

# INSTITUTION OF WHISTLEBLOWERS: CHARACTERISTIC FEATURES AND GUARANTEES OF PROTECTION

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## ABSTRACT

*The article discloses the features of the institution of whistleblowers as persons who report the commitment of corruption offenses, in particular, some issues of functioning and legislative regulation in the United States, the Netherlands and Montenegro. The current international standards for securing guarantees for the protection of whistleblowers were studied. An attention was paid to the regulation of the issue of guarantees of the protection of whistleblowers, as defined by the UN Convention against Corruption, as well as the UN Criminal and Civil Conventions against Corruption. The features of the work on establishment of a regulatory framework for ensuring the protection of whistleblowers carried out by the G20 were outlined. In studying the issues of international legal regulation of the protection of whistleblowers, special attention was paid to a number of documents of the Council of Europe. The absence of a normative document at the EU level to regulate the protection of whistleblowers was emphasized; however, the priority direction was defined with the approval of the Directive, which would secure the guarantees of protection of such persons. The legal framework for the protection of whistleblowers in Ukraine was determined and innovations in this area were identified with the adoption of the draft law “On the protection of whistleblowers”.*

**Keywords:** Corruption, Whistleblowers, Guarantees for the Protection of Whistleblowers.

## INTRODUCTION

Corruption as a negative phenomenon hampers the democratic and economic development of any state, and the experience of a number of states of the world indicates the existence of a number of factors contributing to the spread of corruption (Kulish et al., 2018). At the same time, it is precisely countering the commitment of corruption actions by persons using the official or related powers assigned to them that requires the use of an effective mechanism to combat this negative phenomenon. In the process of preventing and combating corruption, an important place is given to the institution of whistleblowers.

Use of the institution of whistleblowers in the fight against corruption as a negative unlawful social phenomenon is impossible without the appropriate support from the state. In this

context, the issue of the protection of persons assisting in the prevention and counteraction of corruption is of particular relevance.

In the developed countries of the European Union, the use of the institution of whistleblowers as a modern effective mechanism for combating corruption is no longer a new one. At the same time, an important issue in the production of anti-corruption policy is the issue of introducing effective guarantees for the proper protection of whistleblowers, which is possible by securing them at the legislative level. The creation of a comprehensive system for the protection of whistleblowers in Ukraine, confirmed by the presence of state guarantees, may influence the effectiveness of detecting and combating corruption.

## LITERATURE REVIEW

One of the first countries in the world, which introduced regulations for the protection of whistleblowers, is the United States of America. The legal frameworks for the protection of whistleblowers are as follows: (1) The Whistleblower Protection Act (1989); (2) The Intelligence Community Whistle-blower Protection Act (1998); (3) The Sarbanes-Oxley Act (2002); (4) The Whistleblower Protection Enhancement Act (2012). Thus, for example, in accordance with The Whistleblower Protection Enhancement Act (2012), it is determined that the provisions of the Department of State policy, forms and agreements on non-disclosure of information must be agreed and can't replace, contradict or otherwise alter the obligations, rights or obligations of employees established by an existing statute or regulation relating to: (1) secret information; (2) reporting to Congress; (3) reporting to the Inspector General on the violation of any law, rule or regulation, or mismanagement, gross expenditures of funds, abuse of power or a substantial and specific danger to public health or safety; (4) any other protection of whistleblowers.

In the Netherlands, the Chamber of whistleblowers as a specially authorized body which task is, on the one hand, to provide advice to the whistleblowers, and on the other, to investigate cases of possible violations reported by the whistleblower. However, it is important to comply with the procedure for handling information about the committed offense. After all, the internal procedure for considering a report in an enterprise or organization with more than 50 employees is mandatory. Only after that the whistleblower has the right to turn to the Chamber of whistleblowers.<sup>1</sup>

Montenegro created the Directorate for AntiCorruption Initiative (DACI), which is a government agency that implements anti-corruption measures and is empowered to hand reports of whistleblowers. The Directorate does not have the right to investigate cases of corruption offenses, but only hands a report of whistleblowers to the appropriate authorities that verify such information (Anti-Corruption Mechanisms, 2014).

## METHODOLOGY

The methodological basis for the study of the features of the institution of whistleblowers and guarantees of their protection is represented by a set of functional, formal and legal methods and the method of structural and functional analysis. With the help of the functional method, the world experience (international standards) of legal regulation of the institution of whistleblowers was analyzed. The use of the formal and legal method contributed to the disclosure of the content of the provisions established by the current Ukrainian legislation on the guarantees of the

protection of persons who assist in preventing and countering corruption. The method of structural and functional analysis allowed determining the priority guarantees for the protection of whistleblowers.

## FINDINGS AND DISCUSSIONS

The study of the issue of securing guarantees for the protection of whistleblowers in Ukraine at the legislative level, first of all, requires studying the existing international standards in the field of regulation of this issue.

For the first time at the international level, the legal regulation of the institution for the protection of individuals reporting corruption took place in 2004 by adopting the UN Convention against Corruption. Provisions for the protection of reporting persons are contained in Art. 33, according to which each member-state considers the possibility of including in its domestic legal system appropriate measures to ensure the protection of any person, in good faith and reasonably inform the competent authorities of any facts related to crimes under the Convention from any unfair treatment (United Nations Convention, 2004). It is also necessary to emphasize that the important point is to convince the whistleblower in his defense, in particular, an indication that: (1) corruption information reporting by him will be treated properly; (2) all necessary measures will be followed; (3) benefits of providing information about corruption will be higher than the negative consequences for the whistleblower; (4) protection will be provided to the person who provided such information (Technical Guide to the United Nations Convention, 2009). These basic principles must be taken into account when making any decisions regarding the state policy in the field of protection of whistleblowers.

It is important to note that the issues of the protection of whistleblowers are given to the norms of the UN Criminal and Civil Conventions against Corruption. Thus, in accordance with Art. 22 of the Criminal Law Convention on Corruption (ETS 173), each party to the Convention is called upon to take such measures as may be required for the effective and appropriate protection of persons reporting criminal offenses as defined in Articles 2-14 (in particular, giving a bribe or receiving a bribe to national government officials; bribery of members of national state assemblies; bribery of foreign government officials; bribery of members of foreign bodies; giving or receiving bribes in the private sector; bribery of judges and officials of international courts), or otherwise cooperate with investigative and prosecuting authorities (Criminal Law Convention on Corruption, 1999). In turn, in Art. 9 of the Civil Law Convention on Corruption (ETS 174), it is determined that each Party provides in its domestic law adequate protection against any unjustified sanction against employees who have reasonable grounds to suspect corruption and conscientiously report their suspicions to competent persons or bodies (Civil Law Convention on Corruption, 1999).

The G20 summit in Seoul, which took place in 2010, adopted the G20 Anti-Corruption Action Plan, according to which one of the priority areas was the protection of whistleblowers who conscientiously report existing corrupt practices. In particular, it was envisaged to develop and implement, until the end of 2012, the rules for the protection of whistleblowers (G20 Anti-Corruption Action Plan, 2010). For this purpose, a group of experts from the G20 countries carried out extensive work on the analysis and synthesis of the experience of the Organization for Economic Cooperation and Development (OECD), the World Bank, the current legal framework and the practice in the protection of persons reporting information on corruption

actions. As a result of the work carried out in 2011, the G20 Resource Guide on Good Practices in the Protection of Reporting Persons was adopted. According to the G20 Anti-Corruption Action Plan Protection of Whistleblowers, the source of the protection of whistleblowers is the highest level of international law. The protection of whistleblowers was recognized by all major international treaties on corruption. The international anti-corruption legal framework requires countries to include or consider introducing a response into their national legal systems that protect individuals, report in good faith any facts about corruption and the competent authorities (G20 Anti-Corruption Action Plan Protection of Whistleblowers, 2011).

International regulations on the protection of whistleblowers are also represented by several documents of the Council of Europe. Thus, in 2010, the Parliamentary Assembly of the Council of Europe (PACE) adopted the Resolution "Protection of whistleblowers", which marks the recommendations to member states on the adoption of the latest special laws on the protection of informants and provided reliable protection. In 2014, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec (2014), which established the concept of whistleblower. It refers to any person who reports or discloses information about a threat or harm to public interests in the context of their work-related relationships, regardless of whether it is in the public or private sector (Recommendation CM/Rec, 2014). In this regard, the PACE's activities in making strategic decisions to improve the regulatory framework for the protection of whistleblowers have not been completed. One of the most recent documents is the Recommendation 2073 Improving the protection of whistle-blowers, 2015, with which the PACE addressed the Council of Europe Committee of Ministers to further enhance the protection of whistleblowers, starting the negotiation process on a mandatory legal document in the form of a framework convention that will be open to non-member states and covers the disclosure of offenses by persons working in the field of national security and intelligence (Recommendation 2073 Improving the protection of whistle-blowers, 2015).

With regard to the issue of the regulation of the protection of whistleblowers at the level of the European Union, it should be stated that there are no regulatory documents in this area. In 2016, the Greens-European Free Alliance faction introduced the EULeaks project, a service that provides anonymous access for a person to report facts of corruption known to him/her in the EU<sup>2</sup>. On March 12, 2019, the European Parliament and the EU Council nevertheless reached an agreement on the development of a regulatory framework aimed at protecting informants who disseminate data on corruption or other abuses. The project has expanded protection for both public and private employees, the so-called "whistleblowers", who will also have a clear meaning and definition. The next procedural steps are the approval by the European Parliament of the new Directive at the plenary session, and for the Member States-the implementation of its norms in national legislation within two years. The adoption of this Directive is planned by the end of April 2019. The new legislation should secure guarantees to informers of a relatively high level of legal protection against persecution and oblige national law enforcement agencies of EU countries to adequately inform the general public about how to deal with such people (The European Union, 2019).

The issues of protection of whistleblowers in Ukraine are regulated by the norms of section VIII of the Law of Ukraine "On the Prevention of Corruption" in 2014. A person who provides assistance in preventing and combating corruption (whistleblower), Article 53 of the Law defines a person who, in the presence of a reasonable belief that the information is reliable, reports a violation of the requirements of the Law by another person. Certain guarantees of

protection are provided to such persons and their family members, namely: (1) impossibility of dismissal or coercion to dismiss; (2) impossibility of disciplinary action; (3) impossibility of applying to such persons by the employer negative measures of influence (in particular, transfer, certification, change of working conditions, refusal to appoint to the highest position, reduction of wages, etc.) due to the report made. The National Agency for the Prevention of Corruption (NAPC), as well as other state bodies, authorities of the Autonomous Republic of Crimea, local authorities, ensure conditions for their employees to report violations of the legislation on the prevention of corruption by another person, including through special telephone lines, official web sites, means of electronic communications. The legislator also provides for the possibility of making a report on violation of the requirements of anti-corruption legislation without attribution (anonymously) (Law of Ukraine, 2014).

In Ukraine today, there is no special law that defines the basis for the protection of whistleblowers. On the other hand, the NAPC has developed a draft law on the protection of whistleblowers. In particular, the draft proposes the definition of the concepts “whistleblower”, “*corruption report*” and establishes a list of persons who are equal to whistleblowers, specifies the powers of the NAPC and the directions of state policy in the sphere of protection of whistleblowers. It should be noted that the draft law includes norms providing for the following measures for the protection of whistleblowers: (1) protection of information about the whistleblower; (2) compulsory protection of the life, home, health and property of the whistleblower by law enforcement agencies; (3) prohibition of violation of labor rights of whistleblowers; (4) right to free legal aid; (5) restoration of rights and legitimate interests of whistleblowers; (6) compensation of losses and harm caused to whistleblowers. One of the important innovations of the draft law is the provision of legal protection to whistleblowers by lawyers of centers providing free secondary legal aid<sup>3</sup>. The adoption of this draft law will improve the mechanism of state protection of whistleblowers-persons who provide assistance in preventing and countering corruption.

## RECOMMENDATIONS

State guarantees for the protection of whistleblowers that assist in preventing and countering such a negative social phenomenon, of course, require legal regulation as a priority element of the anti-corruption policy of Ukraine. The effectiveness of the fight against corruption is possible only if there is an effective legal framework, which, in particular, is intended to establish state guarantees for the protection of whistleblowers. In order to achieve such goals, it is important for the Ukrainian society to adopt a special legislative act that defines not only the guarantees of protection of whistleblowers, but also the mechanisms for its implementation.

## CONCLUSION

International practice shows that the effectiveness of the real protection of persons who report corruption offenses (whistleblowers) can only be achieved by adopting a special law. A state guarantee for the protection of whistleblowers is one of the pressing issues and the sphere of respect for human rights and countering and preventing corruption offenses. The adoption and improvement of legal acts in the field of protection of the rights of persons reporting corruption offenses is aimed at clearly regulation of the mechanism for protecting such persons and

increasing their effectiveness in combating a corruption - destructive phenomenon in the society of any country.

### ENDNOTE

1. Deshcho pro mizhnarodnyi dosvid u sferi zakhystu vykryvachiv [Somewhat about international experience in defending the disclosure]: the official website of the National Agency for the Prevention of Corruption. URL: <https://nazk.gov.ua/news/deshcho-pro-mizhnarodnyy-dosvid-u-sferi-zahystu-vykryvachiv>.
2. EU Leaks: The Greens/EFA support whistle blowers. URL: <https://www.greens-efa.eu/en/article/news/eu-leaks/>
3. Informatsiia shchodo proektu Zakonu Ukrainy «Pro zakhyst vykryvachiv koruptsii» [Information on the draft Law of Ukraine «On the Protection of the Defenders of Corruption»]: the official website of the National Agency for the Prevention of Corruption. URL: <https://nazk.gov.ua/informaciya-shchodo-proektu-zakonu-ukrayiny-pro-zahyst-vykryvachiv-korupciyi>

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