

WHISTLE BLOWING IN ROMANIA

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Abstract: The paper has three main objectives. The first of these aims to clarify the term and the motivations behind such actions. The second objective is to circumscribe the identification of the legislative and institutional elements regarding whistle blowing, currently existing in Romania. The third objective involves comparative analysis of three cases in the Romanian economy likely to be classified as whistle blowing.

JEL classification: D73, D82, K10, K42

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Introduction

Whistle blowing is a term which does not have an appropriate equivalent in Romanian (in fact in any other languages, and it is usually taken as such). Could we translate it by "denunciation"? To some extent I think so, from the Latin "denuntiare" – to publicly announce. Meanings of the concept of "denunciation" are but many, among them being and that of "turning-in", "tipping-off". Although 20 years have passed since the revolution in Romania and even if in Romania convictions for such offence were not decided by any court (just some rather spectacular moral obloquy), the collective mind, however, held the charge of turning-in (to the former secret police) as a very serious one, which, although it does not generate legal consequences, leads to opprobrium.

Whistle-blowing has nothing to do with this reprehensible action, but rather wants to be an ethical action, but that is difficult to explain in a Romania which is marked by certain social sequelae, due to the nearly five decades of totalitarianism. The conditions under which they could identify, after 1989, about 500,000 cases of informants (figure which some consider to be small compared with the real number, as some of the informants were protected because of their membership of the Romanian Communist Party) is not difficult to understand such sensitivity.

Pleading for the "respectability", "civic values" of the whistle blowing in the Romanian society is even more difficult as not even in countries with some tradition of business ethics, whistle blowing is not free of some controversy. And in these societies, more "settled-in", the whistleblower is considered, at the limits, either a civic hero or a traitor (to his employer, to colleagues).

Whistle blowing defined

The literature has not outlined a single definition of whistle blowing.

Next we will try to identify the most significant approaches to the concept in Romanian and foreign literature, then we will extract a few elements aimed to lead to an agreement as comprehensive as possible.

Near and Miceli (1985, p. 4) define whistle blowing in this way:

"The disclosure by organization members (former or current) of illegal or illegitimate practices under the control of their employer to persons or organizations that may be able to effect action." (quoted by Nam and Lemak, 2007)

In another work, Near and Miceli (1992) come with further clarification regarding the whistleblower and the whistle blowing:

- the whistleblower does not have authority to solve the problem that he signals;
- the warning must be made by a person or organization who has authority to intervene in resolving the reported problem (the whistleblower may discuss with colleagues, family or friends, but it is not a whistle blowing action since the parties indicated hereof cannot correct problem);
- whistle-blowing can be considered a process that involves crossing several stages;
- the whistle blower must inform regarding a question of morality, legality (e.g. the action of an employee to disclose to the press that the company has not accepted a cheaper technological proposal is not whistle blowing).

Jubb (1999) gives a definition which introduces some nuances:

"Whistle blowing is a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization, to an external entity having potential to rectify the wrongdoing." (quoted by Brennan and Kelly).

In Romanian literature, Ionescu et al. (2006) considers that whistle blowing means "disclosure by a member or former member of an organization of information that highlight immoral and/or illegal behavior of that organization, conduct that was maintained secret until then and which affects or could affect the future interests of the community or society generally."

The authors set several milestones of action:

- it is triggered from within the organization, and can be achieved only by someone who belongs or belonged to the organization;
- information must exist as such, i.e. to have a subject (the simple dissent or adverse opinion of an employee from his company is not whistle blowing);
- the disclosed information must be of public importance, and not personal;
- the information must be transmitted to other communication channels than those normally used by the company;
- the information should be revealed in a way as to produce the desired change;
- revealing the information should be made voluntarily and not due to a legal obligation;
- it can be seen as a moral protest, aimed at correcting certain deficiencies or misconduct and not as a revenge or for personal benefits.

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Crăciun et al. (2005) define whistle blowing as a "gesture of an employee to publish the infractions of the law by the company they work for, infractions that company managers would like to keep as far as possible from public opinion."

Next we will insert a matrix, which can be used in defining the concept. The matrix was made by Vandekerckhove (2006), taking a part of Jubb's approach, which introduced an additional element, that is the whistleblower's motivation

Table no. 1 Matrix of possible whistle blowing definitions

Element	Description	Qualifier
Act	Disclosure	Intended/Unintended Authorized/Unauthorized Obligatory/non-obligatory Role prescribed/non role prescribed
Outcome	On public record Not on public record	Anonymous/identified Anonymous/identified
Actor	Employee Organization member Person with privileged access to organization's data or information	Internal auditor Ethics officer Other Past/present Past/present
Motive	Altruism Egoism	Further the public interest without personal benefits Further the public interest without personal benefits because of personal benefits furthering the public interest
Subject	Illegality Immoral acts Specific contraventions (e.g. code of conduct) Wrongdoing	Trivial/non/trivial Actual/Past/Potential Trivial/non/trivial Actual/Past/Potential Trivial/non/trivial Actual/Past/Potential Trivial/non/trivial Actual/Past/Potential
Target	Occurs in the organization In control of organization or involving organization Involving a member of the organization	In function/out of function
Recipient	Internal authorities External authorities Media	Following formalized or conventional lines of communication By-passing formalized or conventional lines of communication

It is noted that all definitions circumscribe to this matrix. Finally, regarding this matrix, we wish to make a final statement concerning the recipient of the message of the denunciation. In the literature it is discussed to what extent it can also be internal. Although there are sufficient authors which consider that a genuine whistle blowing action is only that in which the warning is made by an agent from outside the

organization, or authors who advance the idea that the denunciation within an organization is only a step in the process of whistle blowing, the view that seems to be generalized is that we can talk about two types of whistle blowing, internal and external.

Legislation on whistle blowing in Romania

The first pieces of legislation on whistle blowing, or more correctly, referring to actions that can be assimilated to a certain extent with whistle-blowing are in the Labour Code. In it references are made to the confidentiality clause and to the obligation of fidelity to the employer and maintaining the work secrecy. The relevant articles in this regard are inserted below:

"Art 26. [Confidentiality Clause]

(1) By the Confidentiality Clause the parties agree, all along the duration of the individual employment contract and after its termination, not to transmit data or information they learned during the performance of the contract, in the conditions decided in the internal regulations, in the collective labor agreements or in the individual employment contracts.

(2) Violation of this clause by either party attracts obligation of the party at fault to pay damages.

Article 39. [main rights and obligations of the employee]

(2) The employee has, essentially, the following obligations (...):

d) the obligation of fidelity to the employer in performing duties; (...)

f) the obligation to respect work secrecy. "

The Confidentiality clause is optional, and it is not part of the category of mandatory terms of employment. It can be stated in the contract only after the parties agreed on its content (data or information which may not be disclosed). The Confidentiality clause and work secrecy do not operate regarding the information concerning the conduct of the employer of illegal activities.

An important legislative deadlock in the way of action of whistle blowing is the Law 182/2002 on classified information. The law was very challenged during its discussion by Parliament and later, when by changing it, access to such information of the lawmakers was permitted. We will synthesize the critics that have been made: opposition to rules of the European standard (Recommendation 2/2002 of the Committee of Ministers of the Council of Europe on access to official documents; Recommendation 1402/1999 of the Parliamentary Assembly of the Council of Europe on the control of internal security services); forced inclusion of areas within the national security (public investment, scientific and technological research); lack of obligation of the public authorities and institutions possessing classified information to periodically review the grading; the lack of definition of the concept of "public interest".

For our field of interest is relevant Matei Brătianu's statement, Secretary General of National Syndicate Bloc (BNS): *"The Government has introduced Omerta in Romania. Meaning syndicalists, and not only, risk prison if they signal corruption, illegality or abuse of senior officials."* (www.ziua.net)

Apparently the actions of whistle blowing are blocked rather than stimulated by the national legislation. Employees who would intend to use such behavior must be very persistent in seeking "loopholes" in the legislation, which would not bring administrative penalty or criminal wrongdoing. Fortunately, the pressures of international bodies to harmonize the Romanian legislation on corruption with that of

other countries who have succeeded in having a certain grasp of the phenomenon, also brought in the Romanian "landscape" a few acts that a whistleblower can rely on in his defence from certain penalties.

One of these laws is Law. 365/2004 for the ratification of UN Convention against Corruption, adopted in New York on October 31, 2003. In Article 33 it states:

“Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention”.

And also, Article 39, paragraph 2 provides that:

„Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention..”

At the level of the Council of Europe two conventions on corruption, Criminal Convention and Civil Convention have been developed in which they refer to actions that can be classified as whistle blowing.

The two conventions were ratified by Romania and transposed into national law. Thus the Criminal Convention is subject to Law 27/2002. In it, Article 22 refers to the protection of witnesses and collaborators of justice:

„Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

a. those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;

b. witnesses who give testimony concerning these offences.”

Civil Convention on Corruption was transposed into law 147/2002. Article 9 stipulates the elements of the protection of employees:

„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.”

If the above normative acts are only reference by association to whistle blowing, Romania has a strict law for the Whistleblowers (true, only in the public sector), the Law 571/2004. Under this law the term whistleblower is not used, which is translated by warning of integrity. We will continue to emphasize a few key elements of that law.

First, the warning of integrity is defined as that persons who informs in good faith violations of law, and can be: a public official, personnel operating on the basis of special status: doctors, teachers, police, court clerks, priests, etc..

Under Article 4, the principles governing the protection of the public warning are: the principle of legality, the principle of public interest supremacy, the principle of responsibility, the principle of abusive non-punishment [proportionality], the principle of good administration, principle of good behavior, the principle of balance [mitigation], principle of good faith.

Under Article 5 the warning may be done for:

“a) corruption offences, infringements assimilated to corruption offences, infringements directly connected to the corruption offences, offence of fraud and workplace offences or related to the workplace;

b) offences against financial interests of the European Communities;

c) practices or preferential or discriminating treatments in exercising the duties of the public units;

d) the breach of the provisions concerning the incompatibilities and conflicts of interest;

e) the abusive use of the material or human resources;

f) the political bias in exercising the job prerogatives, except the persons elected or assigned on a political basis;

g) violations of law concerning the access to information and of the decisional transparency;

h) breach of the legal provisions concerning public procurements and the non-returnable financing;

i) incompetence or on-the-job negligence;

j) non-objective assessments of the staff in the process of recruitment, selection, promotion, demoting and dismissal from the position;

k) breaches of the administrative procedures or establishing certain internal procedures by non-observing the law;

l) issuance of administrative or other type of documents serving to group interests or to clients;

m) faulty or fraudulent administration of the public and private patrimony of the public authorities, public institutions and of the other public units;

n) breach of other legal provisions, requiring the observance of the principle of a good administration and that of the protection of public interest.”

The referral can be made, alternately or cumulatively, to the:

“a) to the hierarchical superior of the person having breached the legal provisions;

b) to the manager of the public authority, of the public institution or budgetary unit within which the person having breached the legal provisions is employed, or within which the illegal practice is notified, even if the author cannot be identified;

c) to the discipline committees or to other similar bodies within the public authorities or public institution within which the person having violated the law according is employed;

d) to the judicial bodies;

e) to the bodies in charge with finding and researching the conflicts of interests and of incompatibilities;

f) to the parliamentary commissions;

g) to mass-media;

h) to the professional, trade union or employers' organizations;

i) to non-government organizations.”

In the final part the legislative act provides some measures to protect the integrity of the whistleblowers.

This law regulates, in our opinion, sufficiently well the problematic of whistleblowing. Unfortunately, the law refers only to public establishments. Non-governmental organizations and media should exert pressure for the adoption of such legislation also in the private sector, just as prone to such slippage.

Whistle blowing or not?

Next we will analyze three situations that could be classified as whistle blowing. In each case we will reveal to what extent elements of this type of behavior are found, as previously defined.

The first situation is described in a letter to Senator Iulian Urban, found on his personal website:

"I read the article about the theft to the pumps of Petrom. I was an employee of Petrom and I want to tell you how to steal from the pump and what is in fact the business. That is why I want to hide my identity (...).

It is really a business in three: Metrology representative - employees of the distribution stations - tank drivers.

In the presence of representatives from County Metrology you intentionally adjust the flow of the pump so that it is a little increased, and he signs the Metrology Inspection, after which he receives his share. So those in the station are covered from any claim, presenting the valid Metrology Inspection. Thus the quantity theoretically sold is greater than the actual amount sold, hence the extra fuel in the tank. In the old stations that quantity can be relatively easily extracted from the tank with a hand pump, but the tanks in the new station do not allow this, it is almost impossible to extract fuel from the tank by anything other than the pump. And here is where the tanker drivers come in. When they supply the tank they don't download the whole amount of fuel from the tank, in agreement with the manager or in agreement with the head of the station, the driver is allowed a certain amount of tank fuel, which then is sold in black by the tank driver or here probably the branch networks, for it is, in the end, a question of tonnes of fuel.

I know that these things happen and I could not remain indifferent, the are people who make impressive fortunes on the back of the consumer."

The second case that we intend to analyze refers to a situation which took place in the summer of 2008. During the maturity exam, Gheorghe Rădulescu, a teacher from the School "George Enescu" in Bucharest, President of the Agency for the Evaluation and Quality Assurance of Education (AEACE) - an independent organization, established within the University Foundation Bioterra Bucharest (a private university), has complained several times that the essays of the Romanian language exam were heavily copied. 15 papers were identical, with whole passages copied from the books with the solved subjects. The Baccalaureate Committee Chairman of the Centre for Assessment of the School no. 128, where the problem occurred, did not telephonically notify the Ministry regarding the fraud referred to, as the rules of conduct provided.

Probably due to this lack of response, Professor Gheorghe Rădulescu held several press conferences, making the disclosures indicated above and brought some evidence to support his allegations.

The Ministry of Education denied the allegations and said that George Rădulescu corrected only 17 of the 60 works which were intended for him, and not over 50, as he claimed.

"Also, he graded each paper with grades from 2 to 10, as shown in the schedule for correction, which ruled out the fact that they were" Xeroxed ". Otherwise, the grades would have to be identical. At the same time, this information refuted his assertion that he had not graded the papers" stated the MECT communiqué.

Subsequently, Gheorghe Rădulescu, was brought before a disciplinary committee of the Bucharest School Inspectorate, being accused of disclosing

confidential information. The School Inspectorate claimed that irregularities were found on the technical procedures for informing the authorities. In the report finalized two counts were registered. The teacher has not notified in writing the Committee Chairman and forgot to sign the minutes of turning in the papers.

Baccalaureate went on smoothly and without any action taken against those whose works had stirred those discussions. The second teacher correcting the papers, which had the same 60 works, said on his own responsibility that the incriminated papers were not identical. The only thing similar about them were the phrases learned in school, a normal thing when exam students learn using the same materials or studied in high school in the same teacher's class. And he graded the papers between 2 and 9.60, which, according to MECT, was a sufficient demonstration that the papers were not copied.

Returning to Professor Gheorghe Radulescu, the penalty appears to have been limited to suspension from the Commission of that year's Baccalaureate (MECT even claimed that the teacher made a call for withdrawal, which was approved). The last case is placed in the Ambulance Service Gorj. Jana Prejbeanu, Gorj Ambulance Manager, said on October 31, 2008, for Omega radio, a local station in the town of Târgu Jiu, that some doctors have taken leave illegally, they stayed more home than at work. Prejbeanu says that often, those doctors refuse to go to interventions, even when very serious cases are registered.

The Gorj Ambulance Chief also announced that she has decided that on the first inspection by the Ministry of Health, to put on the table of the ministerial committee, the way in which some subordinates do their job and how, but also the way in which certain health professionals were hired between 2004 - 2006, a period during which the institution had a different leadership. Having won the contest for leadership of the ambulance service, Jana Prejbeanu mentioned that she wanted to clarify in regards to interventions and expanding use of gas road maps. Here also some irregularities were discovered and publicly displayed by Jana Prejbeanu "doctors increased consumption of gasoline in writing. During the previous management, the monthly fuel used by the Ambulance was worth 1.2 billion lei (the litre of gasoline was only 2.6 lei), and when she took charge of the unit, costs and consumption fell to only 800 million lei, given that the litre of petrol reached almost 4 lei.

The three cases will be considered briefly in terms of definitions inserted in the first part and in the light of Law 571/2004, two of the cases found were from the public sector.

The first action, covering the company Petrom makes reference to illegal acts, of public importance. The agent to which the information was revealed is a senator of Romania, and in principle, has some leverage to intervene in regulating the situation.

Among the issues we can discuss in the first instance, to what extent the facts found are real. The employee does not give his name (although this is not necessarily a prerequisite for whistle blowing) and sends a message on a web page (access on this page can be achieved freely, being open to anyone, it is clear that one can question the status of former employee - a condition necessary to discuss the whistle blowing).

With regard to whistle blower's motives, it raises two issues. If we accept that we are dealing with a former employee, under what conditions did he leave Petrom? This may be a revenge (according to his statement, the gesture is motivated by the fact that he can not remain indifferent to how certain people make fortunes on the backs of the consumer)? The lateness intervention can not be overlooked. Why did he wait for

someone else to raise that issue (in terms of principles of ethics, but also legally)? Why did he not make disclosures (in the media, the judicial organs) when the left Petrom and the threat of retaliation disappeared?

Considering all these factors our conclusion is that the information is too brief and too little verifiable to speak about whistle blowing.

The second case seems simpler. The action claimed by Professor Gheorghe Radulescu is a pretty serious one (as moral issue, but also legally), undoubtedly of public interest. The problem is real and the denouncer brought to the press conferences some evidence (quotations from the works incriminated). The gesture seems a moral protest, without any selfish connotation. Gheorghe Radulescu, an insider of that Examination Committee, did not have the authority to fix the problem and warned President of the Commission before coming to the press (even if not in writing), who concealed that information, not informing the Ministry of Education. The disclosure of the irregularity is done during the course of the exam, so that makes a late intervention to correct the situation. The conclusion is clear: we are dealing with an act of whistle blowing. But do we maintain this position if we learn that only a few months after this incident Professor Gheorghe Radulescu was entered as an independent in parliamentary elections?

The last case is rather hilarious. Of whistle blowing we can't even speak. Jana Prejbeanu has the authority to solve the problems referred to (serious, it is true) and, moreover, has a legal obligation to immediately alert the competent organs of the irregularities found.

Conclusions

Whistle-blowing remains a concept in whose perimeter of definition there are still many areas of penumbra, induced by the many nuances that can occur in concrete actions.

In Romania, although the term is quasi-unknown, especially in practice, in business, by employees and managers, the law is surprisingly quite complete (with some gaps in terms of the private sector).

The analysis of three potential cases of whistle blowing reveals that classification requires more subtlety from a "judge", may he be objective and not involved, and a lot of information. The most delicate issue is, in our opinion, proper diagnosis of the whistle blower's good faith that is identifying the true motivations, and implicitly cataloguing him as such. Their hidden character can not be penetrated judging circumstantially. It requires a deeper analysis, a broader framework, extended to behavioral history of the individual in this situation, the history of his relations with the company, the degree of involvement in acts that he wishes to denounce.

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