and state of mind to inappropriate, unfair and chilling scrutiny.

Recommendation: The motive-based "good faith test" should be removed. The only threshold should be whether the person had a reasonable belief, suspicion or grounds to believe the information reported was accurate, which is an objective standard. The requirement to act "with due attention and conscientiously" also should be removed, because its vague subjectivity can be abused.

4) Protection is not lost for inaccurate reports if the person was honestly mistaken and had a reasonable belief the information was accurate. People are presumed to have a reasonable belief unless demonstrably shown otherwise.

The law does not specifically state that protection remains if a person made an inaccurate report in honest error, i.e., that the person was not aware the information was not accurate.

However, in accordance with Article 2 paragraph 1 and Article 3 paragraph 2 of the law, the protection remains in that case (suspicion makes room for inaccuracy and honest errors). For the whistleblower it is enough to be reasonably confident that what he/she reports about is true at the time of submission of the report. Of course, the procedure may result in finding the report inaccurate or erroneous; however, the protection remains unless the reporting represents abuse of protected reporting (whistleblowing) - the only case in which the whistleblower could lose the protection.

Recommendation: The law is sufficient but should be clarified by explicitly stating that a whistleblower still has protection for a report that is mistaken but based on a reasonable belief.

5) Clear reporting channels, designated contact persons, and specified follow-up procedures must be in place within private⁴⁵ and public sector workplaces (internal reporting) and public institutions (external reporting). People have the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.

With the exception of certain circumstances, an employee or any other person covered by the law first should make a report internally, i.e., within the workplace. The report is to be made to a person authorized to receive the information, or to the manager if no authorized person has been designated. Workplaces are required to make reporting procedures available to all employees.

A person covered by the law may file a report initially with public authorities – including the Ministry of Internal Affairs, the public prosecution office, the State Commission for Prevention of Corruption, and the Ombudsman if

- the misconduct involves the manager of the institution or company;
- he/she does not receive information on measures within the legal timeframe;
- measures have not been taken;
- he/she is not satisfied with the measures, or has doubts that measures will not be undertaken; or
- he/she fears harmful consequences to him/her or a person close to him/her.

⁴⁵ Companies over a certain staff number threshold.



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The bylaw related to the law contains provisions that regulate the manner of acting upon whistleblower reports and that ensure the independence of the persons authorized to receive whistleblower reports.

Receiving and keeping records of whistleblower reports (in a special register) is the responsibility of the authorized persons.

The authorized person assesses the content of the report to determine whether it is logical and reasonable and whether it contains sufficient elements to be followed up on for further action. In addition, the authorized person may request additional information from the whistleblower, if he/she is known, and may consult with other persons, while paying attention to the protection of the whistleblower's identity (administrative investigation).

Following completion of the assessment, the authorized person adopts conclusions for further action resulting from the report, which assess the competence or non-competence of the institution, and the necessary actions and measures for acting upon the report.

The authorized person shall inform the head of the institution (institutional chief)/entity about the allegations from the content of the report and the conclusions, unless the authorized person in the performance of the assessment concludes that the allegations from the content of the report are directly or indirectly directed against the manager. In that case, the report is forwarded to the competent institution in accordance with the law.

While this is a thorough, conscientious process, there are no safeguards for structural independence, or against conflicts of interest, either for internal or external units. There is no requirement that the report goes directly to the institutional chief, or that the office leader must address the responsible unit's findings. However, this allows findings to be buried within organizations, and the chief to maintain plausible deniability by never seeing the reports.

In addition to lacking an infrastructure for credibility and independence, this provision is not compliant with the EU Directive without a stipulation of the right of the whistleblower to choose between internal and external reporting authorities for an initial disclosure.

The EU Directive strongly encourages whistleblowers first to report through credible internal channels. However, the EU Directive also is clear that whistleblowers have the choice whether to make their initial report internally (employer) or externally (government enforcement agency). There is a significant chilling effect by forcing whistleblowers to guess whether their external report to a government enforcement agency qualifies for an exception.

Recommendation: Internal and external reporting authorities should be guaranteed adequate resources and training, as well as safeguards for structural independence or against conflicts of interest. Whistleblowers should be given the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.

6) People have the option to report publicly (e.g., via media, NGOs, public meetings, online outlets) under reasonable circumstances that do not place undue restrictions on the person, or that have the effect of blocking the release of information that requires investigation and corrective action to protect the public interest. These circumstances include but are not limited to:

- inaction for more than 6 months on an internal disclosure or 3 months on an external disclosure
- a reasonable belief in a conflict of interest or the destruction of evidence
- an imminent danger to public health or safety
- retaliation likely would result if institutional channels are used.

Under the law, a whistleblower may make a disclosure to the public if:

- no proper procedures are in place for internal or external reporting;
- the person did not receive information about measures taken in response to an internal or external report within the legal timeframe;
- no measures were taken; or
- there is an “easily recognizable threat” of evidence being destroyed or the misconduct being concealed

The law bans the public release of certain information. People who do not comply with this provision lose legal protection. Restricted information includes:

- personal data that is “not of importance” to reporting the misconduct;
- data/information that according to the law is considered to be classified, as well as data/information that would endanger the conduct of a criminal, misdemeanor or civil procedure, if the classification/danger is directly and easily recognizable;
- information that would violate or endanger the national security, defense of the independence, or the territorial integrity of the country.

The standards are acceptable in principle, but the qualifiers added as prerequisites require reliance on subjective and vague, rather than objective standards such as the EU Directive's reasonable belief standard. “Importance,” “endangerment” and non-classified threats to national security are subjective standards vulnerable to arbitrary application. They readily can be used to deny protections from any legitimate whistleblowers, while also exposing them to legal liability. They require would-be whistleblowers to guess whether their rights apply, which inherently will create a severe chilling effect.

There are no objective standards in the law by which a whistleblower could know whether a disclosure would endanger the conduct of a criminal, misdemeanor or civil procedure; lacks “importance;” or would violate or endanger the national security, defense of the independence, or the territorial integrity of the country. On balance, the law substantially complies with EU Directive standards for subject-matter exceptions to public disclosures, but compliance is neutralized by all the generic exceptions to public release of information.

Recommendation: If public disclosure is permitted by EU Directive exceptions, the prerequisite should be the “reasonable belief” test whether the disclosure was justified. The only other restrictions should be whether the information is properly classified with its status specifically designated or marked as classified.



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7) Whistleblowers are entitled to confidentiality of their identity and all identifying information, except when waived by their prior written consent or if required by official investigations or judicial proceedings.

The law requires the protection of whistleblowers' identity and personal data. This applies both to internal and external disclosures, and to all people who come into contact with a whistleblower's identifying information. This information only can be revealed if permitted by the whistleblower or ordered by a court. Whistleblowers must be informed if and when their information will be released, and informed of any witness protection measures available to them. Personal information must not be revealed to the subjects of a whistleblower report.

Recommendation: No modifications are necessary. The law complies with this standard.

8) Protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent.

The law does not specifically state that anonymous whistleblowers who later are identified shall be protected from retaliation. But this is a minimum requirement of credible whistleblower laws. Anonymous disclosures can include valuable leads or evidence, often at a higher volume than other channels. People who file an anonymous report or make a public disclosure anonymously should be protected if they are subsequently identified and are retaliated against.

Recommendation: The law should be clarified to explicitly specify that it applies to all anonymous whistleblower reports supported by credible evidence, and that anonymous whistleblowers who are subsequently identified shall be protected.

9) Reports shall be investigated promptly, and employees shall be informed of investigations and actions taken in response to their report within a reasonable amount of time.

For both internal and external reports, whistleblowers are required to be informed of measures taken in response to their report "without any delay" and within 15 days of when the report was made. If a whistleblower makes a request, public authorities are required to provide information about their activities on the case and provide access to case documents. The whistleblower also is entitled to notice of results.

While helpful, these safeguards are incomplete. For example, the whistleblower has extensive notice rights, but does not have the right to participate in the investigation to rebut testimony by alleged wrongdoers. The legal entity can ask for more information, but it is discretionary. These additional provisions are necessary preconditions for the whistleblower to decide whether he/she wants to take the risk of being retaliated against as a consequence of his/her reporting.

The bylaw related to the law contains provisions that regulate the manner of acting upon whistleblower reports. Receiving and keeping records of whistleblower reports (in a special official register) is the responsibility of the authorized persons.

The law stipulates a short deadline (of 15 days) for responding to the reports (See Article 4 paragraph (4) and Article 5 paragraph (3) of the law) and misdemeanor sanctions are envisaged for violation of the obligation (Articles 16 and 18 of the law).

The institution or legal entity to which the whistleblower submitted the report is obliged:

- at the request of the whistleblower to give him/her a notification on the course and actions taken in the proceedings upon the report, as well as to enable the whistleblower to inspect the files of the case, in accordance with the law;
- after the completion of the procedure, to inform the whistleblower, if known, about the outcome of the proceedings upon the report, in accordance with the law. (Article 5 paragraph (7) of the law).

Recommendation: The law is sufficient as for compliance with the EU Directive's requirements. To most effectively achieve the EU Directive's intent, the law should be expanded to provide whistleblowers the right to provide rebuttal testimony in the investigation; to comment on the adequacy of ensuing reports; and for reports and comments to be placed in the public record, while still protecting a whistleblower's identity and identifying information.

10) Whistleblowers shall be protected from all forms of retaliation, including but not limited to dismissal, suspension, demotion, punitive transfer, negative performance assessment or employment reference, pay reduction, harassment, blacklisting, and psychiatric or medical referral.

The law defines retaliation as: "any kind of violation of a right, during determination of liability, sanction, termination of employment, suspension, reassignment to another job which is less favorable, discrimination or harmful activity or danger of causing harmful activities."

Recommendation: No modifications are necessary. The law complies with this standard.

11) The burden of proof is on the employer to show any actions taken against an employee were not associated with or motivated by the employee having made a report, considered making a report, or assisted a person in making a report. Employees are not required to establish a link between making a report and actions taken against them.

The law states that the burden of proof is on employers in cases "of a dispute for the existence of violation of a right of the whistleblower." However, it is not that simple. Consensus standards require a reverse burden of proof, with specific requirements.

Recommendation: For compliance with the EU Directive, the law should state more explicitly that employers have the burden to prove any detrimental actions taken against an employee who engaged in protected speech are not linked in any way with him/her having made the report.

12) Liability for civil, criminal or administrative actions is waived for people who make a report in accordance with the law.

The law does not specifically address this issue. But the liability shield is a basic requirement of the EU Directive, because criminal, civil or administrative liability can have a far greater chilling effect than workplace harassment.

Recommendation: A provision should be added providing an affirmative defense to civil or criminal liability for any reports where the whistleblower "had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing" misconduct covered by the law.⁴⁶

⁴⁶ See Article 21.7 of the EU Directive



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13) Whistleblowers have the right to effective remedy and fair trial, presumption of innocence, and the rights of defense, including the right to be heard and the right to access files.

For internal reports, employers are required to protect employees from retaliation by preventing “violation of rights” and stopping “activities that violate or jeopardize any right” of the employee. If this protection is not provided, there are multiple options to seek relief through an administrative remedy. Whistleblowers may file a report with the State Commission for Prevention of Corruption, the Ombudsman, the Inspection Council, the Ministry of Internal Affairs or the Public Prosecution Office. These authorities are required to respond “without any delay” and within eight days.

If retaliation is confirmed, an authority shall “without any delay” file a written request to “the competent institutions and bodies for taking urgent measures” to protect the employee. The employee shall be informed of this. If the retaliation continues, the authority shall initiate a “criminal prosecution procedure” to dismiss, reassign or replace elected or appointed persons, officials or responsible persons in public enterprises.

Whistleblowers have the right to court protection, including to stop or reverse retaliation, and compensation for material and non-material damages. Such a lawsuit is to be considered “urgent.”

Recommendation: No modifications are necessary. The law complies with this standard.

14) Rights and remedies cannot be waived or limited by any agreement or condition of employment, including pre-dispute arbitration agreement. Employment contracts may not be used to prevent employees from making or discussing a report.

The law deems “null and void” provisions in contracts and other acts establishing or regulating employment and job engagement that forbid reports in the public interest, or define such reports as a violation of confidentiality, loyalty and professionalism.

Recommendation: This law largely is in compliance with this standard.

15) Penalties shall apply for hindering or attempting to hinder reporting; retaliating or threatening to retaliate against a whistleblower; encouraging or condoning retaliation; bringing vexatious proceedings or actions against a whistleblower; violating a whistleblower's confidentiality; and knowingly reporting and/or publicly disclosing false information.

The law includes violations and fines, including:

- for authorized persons who do not properly act on a report, protect an employee's confidentiality or inform an employee of measures taken;
- for organizations that do not publish internal reporting procedures;
- for institutions of the external reporting channel that do not act upon a whistleblower report as regulated, including with respect to the protection of the whistleblower's confidentiality, fine for persons authorized for receipt of whistleblower reports, and for institutions or legal entities that act contrary to the provisions stipulating taking measures to protect personal or other data revealing the identity of the whistleblower;
- for public institutions that do not submit semi-annual reports on whistleblower cases and a fine for their managers.

While the items on the list are sound, it does not include the most basic offense for which accountability is required – engaging in retaliation.

In accordance with Article 9 paragraph 5 of the law, an external reporting authority will initiate a procedure for criminal prosecution, dismissal, reassignment, replacement or other forms of liability of an official who fails to stop retaliating against the whistleblower, despite the request of the external reporting authority to do so.

Recommendation: The law should be expanded so there is accountability through specific civil, criminal and/or administrative liability for recommending or participating in retaliation.

16) People harmed or affected by reports shown to be knowingly inaccurate shall have access to remedies.

The law prohibits “abuse of whistleblowing” and denies protection to persons who abused the reporting by conscious[ly] submitting untrue information for the purpose of causing harmful consequences, or if they did not check whether their report is true and authentic with due attention and conscientiously, to a degree to which the circumstances allow it. The law states that determined abuse of whistleblowing by which harmful consequences occurred is grounds for initiating a procedure for determining liability.

People harmed or affected by reports shown to be knowingly inaccurate should have access to legal remedies, via laws on libel, slander and/or defamation. However, the subjectivity of “acting abusively” in the part of “checking whether their report is true and authentic with due attention and conscientiously, to a degree to which the circumstances allow” readily can be used to deny protections from legitimate whistleblowers. Executive branch agencies – in particular those that have a role in whistleblower protection – also should not have a role in determining liability for knowingly false reports. This is the role of the courts. The law could create a chilling effect if whistleblowers are open to punishment on such subjective, vague grounds for attempting to exercise their rights.

It also is an opening for the good faith test to be a weapon for attacks against whistleblowers. The phrase “for the purpose of causing harmful consequences” constitutes a motivation or state-of-mind test that is highly subjective, very difficult to establish and irrelevant. Whether a person had a proper or pure intention to make a report should not be a basis for granting or denying legal protections. It only is valid for assessing credibility.

Recommendation: The law should be modified so that liability for exercising rights under the statute is limited to knowingly false statements. People harmed or affected by reports shown to be knowingly inaccurate have access to remedies. Without duplicative threats, the law should make clear that it does not protect knowingly false statements from liability by those third parties. For whistleblowers to trust internal channels as safe, there should be a safeguard against the authorized person breaching confidentiality and pursuing liability against those who make reports. Any liability for making knowingly false statements should be adjudicated by the courts, not by executive branch agencies.

17) A designated agency shall promote whistleblower systems in order to nurture positive public attitudes and facilitate reporting.

The law does not specifically address this issue, which is essential for the public to be aware of rights. Whistleblower laws commonly are dormant or severely underutilized, in part because the public is unaware of their existence and in part because they contradict ingrained cultural traditions. An ambitious public education campaign is a prerequisite for the law to achieve its objectives.



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Recommendation: The law should be expanded for a designated agency such as the State Commission for Prevention of Corruption to conduct a dedicated public education campaign on the nature of whistleblower rights, and how they can benefit the public.

18) A designated agency shall provide assistance for disclosures and retaliation protection through free-of-charge information and advice on rights, reporting channels, contact persons, procedures, remedies and retaliation protection.

The law does not specifically address this issue. If whistleblowers cannot obtain guidance on how to use their rights effectively, it is unlikely the law will make a difference. Further, whistleblowers may inadvertently incur liability or lose protection, because they do not understand its provisions and boundaries.

Recommendation: The law should be expanded so that a designated agency will provide guidance on the law's provisions and how to exercise them properly.

19) Legal aid is available in retaliation protection proceedings, criminal proceedings, and cross-border civil proceedings.

The law does not specifically address this issue, nor the process by which attorney fees are calculated and awarded to whistleblowers who win their cases. However, the national laws on court procedure provide for fees. The law should clarify that there are fees available, through reference to the relevant law, which is common in global whistleblower statutes and is necessary for this law to be self-sufficient in describing the full scope of support whistleblowers can seek.

The EU Directive does not require but suggests that nations consider making whistleblowers eligible for legal aid support. At least initially, there may not be sufficient commercial attorneys who choose to obtain training and gain adequate knowledge of the law for representation, which would be a duty for legal aid counsel.

Recommendation: The law should be modified to make whistleblowers eligible for legal assistance, and explicitly reference the available pre-existing legal right to attorney fees.

20) A designated agency shall provide oversight of whistleblower disclosure and protection mechanisms; identify and seek to remedy any shortcomings or inefficiencies; and maintain and annually release anonymized data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes.

The Ministry of Justice is responsible for supervising the implementation of the law. Managers of public institutions are required to submit semi-annual reports on whistleblower reports to the State Commission for Prevention of Corruption. In turn, the Commission is required to submit an annual report to the Assembly.

Recommendation: The law is in substantial compliance, but should clarify that the annual reports include all the data required for this standard.

21) *A public, transparent review of laws and policies shall be conducted, and any needed reforms made, at least every three years.*

The law does not specifically address this issue. However, this is essential, because it is unrealistic to perfect laws without the lessons learned from experience with their application.

Recommendation: Every three years, the law should require that the Ministry of Justice submit a report on the law's effectiveness in meeting its objectives. The report should include specific recommendations on improvements to the law.

SUMMARY:

North Macedonia is in partial compliance with consensus standards. While the law only complies with nine out of 21 standards, the standards it complies with directly impact the protection of the whistleblower. The law provides broad eligibility for whistleblowing, beyond employment, to include those with current or former business relationships. It protects whistleblowing for all relevant topics of misconduct. It has best practice confidentiality and due process provisions, along with an annual review for oversight. It complies in principle but requires further refinement to provide for civil, criminal and/or administrative liability of an official who recommended or participated in retaliation, as well as to provide for clear reversal of burden of proof.



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SERBIA

Law on the Protection of Whistleblowers (2014)

1) The law applies to all public and private sector employees and workers, including contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and management body members.

The law covers people working in the public and private sectors who make reports in connection with their:

- employment;
- hiring procedure;
- use of services provided by public and other authorities, holders of public authority or public services;
- business dealings; and
- ownership in a business entity.

The law provides broad protection that extends beyond the employment context required by the EU Directive. All citizens use services provided by public authorities, and this law protects corporate owners as well as business employees.

The law provides equal protection for the community surrounding the whistleblower who delivers the report. It covers associated persons; those mistakenly perceived as whistleblowers; those performing official duties; and those engaging in research for the disclosure (an indication they are about to blow the whistle).

Recommendation: The statute is in substantial compliance with consensus standards but should be clarified to explicitly protect former employees. While the text does not exclude this context, it is vulnerable to interpretation to the contrary. Coverage is essential to defend against blacklisting, and there is no benefit to leaving the boundary unclear.

2) Whistleblowing includes corruption; bribery; violation of public law; human rights violations; financial crime and fraud; risks to consumers, public health, safety and environment; and other misconduct and risks that threatened or concern the public interest.

The law covers the disclosure of information regarding:

- infringement of legislation;
- violation of human rights;
- exercise of public authority in contravention of the purpose granted;
- danger to life, public health, safety, and the environment;
- reports made with the aim to prevent large-scale damage.

Recommendation: The scope is broad through its overall provision on large-scale damage. However, it does not expressly list all categories of misconduct specified in the EU Directive and the Council of Europe Recommendation. To prevent confusion about coverage for the implied items not expressly listed, a technique that has worked is to clarify that the law protects reports for infringement of “any” legislation “and implementing rules or regulations.” This will guarantee the necessary scope of coverage while retaining the categories currently specified in the law. For explicit compliance with the EU Directive, the law also should be clarified to protect disclosures of misconduct that has not yet occurred. While courts could make that interpretation, the law is not explicit. The right to warn against and prevent serious consequences is an effective tool in preventing potential wrongdoing.



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3) To qualify for protection, a person must have a reasonable belief, suspicion or grounds to believe the information reported is accurate. Whistleblowers shall not be subject to “good faith” or “motivation” tests. A person is not required to prove a violation has occurred, nor must an investigation, prosecution or other procedure result from the person's report.

In order to qualify for protection, the “truthfulness” of a person's report must be “credible to a person possessing the same average level of knowledge and experience as the whistleblower.”

In global case law, this is the standard that defines reasonable grounds to belief, the EU Directive's standard for protected speech. However, for clarity the language of the law should be replaced by the language of the EU Directive.

Recommendation: While this provision complies with the standard, for clarity the language of the law should be replaced by the language of the EU Directive: “reasonable grounds to believe that the information reported was true at the time of the reporting.”

4) Protection is not lost for inaccurate reports if the person was honestly mistaken and had a reasonable belief the information was accurate. People are presumed to have a reasonable belief unless demonstrably shown otherwise.

The law does not require reports to be accurate, they only have to be supported by a reasonable belief to be accurate. However, it does not explicitly include this provision by stating that protection remains if a person made an inaccurate report in honest error, i.e., that the person was not aware the information was not accurate.

Recommendation: The laws should expressly clarify that a whistleblower still has protection for a report that is mistakenly inaccurate, but based on a reasonable belief to be accurate.

5) Clear reporting channels, designated contact persons, and specified follow-up procedures must be in place within private⁴⁷ and public sector workplaces (internal reporting) and public institutions (external reporting). People have the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.

The law states that all employers are required to:

- designate an “officer” to receive reports and “pursue proceedings related to whistleblowing”;
- inform all employees of their rights;
- take all measures to correct irregularities stemming from reports;
- protect whistleblowers from “any damaging action”;
- take all measures to end retaliation and remove any resulting consequences;
- protect the identity of whistleblowers.

All employers with more than 10 employees are required to adopt an “internal enactment” governing internal whistleblowing procedures, which must be posted in a visible location accessible to all employees and online if possible. Consistent with guidance from the Ministry of Justice rulebook, the internal procedures must be consistent with and not reduce rights in the law, or else they are null and void. However, the law does not include specific requirements for structural independence, controls on conflicts of interest, or access to organizational leadership. The law also provides for external whistleblowing to a competent authority. The whistleblower may choose between internal and external authorities for an initial disclosure.

⁴⁷ Companies over a certain staff number threshold.

Recommendation: The law's language should be tightened to require compliance with the Ministry of Justice rulebook that elaborates specific requirements for proper internal whistleblower reporting channels.

6) People have the option to report publicly (e.g., via media, NGOs, public meetings, online outlets) under reasonable circumstances that do not place undue restrictions on the person, or that have the effect of blocking the release of information that requires investigation and corrective action to protect the public interest. These circumstances include but are not limited to:

- *inaction for more than 6 months on an internal disclosure or 3 months on an external disclosure*
- *a reasonable belief in a conflict of interest or the destruction of evidence*
- *a reasonable belief of an imminent danger to public health or safety*
- *retaliation likely would result if institutional channels are used.*

Under the law, employees may bypass internal and external channels, and make a disclosure to the public if there is an immediate threat to life, public health and safety, or the environment; of large-scale damage; or the destruction of evidence. They must report either internally or externally before making a public disclosure. However, there is no mandatory minimum waiting period for any protected report. This allows more flexibility than the EU Directive, which in absence of the listed exceptions, requires a minimum three-month inaction by the authority on a whistleblower report. The Serbian law allows for a situation where a whistleblower makes a report in the morning to an employer or competent authority and if the person is not confident that the disclosure will be handled responsibly, the whistleblower can go public that afternoon.

Recommendation: For full compliance with the EU Directive, the law should be modified so that the whistleblower only needs a reasonable belief that the circumstances permitting an immediate public report are met without prior internal or external disclosures.

7) Whistleblowers are entitled to confidentiality of their identity and all identifying information, except when waived by their prior written consent or if required by official investigations or judicial proceedings.

The law states that a whistleblower's personal data, and any data that may be used to discover the person's identity, must be protected unless the person waives confidentiality. The law requires whistleblowers to be informed when their identity may be revealed to public authorities, and informed of their rights to witness protection. Personal data may not be revealed to people named in a whistleblower report, unless specifically provided for in another law. If the case is transferred, the original confidentiality agreement migrates with it to any new recipient.

Recommendation: No modifications are necessary. The law is in compliance with this standard.

8) Protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent.

The law does not fully address this issue. It states that employers and public authorities are required to act upon anonymous reports, but it does not explicitly include anti-retaliation grant rights to anonymous whistleblowers as in the EU Directive. There is no loophole in which anonymity does not cancel their rights from becoming operative if they are discovered and harassed. However, the failure to explicitly include protection in that circumstance could cause confusion.



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Recommendation: The law should be modified to explicitly provide anonymous whistleblowers rights against retaliation if they are later identified.

9) Reports shall be investigated promptly, and employees shall be informed of investigations and actions taken in response to their report within a reasonable amount of time.

The law requires employers to “immediately act upon” all internal reports through authorized persons, at the latest within 15 days, and inform employees of the outcomes within 15 days after the reviews are completed. Employees have the right to access information and case files, and the right to participate in the review. These provisions apply to external reports made to public authorities. If a public authority that receives a report does not have jurisdiction to act upon it, it must forward the report to the appropriate authority within 15 days and notify the whistleblower.

Ministry of Justice regulations establish the rules for the duties of authorized persons. The law should provide specific information about the roles and responsibilities for investigating and acting on internal and external reports.

Recommendation: Either directly as part of the law or through requirements for Ministry of Justice regulations, the law should be reinforced to

- provide whistleblowers the right to participate in the investigation through providing rebuttal testimony;
- provide whistleblowers the right to comment on the final report;
- provide transparency by including any reports in the public record.

10) Whistleblowers shall be protected from all forms of retaliation, including but not limited to dismissal, suspension, demotion, punitive transfer, negative performance assessment or employment reference, pay reduction, harassment, blacklisting, and psychiatric or medical referral.

The law defines retaliation as a “damaging action” or omission that “violates or infringes the rights” of an employee or “puts persons at a disadvantage.” Damaging actions and omissions include those related to:

- hiring;
- interns and volunteers;
- work outside of formal employment;
- education, training or professional development;
- promotion, evaluation and professional titles;
- disciplinary measures or penalties;
- working conditions;
- dismissal;
- salary and other remuneration;
- profit sharing;
- bonuses or severance payments;
- duties or transfers;
- harassment;
- mandatory medical examinations.

Recommendation: No modifications are necessary. The statute complies with this standard.

11) *The burden of proof is on the employer to show any actions taken against an employee were not associated with or motivated by the employee having made a report, considered making a report, or assisted a person in making a report. Employees are not required to establish a link between making a report and actions taken against them.*

The law requires whistleblowers first to establish “the probability” of suffering whistleblower retaliation before reversing the burden of proof. Literally this appears inconsistent with the EU Directive, which only requires whistleblowers to demonstrate protected speech and a subsequent, damaging action. However, Serbian courts consistently have found that establishing those two facts satisfies the whistleblower's burden. As a result, the law in practice is being implemented consistent with the Directive. However, it would be healthy to codify those judicial rulings into the statutory language when the law next is revised.

Recommendation: The requirement that the whistleblower first establishes “the probability” of suffering retaliation must be removed from the whistleblower's burden of proof, and the employer's burden of proof expanded to establish that whistleblowing was not linked in any way to alleged retaliation.

12) *Liability for civil, criminal or administrative actions is waived for people who make a report in accordance with the law.*

While not specifically listed, under the general prohibition on prejudicing whistleblowers the law provides a defense against civil liability. However, due to jurisdictional factors, the whistleblower law does not provide an affirmative defense against criminal liability. But criminal liability can have a greater chilling effect than workplace harassment or civil liability.

Recommendation: For compliance with the EU Directive, the law should be clarified explicitly to shield against civil liability whenever the whistleblower has a reasonable belief that the disclosure was necessary to address misconduct, and expanded to provide this affirmative defense against criminal liability as well.

13) *Whistleblowers have the right to effective remedy and fair trial, presumption of innocence, and the rights of defense, including the right to be heard and the right to access files.*

Employees have the right to seek compensation for damages from the courts. Lawsuits must be filed within six months of learning that retaliation occurred, or three years from when retaliation was undertaken. Such lawsuits are to be considered “urgent.” Judges who hear these cases must have completed training and be certified for “special knowledge in protection of whistleblowers,” in coordination with the Judicial Academy and the Ministry of Justice. The law provides explicit emphasis on the availability of immediate, temporary relief for the duration of proceedings. Parties in the case have the option of an out-of-court settlement via mediation or other amicable procedures.

The law also is unusual in a negative way. Due to a Constitutional Court ruling which has not been acted on, there is no available administrative remedy. Whistleblowers only have access to their rights by going to court, an option that many unemployed persons cannot afford.

Recommendation: The law should be expanded to provide administrative remedies for those who cannot afford a court trial, or who do not have the wherewithal to engage in time-consuming and burdensome legal proceedings.



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14) Rights and remedies cannot be waived or limited by any agreement or condition of employment, including pre-dispute arbitration agreement. Employment contracts may not be used to prevent employees from making or discussing a report.

The law states that “prevention of whistleblowing shall be prohibited,” and that “any provision of a general or particular enactment that prevents whistleblowing shall be null and void.” The law states internal reporting procedures within the workplace may not reduce or deny the right to make a report.

Recommendation: No modifications are necessary. The law complies with this standard.

15) Penalties shall apply for hindering or attempting to hinder reporting; retaliating or threatening to retaliate against a whistleblower; encouraging or condoning retaliation; bringing vexatious proceedings or actions against a whistleblower; violating a whistleblower's confidentiality; and knowingly reporting and/or publicly disclosing false information.

The law includes violations and fines, including:

- A fine from 50,000 RSD to 500,000 RSD for employers with more than ten employees that:
 - fail to adopt internal whistleblowing procedures;
 - fail to post these procedures in a visible location.
- A fine from 50,000 RSD to 500,000 RSD for employers that fail to:
 - protect a whistleblower from damaging action;
 - remove the consequences of a damaging action;
 - inform all employees of their rights under the law;
 - appoint an authorized person to receive and review reports;
 - act upon reports within the timeframe;
 - inform a whistleblower about outcomes within the timeframe;
 - inform a whistleblower about the progress of a case;
 - grant a whistleblower access to case files;
 - permit a whistleblower to participate in a case.
- For authorized persons of a legal entity or national, provincial, or local authorities, the fine for these violations is from 10,000 RSD to 100,000 RSD.
- For entrepreneurs, the fine for these violations is from 20,000 RSD to 200,000 RSD.

Recommendation: No modifications are necessary. The law complies with this standard.

16) People harmed or affected by reports shown to be knowingly inaccurate shall have access to remedies.

The law explicitly prohibits “abuse of whistleblowing,” which bars protection and permits liability for “disclosures of information he [or she] knows to be false...”

Recommendation: No modifications are necessary. The law complies with this standard.

17) A designated agency shall promote whistleblower systems in order to nurture positive public attitudes and facilitate reporting.

The law does not specifically address this issue. While there was extensive public education on whistleblowing it was not institutionalized in the law. If whistleblowers cannot obtain guidance on how to use their rights effectively, it will undermine the law's capacity to make a difference. Further, whistleblowers may inadvertently incur liability or lose protection, because they do not understand its provisions and boundaries.

Recommendation: The law should be expanded to ensure that a designated agency is in charge of providing guidance on the law's provisions and how to exercise them properly.

18) A designated agency shall provide assistance for disclosures and retaliation protection through free-of-charge information and advice on rights, reporting channels, contact persons, procedures, remedies and retaliation protection.

Each institution covered by the law has this responsibility, to be distributed through an institutional "enactment" and carried out by the authorized person. Without organizational independence, however, there is a conflict of interest for the institution charged with misconduct to guide those seeking to challenge it.

Recommendation: The law should designate an independent agency to provide assistance for whistleblowers on how to properly act on their concerns.

19) Legal aid is available in retaliation protection proceedings, criminal proceedings, and cross-border civil proceedings.

The law does not specifically address this issue, but legal aid is generally available in Serbia. The law provides attorney fees for whistleblowers who prevail.

Recommendation: The law should be clarified to reference that the general availability of legal aid applies to whistleblower cases.

20) A designated agency shall provide oversight of whistleblower disclosure and protection mechanisms; identify and seek to remedy any shortcomings or inefficiencies; and maintain and annually release anonymized data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes.

The Labor Inspection and the Administrative Inspection are responsible for monitoring the implementation of the law, in accordance with the law governing their respective authorities.

The Minister of Justice is responsible for and has issued a handbook with procedures covering:

- internal whistleblowing,
- appointing authorized persons within workplaces, and
- other issues for internal whistleblowing in workplaces with more than ten employees.

However, there are no requirements to publicly report on the specific data in this standard, such as the number of whistleblower reports received, investigations and proceedings initiated as a result of such reports and their outcome, estimated financial damage and the amounts recovered. There is no provision for transparency on the outcomes of court rulings.



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Recommendation: The law should be clarified to require that administrative agencies provide the specific data in this standard, and that the public record include the results of judicial decisions.

21) A public, transparent review of laws and policies shall be conducted, and any needed reforms made, at least every three years.

The law does not specifically address this issue, which is essential because it is unrealistic to perfect laws without the lessons learned from experience with their application.

Recommendation: Every three years, the law should require that the Ministry of Justice submit a report on the law's effectiveness in meeting its objectives. The report should include specific recommendations on improvements to the law.

SUMMARY:

Serbia's law has numerous positive provisions that literally or substantially comply with the most fundamental consensus standards, including:

- broad scope of protected persons that includes those researching to prepare whistleblowing reports, assisting or associated with whistleblowers or disclosing protected information as part of job duties; and extending beyond normal limits to shield citizens affected by the misconduct, corporations and NGO's;
- broad scope of subject-matter eligible for protected speech;
- language equivalent to the "reasonable belief" standard;
- freedom of choice between internal and external channels for initial disclosure;
- public freedom of expression without time delays following an initial report;
- controls on internal and external whistleblowing channels that allow the whistleblower to participate in the process and review the evidence file to monitor the investigation;
- best practice confidentiality rights;
- comprehensive shield against gag orders;
- access to court for independent due process through priority proceedings, with cases heard by judges certified for training in the whistleblower statute;
- emphasis on temporary relief while court cases are pending;
- remedies that eliminate the direct and indirect effects of retaliation;
- comprehensive scope of disciplinary accountability; and
- attorney fees through existing law.

This is a law that substantially complies with the Council of Europe Recommendation. Indeed, a recent Government Accountability Project-International Bar Association study⁴⁸ concluded that no national whistleblower law is stronger than Serbia's for compliance with consensus global best practices. But it was enacted before the EU Directive, which made unprecedented advances for whistleblower rights in some areas. For comprehensive compliance with the EU Directive's new requirements, the law must be updated for certain details, because it:

- fails to shield against criminal liability;
- requires the whistleblower to establish the probability of retaliation before the burden of proof reverses;
- fails to include an administrative remedy for those who cannot afford a trial;
- fails to include a permanent structure for public education on the statute;
- fails to provide transparency for court decisions; and
- fails to include periodic, mandatory review to act on lessons learned.

⁴⁸ 'Are whistleblowing laws working? A global study of whistleblower protection litigation', 2021, <https://whistleblower.org/wp-content/uploads/2021/03/Are-Whistleblowing-laws-working-REPORT.pdf>



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Annex 1: Methodology of the Gap Analysis of Whistleblower Protection Laws in the Western Balkans and Moldova

Since 2013, designated whistleblower protection laws or statutory provisions have been enacted in Albania, Bosnia and Herzegovina, Kosovo*, Moldova, Montenegro, North Macedonia and Serbia. Under these laws and provisions, employees in all of these jurisdictions have reported crime, corruption, public health threats or other concerns to their supervisors, public authorities, NGOs, the media and the general public.

The Gap Analysis compares laws in the seven jurisdictions⁴⁹ to the Council of Europe Recommendation on Protection of Whistleblowers (hereinafter: CoE Recommendation) and the EU Directive on the Protection of Persons who Report Breaches of Union Law (hereinafter: EU Directive). For this purpose, twenty-one key standards were extracted from the CoE Recommendation and the EU Directive. The Gap Analysis assesses to what extent each standard is incorporated in the laws. Through this quantitative assessment, general and specific gaps in statutory provisions were identified, and recommendations for improvement developed for each jurisdiction.

The results of the Gap Analysis and recommendations will provide the foundation for follow-up advocacy, capacity building and public awareness activities toward improving whistleblower policies and systems in the seven jurisdictions. These activities will include presenting the results and related materials via RAI Secretariat and other events, multi-stakeholder trainings, capacity-building missions, RAI Secretariat learning platform, citizen education campaigns and NGO participation.

Key standards for comparison:

- 1) The law applies to all public and private sector employees and workers, including contractors, trainees, volunteers, part-time employees, temporary employees, job applicants, former employees and management body members.
- 2) Whistleblowing includes corruption; bribery; violation of public law; human rights violations; financial crime and fraud; risks to consumers, public health, safety and environment; and other misconduct and risks that threatened or concern the public interest.
- 3) To qualify for protection, a person must have a reasonable belief, suspicion or grounds to believe the information reported is accurate. Whistleblowers shall not be subject to “good faith” or “motivation” tests. A person is not required to prove a violation has occurred, nor must an investigation, prosecution or other procedure result from the person's report.
- 4) Protection is not lost for inaccurate reports if the person was honestly mistaken and had a reasonable belief the information was accurate. People are presumed to have a reasonable belief unless demonstrably shown otherwise.
- 5) Clear reporting channels, designated contact persons, and specified follow-up procedures must be in place within private⁵⁰ and public sector workplaces (internal reporting) and public institutions (external reporting). People have the unqualified right to choose between internal (workplace) and external (public institutions) channels when making a legally protected disclosure.

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

⁴⁹ For Bosnia and Herzegovina, entity-level laws will be included.

⁵⁰ Companies over a certain threshold.



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- 6) People have the option to report publicly (e.g. via media, NGOs, public meetings, online outlets) under reasonable circumstances that do not place undue restrictions on the person, or that have the effect of blocking the release of information that requires investigation and corrective action to protect the public interest. These circumstances include but are not limited to:
 - a. inaction for more than 6 months on an internal disclosure or 3 months on an external disclosure
 - b. a reasonable belief in a conflict of interest or the destruction of evidence
 - c. an imminent danger to public health or safety
 - d. retaliation likely would result if institutional channels are used.
- 7) Whistleblowers are entitled to confidentiality of their identity and all identifying information, except when waived by their prior written consent or if required by official investigations or judicial proceedings.
- 8) Protections and rights are extended to anonymous whistleblowers who are subsequently identified – with or without their consent.
- 9) Reports shall be investigated promptly, and employees shall be informed of investigations and actions taken in response to their report within a reasonable amount of time.
- 10) Whistleblowers shall be protected from all forms of retaliation, including but not limited to dismissal, suspension, demotion, punitive transfer, negative performance assessment or employment reference, pay reduction, harassment, blacklisting, and psychiatric or medical referral.
- 11) The burden of proof is on the employer to show any actions taken against an employee were not associated with or motivated by the employee having made a report, considered making a report, or assisted a person in making a report. Employees are not required to establish a link between making a report and actions taken against them.
- 12) Liability for civil, criminal or administrative actions is waived for people who make a report in accordance with the law.
- 13) Whistleblowers have the right to effective remedy and fair trial, presumption of innocence, and the rights of defense, including the right to be heard and the right to access files.
- 14) Rights and remedies cannot be waived or limited by any agreement or condition of employment, including pre-dispute arbitration agreement. Employment contracts may not be used to prevent employees from making or discussing a report.
- 15) Penalties shall apply for hindering or attempting to hinder reporting; retaliating or threatening to retaliate against a whistleblower; encouraging or condoning retaliation; bringing vexatious proceedings or actions against a whistleblower; violating a whistleblower's confidentiality; and knowingly reporting and/or publicly disclosing false information.
- 16) People harmed or affected by reports shown to be knowingly inaccurate shall have access to remedies.
- 17) A designated agency shall promote whistleblower systems in order to nurture positive public attitudes and facilitate reporting.

- 18) A designated agency shall provide assistance for disclosures and retaliation protection through free-of-charge information and advice on rights, reporting channels, contact persons, procedures, remedies and retaliation protection.
- 19) Legal aid is available in retaliation protection proceedings, criminal proceedings, and cross-border civil proceedings.
- 20) A designated agency shall provide oversight of whistleblower disclosure and protection mechanisms; identify and seek to remedy any shortcomings or inefficiencies; and maintain and annually release anonymized data on the number and types of whistleblower reports, retaliation protection requests and approvals, reasons for denials of retaliation protection, and case outcomes.
- 21) A public, transparent review of laws and policies shall be conducted, and any needed reforms made, at least every three years.



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Annex 2: Council of Europe Recommendation

Recommendation [CM/Rec\(2014\)7](#) of the Committee of Ministers to member States on the protection of whistleblowers

(Adopted by the Committee of Ministers on 30 April 2014, at the 1198th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve a greater unity between its members, *inter alia*, for the purpose of safeguarding and realizing the ideals and principles which are their common heritage;

Considering that promoting the adoption of common rules in legal matters can contribute to the achievement of the aforementioned aim;

Reaffirming that freedom of expression and the right to seek and receive information are fundamental for the functioning of a genuine democracy;

Recognizing that individuals who report or disclose information on threats or harm to the public interest ("whistleblowers") can contribute to strengthening transparency and democratic accountability;

Considering that appropriate treatment by employers and the public authorities of public interest disclosures will facilitate the taking of action to remedy the exposed threats or harm;

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) and the relevant case law of the European Court of Human Rights, in particular in relation to Article 8 (respect for private life) and Article 10 (freedom of expression), as well as the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108);

Bearing in mind the Council of Europe's Programme of Action Against Corruption, the Council of Europe Criminal Law Convention on Corruption (ETS No. 173) and the Council of Europe Civil Law Convention on Corruption (ETS No. 174) and, in particular, respectively Articles 22 and 9 thereof, as well as the work carried out by the Group of States against Corruption (GRECO);

Taking note of Resolution 1729 (2010) of the Parliamentary Assembly in which the Assembly invites member States to review their legislation concerning the protection of whistleblowers bearing in mind a series of guiding principles;

Taking note of the compendium of best practices and guiding principles for legislation on the protection of whistleblowers prepared by the OECD at the request of the G20 Leaders at their Seoul Summit in November 2010;

Considering that there is a need to encourage the adoption of national frameworks in the member States for the protection of whistleblowers based on a set of common principles,

Recommends that member States have in place a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest. To this end, the appendix to this recommendation sets out a series of principles to guide member States when reviewing their national laws or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems.



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To the extent that employment relations are regulated by collective labour agreements, member States may give effect to this recommendation and the principles contained in the appendix in the framework of such agreements.

PRINCIPLES

Definitions

For the purposes of this recommendation and its principles:

- a. “whistleblower” means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector;
- b. “public interest report or disclosure” means the reporting or disclosing of information on acts and omissions that represent a threat or harm to the public interest;
- c. “report” means reporting, either internally within an organization or enterprise, or to an outside authority;
- d. “disclosure” means making information public.

I. Material scope

1. The national normative, institutional and judicial framework, including, as appropriate, collective labor agreements, should be designed and developed to facilitate public interest reports and disclosures by establishing rules to protect the rights and interests of whistleblowers.
2. Whilst it is for member States to determine what lies in the public interest for the purposes of implementing these principles, member States should explicitly specify the scope of the national framework, which should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment.

II. Personal scope

3. The personal scope of the national framework should cover all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not.
4. The national framework should also include individuals whose work-based relationship has ended and, possibly, where it is yet to begin in cases where information concerning a threat or harm to the public interest has been acquired during the recruitment process or other pre-contractual negotiation stage.
5. A special scheme or rules, including modified rights and obligations, may apply to information relating to national security, defense, intelligence, public order or international relations of the State.
6. These principles are without prejudice to the well-established and recognized rules for the protection of legal and other professional privilege.

III. Normative framework

7. The normative framework should reflect a comprehensive and coherent approach to facilitating public interest reporting and disclosures.
8. Restrictions and exceptions to the rights and obligations of any person in relation to public interest reports and disclosures should be no more than necessary and, in any event, not be such as to defeat the objectives of the principles set out in this recommendation.
9. Member States should ensure that there is in place an effective mechanism or mechanisms for acting on public interest reports and disclosures.
10. Any person who is prejudiced, whether directly or indirectly, by the reporting or disclosure of inaccurate or misleading information should retain the protection and the remedies available to him or her under the rules of general law.
11. An employer should not be able to rely on a person's legal or contractual obligations in order to prevent that person from making a public interest report or disclosure or to penalize him or her for having done so.

IV. Channels for reporting and disclosures

12. The national framework should foster an environment that encourages reporting or disclosure in an open manner. Individuals should feel safe to freely raise public interest concerns.
 13. Clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures.
 14. The channels for reporting and disclosures comprise:
 - reports within an organization or enterprise (including to persons designated to receive reports in confidence);
 - reports to relevant public regulatory bodies, law enforcement agencies and supervisory bodies;
 - disclosures to the public, for example to a journalist or a member of parliament.
- The individual circumstances of each case will determine the most appropriate channel.
15. Employers should be encouraged to put in place internal reporting procedures.
 16. Workers and their representatives should be consulted on proposals to set up internal reporting procedures, if appropriate.
 17. As a general rule, internal reporting and reporting to relevant public regulatory bodies, law enforcement agencies and supervisory bodies should be encouraged.

V. Confidentiality

18. Whistleblowers should be entitled to have the confidentiality of their identity maintained, subject to fair trial guarantees.

VI. Acting on reporting and disclosure

19. Public interest reports and disclosures by whistleblowers should be investigated promptly and, where necessary, the results acted on by the employer and the appropriate public regulatory body, law enforcement agency or supervisory body in an efficient and effective manner.
20. A whistleblower who makes an internal report should, as a general rule, be informed, by the person to whom the report was made, of the action taken in response to the report.

VII. Protection against retaliation

21. Whistleblowers should be protected against retaliation of any form, whether directly or indirectly, by their employer and by persons working for or acting on behalf of the employer. Forms of such retaliation might include dismissal, suspension, demotion, loss of promotion opportunities, punitive transfers and reductions in or deductions of wages, harassment or other punitive or discriminatory treatment.
22. Protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import or that the perceived threat to the public interest has not materialized, provided he or she had reasonable grounds to believe in its accuracy.
23. A whistleblower should be entitled to raise, in appropriate civil, criminal or administrative proceedings, the fact that the report or disclosure was made in accordance with the national framework.
24. Where an employer has put in place an internal reporting system, and the whistleblower has made a disclosure to the public without resorting to the system, this may be taken into consideration when deciding on the remedies or level of protection to afford to the whistleblower.
25. In legal proceedings relating to a detriment suffered by a whistleblower, and subject to him or her providing reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure, it should be for the employer to establish that the detriment was not so motivated.
26. Interim relief pending the outcome of civil proceedings should be available for persons who have been the victim of retaliation for having made a public interest report or disclosure, particularly in cases of loss of employment.



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VIII. Advice, awareness and assessment

27. The national framework should be promoted widely in order to develop positive attitudes amongst the public and professions and to facilitate the disclosure of information in cases where the public interest is at stake.
28. Consideration should be given to making access to information and confidential advice free of charge for individuals contemplating making a public interest report or disclosure. Existing structures able to provide such information and advice should be identified and their details made available to the general public. If necessary, and where possible, other appropriate structures might be equipped in order to fulfil this role or new structures created.
29. Periodic assessments of the effectiveness of the national framework should be undertaken by the national authorities.

Annex 3: Free Speech Rights in European Union Directive on Whistleblower Protection

The December 2019 European Union Whistleblower Directive introduced a new era of best practice free speech rights for the continent, and is setting the pace for freedom of expression globally. The index below summarizes the advances in key provisions, with references as necessary to the Recital which provides more detail to interpret more generalized language.

Who is protected? The Directive helps more people and institutions than most prior whistleblower laws or policies. In addition to employees, it protects unions, civil society organizations or persons assisting or associated with them, companies where they work, shareholders, suppliers, consultants and self-employed. It protects those who are associated with or assist whistleblowers. Although the directive encourages the use of formal institutional channels, there are no restrictions based on context. (Articles 4, 19) The Recital, at para. 62, clarifies that speech is protected when communicated as part of job responsibilities: “This Directive should also grant protection where Union or national law requires the reporting persons to report to the competent national authorities, for instance as part of their job duties and responsibilities or because the breach is a criminal offence.”

No loopholes ban on any workplace harassment: Except for national security actions primarily outside the EU's authority, the Directive outlaws any act or omission that causes detriment, whether direct, indirect, threatened, taken, recommended or even tolerated (which adopts the principal of a management duty to prevent retaliation). (Article 19)

Shield against civil and criminal liability: The Directive provides an affirmative defense that defeats criminal or civil liability when the whistleblower has “reasonable grounds to believe that the reporting or public disclosure of information was necessary for revealing a breach of this directive.” The only exception is where the criminal misconduct was independent of the whistleblowing disclosure, such as breaking and entering an organization's premises. [Articles 21(2-3), 21(7)]

Standard for protected speech: For entitlement to protection whistleblowers only need a reasonable belief that their disclosures are true and relevant. Many other laws require them to have a reasonable belief that the alleged wrongdoer was actually guilty, not just that they reasonably believe they are reporting mere evidence of misconduct. The EU Directive's more realistic standard gives them a significant head start. [Article 6.1(a)]

Mandatory channeled reporting sequence: Before they can make a public disclosure, whistleblowers must report either internally to the institution where they work, or externally to a government authority. The delays for public freedom of expression have been shrunk to three months, because the whistleblower has the choice to make an external (government) disclosure without first reporting internally. However, the directive strongly encourages whistleblowers first to report within the organization where they work, so that institutions have the first opportunity to correct their own deficiencies. (Articles 7, 10, 15)

Internal whistleblower channels: These are the channels where a whistleblower is employed, or where the alleged misconduct occurred for non-employee whistleblowers such as shareholders or suppliers. The Recital explains that internal channels must be free from conflict of interest, staffed by trained personnel, and should be led by an official who reports directly to the organizational chief. This will increase legitimacy and prevent plausible deniability by leadership. (Articles 8, 9)



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External reporting channels: These are the channels where a whistleblower can make a protected report to government authorities competent to investigate or order corrective action on the alleged misconduct, with equivalent structural requirements as for internal channels. (Articles 11-13)

Action on disclosures: Whistleblowers are entitled to receipt of their report, a follow-up meeting upon request, and follow-up guidance within three months which can be extended to six months if necessary. (Articles 8-9, 11-13)

Confidentiality: The Directive is flawless, protecting against release of identifying information without advance consent, and requiring advanced notification when exposure is non-discretionary. [Articles 16, 23.1(d)]

Anonymous disclosures: Although mandatory follow-up action is discretionary, these receive credit as disclosures that qualify for protection if the whistleblower is identified. This creates a subtle, but very powerful, weapon against the weakness of advance exposure to wrongdoers and vulnerability to retaliation that are inherent in tiered reporting. [Article 6(3)]

Employee's burdens of proof – *prima facie* case: Whistleblowers meet their burden and there is a presumption of retaliation if they prove that they engaged in protected activity, and that they then suffered a detriment. The burden of proof then shifts to the employer. Most laws require that the whistleblower also prove a nexus, or retaliatory connection, between protected activity and the detriment. This gives whistleblowers another significant head start. [Article 21(5)]

Employer's reverse burden of proof: If the employee establishes the *prima facie* case, the burden of proof shifts to the employer to demonstrate that the alleged retaliation was not based on whistleblowing. The Recital explaining how to implement this principle explains that the employer must prove that the alleged retaliatory act in a case is “not connected in any way” with the whistleblowing report or disclosure. [Article 21.5, Recital (93)]

Due process: Whistleblowers have access to court to enforce their rights. While informal remedies should be available for those who cannot afford court, this is best practice due process to enforce rights. As a rule, judicial forums are more independent from political pressure than administrative bodies. (Article 21.7)

Anti-gag: The Directive is clear that the free speech rights cancel out any other restrictions and threats from Nondisclosure Agreements, contracts, asserted trade secrets, data protection laws, breach of copyright, or the widening menu of civil and criminal litigation for breach of contract or that the whistleblower obtained evidence through theft of organizational property, even if the evidence was not connected with the whistleblower's job duties. The only exceptions are for independent criminal offenses like breaking and entering. [Articles 21(2-7)]

Affording rights: The Directive provides for legal assistance in criminal and in cross-border civil proceedings. [Article 20(c)]

Interim relief: The Directive's Recital makes this an enforcement priority, which while generalized is the most significant principle for the law to make a difference. [Article 21(6), Recital (93)]

Effective remedies: Whistleblowers cannot “lose by winning” with the Directive's remedies. They are entitled to be made whole with guaranteed reinstatement and compensatory damages. [Article 21(8)]



Accountability: The Directive imposes criminal, civil or administrative penalties on those who engage in retaliation or violate the Directive's requirements to implement its provisions, protect confidentiality or prevent retaliation. Punishment for blowing the whistle is limited to knowingly false statements, with a ban on penalties that would create a chilling effect. (Article 23)



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Annex 4: Glossary of Terms

Duty speech: communication of protected information as part of job responsibilities.

Employee's burden of proof: the evidentiary requirement for an employee to demonstrate prima facie, or legally credible, case of retaliation. Under the EU Directive, this means demonstrating protected speech (report or disclosure) and subsequent prejudicial action by the employer. The employee has no burden to demonstrate a link between the disclosure and the employer's action – only that the employee made a disclosure and that a prejudicial action occurred.

Employer's reverse burden of proof: The evidence an employer must present to successfully defend against a retaliation claim after the whistleblower has satisfied his or her burden of proof. Under the EU Directive, this requires proving that whistleblowing was not linked in any way with the alleged retaliatory action.

Designated official/authorized person: The individual responsible to receive and act on whistleblowing disclosures through an employer's internal channel.

External disclosure or report: Whistleblowing to a government office with responsibility to investigate or act on the alleged misconduct.

Internal disclosure or report: Whistleblowing to a designated official at the institution where the employee works.

Public disclosure or report: Whistleblowing to a nongovernmental audience, such as citizen organizations, unions or the media.

Reasonable belief: The standard for a person who makes a disclosure or report to be protected by a whistleblower law. Under best practices, this means the whistleblower genuinely believed the truth of concerns that would be credible to peers. Protection is not lost for inaccurate disclosures made in honest error.

Relief: The system to eliminate the direct or indirect consequences of retaliation.

Remedy: The specific compensation ordered as relief in response to retaliation.

Retaliation: Prejudicial actions threatened or taken against an individual by an employer when an individual is perceived as reporting or about to report, or connected with an individual who reports suspected illegality, corruption, or other misconduct or action that threatens the public interest as specified in the EU Directive.

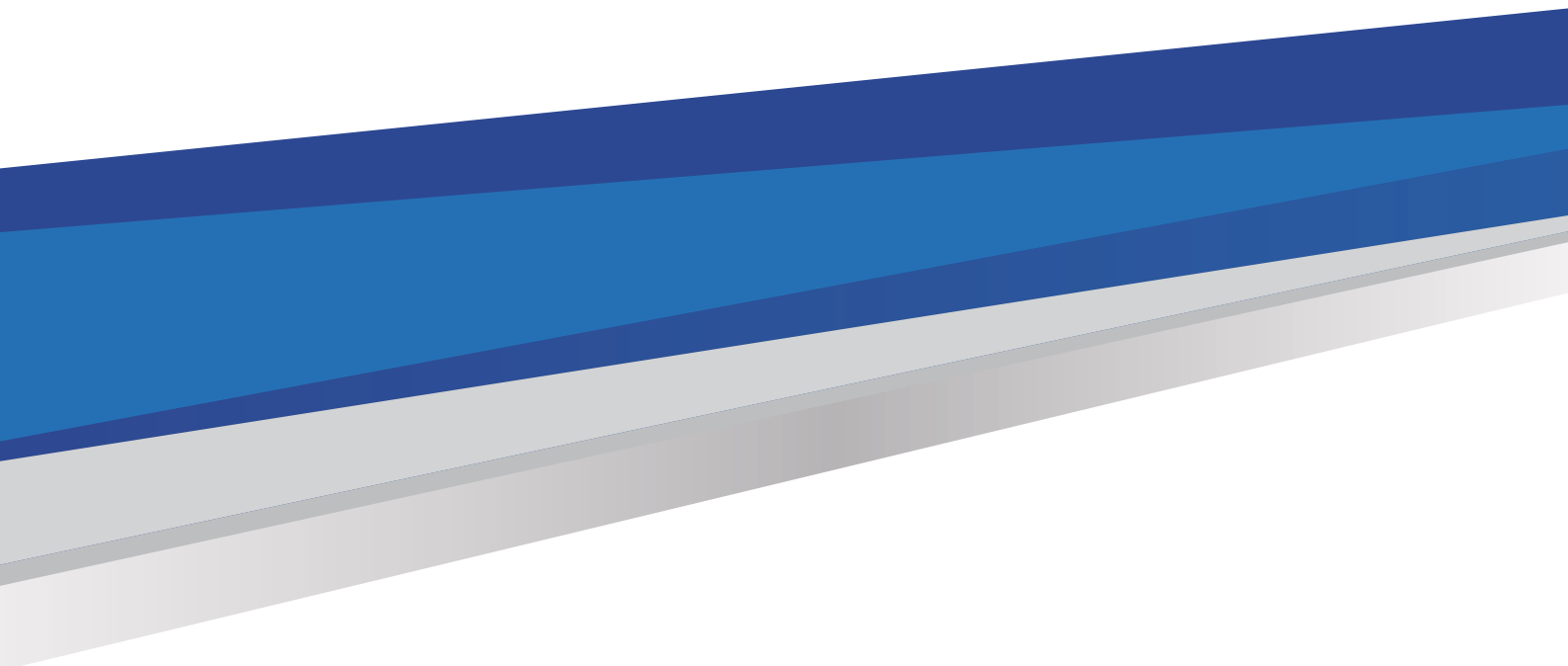
Whistleblower: An individual affected by an institution, and most frequently an employee, who communicates information, evidence or concerns supported by a reasonable belief of illegality, corruption, or other misconduct or action that threatens the public interest as specified in the EU Directive.



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