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Technical Paper

REVIEW OF FINAL VERSION OF DRAFT LAW ON PROTECTION OF WHISTLEBLOWERS

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Table of Contents

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Executive Summary

This paper reviews the final draft version of the Serbian Law on Protection of Whistleblowers in its English translation. It considers to what extent it addresses the recommendations set in the Technical Paper ECCU-PACS SERBIA-TP8-2014[1], dated January 2014, which (hereinafter referred as TP8). It also takes into account:

- the discussions at the Working Group meeting in Novi Sad on 3-5 April 2014, on which a follow- up report was prepared in mid-April 2014;

- the Recommendation CM/Rec(2014)7of the Council of Europe's Committee of Ministers to Member States on the protection of whistleblowers[2], which was adopted on 30 April 2014 (referred to hereafter as the CoE Recommendation). The principles in this adopted Recommendation do not differ from the draft version used in TP8.

In view of the expert, the final draft conforms with all the relevant principles of the CoE Recommendation, apart from the following:

- Principle 5: although the provision dealing with classified data (article 21, discussed below) has been improved, it remains over-restrictive;

- Principle 6: TP8 dealt with this issue (legal privilege) at its section 1.5. It may or may not require a statutory provision in Serbia. If not, it would be desirable to explain why in the explanatory note;

- Principle 29: TP8 dealt with this issue (of review) at 1.3. Though a statutory provision[3] is desirable, to ensure that a review takes place, a firm commitment might be adequate. However, no such commitment is made in the Explanatory Note, where one might expect to see it. A commitment to review the practical operation of the law might help allay concerns and thus aid its parliamentary passage.

- In addition, Principles 13 and 27 remain to be addressed in the implementation process.

The CoE Recommendation does not contain any principles about institutional arrangements. It comes however as a surprise that all references to the Ombudsman have been removed from this draft. His role in overseeing the operation of the law was significant, both in the draft law

[1] http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/PACS-Serbia/Technical%20Paper/TP8%202014%20PACS%20Expert%20Opinion-draft%20Law-Protection-Whistleblowers_EN.pdf

[2] https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec%282014%297&Language=lanEnglish&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

[3] For an example, see clause 2 of the latest version of the Irish Bill: http://www.oireachtas.ie/documents/bills28/bills/2013/7613/b76c13d.pdf

prepared in 2013 by the Working Group set up by the Information Commissioner, and in the earlier versions of the current draft. Instead Article 37 provides that *'Supervision of the enforcement of this Law shall be conducted by labour and administrative inspectorate, respectively'*.

It is useful to require the inspectorates to oversee compliance by employers with the law (provided they have sufficient independence and powers), but there is a wider role for ensuring that all the regulators (including the inspectorates) do their jobs. As the courts are not reputed to be efficient in all cases, this might best involve the Ombudsman, in view of his independence and the reputation of his office in Serbia. There may be sound reasons for the change of policy. However, the policy should be explained in the Explanatory Note, as the previous policy has been well trailed in public.

It is noted that the current draft gives a new prominence to the involvement of specialised judges – which is a welcome development, especially if this helps the courts act speedily.

Some detailed improvements to the draft could still be made to conform further with good practice, and detailed views on these are mentioned below. However there will always remain room for disagreement on points of detail and, after the thorough consultation process that has been undertaken, both within and outside Serbia, the priority should be to present the law to Parliament – where no doubt there will be further debate. As it stands it already represents an advanced form of a whistleblowing law.

1. COMMENTS AND RECOMMENDATIONS

1.1 The Draft Law

Article 2.1

This provides a very wide scope, which addresses the previous concerns about the former Article 5.

Article 2.2 and 2.6

There seems room to doubt whether the draft law applies to job applicants who were not, in the event, hired. The explanatory note (page 18) states that the law applies to those 'who learned about the information they have disclosed during their being hired to work with the employer'. Does this extend to cases where the applicant was not hired? Article 2.6 in particular leaves room for doubt. The CoE Recommendation (principle 4) makes clear that protection for applicants is desirable but not essential.

Article 2.8

As agreed in Novi Sad, the requirement for damage to be 'due to' whistleblowing has been replaced in Art 2.8 by a lower test – that the damage be 'related to' whistleblowing (meaning 'due in whole or in part'). However this change has not been carried through to other relevant articles – notably 22, 23 and 30. [It is also relevant to Articles 2.3 and 6 – though these are a slightly different case]. A solution might be simply to use the defined term 'harmful action' wherever possible – in particular, in Article 30, the words 'due to whistleblowing' are unnecessary and can only cause confusion.

Article 3

This is a clear statement to meet principle 11 of the CoE Recommendation. As a matter of drafting, it is worth considering whether the last paragraph of Article 22 might better be combined with this.

Article 5.1

This article would limit the protection provided under this law to whistleblowers who comply with this specific law. As pointed out in TP8 (in relation to Article 2.1), there are other Serbian laws which provide for whistleblowing. One is repealed by Article 41 (and the desirability of that is discussed below), but there may be others. It may be desirable to allow all whistleblowers to claim the protections of this law.

Article 5.2

The concern about the time limit of ten years expressed in TP8 remains. It would seem odd to leave someone unprotected for blowing the whistle on a crime before its statute of limitations had expired. It would be better to specify that where criminal offences are concerned, the normal rules on statutes of limitation apply to whistleblowing, and not the ten year limit specified here.

Article 5.3

This contains a crucial test, which should be equivalent to the 'reasonable grounds to believe' test of principle 22 of the CoE Recommendation. It was explained in Novi Sad that the test used would be a standard test in Serbian law which did not place a high burden on the whistleblower. Presumably Article 5.3 reflects that policy. In English the requirement that an average person, who had similar experience to the whistleblower, would **put faith in** (the veracity of the information subject of the whistleblowing) does sound rather a high burden. In English it would be better to say, for example, would **tend to believe** (in the veracity etc). However if this is a standard test, and has not proved in practice to set a high burden, then it is acceptable. There may also be translation issues here (we discussed in Novi Sad the fact that the Serbian equivalent of 'would believe' did not imply the distinction from 'could believe' that exists in English).

Article 8

It is worth considering whether this should also protect those in the private sector who have relevant duties.

Article 11

As recommended in TP8, and agreed in Novi Sad, Article 11 should limit itself to cases of 'illegal benefits.' It is not unreasonable that a whistleblower might have his legal costs paid. He might also have accepted a settlement and then changed his mind. There is also the issue of rewards. The Explanatory Note states the reasons for a general policy of not making provision for rewards, though neither the law not the Explanatory Note make clear whether rewards are actually prohibited. Presumably that is not the intention, as there may be specific circumstances in which it is normal and reasonable for public authorities (police, tax authorities etc) to offer rewards for information. The Explanatory Note might usefully make clear, assuming it is indeed the case, that such official rewards are not prohibited. It may be worth noting that the current Irish Bill[4] deals with this matter: it precludes whistleblowing to the public for "personal gain"

[4] see footnote 1

but provides (in its clause 10(5)) that 'personal gain' '*excludes any reward payable under or by virtue of any enactment*'.

Article 16

As mentioned in TP8 (under Article 12), the definition of employer in Article 2 seems too narrow to work in this context.

Article 20

This sets a much lower hurdle for public disclosure than the previous version. However there seems to be a logical gap as it mentions, but does not regulate, cases which have first been referred to internal routes or to authorities. The gap might be filled if this article also allowed approaches to the media in cases where the employer or authority has not complied with the procedures under Articles 16 or 19.

Article 21

This is somewhat less restrictive as regards the use of classified data than the previous article (19). However, it does state that '*if a disclosure contains classified information, a whistleblower cannot make it public, unless otherwise prescribed by law'*. This seems too wide, in referring to all types of classified information, rather than the especially sensitive information which is the subject of principle 5 in the CoE Recommendation.

In addition, it is desirable to reconsider whether there should be exceptions to the general rule. The model law drafted by the Working Group set up by the Information Commissioner in 2013 stated '*the public shall not be informed about such data if the objective of the information may be attained otherwise or if by publishing such a data more serious damage might be caused than damage the information indicates*.' That is the kind of balancing act that the case law of the ECtHR[5] would support.

The model law also provided that '*a whistleblower may, through an authority or organisation, contest confidentiality of a data if he/she considers that the data has been classified as secret for the purpose of concealing a criminal offence….. etc*' (Article 10). Article 3 of the Law on Data Secrecy declares that information classified as secret in order to conceal illegal acts shall not be considered classified. That provision could be of importance in a whistleblowing case. No procedure is prescribed for dealing with lifting secrecy in Article 3 cases and it seems desirable to rectify that, whether in this law or by an amendment to the Data Secrecy Act.

[5] Guja v Moldova [no. 14277/04, 12 February 2008]

Article 26

This is a new provision requiring specialised training of judges who hear cases, which should help ensure that the law is applied consistently. This is very welcome: the failure to ensure this in the UK became a matter of regret to those who devised the UK law.

Article 37

New powers may be needed if the Inspectorates are to fulfil this function effectively. Is the Administrative Inspectorate sufficiently autonomous in their work? As for the Labour Inspectorate - when the expert met them in 2012 - they informed him that they could not impose sanctions on employers and said that there was a problem of non-compliance by employers with their rulings. In one case they ordered the re-instatement of a whistleblower, but the employer did not comply. They are empowered to petition the misdemeanour court in such cases but are not satisfied with the existing mechanisms. They expressed the need for view for a clearly stipulated competence in a special law on protection of whistleblowers which would empower them to exercise jurisdiction in cases where employees suffer retaliation as a result of whistle blowing[6]. It is not clear what consultations may have taken place with the Inspectorates, but it might be useful to consider whether they need extra powers to enable action under Article 37.

Article 41

The repeal of Article 56 of the Anti-Corruption Act is open to question, as TP8 says. This provision gives the Anti-corruption Commission power to assist civil service whistleblowers who raise corruption issues. A recent survey carried out by NGO Pistaljka, admittedly of a limited number of whistleblowers, suggested that the majority of those who had used this provision were satisfied with the result. The role of advice and assistance to whistleblowers may represent a gap in the Serbian scheme and it would seem preferable to amend and update this provision rather than repeal it.

Article 42

The implementation period of six months does not seem long enough, especially considering that under Article 40, employers are not required to adopt a general act under Article 17 for 9 months after enactment. (The Article 40 period is justified, considering that employers need to take into account the government bye-law, which will take 3 months to implement). One year would be better.

Prior training of judges will also be required under Article 26, and there is a wider need for training of all those who may be involved in dealing with whistleblower reports, as well as work

[6] http://www.acas.rs/sr_cir/component/content/article/39-aktuelnosti/748-agencija-predstavlja-izvestaj-pola-stivensona.html

to ensure general public awareness. This should include clarification of reporting channels (a list of which authority is responsible for which issue would be helpful here).

1.2 The Explanatory Memorandum

The CoE Recommendation should be mentioned in the opening section on international measures.

Some of the issues mentioned above need to be addressed (notably a commitment to review, why there is no provision on legal privilege, and the issues mentioned under Articles 2.2 and 11).

In the context of Article 42, it would be useful to outline the work that will be required to implement the law.

2. APPENDIX I – Draft Law on Protection of Whistleblowers

Draft Law on Protection of Whistleblowers

Chapter I
Introductory Provisions

Scope of the Law

Article 1

This Law regulates whistleblowing, whistleblowing procedure, rights of whistleblowers, obligations of the state and other authorities and organisations and legal entities and natural persons related to whistleblowing, as well as other issues of importance for whistleblowing and the protection of whistleblowers.

Definitions

Article 2

In terms of this Law, the following expressions shall have the meaning stated herein below:

1. **"whistleblowing"** is disclosure of information on violations of laws and regulations, violation of human rights, exercising a public authorisation contrary to the entrusted purpose, risk to public health, security, environment, as well as for the purpose of preventing damage of large proportions;
2. **"a whistleblower"** is a natural person who engages in whistleblowing, in the context of his/her work-based relationship; employment/recruitment procedure; use of services rendered by public authorities, holders of public authorisations or public services; business cooperation and the right of ownership in a company;
3. **"an associated person"** is any person who makes probable that a harmful action has been undertaken against him/her, due to his/her connection with a whistleblower;
4. **"an employer"** is an authority of the Republic of Serbia, territorial province or local self-government unit, holder of public authority or public service, a legal entity or an entrepreneur who employs one or more persons;
5. **"an authorised person"** is any person in a legal entity that has been entrusted with tasks that refer to the management, business activities or process of work, as well as the person who performs official duties within a government authority, provincial authority, or local government unit.
6. **"working relationship"** is full-time employment, work outside employment, volunteering, exercising a public office or any other actual work for an employer;
7. **"an authorised authority"** is any authority of the Republic of Serbia, its provincial or local government authority or holder of public authorities competent to act upon the information disclosed in accordance with the Law.
8. **"harmful action"** is any act or failure to act that jeopardizes or violates the rights of a whistleblower or an associated person or any doing that brings such persons in an unfavourable position, including harassment or discrimination related to whistleblowing.

Chapter II
General Provisions on Whistleblowing and Right to Protection

Prohibition against Preventing Whistleblowing

Article 3

It is prohibited to prevent whistleblowing.

Any provision of a general or particular act that prevents whistleblowing shall be considered null and void.

Prohibition of Undertaking Harmful Action

Article 4

It is prohibited to undertake any harmful action.

Right to Protection of Whistleblowers

Article 5

A whistleblower shall have the right to protection in accordance with this Law, if he/she:

1. engages in an act of whistleblowing at the employer, at the authorised authority or in public, in a manner prescribed by this Law;
2. discloses a piece of information within one year from the date he/she came into possession of the information that prompted the whistleblowing, but not later than within ten years from the date such act had been performed;
3. if, at the moment of whistleblowing, and based on the information available, any other person of average knowledge and experience as the whistleblower would put faith in the veracity of information subject of the whistleblowing.

Protection of Associated Persons

Article 6

An associated person shall have the same protection as a whistleblower, if he/she makes probable that a harmful action has been undertaken against him due to connection to the whistleblower.

Right to Protection Due to Mistaken Identity of a Whistleblower

Article 7

The same right to protection enjoyed by a whistleblower shall also be afforded to a person who makes probable that a harmful action was undertaken against him/her because the actor of the harmful action had mistaken him for a whistleblower or for a person associated to a whistleblower.

Protection of Official Persons

Article 8

An official person shall be afforded the same protection as a whistleblower, if he/she makes probable that a harmful action has been undertaken against him/her as a result of his executing his official duties.

Right to Protection for Requesting Information

Article 9

A person requesting data related to the information referred to in Article 2, Item 1) of this Law, shall be entitled to the same protection as the whistleblower, if he/she makes probable that a harmful action has been undertaken against him/her as a result of requesting such data.

Protection of Whistleblower's Personal Data

Article 10

A person authorised to receive the information referred to Article 2; Item 1) of this Law shall protect the whistleblower's personal data or the data that may reveal the whistleblower's identity, unless the whistleblower agrees to disclose such data in accordance with the law regulating the protection of personal data.

Any person who learns about the data referred to in Paragraph 1 of this Article is obligated to protect such data.

A person authorised to receive information referred to in Article 2, Item 1) of this Law shall, while receiving such information, inform a whistleblower that his/her identity may be revealed to the competent authority, if the actions of that authority would not otherwise be possible, and inform him about protection measures available to the parties in criminal proceedings.

If it is necessary to reveal the identity of a whistleblower in the course of the proceedings, a person authorised to receive the information referred to in Article 2, Item 1) of this Law shall inform the whistleblower about it before revealing his/her identity.

Whistleblower's personal data referred to in Paragraph 1 of this Article shall not be revealed to the person referred to in the disclosure, unless otherwise prescribed by a specific law.

Prohibition against Abuse of Whistleblowing

Article 11

Abuse of whistleblowing is prohibited.

Abuse of whistleblowing is performed by a person who:

1) submits information he/she knew was untrue;
2) in addition to a request for action related to the whistleblowing information, he/she demands benefits for himself or another person.

Chapter III
PROCEDURE

a) General Provisions

Urgency in Undertaking Actions

Article 12

Acting upon the disclosure referred to in Article 2, Item 1), of this Law shall be particularly urgent.

Types of Whistleblowing

Article 13

Whistleblowing may be internal, external, or whistleblowing made to the public.

Internal whistleblowing is disclosing the information referred to in Article 2, Item 1 of this Law to an employer.

External whistleblowing is disclosing the information referred to in Article 2, Item 1) of this Law to an authorised authority.

Whistleblowing to the public is disclosing the information referred to in Article 2, Item 1) of this Law to the mass media, via internet, at public gatherings, or in any other way such disclosure may be made accessible to the public.

A whistleblower may disclose the information referred to in Article 2, Item 1) of this Law to an employer or to an authorised authority, while engaging in whistleblowing to the public is possible, provided the conditions stipulated in this Law have been fulfilled.

Content of Disclosure

Article 14

The disclosure referred to in Article 2, Item 1) of this Law shall contain data on breaches of legislation, violation of human rights, exercising public authority contrary to the purpose intended, risk to public health, security, environment, as well as the data aimed to prevent damage of large proportions.

The disclosure referred to in Paragraph 1 of this Article may contain the signature and data of a whistleblower.

An employer or an authorised authority within their respective remits shall also act upon anonymous disclosures regarding the information referred to in Article 2, Item 1), of this Law.

b) Internal Whistleblowing

Obligations of an Employer

Article 15

An employer shall protect a whistleblower and an associated person from any harmful action and he/she shall take the necessary measures to bring any harmful action to an end and rectify the consequences of any harmful action.

The employer is obligated to notify in writing every gainfully employed person about their right to protection in accordance with this Law.

The employer shall appoint a person authorised to receive disclosures and act upon them.

Procedure
Article 16

The procedure of internal whistleblowing is initiated by making a disclosure referred to in Article 2, Item 1) of this Law to an employer.

The employer shall act upon the information referred to in Article 2, Item 1) of this Law initiating whistleblowing, within 15 days from the receipt of such information.

The employer shall inform the whistleblower about the outcome of the procedure once it has been concluded, within 15 days from closing of the procedure.

The employer shall, upon a whistleblower's request, provide him with information about the progress and actions undertaken within the procedure and enable the whistleblower to have access to the case files and attend the procedural actions, in accordance with the law.

Employer's General Act
Article 17

Any employer having more than ten employees shall regulate the internal whistleblowing procedure by a general act.

The employer shall post the general act referred to in Paragraph 1 of this Article in a visible place, accessible to each and every gainfully employed person, as well as to post it on the employer's Web Page.

Provisions of the general act on the procedure of internal whistleblowing must be in line with this Law and the by-law referred to in Article 18 of this Law.

Provisions of the general act from Paragraph 1 of this Article shall not reduce the scope of rights or deprive a whistleblower or an associated person of any rights stipulated in this Law.

Provisions of the general act referred to in Paragraph 1 of this Article which is not in line with this Law and the by-laws adopted in accordance with this Law shall be considered null and void.

Ministerial By-law
Article 18

The Minister responsible for judicial affairs shall enact a by-law regulating in more detail the procedure of internal whistleblowing for employers who have more than ten employees.

c) External Whistleblowing

Article 19

A procedure of external whistleblowing is initiated by the disclosure referred to in Article 2, Item 1) of this Law to an authorised authority.

If whistleblowing refers to those gainfully employed by an authorised authority, the whistleblower shall address the authority's executive officer, and if the disclosure refers to an executive officer of the authorised authority, the whistleblower shall address the executive officer of its immediate superior authority.

The authorised authority shall act upon the disclosure referred to in Paragraph 1 of this Article within 15 days from the date of receipt of the disclosure.

If the authorised authority in receipt of the disclosure is not authorised to act upon such disclosure, it shall forward the disclosed information to the competent authority within 15 days from its receipt and shall inform the whistleblower accordingly.

The authority to which the disclosure had been ceded shall be bound by the protection measures afforded to the whistleblower by the authority that had ceded the disclosed information.

If a whistleblower gave no consent to have his identity revealed, the authorised authority that received the disclosure from the whistleblower and was not authorised to act upon it shall be obligated to ask for the whistleblower's approval before it transmits it to the authorised authority.

The authorised authority shall, upon a whistleblower's request, provide him with information about the progress and actions undertaken within the procedure, and enable him to have access to the case file and to attend the procedural actions, in accordance with the law.

The authorised authority shall inform a whistleblower about the outcome of the procedure once it has been finalized, within 15 days from the date of closing the procedure.

d) Whistleblowing to the Public

Article 20

A whistleblower may make a disclosure to the public, without prior notification to the employer or an authorised authority, if he/she has reasonable grounds to believe that using other types of whistleblowing might create a risk to destruction of evidence or that he/she himself might be exposed to a harmful action.

A disclosure may also be made to the public, without prior notification to the employer or an authorised authority in case of immediate threat to life, health, safety of people, survival of plant or animal life and the environment.

e) Handling Classified Information

Whistleblowing Containing Disclosure of Classified Data
Article 21

The disclosure referred to in Article 2, Item 1) of this Law may contain classified data.

Classified data referred to in Paragraph 1 of this Article are the data already classified as such in accordance with the regulations on classified information.

If a disclosure contains classified data, a whistleblower shall be obligated to address his employer first, and if the disclosure refers to the person authorised to act upon the disclosure, such disclosure shall be rendered to the employer's executive officer.

In case the employer failed to act within 15 days upon the whistleblower's disclosure containing classified data, if there was no response or no appropriate measures taken by the employer within his remit, the whistleblower may address an authorised authority.

Notwithstanding Paragraph 3 of this Article, in case that the disclosure refers to an executive of the employer, such disclosure shall be rendered to the authorised authority.

If a disclosure contains classified information, a whistleblower cannot make it public, unless otherwise prescribed by law.

If a disclosure contains classified information, the whistleblower and other persons shall comply with general and special measures for protection of classified data, as specified by the law regulating classified information.

Chapter IV
PROTECTION OF WHISTLEBLOWERS AND COMPENSATION FOR DAMAGE

Prohibition of Putting Whistleblowers in Unfavourable Position

Article 22

The employer of a whistleblower must not, by doing or by failing to do, put a whistleblower or an associated person in an unfavourable position, in particularly related to:

1. employment/recruitment procedure;
2. acquiring the status of an intern or a volunteer;
3. work outside employment;
4. education, training, or professional development;
5. promotion at work, assessment evaluation, promotion or demotion;
6. disciplinary measures and penalties;
7. working conditions;
8. termination of employment;
9. wages and other employment fringe benefits;
10. stake in the employer's profits;
11. payment of bonuses and incentive retirement package;
12. job assignments or transfer to another job;
13. failure to implement protection measures against harassment by other persons;
14. referrals to mandatory medical checks or referrals to assessment of fitness to work.

Provisions of a general act entailing denial or violation of the rights of a whistleblower or an associated person or putting these persons in an unfavourable position due to whistleblowing shall be considered null and void.

Compensation for Damage due to Whistleblowing

Article 23

In cases of inflicting harm due to whistleblowing, a whistleblower and an associated person shall have the right to compensation for damage in accordance with the law regulating contract and torts.

Judicial Protection of Whistleblowers

Article 24

A whistleblower or an associated person suffering a harmful action related to whistleblowing has the right to judicial protection.

Judicial protection is exercised by filing a lawsuit for protection related to whistleblowing before a competent court within six months from the date of learning about the harmful action undertaken, or within 3 years from the date of occurrence of a harmful action.

In judicial protection proceedings, the competent court is the High Court according to the territory where the harmful action was undertaken or according with the place of adobe of a whistleblower or an associated person.

Judicial protection proceedings related to whistleblowing shall be urgent.

A judicial review shall always be permitted in judicial protection proceedings related to whistleblowing.

The provisions of the Civil Procedure Law applied in labour disputes shall apply accordingly in judicial protection proceedings related to whistleblowing, unless otherwise prescribed by law.

Composition of the Court
Article 25

In civil actions initiated by a lawsuit in which whistleblowing is the subject of litigation, a single judge shall always administer justice in the first instance, while a panel consisting of three judges shall be in charge in the court of appeals.

Special Knowledge of Whistleblowing Required
Article 26

A judge administering justice in a lawsuit related to whistleblowing or in special proceedings referred to in Article 28 of this Law must be a person who has acquired special knowledge about the protection of whistleblowers.

Special knowledge and professional training of persons who administer justice in cases related to the protection of whistleblowers shall be acquired at the Judicial Academy, in cooperation with the ministry responsible for judicial affairs.

The curriculum and other issues of importance for acquiring special knowledge related to the protection of whistleblowers shall be prescribed by a by-law enacted by the minister responsible to for judicial affairs.

Contents of a Civil Action
Article 27

The following may be requested in a civil action filed for the protection related to whistleblowing:

1) to establish that a whistleblower or an associated person were subjected to a harmful action,
2) to prohibit engagement in, or repetition of a harmful action;
3) to eliminate consequences of a harmful action;
4) to compensate for material and non-material damages;
5) to publish the judgment handed down regarding the civil action filed due to the reasons stipulated under Items 1) to 4) above, in the mass media, at the expense of the accused.

The civil action referred to in Paragraph 1 of this Article cannot revoke the legality of an employer's individual act used to assess the rights, obligations and responsibilities of an employee arising from his employment.

Whistleblower's Rights in Special Proceedings
Article 28

In an application for the constitutional review of an employer's individual act used for assessing the rights, obligations and responsibilities of a whistleblower resulting from his/her employment, according to special regulations, the whistleblower may state that the employer's individual act represents a harmful action related to whistleblowing.

The claim referred to in Paragraph 1 above may be stated in the application or at the preliminary hearing, and thereafter only if the applicant makes it probable that without any fault on his part he was unable to state such a claim at an earlier occasion.

In special proceedings, the court shall assess validity of the claim that the employer's individual act represents a harmful action related to whistleblowing, in accordance with this Law.

Introducing the Parties to the Right to Resolve a Dispute through Mediation

Article 29

The court conducting the proceedings for the protection due to whistleblowing shall, in the preliminary hearing, or in the first hearing for the main hearing, instruct the parties of the option of pre-trial settlement through mediation or any other mutually agreed manner.

Burden of Proof

Article 30

In case that during the proceedings the plaintiff has demonstrated likelihood that he/she had suffered a harmful action due to whistleblowing, the burden of proof shall be on his/her employer and the employer shall have to prove that the harmful action is not in causal relation with whistleblowing.

Investigative Principle

Article 31

In the proceedings for the protection related to whistleblowing, the court may establish the facts which are not even disputed by the parties, and the court may also independently investigate the facts not presented by either party in the proceedings, if it deems that this is important for the outcome of the proceedings.

Absence of the Defendant

Article 32

In case a duly summoned defendant fails to appear at the main hearing, the court may conduct the hearing in absence of the defendant, and it may also hand down the decision based on the facts established at that hearing.

Temporary Protection Measures and Jurisdiction

Article 33

In the proceedings for protection related to whistleblowing or in the proceedings referred to in Article 28 of this Law, the court conducting the proceedings may order an interim measure in accordance with the law regulating enforcement and security action.

A motion for ordering an interim measure may be submitted prior to initiating judicial proceedings, during the judicial proceedings, as well as after closing of the judicial proceedings, until the enforcement has been effected.

During the proceedings, the court may ex officio order an interim measure, too.

An Interim Measure Prior to Initiating Judicial Proceedings

Article 34

Notwithstanding Article 33, Paragraph 1 of this Law, the motion for ordering an interim measure prior to initiating judicial proceedings shall be decided by a court competent for ruling on the civil action filed for the protection related to whistleblowing.

When ordering an interim measure referred to in Paragraph 1 of this Article, the court shall set the time limit for filing a lawsuit before the competent court, taking into account the time limits specified by separate regulations for filing a lawsuit.

During the proceedings, the court may *ex officio* order an interim measure*, too.*

Motion for an Interim Measure
Article 35

In a motion for an interim measure the court may be requested to stay the legal effect of an act, to prohibit implementation of a harmful action or to order rectifying of the consequences caused by harmful action.

The court shall decide on the motion for an interim measure within eight days from the date of receipt of the motion.

Appeal against the Decision on an Interim Measure

Article 36

A separate appeal shall not be permitted against the decision ordering an interim measure.

Supervision of Enforcement of the Law

Article 37

Supervision of the enforcement of this Law shall be conducted by labour and administrative inspectorate, respectively.

Chapter V
PENAL Provisions

Misdemeanours

Article 38

A fine ranging from RSD 50,000 to RSD 500,000 shall be imposed on an employer - legal entity having more than ten employees for a misdemeanour, if:

1. it fails to adopt a general act on internal whistleblowing procedure (Article 17, Paragraph 1;
2. it fails to post the general act regulating internal whistleblowing procedure in a visible place accessible to each and every gainfully employed person (Article 17, Paragraph 2).

A fine ranging from RSD 10,000 to RSD 100,000 shall be imposed on the responsible person in a legal entity, state authority, authority of the autonomous province, or local government unit for the misdemeanour referred to in Paragraph 1 of this Article.

A fine ranging from RSD 20,000 to RSD 200,000 shall be imposed on an entrepreneur having more than ten employees, for the misdemeanour referred to in Paragraph 1 of this Article.

Article 39

A fine ranging from RSD 50,000 to RSD 500,000 shall be imposed on the employer – legal entity for a misdemeanour, if:

1. it fails to protect a whistleblower and an associated person or if it fails to take the necessary measures to stop the harmful action and rectify the consequences of the harmful action (Article 15, Paragraph 1);
2. it fails to inform in writing all gainfully employed persons about the rights stipulated by this Law (Article 15, Paragraph 2);
3. it fails to appoint a person authorised to receive disclosures and conduct the procedure related to whistleblowing (Article 15, Paragraph 3);
4. it fails to act upon the information initiating whistleblowing within the prescribed time limit (Article 16, Paragraph 2);
5. it fails to provide information to the whistleblower about the outcome of the procedure within the prescribed time limit (Article 16, Paragraph 3);
6. it fails to provide information to a whistleblower, upon his request, about the progress and actions undertaken in the procedure or fails to enable the whistleblower to have access to the case files and to attend the procedural actions (Article 16, Paragraph 4).

A fine ranging from RSD 10,000 to RSD 100,000 shall be imposed on the responsible person in a legal entity, state authority, authority of the autonomous province, or local government unit for the misdemeanour referred to in Paragraph 1 of this Article.

A fine ranging from RSD 20,000 to RSD 200,000 shall be imposed on the entrepreneur for the misdemeanour referred to in Paragraph 1 of this Article.

Chapter VI
TRANSITIONAL AND FINAL PROVISIONS

Time limit for Adoption of the By-law

Article 40

The by-law referred to in Article 18 and Article 26, Paragraph 3 of this Law shall be enacted within three months from the effective date of this Law.

Employers shall adopt the general act referred to in Article 17, Paragraph 1 of this Law, or shall harmonize an existing general act with the provisions contained herein and the by-law referred to in Article 18 of this Law within nine months from the date this Law comes into effect.

Cessation of Validity of other Regulations

Article 41

On the date this Law takes effect, Article 56 of the Anti-Corruption Act (*Official Gazette of the RS*, nos. 97/08, 53/10, 66/11 – Constitutional Court, 67/13 – Constitutional Court and 112/13 – authentic interpretation) in the section referring to the protection of persons disclosing a suspicion on corruption and the Rulebook on Protection of a Person who Reports Suspicion on Corruption (*Official Gazette of the RS*, no. 56/11) shall cease to be valid.

Persons entitled to protection in accordance with the regulations referred to in Paragraph 1 of this Article acquired before the date of commencement of application of this Law shall be subject to legal provisions in force at the time.

Article 42
Coming into Effect

This Law shall come into effect on the eight day from the date of its publication in the *Official Gazette of the Republic of Serbia*, and its implementation shall start six months from the date of its coming into effect.

3. APPENDIX II - EXPLANATORY MEMORANDUM

I. CONSTITUTIONAL BASIS

The constitutional basis for adoption of the Law on Protection of Whistleblowers is contained in the provision of Article 97, point 17, of the Constitution of the Republic of Serbia according to which the Republic of Serbia regulates and provides for other relations of interest to the Republic of Serbia, in compliance with the Constitution.

II. REASONS FOR ADOPTION OF THE LAW

The widespread corruption in our society in transition fully justifies the need for adoption of a special law/legal framework for protection of whistleblowers, which would constitute an efficient system of protection of persons who report corruption.

The existing internal legal framework does not provide for adequate protection to the persons, who due to the reporting of a suspected corruption or of some other unlawful acts, almost without exception, suffer certain consequences, specifically, as often as not, those that affect their legal employment status.

The obligation to adopt such a comprehensive legal provision results from two acts, specifically, in the first place, the National Anti-corruption Strategy for the period from 2013 to 2018 (Official Gazette of the RoS, No. 57/13), and then also from the related Action Plan (Official Gazette of the RoS, No. 79/13). Namely, in the fourth Chapter of the National Strategy, one of the defined objectives that needs to be achieved is the objective under number 4.9, which implies establishing of an efficient and effective protection of whistleblowers or persons who report a suspected corruption. On the other hand, as one of normative activities, the related Action Plan also provides for adoption of this law, specifically in the measure number 4.9.1.

It is beyond dispute that, by general positive legislation in the Republic of Serbia, certain protection of „whistleblowers“ is regulated, but only to specific categories of such persons, whereby adequate mechanisms for their protection have not been established.

The obligation of the Republic of Serbia to comprehensively regulate by law the issue of protection of persons who report a suspected corruption and other unlawful acts, also results from international agreements that have been ratified by our state. This because the ratified international acts, in line with the hierarchy of the validity of regulations set in the Constitution, are a part of the internal legal system and are, therefore, directly applied and have priority in relation to laws and other bylaws; consequently, judging by their legal force, they are just below the Constitution as the highest legal act.

Article 33 of the United Nations Convention against Corruption prescribes that each State Party shall review the possibility to provide in its internal legal system adequate measures for provision of protection against any unjustified acts against any person who reports to competent authorities in good faith and on a reasonable basis any facts that are related to corruptive criminal acts provided for by this Convention. On the other hand, the Civil Law Convention on Corruption of the Council of Europe contains the binding provision, specifically in Article 9, which prescribes that each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.

By proposing this law, the necessary steps are being undertaken towards establishing of a normative framework and capacities for a decisive combat against corruption and, therefore, apart from fulfilling the obligations from international acts, it meets recommendations, first of all, the recommendations of the Group of States against Corruption of the Council of Europe (GRECO).

The draft Law provides a full scope of protection to persons who report a suspected corruption and thereby the deficiencies are eliminated of inadequate and partial protection to

certain categories of „whistleblowers" that currently exists in our internal legislation. The protection that a whistleblower shall enjoy is established with the objective to protect public interest and includes different types of protection, subject to different types of retaliation that may be applied against a whistleblower.

The law does not provide for a pecuniary reward for a whistleblower. The reasons on which such a solution is founded are numerous. Making public corruptive, but also other potentially dangerous acts, must not be motivated by lucrative reasons.

A pecuniary reward is in a direct collision with the development of moral and expression of social condemnation of unlawful acts, as elements that represent the backbone of a healthy system of values that should be established in a society.

Protection of the rule of law must be the key motive to an individual, who is pointing to corruptive and other acts. Otherwise, the risk is created that an individual, motivated by compensation in form of cash, frequently and without verification, by all means in the absence of good faith, may point to certain actions, thereby undermining the protection that is provided by this Law.

III. EXPLANATION OF SPECIFIC PROVISIONS

The Draft defines both material and procedural issues in the area of protection of whistleblowers endeavouring, by such a coherent approach, to provide comprehensive protection to whistleblowers and its efficient application in practice. The point of such an approach is to motivate potential whistleblowers to disclose information in public interest whereby their protection will be guaranteed and inflicting of damaging consequences will be suppressed to the greatest possible extent. The Draft provides a safe alternative to the silence of whistleblowers through the procedure of protection, which is easily accessible, unquestionable, and efficient.

Application of the Law on Protection of Whistleblowers is defined by the personal and material scopes. The personal scope of application identifies the persons, who are protected by the provisions of the Law, while the material scope of application identifies the cases of disclosure of information of public interest in which the Law is to be applied.

Material scope

The Law on Protection of Whistleblowers, in the provision of Article 2 paragraph 1 point 1, defines the meaning of the term 'whistleblowing' as disclosing information on violation of regulations, violation of human rights, exercising of public powers contrary to the purpose of their entrusting, threats to public health, security, the environment, as well as for the purpose of prevention of large-scale damages. The material scope of application of the Law is wider than the standard set by the Council of Europe Recommendation and Resolution 1279 (2010). The Council of Europe Recommendation allows member states to determine what the public interest is, but sets the standard which every member state should adopt. The Law on Protection of Whistleblowers took into consideration the specific aspects of the Republic of Serbia and, therefore, the standard of the Council of Europe Recommendation has been extended so that the material scope of application also includes disclosure of information on exercising of public powers contrary to the purpose of their entrusting and for the purpose of prevention of large-scale damages.

It is important to mention that Article 3 paragraph 1 of the Law prescribes that any prevention of whistleblowing shall be prohibited, while paragraph 2 prescribes that a provision of a general or an individual act preventing whistleblowing shall be null and void.

Personal scope

The Law on Protection of Whistleblowers governs the personal scope in Articles 2, 6, 7, 8, and 9.

The initial basis of protection, which is provided by this Law, is regulated in the provision of Article 2 paragraph 1 point 2 by the definition of the term 'whistleblower' so that it includes a natural person who engages in whistleblowing related to his/her employment procedure, using of services of authorities, holders of public powers or public services, business cooperation and ownership right over a company.

As regards the personal scope of the application of protection of whistleblowers, the Resolution 1279 and the Recommendation of the Council of Europe emphasize that one of the characteristics of a whistleblower is his/her employment by an employer, of any type, paid or unpaid, permanent or temporary employment, etc. Namely, the fact that a whistleblower works for an employer makes him/her vulnerable with regard to possible damaging consequences he/she may suffer because of disclosure of information that concern threatening or violation of public interest by the employer. This characteristic specifically differentiates a whistleblower from other persons who, for example, report that they have learnt about committing of a criminal offence that is not related to their employment.

The Law on Protection of Whistleblowers provides protection to whistleblowers and/or to natural persons who engage in whistleblowing:

- **Related to their employment.**

  Employment is defined in Article 2 paragraph 1 point 6, so that it includes employment, work outside employment, volunteering, holding an office, as well as any other actual work for an employer. This definition should be understood in terms of the laws governing labour relations. The term employment includes, for example, the persons who are employed with an employer on temporary or permanent jobs, persons who do certain jobs based on a temporary service contract, contract on temporary and odd jobs, persons who volunteer or are engaged in probationary/apprenticeship work, etc. In addition to the above, it is important to emphasize that the Law stipulates the phrase 'related to' employment, which indicates that the protection is also provided to the persons who are no longer hired to work with an employer (for example, former employees, retired persons, etc.) and who learned about the information they have disclosed during their being hired to work with the employer. Here, it should be stressed that the term 'employer' is defined in Article 2 paragraph 1 point 4 of the Law, so that it includes an authority of the Republic of Serbia, territorial autonomy or unit of local self-government, holder of public powers or a public service, legal entity or entrepreneur who hires one or more persons to work. In addition to the above examples, the Law provides protection in case of any other actual work for an employer. Such protection is in compliance with the Resolution 1279 and the Recommendation of the Council of Europe, which set minimum requirements with regard to the personal scope of protection of whistleblowers in the form of a connection of a whistleblower and an employer, which is reflected in any employment.

- **Through the employment procedure.**

  When explaining the personal scope of application of the Law, it should be repeated that the Resolution 1279 and the Recommendation of the Council of Europe encourage as wide protection of whistleblowers as possible. Taking into account specific qualities of social, welfare, and economic factors of the Republic of Serbia, the Law provides for a wider protection by the including persons who disclose information of public importance they learnt about in the course of the employment procedure.

- **By using the services of authorities, holders of public powers or public services.**

  Bearing in mind the risks of corruption and other unlawful behaviours and abuses of powers that have been identified in the area of using of services of authorities, holders of public powers or public services, the Law also provides protection to whistleblowers

who disclose information of public interest they have learnt about related to the use of the above services. The Law provides protection in case of the use of services in the public sector because only authorities, holders of public powers or public services have the competence to act, and thereby the monopoly in providing such services as well.

- **By business cooperation and ownership right over stakes and shares in a company.**

  The Law on Protection of Whistleblowers provides protection to whistleblowers both in public and in private sectors. Knowledge about threat to or violation of public interest related to business cooperation and ownership right over stakes and shares in a company represents the information of public importance and, therefore, the Law also provides protection to whistleblowers from the private sector.

There are categories of persons, who are not whistleblowers in terms of the Law, but who may realise the same protection as whistleblowers. We are talking about the so-called associated persons, the persons who are mistakenly deemed to be whistleblowers or associated persons, official persons as well as the persons who collect information that point to potential threat to or violation of public interest.

1. Associated persons.

The provision of Article 6 of the Law on Protection of Whistleblowers prescribes that an associated person has the same protection as the whistleblower if he/she makes it probable that a harmful action has been taken against him/her due to the connection with the whistleblower. The meaning of the term 'associated person' is regulated in Article 2 paragraph 1 point 3 of the Law and it includes a person who makes it probable that a harmful action has been taken against him/her due to the connection with a whistleblower.

The practice of disclosure of information of public importance has demonstrated that the damage due to whistleblowing does not have to be suffered only by whistleblowers. That so-called retaliation may indirectly affect a whistleblower by direct suffering from damaging consequence by a person connected with the whistleblower. For an associated person to be able to realize protection from damaging consequences before a court, it is necessary that he/she achieves the minimum level of proving of the causal connection between the detrimental consequence and his connection with the whistleblower. That minimum level of proving is reflected in the phrase 'to make probable' and that is a legal standard that has already been applied and is known in the practice of the Republic of Serbia. It is important to mention that the Law does not define boundaries, type or other characteristics of 'connectedness' between a whistleblower and an 'associated person' (blood relationship, in-law relationship, emotional bond, etc.). In such a way, the Law leaves open possibilities for protection of associated persons irrespective of the type or level of connection. So, the Law provides open possibilities for protection of an associated person while only requiring that the person proves that he/she is connected with the whistleblower (regardless of the type or level of connectedness), as well as to make it probable that a harmful action has been taken against him/her due to such connection. Putting a legal boundary to the type or level of connectedness of persons with a whistleblower would mean that the legislator has the possibility to predict all the possible cases of taking a harmful action against associated persons, which certainly is not the case. Due to the above reason, the legislator opted to leave an open path for protection of associated persons.

2. Protection due to a mistaken designation of a whistleblower

The Law on Protection of Whistleblowers provides protection, which enjoys a whistleblower and a person who makes it probable that a harmful action has been taken against him/her, because the person who has taken a harmful action by mistake deemed that that person is a whistleblower, or an associated person (Article 7 of the Law). The practice in the area of protection of whistleblowers has demonstrated that there are situations in which the tortfeasor (the person who takes a harmful action) by mistake deems that the person to whom he/she is inflicting damage is a whistleblower, or an associated person. This is the situation that may happen when whistleblowing has really taken place, but there is a wrong perception of the whistleblower, or an associated person (error in persona). Also, the tortfeasor may have a wrong perception that whistleblowing has taken place at all and that for that, putative whistleblowing, there is a person is responsible and, therefore, he/she inflicts damage to that person (error in substantia). Protection, in such cases, is provided to the so-called putative whistleblowers, and/or putative associated persons. The appropriateness and legitimacy of such protection is reflected in the importance of whistleblowing and disclosure of information of public importance.

3. Protection of official persons.

A special case, which is related to whistleblowing, is the specific position of persons whose job description includes submitting of information on violation of regulations, violation of human rights, exercising of public powers contrary to the purpose of their entrusting, threat to public health, security, the environment, as well as for the purpose of prevention of large-scale damages (the subject matter of whistleblowing). Specific characteristic of such persons is that disclosure of information on the subject matter of whistleblowing falls within their line of duty. From the specified reason, their activities in view of the subject matter of whistleblowing do not represent whistleblowing and such persons cannot be considered as whistleblowers in terms of this Law. However, it often happens that consistent pursuance of the line of duty may have the same consequence as whistleblowing. For that reason, the Law provides protection to the persons who consistently pursue their line of duty in Article 8, although it is possible that thereby they will have to confront their superiors and to suffer damaging consequences. At this point, it should be clarified that, if an official person discloses information on the threat to or violation of public interest that are related, for example, to his/her working environment, he/she shall be deemed as a whistleblower in compliance with the Law, if such disclosure does not pertain to his/her line of duty.

4. Protection due to requesting information

The Law on Protection of Whistleblowers protects a whistleblower, an associated person, and other categories of persons, after whistleblowing takes place. However, for a potential whistleblower to disclose information of public interest, he/she previously undertakes certain activities in order to collect data and to form a reasonable view that his/her perception that there is a threat to or violation of public interest is real and true. The Law also provides protection to potential whistleblowers in the phase that precedes concrete whistleblowing. Article 9 of the Law prescribes that the person, who requests data related to the information referred to in Article 2 paragraph 1 point 1 of this Law, is entitled to protection as a whistleblower if he/she makes it probable that a harmful action has been taken against him/her due to the requesting of those data. In this case, the person referred to in Article 9, in order to realise protection, should demonstrate the minimum level of proof ('make probable') that a harmful action has been taken against him/her due to the requesting of such information. Naturally, he/she should prove that he/she really requested information, and/or undertook activities aimed at gathering information of public importance. The person, who pretends to realise the protection

referred to in Article 9, cannot only invoke the intent to whistleblow, instead it is necessary that he/she has really undertaken any action by which he/she would materialise his/her intent to whistleblow. Naturally, the result of such investigations does not always have to be disclosure of the threat to or violation of public interest. Collecting of data may also go in the direction of eliminating suspicions of violation of public interest. At any rate, preventing the collection of information by taking a harmful action against such person is not in public interest and, therefore, the protection of persons who collect the data referred to in Article 9 is prescribed.

Right to protection

The Law on Protection of Whistleblowers regulates requirements for realisation of protection in Article 5.

A whistleblower is entitled to protection in compliance with this Law if he/she:

1. Engages in whistleblowing with the employer, an authorised authority or the public in the manner stipulated by this Law,

2. Discloses information within one year from the date of learning about a committed act, due to which he/she engages in whistleblowing, but not later than within one year as of the date of committing of such act,

3. At the moment of whistleblowing, based on available data, a person having average knowledge and experience, same as the whistleblower, would believe in the truthfulness of the information used for whistleblowing.

The right to protection is provided if a harmful action is taken against the whistleblower, which is, in Article 2 paragraph 1 point 8 of the Law, defined as any action or failure to act by which the whistleblower or an associated person is threatened or his/her right is violated, and/or by which such persons are put in an unfavourable position, including abuse or discrimination related to whistleblowing. The term 'related to whistleblowing' includes situations when a harmful action is taken due to whistleblowing, but there are also situations where there is a misconception that whistleblowing has taken place. At this point, it should be mentioned that Article 4 of the Law prescribes prohibition of taking a harmful action.

Protection of personal data on whistleblower

Article 10 of the Law regulates protection of personal data so that the duty of the person, who is authorised to receive information on whistleblowing, is introduced to protect personal data on the whistleblower but also the data based on which the identity of the whistleblower can be revealed.

The exemption from the application of the above provision exists in two alternative cases:

1. If the whistleblower agrees to the disclosure of personal data, and/or data based on which the identity of the whistleblower can be revealed, and
2. If, without the disclosure of identity of the whistleblower, action of the competent authority would not be possible, under the condition that the person authorised to receive information has informed the whistleblower on the described possibility prior to the receipt of the information and if, prior to the revealing of identity of the whistleblower, the competent authority has informed the whistleblower thereof.

Personal data on a whistleblower must not be communicated to the person, who is referred to in the information referred to in Article 2 paragraph 1 point 1 of this Law, unless a separate law prescribes otherwise.

It should be noted that noncompliance with the provision of Article 10 of the Law on Protection of Whistleblowers should be incriminated and prescribed as a criminal offence in the Criminal Code. The strategic approach of the Republic of Serbia in the area of combating corruption is to codify and improve criminal offences that are directly or indirectly related to the phenomenon of corruption. In these terms, disclosure of personal data on the whistleblower,

and/or data based on which the identity of the whistleblower can be revealed, is not sanctioned by the Law on Protection of Whistleblowers, but it will be incriminated in the Criminal Code.

CHAPTER III

PROCEDURE

Chapter III of the Law on Protection of Whistleblowers governs the procedure of whistleblowing. It is important to stress that the initial provision in this Chapter, Article 11, prescribes particularly urgent action concerning disclosed information of public interest (Art. 2 para1 point 1 of the Law). So, an employer or an authorised authority shall without any further delay and particularly urgently act concerning the disclosed information.

Types of whistleblowing

The Law on Protection of Whistleblowers stipulates three types of whistleblowing: internal, external, and whistleblowing to the public. The internal whistleblowing represents the disclosure of the information referred to in Article 2 point 1) of this Law to an employer. The internal whistleblowing also includes the possibility of disclosing information to the representative trade union with the employer, and/or to another person or organisation authorised by the employer for that purpose. This possibility follows from the provision of Article 15 paragraph 3 of the Draft, which prescribes that the employer shall designate the responsible person for receipt of information and managing of the procedure related to whistleblowing.

One of the reasons for the specified solution is that the activity of trade unions in labour relations has an important role in protection of workers and thereby in the protection of whistleblowers. The external whistleblowing represents the disclosure of the information referred to in Article 2 point 1) of this Law to an authorised authority. Whistleblowing to the public represents the disclosure of the information referred to in Article 2 point 1) of this Law to mass media, via Internet, at public gatherings or in some other way by which information can be made available to the public.

A whistleblower may disclose the information, referred to in Article 2 point 1) of this Law, to the employer or an authorised authority, and whistleblowing to the public may be engaged in if the requirements prescribed by this Law are met. So, the internal and the external whistleblowing are set forth alternatively, while whistleblowing to the public is set forth as the subsidiary one with respect to the internal and the external whistleblowing. In the second version of the Draft Law on Protection of Whistleblowers, wider authorities of a whistleblower are provided than in the comparative practice, so that he/she may elect the legal path for which he/she deems that it would be the most efficient one in a concrete situation. Namely, in comparative solutions, the procedure of the internal disclosure is predominantly set forth as the primary one relative to the external whistleblowing, except in exactly and precisely defined exceptions. However, such a solution was not accepted because the legislator cannot in advance envisage and precisely enumerate all the situations in which the internal whistleblowing would be dangerous for a whistleblower, unfeasible or ineffective. In the second version of the Draft Law on Protection of Whistleblowers, alternative «channels» for whistleblowing are put at the disposal to a potential whistleblower: internal or external ones.

From the aspect of precise prescription of obligations to act with regard to the receipt of disclosed information, Article 18 of the Draft Law prescribes that the minister in charge of judiciary affairs shall issue a secondary legislation act, which will specify in detail the procedures to facilitate reporting of irregularities, provide information, and the necessary help to the person who engages in disclosure, protect the person who engages in disclosure from a harmful action, etc.

Article 14 of the Law precisely defines the obligation of an employer and an authorised authority to act upon anonymous reports as well. The provision of Article 14 paragraph 3 of the Law prescribes the duty of an employer and an authorised authority to act upon anonymous

information as well. Namely, the Draft Law differentiates between confidential and anonymous information. Confidential provision of information is regulated through the provision of Article 10 paragraph 1 of the Law, which prescribes that the person, who is authorised to receive information from a whistleblower, shall protect personal data, as well as the data based on which the identity of the whistleblower can be disclosed. Anonymous provision of information is regulated through the subject provision, bearing in mind the seriousness and sensitivity of the information to which the provision of information may refer. Therefore, the employer and the authorised authority, who receive anonymous information, have the duty to verify the allegations within their respective powers, and/or competences.

Internal whistleblowing

The internal whistleblowing is regulated by the provisions of Articles 15-18 of the Draft.

Article 15 of the Draft regulates **obligations of an employer**, and so he/she is obliged to provide protection to a whistleblower and an associated person from a harmful action, as well as to undertake the necessary measures for the purpose of stopping a harmful action and elimination of the consequences of the harmful action. Additionally, the employer shall submit to all the persons hired to work a written notification about the rights referred to in this Law, as well as designate a responsible person for the receipt of information and managing of the procedure related to whistleblowing.

The procedure of the internal whistleblowing is regulated by the provision of Article 16 of the Draft.

Whistleblowing starts with the submission of the information referred to in Article 2 paragraph 1 point 2 of the Law. The moment of commencement of whistleblowing is relevant from many aspects. For example, for the purpose of exercising of the right to protection, harmful action should be caused by whistleblowing, which implies that it can take place only after the moment of commencement of whistleblowing, and/or after submitting of the information of public interest.

Actions by which public interest is threatened or violated may take place with any employer, irrespective of the number of those hired to work. Consequently, every employer shall (in addition to the obligations referred to in Article 15 of the Draft) act upon the information referred to in Article 2 point 1) of this Law by which whistleblowing is engaged in, within 15 days from the date of receipt of the information. The obligation to act upon the information implies that the employer shall, within the prescribed time period, initiate the procedure from their competence, i.e. engage in activities and issue a document by which the procedure would be initiated concerning the disclosed information. Naturally, this does not mean the actual closing of the procedure because, in most of the cases, the procedure related to the disclosed information will last longer than 15 days, in compliance with separate regulations. The provision of Article 16 of the Draft also obligates the employer to inform the whistleblower about the outcome of the procedure upon its closure, also, within 15 days as of the date of closing of the procedure. Additionally, the employer shall provide information to the whistleblower, at his/her request, about the development and actions undertaken within the procedure, as well as enable the whistleblower to have insight in the files of the case and to be present during actions within the procedure, in compliance with the law.

The Draft Law regulates, in the provision of Article 18 of the Draft, the additional obligation of the employer who has more than ten employed persons. Namely, in compliance with separate regulations, the obligation to adopt a general act is not related to small enterprises and to other categories of employers. For the above reason, the Draft Law obligates an employer who has more than ten employees to regulate the procedure of the internal whistleblowing in their existing general act (which will mainly be realized through amendments of such an act). Those employers, who do not have the obligation to adopt a general act according to separate regulations, do not have the obligation to regulate the procedure of the internal whistleblowing through a general act either, instead it should be done in the internal procedure that corresponds to the size and number of persons hired to work. For example, if an employer has only one person hired to work, or even none, the provisions on the internal whistleblowing

would not make sense or be appropriate. In this case, the person hired to work could directly address the authorised person, because addressing the employer would not be purpose-serving. This is one of the reasons due to which the internal and the external whistleblowing are set forth alternatively.

In order to ensure consistency in the provisions of a general act that are related to the procedure of the internal whistleblowing, the provision of Article 18 prescribes that the minister in charge of judiciary affairs shall, through a secondary legislation act, regulate in detail the minimum rules that every above general act should contain. The underlying point of such a solution is ensuring the uniform procedure that would be efficient and which would be easily accessible to a whistleblower. From the aspect of the comparative law, there are solutions in which, by nonbinding acts, such as for example, a code, the desirable standard in regulating the internal whistleblowing would be presented, and it is up to the employers to adapt given provisions to their business operation. Such a solution may certainly be appropriate in societies in which the rule of law prevails and in which it is certain that employers will really act in compliance with the recommendations. However, orientation of the legislator in the Republic of Serbia is to prescribe minimum standards that would be obligatory for every employer. In this way, first of all, supervision over the implementation of these provisions and the level of meeting the obligations will be ensured and, on the other hand, the consistency and legal security that are of crucial importance in the area of whistleblowing. For the implementation of a secondary legislation act to be successful, agreement on the standard rules must reached through consultations and consensus of trade union organisations and employers, so that they could have the opportunity to carefully examine what is appropriate for their organisation and in what way efficiency in acting can be ensured.

External whistleblowing

The procedure of the external whistleblowing also starts with the submitting of the information referred to in Article 2 point 1) of this Law, but to an authorised authority. If whistleblowing is related to those hired to work in the authorised authority, the whistleblower shall address the executive of that authority and, if whistleblowing is related to the executive of the authorised authority, the whistleblower shall address the executive of the next superior authority.

The authorised authority shall act upon the information referred to in paragraph 1 of this Article within 15 days from the date of receipt of the information.

If the authorised authority to which the information is submitted is not competent to act related to whistleblowing, it shall forward the information to the competent authority within 15 days from the date of receipt thereof and inform the whistleblower thereof.

The authority to which the information has been ceded is bound by the measures of protection provided to the whistleblower by the authority that has ceded the information to it.

If the whistleblower has requested that his/her identity is not revealed, the authorised authority that has received the information from the whistleblower, and is not competent to act, shall, prior to forwarding it to the competent authority, previously request approval from the whistleblower for forwarding the same.

The authorised authority shall provide information to the whistleblower, at his/her request, on the development and actions undertaken within the procedure, as well as enable the whistleblower to have insight in the files of the case and to be present during the actions within the procedure, in compliance with the law.

The authorised authority shall inform the whistleblower about the outcome of in the procedure upon its closure, within 15 days as of the date of closing the procedure.

Whistleblowing to the public

A whistleblower may whistleblow to the public without previously informing the employer or an authorised authority if he/she justifiably believes that, by using other types of whistleblowing, there would be the threat from the destruction of evidence, or that he/she

would be exposed to a harmful action. The public may be whistleblown, without previously informing the employer or an authorised authority also in case of an imminent threat to life, health, safety of people, survival of plant or animal world, and the environment. In the latter case, the requirement that the whistleblower justifiably believes that, by using other types of whistleblowing, there would be a threat from the destruction of evidence is not demanded.

At this point, one should keep in mind that, in case when there is some unlawful act in the authorised authority, there is the next superior authority in the hierarchy, which the whistleblower could address and, therefore, in such a case, it is not necessary to immediately disclose the information to the public. This is particularly related, for example, to judicial authorities, and it is particularly important with respect to criminal proceedings.

Secret data

The provisions of Article 20 of the Draft govern the procedure of whistleblowing in case of secret data. It should be noted that it is necessary for the data to be already marked as secret in compliance with the regulations governing secret data, before the whistleblower discloses such data. So, if certain data have not been previously classified and marked by some degree of secrecy, this provision shall not be applied and the whistleblower should not suffer damaging consequences because of disclosing of such data. If their disclosure is necessary for the purpose of whistleblowing, one should bear in mind that they are particularly sensitive and a solution should always be selected so that their disclosure remains within the actual authority - organisation or the competent authority (particularly if their disclosure would inflict a bigger damage than the damage that is attempted to be prevented by the disclosure of such data).

Protection of whistleblowers and compensation for damage

The Draft Law puts the protection of a whistleblower/associated person in the spotlight and prescribes, in Art. 22, prohibition to the employer to put a whistleblower or an associated person in an unfavourable position by action or failure to act and thereafter the general provision prescribes the most common situations related to which a whistleblower/associated person are put in an unfavourable position, such as:

- Employment;
- Acquiring of the capacity of an intern/apprentice or a volunteer;
- Work outside employment;
- Education, training or professional improvement;
- Promotion at work, evaluation, acquiring or loss of function;
- Disciplinary measures and sanctions;
- Working conditions;
- Termination of employment;
- Wages and other fringe benefits from employment;
- Share in the profit of the employer;
- Payment of bonuses and an incentive retirement package;
- Allocation of workload or transfer to another workpost;
- Failure to undertake measures for the purpose of protection due to harassment by other persons;
- Referral to mandatory health checkups or referral to checkups for the purpose of assessment of the ability to work;
- And similar.

The above list is not of an exhaustive character. It is also emphasized by the same Article of the Draft Law that the provisions of a general act by which a whistleblower or an associated person is denied or violated the right, and/or by which such persons are put in an unfavourable position related to whistleblowing are ABSOLUTELY NULL AND VOID.

Therefore, even in a situation when provisions of a general act would exist (e.g. of a collective agreement), which would provide for a possibility to deny rights of a whistleblower or an associated person related to whistleblowing, the same provisions would produce a legal effect. In

the above described manner, more comprehensive protection is provided to a whistleblower/associated person.

In line with the provision of Art. 23 of the Draft Law, a whistleblower/associated person are entitled to compensation for the damage they suffer due to whistleblowing in compliance with the law governing obligational relationships.

The Draft Law provides for judicial protection of a whistleblower/associated person in view of the fact that the Constitution of the Republic of Serbia (Official Gazette of the RoS No. 98/2006) provides for the right to a fair trial (Art.32) according to which everybody is entitled to an independent, unbiased court already established by the law to publicly hear and rule on his/her rights and obligations in a fair manner and within reasonable time. Consequently, Article 24 of the Draft Law provides for that a whistleblower or an associated person, against whom a harmful action has been taken related to whistleblowing, is entitled to judicial protection. Judicial protection is realized by bringing an action for protection related to whistleblowing to the court of jurisdiction, within six months as of the date of learning about the harmful action taken, or three years from the date when the harmful action was taken, which is an optimal deadline within which the action can be brought, which fully corresponds to the examples of good practice.

In the proceedings of judicial protection, which are urgent, a high court has the jurisdiction according to the place of taking of the harmful action or according to the place of abode of the whistleblower or of the associated person. The Draft Law also stipulates that, in these proceedings for judicial protection, review as an extraordinary legal remedy is always admissible, which is prescribed for the purpose of as safe as possible and more comprehensive protection of a whistleblower/associated person and, therefore, the court ruling is subject not only to the second-instance but also to the third-instance review, through the possibility to pursue extraordinary legal remedy. It is also provided for that, in the proceedings for judicial protection related to whistleblowing, the provisions of the law on civil procedure governing proceedings in industrial/labour disputes shall be appropriately applied, unless this Draft Law as *lex specialis* stipulates otherwise.

As to the composition of the court, Art. 25 provides that, in the civil lawsuit for an action related to whistleblowing, in the first instance, a single judge shall always adjudicate and, in the second instance, a panel composed of three judges.

The judge, who acts on the action related to whistleblowing or in special proceedings referred to in Art. 28 of this Draft Law (in which the legality of an individual act is contested), must be the person who has acquired special knowledge related to whistleblowing. The program and manner of acquiring of special knowledge shall be prescribed by the minister in charge of judiciary affairs.

As to the content of the statement of claim related to whistleblowing, art. 27 of the Draft Law, prescribes that, in the same, the following may be requested:

- Establishing that, against the whistleblower or the associated person, a harmful action has been taken,
- Prohibition of taking and repeating a harmful action;
- Elimination of consequences of the harmful action;
- Compensation for material and non-material damages;
- The judgment handed down on the action may be made public in mass media, at the cost of the defendant.

It is further provided for that, by the action related to whistleblowing, the legality of an individual act of the employer, by which they have dealt with the rights, obligations, and responsibilities of an employee, on the ground of work, cannot be contested.

However, already in the next Article (28), the connection is made between the legal system of protection of a whistleblower/associated person referred to in this Draft with the judicial proceedings in which the legality of the individual act of the employer is reviewed and, therefore, special rights of a whistleblower are provided in such proceedings as well.

In line with the above, in the proceedings on the action for review of the legality of an individual act of the employer which has dealt with the rights, obligations, and responsibilities of a whistleblower on the ground of work, under separate regulations, a whistleblower may make the allegation that the individual act of the employer is a harmful action related to whistleblowing, which allegation can be made in the statement of claim or at the preparatory hearing, and thereafter only if the applicant of the allegation makes it probable that, without his/her fault, he/she could not present this allegation earlier.

The Draft Law, without disrupting the existing system of protection of labour relations and the legal system of the Republic of Serbia, introduced a radical change in favour of a whistleblower/associated person. The change is related to a situation when a whistleblower/associated person, in the course of a lawsuit conducted related to the review of the legality of the individual act of the employer (e.g. a decision on termination of the employment contract or a decision on transfer to another workplace...), makes probable the allegation that the subject individual act of the employer is related to whistleblowing, the court, before which the proceedings are conducted for the review of legality of the individual act, is obliged to apply the rules of this Draft Law that are related to the special protection of the rights of a whistleblower/associated person (like the rule on reverse onus, the inquisitorial principle...). In the described way, the domain of application of this Draft Law has been actually extended even to the lawsuits in which the legality of individual labour-law related act issued to the detriment of a whistleblower/associated person related to whistleblowing is contested.

That is why the rule is prescribed that the judges, who process in special proceedings (in which the legality of an individual labour-law related act is contested), must have special knowledge related to whistleblowing. Therefore, apart from judges of high courts, who adjudicate on actions related to whistleblowing, judges of basic courts and of administrative courts, who adjudicate in labour disputes as well must be well trained related to the rules of the Law on Protection of Whistleblowers and to special rights of whistleblowers/associated persons. We are emphasising that, by the beginning of the application of the Law, special training courses will be provided related to the protection of whistleblowers, both for high court judges, who will be in charge of acting on actions related to whistleblowing, and for judges of Basic Courts in the Republic of Serbia, who process in labour disputes, and who will also to a large extent apply this Law in their work. Special attention will be dedicated to the clarification of the impact of the ALLEGATIONS OF THE PLAINTIFF (the whistleblower/associated person) that an individual labour-law related act of the employer, the legality of which is reviewed before a basic court, is issued related to whistleblowing. Judges will be trained how to act in a situation when the plaintiff has made this allegation probable and to manage the proceedings further by applying the legal system of this Law. Training courses will also be provided for judges of administrative courts, in view of the domain of application of this Law and, hence the possibility that the subject matter of dispute appears even before the Administrative Court (example: dismissal of civil servants related to whistleblowing).

Further on, the Draft Law provides for the possibility to familiarise the parties with the right to settle the dispute through mediation (Article 29) and that the court before which the proceedings for protection related to whistleblowing are conducted shall, at the preparatory hearing, or the first hearing for the main hearing, point to the parties to the possibility for extrajudicial settlement of the dispute by way of mediation or in another consensual manner. In such a way, the possibility of extrajudicial, prompt, and efficient settlement of a dispute is also provided to mutual interest.

The Draft Law also stipulates the rule on reverse burden of proof (Art. 30) and, therefore, in a situation when the plaintiff (the whistleblower/associated person), in the course of the proceedings, made it probable that a harmful action has been taken against him/her related to whistleblowing, the burden of proof that the harmful action is not in the causal connection with whistleblowing is on the employer. This rule is motivating for a whistleblower, in view of the fact that the plaintiff should only make it probable that he/she has suffered damaging consequences related to whistleblowing, and then the employer should prove that the

occurred detrimental consequences to the whistleblower are not related to whistleblowing. Thereby deviation is made from the general rule on the burden of proof.

The inquisitorial principle is also stipulated, as opposed to the principle of the will of the parties, characteristic for the area of civil procedure, specifically for the purpose of protection of whistleblowers (Article 31) and, therefore, in these proceedings, the court may establish facts even when they are not disputable among the parties, and it may also independently investigate the facts that neither party presented in the proceedings, if it holds that it is of importance for the outcome of the proceedings. The inquisitorial principle in civil law matters is seldom provided for like, e.g. in family-law relationships for the purpose of protection of the best interest of a child. Provision for the inquisitorial principle in the Draft Law corroborates the readiness and decisiveness of the legislator to protect a whistleblower, as well as the importance that is attached to such protection.

The rule on the absence of the defendant (Article 32) is also provided for and, therefore, if the defendant fails to appear at the hearing for the main hearing, despite being duly summoned, the court may hold the hearing even in the absence of the defendant, as well as rule on the basis of the established facts of the case at the hearing. If we link this rule on the absence of the defendant with the rule on reverse burden of proof, we shall come to the conclusion that, in a situation when a whistleblower makes it probable that he/she has suffered a damaging consequence related to whistleblowing, if the employer as the defendant is not appearing at the hearings, the ruling shall be handed down in favour of the plaintiff.

Further provisions of the Draft Law (Art. 33 - 36) provide the possibility of temporary protection of a whistleblower in the form of the interim measure, so that in the proceedings for protection related to whistleblowing or in special proceedings (in which the legality of an individual act is contested), the court conducting the proceedings may order the interim measure in compliance with the law governing enforcement and security. The motion for ordering the interim measure may be made prior to the initiation of the judicial proceedings, in the course of the judicial proceedings as well as upon closing of the judicial proceedings, until the enforcement is completed. In the course of the proceedings, the court may order the interim measure *ex officio* as well.

As to the content of the motion for ordering the interim measure, the rule is prescribed according to which it may be requested that the court should postpone the legal effect of the act, prohibit taking of a harmful action, as well as order elimination of the consequence caused by the harmful action. The court shall decide on the motion for ordering the interim measure within eight days from the date of receipt of the motion. (Art. 35) No special appeal shall be allowed against the ruling ordering the interim measure.

In a situation when the interim measure is ordered even prior to the initiation of the judicial proceedings, the court of jurisdiction to act on the action related to whistleblowing (high court) shall decide on the same, in which case the court also determines the deadline within which the action must be brought before the court of jurisdiction, taking care of the deadlines determined by separate regulations for bringing an action.

Bearing in mind the actual length of the duration of judicial proceedings, the fact that whistleblowers are predominantly an economically weaker party, this Draft Law also provides for a special temporary protection of whistleblowers in the form of the interim measure, and reinstalling of the worker and/or elimination of detrimental consequences related to whistleblowing prior to initiation, in the course of conducting as well as upon closing of the judicial proceedings, whereby double positive effects are achieved in favour of a whistleblower/associated person:

1. Material circumstances of the whistleblower/associated person are secured in the course of the duration of the judicial proceedings

2. The burden of proof that the harmful labour-law related consequence is not related to whistleblowing is transferred to the employer; the plaintiff should only make it probable that the harmful action against him/her was taken related to whistleblowing.

Intention of the legislator clearly expressed through the presented Draft Law is that as wide circle of persons as possible is covered by the protection that is provided by this Law, that the protection is prompt, which is achieved by the possibility of ordering and extension of the interim measures, as

well as by the rule on reverse onus, in view of the fact that it is clear that employers in a large number of cases are the economically stronger party in lawsuits and that, for this reason, in the past, whistleblowers have not engaged in lawsuits.
We are also emphasising that, during the finalisation of the Law on Free Legal Aid, which is currently in the drafting phase, the possibility will be considered that whistleblowers are entitled to a free-of-charge attorney, in a situation when they are not in a sufficiently good economic position to engage professional aid.
Supervision over the implementation of the Law, in line with Art. 37 of the Draft Law, shall be exercised by the labour inspectorate and/or the administrative inspectorate.

Reward to whistleblower

The Law does not provide for pecuniary reward to a whistleblower. The reasons on which such a solution is based are numerous. Disclosure of corruptive, but also of other potentially dangerous actions, must not be motivated by lucrative reasons.

A pecuniary reward is in a direct collision with moral development and expression of social condemnation of illegal actions, as elements that are the backbone of a healthy system of values that should be established in a society.

Penal provisions

Chapter V of the Law prescribes misdemeanours of the employer – legal entity, the responsible person, and entrepreneur, for violation of material provisions of this Law.

Chapter VI Law – Transitional and Final Provisions (Art. 37 to 39) stipulates that, upon coming into force of this Law, the provisions of Article 56 of the Anti-corruption Agency Act (*Official Gazette of the RoS*, Nos. 97/08, 53/10, 66/11 – US, 67/13 – US and 112/13 – authentic interpretation) and the Rulebook on Protection of a Person Who Reported Suspicious Corruption (*Official Gazette of the RoS*, No. 56/11) shall cease to be valid, stipulates the deadline for adoption of secondary legislation regulations, as well as the coming of the Law into force and the commencement of its implementation.

IV. FINANCIAL RESOURCES REQUIRED FOR THE IMPLEMETATION OF THE LAW

For implementation of this Law, it is necessary to provide additional financial resources in the budget of the Republic of Serbia.