Whistleblowing – a Mechanism for Collecting Data on Non-Compliance with the Principles of Administrative Law in Order to Mitigate Risks

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Abstract: Clear, consistent and predictable rules applicable to the administrative activities of the EU institutions, as well as deepening the EU integration are crucial in order to create a European administrative space. Building on the need to achieving this goal, the paper analyses the object, the procedure applicable, the legal regime and the safeguards granted to whistleblowers, as well as the role of the whistleblowing as a preventive or risk mitigation mechanism for those situations in which non-compliance with the principles of administrative law may affect the validity of documents, the performance of the legal competencies of the institution or citizens` rights. It raises awareness on risks and costs of non-compliance with the principles of the administrative law and good administration standards, as well as on the vulnerabilities and effects it can generate. The document also places whistleblowing in the context of control mechanism available for verifying the compliance of concrete administrative activities with these principles, as a solution to identify and retrieve breaches from within the institution. To draw conclusions, this paper builds on the above analysis and the current Romanian good practice in the field, and frames a series of recommendations for improving the procedure applicable to whistleblowing.

Keywords: public interest; administration; whistleblowing; good administration; risk mitigation

1. Whistleblowing – an International Perspective

Over the constitutional history of nations that have built the contemporary society there are three development periods the governance passes through. In the current period the sovereign people initiates the development of the administration under

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the rule of the new constitution that brought it to power (Wilson, 1887). In this paradigm, the rulers assume the role of officials in the service of the sovereign people and take all necessary efforts to meet people's needs. That is why consulting or participation of the people in the administration becomes one of the guiding principles of modern administrations.

Built on this paradigm, the US administration is the one that offered the widest space for citizen participation in decision making processes, not just as a form of control over the administration, but also as a form of capitalizing their knowledge in the governance process. In this context, protecting the public interest has acquired since the beginning meanings enhanced by the understanding of the need for protecting the general interests of citizens both on the smooth running of the administration in general, and also on the judicious use of public resources generated by the citizens themselves.

Thereby in the Code of US Federal Regulations - the equivalent of an administrative code - in Chapter 5, dedicated to the administrative staff, it is for the first time that a bill prohibits the sanctioning of a federal official if he/she reports a fact about which has data that reasonably suggest a law violation, a misuse of public resources or any abuse (Section 2302, (b) (8), of Chapter 5).

In the European law, the first such law appeared in 1994 in the Anglo-Saxon space, when the Great Britain adopted its own law to protect whistleblowers (Whistleblowers Protection Act). The whistleblower is referred to as a person who makes a complaint about an action contrary to the law, *maladministration*, negligence or misconduct affecting the public or that may represent a danger for the public health and safety, or to the environment (Part I, Section 2 of the Act Object, art. 3).

Within the French zone there are currently more law-like regulations dealing with pieces of whistleblowers protection, but none of them is comprehensive. One such project is being currently in the process of adoption.

Globally, the oldest regulatory dedicated to the whistleblower's protection dates back from 1982, when it was adopted, under the UN aegis, the Termination of Employment Convention, which entered into force in 1985. Among the grounds for unjustified termination of the labor contract, the Convention also includes one related to "the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities" (Art 5 c)).

Later on, the Civil Law Convention on Corruption regulates in its Article No. 9 the Member State obligation to "provide in its internal law for appropriate protection

against any unjustified sanction for employees who, in good faith and based on legitimate suspicions, disclose evidence of corruption to the responsible persons or authorities". The Convention was ratified by Romania by the Law No. 147/2002.

In light of the practice of the European Court of Human Rights in applying Article No. 10 of this Convention on the freedom of expression, and under the pressure of many induced disasters as the result of ignoring complaints made by officials of the institutions of the Member States, The Parliamentary Assembly of the Council of Europe adopted in 2010 the Resolution No. 1729 requiring the Member States to review their national legislation based on a set of principles settled out in that Resolution. From the very first paragraph it is clearly defined that the whistleblowers are those people who draw attention to stop irregularities or other activities which present risks for other human beings, and that the whistleblower's actions represent an opportunity to strengthen the public accountability and the fight against the corruption.

Currently, the most advanced and comprehensive international regulation on whistleblowing is the Recommendation No. 7 from 2014 of the Committee of Ministers of the Council of Europe. According to the same document, reporting or providing information for the public interest refers to those actions or omissions which represent a threat to or are detrimental to the public interest (Principles, letter A and b, Annex). It is worth noting in this document a substantial diversification of the warnings content, thus expanding the scope from law violations to the threatening of the public interest. Along with the mentioned definitions, the document, accompanied by an extensive explanatory memorandum, contains a set of principles and procedural rules that need to be approved by Member States to ensure the mechanism functioning. Thereby, the Recommendation No. 7 becomes the reference standard for necessary regulations to be adopted. Therefore, all the analysis developed in this study in accordance to it. In June 2015 the Parliamentary Assembly of the Council of Europe reiterates the importance of the whistleblowing in public interest to guarantee freedom of expression, right to information, right to work, freedom of conscience, and for fighting corruption, increase transparency and public accountability in a modern democratic society and adopts a new Recommendation (Recommendation No. 2073, 2015). It invites the Committee of Ministers to initiate a process of formulating and adopting a legally binding document on whistleblowing in public interest and on the granted protection to encourage those who make such referrals.

With effects globally, the UN Convention against Corruption , adopted in 2003 in Merida and which came into force in October 2005, stipulates in Article 33 that "each of the member states to incorporate into the national legal system the

necessary measures to guarantee the protection against the unfair treatment applied to any person who reports to the competent authorities, in good faith and based on reasonable grounds, any facts concerning offenses established in accordance with this Convention (that is corruption offenses)". Romania has ratified the UN Convention against Corruption by the Law no. 365/2004.

These international concerns did not have remained extraneous to the European Community, some of them inclusively overlapping in terms of the schedule. Into the *acquis communitaire* plan, the first whistleblower protection regulation follows the UN Convention pattern on the termination by the employer of the of employment agreement. Thus, the Council Directive 2000/78/EC on the equal treatment provides in its Article No. 11 the obligation to protect the workers against retaliations: "The Member States shall introduce into their national legal systems necessary measures to protect workers against dismissal or other adverse treatment by the employer, applied in response to a complaint at the enterprise or any legal action regarding the compliance with principle of equality".

Similarly to the already mentioned regulations, the Commission Regulation from 2014 on the Market Abuse (Regulation (EU) No. 596/2014) stipulates in Article No. 32 the Member States' obligation to "ensure that the competent authorities establish effective mechanisms that enable effective reporting to the competent authorities of the actual breaches or potential of this Regulation". Such mechanisms should include at least "*(a) specific procedures for the receipt of reports of breaches and the measures taken in response to them, including the establishment of secure communication channels for such reports; (b) adequate protection at work for people working under an employment contract and are denouncing breaches or are accused of violations against retaliation, against discrimination or any other types of unfair treatment; and (c) protection of personal data for both the person who reports the breaches as well as of the person who committed the violation, including protection linked to confidentiality regarding their identity, at all stages of the procedure […]*".This Regulation is complemented by the Implementing Directive (EU) 2015/2392 detailing the protection mechanisms and procedures to be followed in such referrals.

Last year, due to the adoption of new regulations on trade secrets (**Directive (EU) 2016/943)**, which according to many experts question the freedom of expression and the opportunity to present warnings in the public interest without risking further sanctions, despite the paragraph 12 of the Directive preamble, the Greens in the European Parliament launched on May 4, 2016 a public debate of the text of a proposal for a Directive on the protection in the European Union of whistleblowers in the public and private sectors.

According to the new document, would be treated as whistleblowers those persons who provide, attempt to provide or are perceived as providing information or evidence which are in the public interest or concern a threat or harm to the public interest, of which they become aware in the context of their labor relations. Worth noting that under this directive it is outlined once more the crucial role of this instrument of the public interest whistleblowing for preventing breaches.

2. The Public Integrity Disclosure Mechanism

2.1. Persons Subject to Protection

It can be seen that the institution of integrity warning emerges between two milestones: on one side are the public interest and its protection in terms of encouraging the insiders to report violations of the law or principles, and on the other hand the guarantee adequate protection for staff serving the public interest by formulating such complaints against any form of discrimination, punishment or retaliation. This dichotomous structure derives from the very form of regulation, some of the approaches being founded on the whistleblower definition or the obligation to provide adequate protection to those who make complaints in the public interest, while others are based on the definition of integrity warning.

The majority of the legislative constructions currently begin to develop procedures to be followed and the procedures for protection starting from the second milestone, that of the individual protection.

From this standpoint, we believe that the integrity warning institution and the protection mechanisms derived from it must be assimilated with the tools for the human rights protection. Thus, the whistleblowing is engrafted to the correct, in the public interest, freedom of speech by citizens engaged in public service, expressing a point of view before the competent authorities about *possible* violations. At this point, the key element is the legitimate and reasonable whistleblower's belief, and of any other person in a similar situation, that data and information in their possession indicate a violation of the law or enshrined principles.

The same institution constitutes an instrument for the protection of labor rights, which cannot be restricted as a result of the warning act or as penalty for it. This assertion constitutes the essence of the US regulation, which firstly establishes legislatively the prohibition of the sanction because of the complaints, and then, later on, regulates the whistleblower protection itself. It follows from this also the defending of the right to adequate protection against retaliation.

One the other hand, we believe that it must be stressed the importance of this mechanism also in terms of the benefits it can bring to the functioning of public administration, for the own administrative procedure and for the administrative act, all materialized in the public interest protection.

Under the US law, the public interest is defined by reference to the items bearing the warning and the list of what must specifically be protected: funds and public resources, public institutions staff, the quality and effectiveness of public services rendered, reputation of the public administration.

The public interest in the European regulations finds its counterpart in "the financial interests of the European Union" and the elements of protection of European foundations: the freedom of movement of workers, goods and services and of the capital.

The Romanian law defines the public interest as those aiming at the rule of law and constitutional democracy, guaranteeing the compliance by the institutions and public authorities of the rights, freedoms and legal interests and fundamental duties of citizens acknowledged by the Constitution, law, and treaties to which Romania is part of, meeting of the community needs, achievement of competence of the public authorities and fulfillment of their duties by respecting the principles of efficiency, effectiveness and economy in the resource spending (Art. 2 (1) (r) of the Law 554/2004; art 4 (c) of the Law 571/2004; art. 4 (c) of the Law 7/2004; art. 4 (c) of the Law 477/2004).

Thus, a mechanism efficiently built can provide substantial remedies ***to prevent*** situations maladministration or violation of the law, especially when they result from the blame or negligence.

This dimension must be reviewed, especially since the majority of the national legislations already stipulate *a legal obligation to inform the criminal authorities*[1] when it is found committing a crime or just *an offense under criminal law* which may not fulfill all the conditions for the existence of a crime. The legal obligation of denouncing the crime remains even more firmly for the heads of the institutions or of the public authorities, or for the control bodies when finding such deeds. Therefore, that obligation has the effect of denunciation of the own managerial shortcomings or of the lack of diligence. The existence of an efficient mechanism of public interest warning provides to the head of the institution an instrument of

[1] Article 267 of the New Penal Code - Omission of notification (1) The civil servant that, having obtained knowledge of the perpetration of an offense under criminal law in relation to the department in which it performs its duties, and fails to immediately notify to the prosecuting authorities is punished [...]; (2) When the offense is committed by fault, the penalty is […].

knowledge and preventive remedial of the administrative procedure elements or of administrative provisions, before they might become a law violation or of the operation principles.

Not in the least, in the light of Article No. 41 of the EU Fundamental Rights Charter, whistleblowing is an instrument to protect citizens' right to good administration.

2.2. Violations of Administrative Law Principles and Standards Applicable to Institutional Proceedings - The Subject of the Referral

Continuing the analysis of national and international normative acts mentioned in the first section, we will find that the object of the integrity warning, respectively those aspects of illegality, negligence, lack of efficiency, discrimination or abuse that may be subject for a public interest complaint for which the whistleblower can benefit from protection, vary widely from one approach to another. Some legal structure, as also is in the Romania's case, deals with the protection in the broadest sense. The subject of warning can be both illegal acts or criminal acts, but also violations of the principles of good governance, of the transparency, efficiency and effectiveness, or violations of the Conduct Code. Other constructions limit the scope of the warning, and therefore the kind of the situations for which might be sought the protection, only to those situations of law violation or facts under criminal law, removing thus substantially from the content of what should be the goal of this institution - to prevent and limit the law breach situations.

Hence, the key elements of the public interest warning's object are those acts or facts which represent by their nature or by the procedure followed, a breach of good administration or a threat to it. It appears necessary to clarify in this context the concept of good governance, whose reverse - *maladministration*, may be subject to an integrity warning.

The British law defines *maladministration* even in his body as an “illegal administrative action, arbitrary, unjust, oppressive, improperly, discriminatory or of an improper purpose” and includes it in the category of things that can represent a warning subject.

The good governance concept is closely linked to that of good administration. The most comprehensive definition is currently the one given by the World Bank, which assumes the rule of law to ensure the safety of citizens, the good administration for the fair use of public funds, accountability and responsibility of

those managing the public affairs and transparency.[1]

In the Community rules, the Article No. 195 of the Treaty establishing the European Community, it is described the role of the European Ombudsman as being that of the assessment of the institutions activities in terms of avoiding and limiting the *maladministration* elements.

The Annual Report of the European Ombudsman says in 1995 that there is *maladministration* if an institution of the European Communities does not act in accordance with the constitutive treaties, do not comply with the rules and principles established by the Court or does not respect fundamental rights. Based on the Ombudsman proposal, the European Parliament adopted in September 2001 the European Code of Good Administrative Behavior.

It should be stressed that ultimately, conclusion of maladministration verifications is never a legal verdict (De Leeuw, 2009). This feature of the control exercised by the Ombudsman, which exceeds the legality aspects, is a common feature for the most of the systems of this kind (Bonnor, 2003). Moreover, the legality control can coexist in the same decision, as shown by the Danish or Swedish Ombudsman's practice, but also that of the European one (De Leeuw, 2009).

According to the European Code of Good Administrative Behavior the European citizen has the right to a good administration. This right includes especially: the right of every person to be heard before an adversely affecting individual measure to be taken against him; the right to access the file concerning him, respecting the legitimate interest of confidentiality and professional and business secrecy; the administration's obligation to justify its decisions; the right to compensation from the Community for damage caused by its agents in carrying out their functions in accordance with the general principles common to the Member States legislations.

Coming back to the two approaches earlier mentioned in this section, among the limiting rules from the perspective of the object of the warning - we found at the moment of 2013 - the legislations of Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Ireland, Italy, Latvia, Malta, Netherlands, Poland, Sweden and Hungary, while those of Bulgaria, Finland, Greece, Lithuania, Portugal, Slovakia and Spain offer a very limited level of protection (Worth, 2013).

Romania, along with Britain, Slovenia and Luxembourg has the most advanced regulations and currently provides the most extensive protection.

The legislative solution adopted by Romania, although preceding the

[1] http://www.apubb.ro/goodgovernancestudies/.

Recommendation No. 7/2014 of the Council of Europe and the European Directive proposal, is consistent with the recommendations made by them: the possibility of reporting the breaches of the principles of good administration, transparency, efficiency and effectiveness, or of the conduct code. It is thus essentially equivalent to what both documents defined as a threat to the public interest whose consequences can still be stopped.

2.3. Legal Regime Applicable to Whistleblowing in Romania

As pointed out in the preceding sections, since 2004 Romania has a legislation devoted to the public interest whistleblowing, grounded on a broad approach and whose elements are found in the majority of recent international regulations titled recommendation.

Law No. 571/2004 (art. 2) is applicable from the *ratione personae* perspective to all the persons engaged in activities that develop in the public authorities and institutions within the frame of the central public administration, of the local public administration, of the Parliament apparatus, the working body of the Presidential Administration, the working apparatus of the Government, of autonomous administrative authorities, public institutions of culture, education, health and social assistance, of national companies, autonomous administrations of national and local interest, as well as national State-owned companies. It therefore follows that the instrument of integrity warning is applicable to all those entities that are using public resources, including those who manage areas and sensitive information - how are the military or intelligence services. This approach is also found explicitly described in the Recommendation No. 7/2014.

The instrument is equally applicable to entities acting as private operators in terms of the market, but which by their nature uses public resources, an approach supported by SGG Order no. 400/2015 on the internal management control.

From the perspective of the legal status of those persons to whom this mechanism is applicable, the law does not distinguish between civil servants and contracted personnel and is applicable to both categories. Consistent with maximal standard used, the law is equally applicable to persons appointed to scientific advisory boards, special commissions and other collegial bodies organized in the structure or within the authorities or public institutions (art 2(2) of the Law 571/2004), whether they are paid or not. Moreover, the legislation expressly provides that the Law No. 571/2004 has special rules and applies mainly to the labor code or the civil servants statute.

Ratione materiae, the law (art. 5 of Law 571/2004) is applicable to those situations when the complaint focuses on denouncing the criminal acts, particularly on the

corruption acts, those assimilated and those in connection with them, as well as service offenses, crimes against the financial interests of the European Communities, preferential or discriminatory practices or treatments in exercising the public entities attributions, violating the provisions on incompatibilities and conflicts of interest, abusive use of material or human resources, the political bias in exercising the prerogatives job, violations of the law on access to information and decision-making transparency, violation of legal provisions on public contracts and grants, incompetence or negligence, non-objective evaluation of personnel recruitment, selection, promotion, demotion and dismissal, *violations of administrative procedures or establishing certain internal procedures by breaking the law; issuing administrative documents or other measures serving to the interests of a group or certain clients, faulty or fraudulent administration of public and private property of public entities, violation of other statutory provisions which require compliance with the principle of sound administration and the protection of public interest.*

Notice therefore that the legislation in Romania offers a very wide range of situations that may be the object of warning of integrity, representing from the administrative perspective a genuine instrument for safeguarding the good administration, provided that it is correctly and effectively applied.

The range is wide also regarding the structures that may receive warnings in the public interest, noting that this list is not exhaustive, nor establishes an order of priority between different structures, nor imposes on them an obligation to investigate the notifications received. The competence for solving complaints remains of the institutions empowered under the civil law, the role of those listed by the Article No. 6 of the law being to take note of these complaints, such that on this basis the people who have expressed those complaints might be protected by the law. May thus receive warnings in the public interest: the hierarchical superior of the offending person; the head of public authority, public institution or budgetary unit where the person who has violated the law is employed, or the head of the public authority where the illegal practice is denounced even if cannot precisely identify the perpetrator; disciplinary commissions or other similar bodies within the public authority, public institution or other establishments where the person who broke the law is employed; judicial bodies; bodies responsible for finding and researching the conflicts of interests and incompatibilities; parliamentary committees; media; professional organizations, trade unions or employers' organizations and NGOs.

There are two levels (Alistar, Stănescu, & Moinescu, 2005) regarding the protection granted to those that formulate warnings in the public interest - one administrative and one judicial. In terms of administration, the law establishes that

the whistleblower has the presumption of good faith benefits, being assumed that the complaint was formulated based on reasonable grounds, without having to effectively demonstrate a breach of the law. Also at the request of the whistleblower, if he/she is called before the disciplinary committee as a result of or in connection with the warning made or for another of his/her deed, he/she may request that the proceedings is made public by the announcement on the website of the institution, under penalty of nullity proceedings. The whistleblower may apply for participation to the procedure alongside a defender, a member of the trade union or professional association and with the presence of the press. If person covered by the whistleblower complaint is the hierarchical superior, directly or indirectly, or has control responsibilities, inspection or assessment of the warning, the whistleblower's identity will be protected.

From the judicial perspective, when the complaints addresses to offenses under the criminal law, there are applicable by default the provisions on witness protection. Where is the subject of the judicial proceedings the cancellation of the penalty imposed to the whistleblower for the formulated complaint, the burden of proving is reversed, it belonging now to the employer who must prove the dishonesty of the whistleblower for making inoperable the protection granted by law. At the same time the court will check the proportionality of the sanction, if this concerns to another deed of the whistleblower, verifies that it is in accordance with the previous institutional practice or has a worse regime, which would be seeking instead to punish the warning itself. In this case the court may go up to the full cancellation of the sanction.

As may be seen from the above analysis, the Romanian legislative approach follows the already recognized pattern, focused on the protection of rights of the person that makes the notification and less on the benefits that this tool could bring from an institutional perspective. Unfortunately, despite it is highly advanced and efficient in terms of legislation, this particularly useful tool for the risk management in public entities remains insufficiently applied in practice due to a limited understanding of its benefits.

3. Preventing or Minimizing Threats, Vulnerabilities, Risks and Costs - The Benefits of Whistleblowing

Starting from the analysis of the elements that might be the subject of the public interest whistleblowing, we can identify a number of risks that may be prevented by the use of this instrument, or on the contrary how by non-using it can be irreparably affected an entity's activities.

Depending on the form of liability which they may entail all these risk categories are divided as follows.

A first risk category is determined by the breaches of rules governing the exercise regime of a certain activity, such it is the sanitary veterinary permit for the functioning of a school. The consequence of the non-compliance may inclusively be the cessation of the activity itself, with many other bad effects both for the community it serves that entity as well as for its employees who remain jobless, therefore without income, or who continue to work under more arduous conditions, and very often with much higher costs. While the use of warning to signal the failure of the approval can prevent such situations, the non-use can have much more dramatic consequences. In the preceding example, failure to comply with detailed rules governing the system for the exercise of the activity may overlook items related to the interior space safety or the building's security features that may endanger the lives of those who participate in activities. Producing such a risk may rise to criminal liability of the head of the institution or entity and those responsible for ensuring of the operating conditions. From the perspective of the administrative procedure, such situations can be translated into the non-compliance with the own rules and standards of each activity, and also into the non-compliance with the elements for the exercise of the activity with professionalism, for protecting the public interest, by taking into consideration of all relevant elements and by the listening of all the stakeholders in an appropriate timeframe.

In the institutional practice, there are countless situations where the idea of the appropriate timeframe is applied improperly, sometimes for reasons of legislative constraints, sometimes in pure procedural reasons, which could be corrected by using the integrity warning mechanism. In situations when, for example, several institutions are called upon to rule on certain interdependent issues it is necessary that, at operational level, the each institution's procedures to take into account the others constraints. The environmental permits for example, may not have a validity period less than the minimum period for obtaining permits for construction.

A different category of risks arises from the infringement of the rules applicable to certain categories of actions irrespective of the identity of the entity, such as the public procurement procedure for the purchases exceeding certain thresholds (Law 98/2016) or from the infringement of the rules of decisional transparency for the adopted acts (Law 52/2003). Either of these situations questions the legality of acts adopted and may entail the invalidity of those provisions elaborated through the law breach.

The likelihood is high for occurring financial impacts from this nullity, whether for the compensation of the damages caused by the adopted act, or for the damage caused by affecting the legitimate interests of a bidder. The same risk category may also affect the access to sources of financing, such as for infrastructure projects, where the successive calendar delays, including as a result of the finding of nullity or cancellation certain acts or procurement procedures, lead not only to the failure to fulfill the granted works, but also to the obligation for returning, for failure to

follow the contractual terms, of the funds already spent. Such a situation is likely to grow exponentially the financial burden and to affect the administrative capacity of the target institution, and also the right to effective and judicious management of public finances at which citizens are taxpayers.

Similarly the foregoing, the nullity of acts affects any action taken by an entity that does not comply with the public order regulations prescribed by law, irrespective that the law stating expressly in his body or not that penalty. The penalty is that of the absolute nullity whenever the non-compliance with the law is likely to affect the public interest.

Another risk with financial implications might result from non-compliance with the principles of efficiency and economy in the use of public funds, noted by Court of Auditors in its audit missions. The Court of Auditors shall exercise control over the formation, administration and use of the financial resources of the state and of the public sector (art 140 of the Constitution; Law 94/1992).

These institutional risks are not outside the field of personal responsibility. Each of these risks may entail disciplinary, administrative, civil or criminal liability of the head of institution and the responsible persons.

It constitutes misbehavior the breach, by the officials responsible for this, of the norms on decisional transparency and access to public information (art. 15 of Law 52/2003; art. 21 of Law 544/2001). Misbehavior is equally the failure to comply with the code of conduct of civil servants or contractual staff of public authorities and institutions (art.23 of Law 7/2004; art. 24 of Law 477/2004), codes whose essence lies precisely in enunciating the principles that should govern their work.

Last but not least, the breach of internal procedures and regulations or of the organization rules and operation represents a disciplinary offense for the civil servants as well as for the contractual staff (art. 77 of Law 188/1999; art. 247 of the Labor Code).

Regarding the liability offenses, an example is the failure of the statements of assets and interests submission within, which also could be avoided if within the establishment there would be an effective warning mechanism in the public interest that would report on such situation (art. 29 of Law 176/2010). In a similar way, the warning can help prevent situations where a person under a conflict of interest participate in decisions making that thus become cancellable, and allows him refrain or to be objected in order to avoid the already mentioned consequences.

Regarding the civil liability, both the Romanian Constitution and Law No. 554/2004 on the administrative litigation and Civil Service Regulations or Labor Code, provide for the financial liability of those who are found to be guilty of infringement of the rules, internal procedures and principles, in a situation in which occurred a harm of a legitimate interest. When such damage is the result of

carrying out orders or provisions of service they provide which are unlawful or by employing the legal or administrative procedures applying to the public authority or institution in which they are employed, the person cannot be sanctioned. Whistleblowing is an initial instrument through which such situations may be subject to notification and it can prevent the liability of that person. The warning can equally be used to remedy those aspects of administrative procedure that are harmful.

Not in the least, whistleblowing may prevent or limit the effects of an offense under the criminal law. The criminal liability is personal and can be engaged both for the executive staff as well as for the management staff for deeds committed during or in connection with fulfilling their duties, the criminal liability for corruption being the best known currently.

Along with the administrative or criminal liability, the different forms of violation of law or breaching of the principles of sound administration may also lead to additional sanctions concerning the prohibition for holding public office for a certain period.

Returning to the institutional forms of liability, recall that according to the Romanian Penal Code, the legal persons are criminally responsible, together with the individuals that represent them or that are guilty of deeds under the criminal law. In these cases, criminal liability may go from the fine penalty and the prohibition for participation in tenders for a maximum period of 5 years, until its dissolution. It is mentioned that although for the Romanian case the law of the integrity warning is applicable only to the public sector bodies or those with public capital, among them are found commercial companies to whom such penalties or risks are alike incidents.

Responsibility of the management staff of an entity, of its managers can also be engaged for two distinct elements: for unlawful orders or provisions which they make or for lack of due diligence in preventing law infringements.

Concerning liability for lack of diligence of the head of the institution, it is established by the Government Ordinance No. 119/1999 (art. 3, 4, 5 (2^1) and 27), but also through less obvious forms of liability such as the liability engaged as a result of the control of the Control Body of the Prime Minister or of the ministers, the reports presented to the Parliament by the various institutions under its control, and the reports submitted by the Ombudsman or by the prefect when exercising the right of administrative guardianship.

It should also be noted that the liability may be engaged when the head of institution refuses to perform certain acts, which although are not assigned to him directly, depend on his/ her approval - for example communication of public information or provision of information at the request of the National Integrity

Agency.

Not least, the heads of institutions may be held liable for the failure to fulfill the court decisions that impose obligations to the entities they represent.

The integrity warning can provide an alarm signal, thus enabling the head of institution to remedy the situation before it produces effects, in all cases mentioned above.

4. Conclusions

It's a fact that the public official or the contractual employee, which is a the person into an employment or service relationship with a public or private entity, has access to information and acquaints, unavoidably sometimes, of administrative activities otherwise inaccessible to third parties or for the general public. Sometimes these people can observe misconduct, irregularity of the functioning and principles governing the procedural correctness and the proper administration.

Awareness of the need to protect the public interest by avoiding risks, vulnerabilities and of the costs arising from breach of the principles and standards of good governance, imposes the whistleblowing not only as a professional duty, but also one civic and moral at the same time.

Encouraging the use of this mechanism to control the regularity of the application of the principles of procedural fairness, individually or through international conventions the Member States have adopted appropriate regulations.

The majority of the legislative constructions begins, currently, with the issue of the whistleblower’s individual protection and further develops the procedures to be followed and the means of protection.

From this perspective, we believe that the institution of public interest whistleblowing and the protection mechanisms derived from it must be assimilated to the human rights protection tools. Whistleblowing is thus engrafted onto the correct, in the public interest, freedom of speech of the citizens engaged in public service, expressing a point of view before the competent authorities regarding possible breaches of the law. The whistleblower's legitimate and reasonable belief, or that of any person in a similar situation, that data and information in its possession indicate a violation of law or principles enshrined, represents the key element at this point.

Policy of encouraging public interest whistleblowing, combined with an adequate protection granted to the whistleblower, may constitute an instrument for reducing

the *black figure of irregularities*, which erodes the proper administration of the public affairs.

We think that in Romania is necessary that this instrument become urgently operational for both the prevention of tragedies with irreparable consequences, as well as for the increase of the trust capital into the public sector structures by supporting an effective operation and by limiting the irregularities.

In this regard, in light of the SGG Order No. 400/2015, we propose the followings as benchmarks of the operational procedure on the public interest whistleblowing:

Development of credible mechanisms for taking over the allegations, which offer sufficient guarantees to protect the identity of the person who filed the complaint, without the abandoning thereby the requirement of declaring the identity. Such mechanisms may include: electronic systems that hide the addresses from which the complaints originate, these being verified only in exceptional cases; the outsourcing of services for the complaints takeover by entities which by law are entitled to receive complaints, but are not part of institutional hierarchy – NGOs, professional organizations, trade unions or employers organizations.

Appointment of a structure within the institution responsible for analyzing complaints, identify risks and vulnerabilities and formulate remedial measures. That structure must be directly subordinate to the head of institution and not be in any hierarchical relationships with the other structures (juridical, human resources, internal audit), to enjoy independence and to facilitate the collaboration with them. In this regard, it can be expanded the power of the Ethics Counselor established by the Law No. 50/2007 and also clarified its position into the organization.

Setting the professional obligation of reporting on systemic route first and only in exceptional cases on the external channels, respectively when the internal complaint could prejudice the course of investigations, or it concerns the head of institution or even to the person responsible for taking complaints. By law, reporting can be done in any situation cumulatively to the institutions referred to therein.

Implementation of a mechanism for answering the warnings received, that encompasses the remedial measures ordered. Using the model of the integrity incidents mechanism formulated by the National Anticorruption Strategy 2012-2015, the institution will create a public register of risks and vulnerabilities identified as a result of whistleblowing, the measures taken to remedy them and

who are the responsible for their fulfillment, periodically reporting on the progress of their application.

Providing expert advice, possibly in partnership with civil society, for individuals who want to make public interest warnings.

We consider that a procedure as that outlined above is such to ensure the transparent nature of the action for reporting irregularities by employees, is able to eliminate the denouncement suspicion and to configure the warning as the exercising of professional duties.

To ensure the full functionality of this scheme, the employees that report breaches on which they know directly or indirectly, should effectively benefit of the protection against any discrimination or abuses, and the managers should be obliged to undertake the appropriate investigations in order to elucidate the facts mentioned and to order the necessary measures.

Considering the above recommendations, a different paper is considered in order to further detail their implementation, altogether with an analysis of the legal nature of the disclosure, in order to determine the applicable legislation and the responsible structures within a public institution to handling it.

5. References

Alistar, V.; Stănescu, I. & Moinescu, G. (2005). *Guide on the whistleblower protection.* Bucharest: Publisher Afir, http://www.transparency.org.ro/publicatii/ghiduri/GProtectieAvertizori.pdf.

***(2014). Annex of the Recommendation CM/Rec, 7.

***Termination of Employment Convention, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312303.

Bonnor, P. (2003). Ombudsman and the development of Public Law. *European Public Law*, Vol. 9, No. 2, pp. 237-267, p. 247. In De Leeuw, M. (2009). An empirical study into the norms of good administration as operated by the European Ombudsman in the field of tenders, *EUI Working Papers*, RSCAS 2009/20 Robert Schuman for Advanced Studies, p. 5.

***Code of Federal Regulations, http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section2302&num=0&edition=prelim.

***Council of Europe, Civil Law Convention on Corruption, Strasbourg 4.11.1999.

***(2000). Council of the European Union, the Council Directive of November 27th, 2000 on the elaboration of a general framework for ensuring equal employment opportunities and for equal labour conditions, 2000/78/EC.

De Leeuw, M, An empirical study into the norms of good administration as operated by the European Ombudsman in the field of tenders, EUI Working Papers, RSCAS 2009/20 Robert Schuman for Advanced Studies, p. 3; sursa: http://cadmus.eui.eu/bitstream/handle/1814/11234/EUI_RSCAS_2009_20.pdf?sequence=3.

Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure**,** http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0943&from=EN.

***(1995). European Ombudsman Annual Report, p. 6.

***Resolution No. 1729/2010 of the Parliamentary Assembly of the Council of Europe; http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851&lang=en.

***Recommendation No. 7/2014 of the Committee of Ministers of the Council of Europe, http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec%282014%297E.pdf.

Proposal for a Directive on the protection in the European Union of whistleblowers in the public and private sectors; http://www.greens-efa.eu/the-right-to-speak-out-15199.html; http://www.greens-efa.eu/fileadmin/dam/Images/Transparency_campaign/WB_directive_draft_for_consultation_launch_May_2016.pdf.

***Law 176/2010 regarding the integrity in exercising public functions and dignities.

***Law 188/1999 regarding the status of civil servants.

***Law 94/1992 on the organization and functioning of the Court of Accounts.

***Law No. 477/2004 on the Code of Conduct for contractual staff of public authorities and institutions.

***Law No. 50/2007 for amending and supplementing the Law No. 7/2004 on the Civil Servants Conduct Code.

***Law no. 52/2003 on decisional transparency in the public administration.

***Law no. 53/2011 on the Labor Code.

***Law no. 544/2001 on free access to public information.

***Law No. 554/2004 on administrative proceedings.

***Law No. 571/2004 on whistleblowers' protection.

***Law No. 7/2004 on the Code of Conduct for civil servants.

***Law no. 98/2016 on public procurement.

***New Penal Code.

***Order of the General Secretariat of the Government No. 400/2015 approving the management Internal Control Code of the public entities.

***Ordinance No. 119/1999 on the intern management control and the preventiv financial control.

***Recommendation No. 2073 (2015) on whistleblowers protection improvement, http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMTkzNiZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIxOTM2.

***Regulation (EU) No. 596/2014 of the European Parliament and of the Council of April 16th, 2014 on the market abuse (market abuse regulation) and for repealing the Directive 2003/6/EC of the European Parliament and of the Council and for repealing the Commission's Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32014R0596&from=EN.

***Romanian Constitution.

***Whistleblowers Protection Act 1994.

Wilson, W. (1887). The study of administration. *Political Science Quarterly*, Vol. 2, No. 2 (Jun 1887), p. 204, source: www.jstor.org.

Worth, M. (2013). *Whistleblowing in Europe. Legal Protections for Whistleblowers in the EU, Transparency International*, p. 10. http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu.