



Mutual Learning Programme

DG Employment, Social Affairs and Inclusion

Peer Country Comments Paper – Croatia

Will a new Act improve the whistleblowers protection in Croatia?

**Peer Review on “Enhancing whistleblower protection
through better collaboration between responsible
authorities – a tool to prevent and tackle
work-related crime”**

Norway, 14-15 February 2019



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1 Introduction

This paper has been prepared for the Peer Review on "Enhancing whistleblower protection through better collaboration between responsible authorities – a tool to prevent and tackle work-related crime" within the framework of the Mutual Learning Programme. It provides a comparative assessment of the policy example of the host country (Norway) and the situation in Croatia. For information on the host country example, please refer to the Host Country Discussion Paper.

2 Overview of key trends of wrongdoings in the workplace

Croatia emerged from a socialist system and experienced damages in the Homeland war in the 1990s. In the following years, Croatia undertook the path of EU integration, resulting in the EU accession in 2013. Schneider (2017) estimates that in 2015 Croatia registered one of the highest levels of undeclared economy among all EU-28 Member States (27.7 % of GDP, while the EU-28 average is 18.3 % of GDP). Corruption is an important issue as well: despite various governments' nominal commitments to eradicating corruption, many cases of corruption involving politicians and businessmen are often raised by journalists. Often, those suspected of corruption or being involved in organized crime faced no further consequences for their alleged wrongdoings, other than media public censure. Throughout the last 15 years the Croatian public was becoming increasingly concerned about corruption. *Transparency International* surveys found that 85.9 % (in 2003) and 89 % (in 2005) of Croatians, considered corruption to be widespread (Budak, 2006).

There is a public belief in Croatia that corruption can be found almost at any level of the society – from the top to the bottom. Fragmentary research data and anecdotal evidences also suggest that tolerance towards petty or low-level corruption is much higher than towards high-level corruption (Lovrinčević, Mikulić and Budak, 2006). A government-financed survey in 2004 found that 72% of Croatians believed that most civil servants were involved in corruption (Sekulić, 2010). According to *Transparency International Hrvatska* (2019) on a ranking of 180 countries based on the *Perception of Corruption Index 2018*, Croatia is 60th with 48 points. It fell by one point and three places compared to 2017. All sources conclude that further progress is needed to enforce the adopted legislation against corruption¹ and to further strengthen the implementing structures, in order to fill in the gap between the legislation and its implementation. Despite progress in economic and administrative reforms in improving the transparency and accountability and establishment of the Office for Combating Corruption and Organised Crime (USKOK), problems remain, including a judiciary system plagued by case backlogs and complex bureaucracy. In order to reduce corruption, it will be necessary to concentrate on drafting more precise legislation, including improving the regulation of the whistleblowers protection, and coordinating laws and regulations, giving the courts greater independence and making them better equipped.

3 National policy / measures

3.1 Current situation with regulation and court practice

Whistleblowers are people who publicly notify the illegal activities of individuals or companies. The definition of the legal position of whistleblowers varies from country to country. Some countries have special laws regulating this area. Croatia currently does

¹ Zakon o sprječavanju sukoba interesa (The Act on prevention of the conflict of interest) (OG 26/11, 12/12), Zakon o financiranju političkih aktivnosti i izborne promidžbe (The Act on financing political activities and election campaign) (OG, 24/11, 61/11, 27/13, 02/14), Etički kodeks državnih službenika (Ethical code of civil servants) (OG 40/11, 13/12).

not have a specific law regulating the legal position and protection of the whistleblowers, however this is explicitly regulated by several laws, such as the Labour Act (OG 93/14), the Civil Servant Act (OG 49/12) and the Criminal Code (OG 125/1).

The Labour Act in Article 117, (2) and (3), orders that firing a worker due to an appeal or civil action, or due to the participation in a proceeding against the employer due to the violation of laws, regulations or administrative provisions, collective agreement or working regulations, or the worker's reporting to the competent state authorities is deemed as an unfair dismissal. Furthermore, the workers' approaching with information to the responsible individual or state authorities on the grounds of reasonable suspicion of corruption in good faith does not constitute a just cause for terminating the employment contract.

The Civil Servants Act stipulates a particular protection of civil servants when they report on cases of corruption. According to Article 14a of this Act, the warning of a civil servant for justified suspicion of corruption or sending a report on such suspected actions to the competent persons within the company and/or to the competent State bodies is not a justified reason for the termination of an employment contract. Anonymity and protection of mistreatment are guaranteed to a civil servant who, because of a reasonable suspicion on a case of corruption, submits information on such suspicion to responsible persons or competent state bodies if the competent State body finds it is to be a severe form of corruption. The head of the body is obliged to institute proceedings for serious breach of duty against a senior civil servant who violated the protection of anonymity and mistreatment of such civil servants. Article 112 of the Civil Servant Act defines that a civil servant may be suspended from civil service by a resolution of the chief executive of the State body if criminal proceedings or procedures for severe breaches of official duties with the traits of corruption are initiated against said civil servant. According to Article 136a, a civil servant shall be dismissed from the civil service by the decision of the chief executive of the State body if he or she performed severe breaches of official duties with the traits of corruption. Briefly, the Act prohibits the dismissal of civil servants who are whistleblowers, guarantees anonymity of whistleblowers and protects whistleblowers from any form of abuse.

The Criminal Code in Article 131(1) stipulates that whoever terminates an employment contract of a worker because he turned in or reported in good faith on justified suspicion of corruption to the competent persons or State authorities, shall be punished by imprisonment not exceeding three years. For criminal and civil liability of the responsible person, a condition is that the worker performed the deed in good faith on justified suspicion. If there is no good faith on justified suspicion on the employee's side, there is no criminal and civil liability on the employer's side. In order for a worker who reported suspected corruption to succeed in exercising his or her rights before the court, the most important requisite is that he or she has undertaken the activities in the manner prescribed by law. The most common mistakes made by workers in this area are that they do not address the responsible persons or the State authorities (i.e. they choose public defamation and insults).

The Constitutional Court of the Republic of Croatia emphasises in its decisions that the Constitution guarantees freedom of thought and expression, which also includes freedom of speech and public appearance. However, this freedom is not absolute, but subject to the constraints imposed by the Constitution and by the law. When assessing whether there was a violation of freedom of thought and expression, it is necessary to examine each particular case and its circumstances.

Regarding the Article 117 of the Labour Act, it is particularly important to confirm that the worker reporting to the competent persons or State authorities is in good faith. If it is impossible to conclude that there was a reasonable suspicion of corruption or if the allegation of this suspicion was submitted in good faith, then the ban on the cancellation of labour relation does not exist. In addition, the protection foreseen by Article 117 of

the Labour Act requires that the worker refers to the responsible persons or to the competent authorities of the State authority. In practice, workers tend to address either to media or to the responsible persons or authorities of the State and the media. Obviously, the media are neither responsible nor the competent body.

According to the practice of Croatian courts and the European Court of Human Rights, several circumstances are essential for freedom of expression. The first is the status of a person who discloses information. In principle, greater protection against interference is provided to journalists while performing their duties, while less protection is given to workers obliged to loyalty and discretion towards their employer. The second factor is the ways and means of information disclosure, particularly whether information has been disclosed by the media, and with what effect. The worker should primarily refer to the responsible persons or to the competent authorities of the State authority. The third is the authenticity of the disclosed information. The fourth is proportionality of the seriousness of the indictment and the significance of the evidence. The fifth is the existence of public interest regarding the relevant information. The public interest in disclosing information should be stronger than the need to protect some employer's rights. Finally, the sixth factor is the motive of the person, who disclosed the information as the main element if such action has been performed in good faith. Specifically, this means that there must be a reasonable suspicion of corruption, the worker should not act with malicious intent, with the goal to harm the employer. He or she must have enough evidence to substantiate his or her doubts. The worker is not entitled to defamation and insult to the employer's account, as it jeopardises the business reputation and interest of his employer. As a rule, a worker should contact the supervisors or another competent body (for example, the State Attorney's Office), and only if the circumstances indicate that the information will not be further transmitted or that he or she will not achieve adequate protection.

This situation is confirmed by the decision of the Constitutional court, number U-III-1142/13 from 1 December 2014. The courts states: "It is not disputed that the plaintiff handed over the documents relating to the proceedings of the defendants to the "Z" portal and to the "N" magazine. Based on such documents, the media published articles depicting the business of defendants extremely negative and unlawful. That being the case, and according to the judgment of this court, the plaintiff certainly caused damage to the business reputation of the defendant and without the "calculation" of the damage. With references to Public reporting in Art. 10 of United Nations Convention against corruption, the plaintiff cannot improve his legal situation. Mentioned Convention does not guarantee unlimited freedom of expression. Whoever uses this freedom has the duty and responsibility, as well as the means to disseminate correct and authentic information. The plaintiff was not a journalist whose role was to inform and attract public attention, but the employee of the defendant who forwarded the incriminating information to the police, the competent State Attorney's Office and the Office for Combating Corruption and Organised Crime (USKOK). These institutions took measures to determine the irregularity pointed out by the plaintiff. Therefore, in the circumstances of the case, the dismissal of the plaintiffs' employment contract is not disproportionate to the legitimate aim sought to be achieved, on the one hand, the right of the plaintiff to freedom of expression, but on the other hand the protection of the reputation and business interests of the defendants. Consequently, in the circumstances, the defendant acted lawfully and had a justified reason for dismissing the plaintiff's employment contract, and therefore the annulled decision on dismissal is not inadmissible." (Gović Penić, 2018).

3.2 New legal framework in preparation

Croatia is in the process of introducing a specific regulation (*lex specialis*) for whistleblowers protection and reporting irregularities. After consultations with representatives of social partners, the Croatian government sent to the Parliament in September 2018, a bill designed to protect those exposing any kind of information or

activity that is deemed illegal, unethical, or not correct within an organisation that is either private or public. The whistleblowers protection bill includes all legal standards for the protection of whistleblowers, given that until now Croatia did not have an integral act, which would regulate this topic in a uniform fashion. The bill includes general regulations, principles and rights of whistle-blowers and their protection. It also regulates the procedure for reporting irregularities and the conduct following the report. The new bill regulates that a whistle-blower must receive feedback within 60 days of his reporting the wrongdoing and must be given access to the case and case files. With this bill the government sends a message of encouragement to all those who detect irregularities to report them, being aware that the State has mechanisms to deal with this. Under the bill, whistleblowers will be entitled to court protection, compensation, identity protection and confidentiality. The protection measures are extended to the people who are connected with whistleblowers. The Prime Minister declared that the bill would most definitely contribute to the fight against corruption. The expected date of the Act on whistleblowers protection to come on force is January 2020.

Although it may have negative connotations, the appearance of whistleblowers in Croatia is generally seen as a positive occurrence. Currently in Croatia, the minimal protection of whistleblowers is prescribed by the Labour Act and by some other special laws. All the regulations in this area stimulate reporting corruption, which has preventive effects. The protection of whistleblowers in Croatia is a new area, which will probably be improved with the new Act. The draft of the Act plans the Ombudsman office as a coordinating body that will collect complaints and submit them to the responsible institutions.

4 Assessment of public policy implications and success factors

4.1 Norway and Croatia: similarities and differences

Norway and Croatia share many similarities and differences. Like the Norwegian model of labour relations, a relatively high and stable union density, particularly in the public sector, characterises Croatian system of industrial relations. In a small country like Croatia (with 4.2 million inhabitants and 1.3 million employees), there is a huge number of registered trade union organisations: 625 in total, of which 314 are active in one country (there are 21 countries in total) (Grgurev and Vukorepa, 2015). This leads to trade union fragmentation, which has weakened the labour movement. In the public sector, the collective bargaining system is realised on sectoral or sub-sectoral levels (for example, for pre-school, primary and secondary education, higher education), while in the private sector, bargaining almost mostly takes place on the company level. In Croatia, the collective bargaining coverage is above 50%, and almost 100% coverage in public sector.

By international comparison, Norway has a sound and transparent legal system and Government and administration act predictably. The Croatian legal system puts heavy emphasis on the rule of law. However, in practice, legal certainty is often limited. As regulation is sometimes inconsistent and administrative bodies frequently lack the necessary legal expertise, executive ordinances do not always comply with the original legal mandate. As a result, citizens often lack confidence in administrative procedures, and frequently perceive the acts of administrative bodies to be arbitrary (Petak et al, 2017). Large-scale reforms, including the formal initiatives to enhance the rule of law and curtail corruption, brought Croatia closer to the EU. However, abuse of the public office and illicit forms of enrichment remained crucial characteristics of the Croatian political order long after EU membership (Elbasani & Šelo Šabić, 2017). Furthermore, various laws are prone to constant changes, causing legal instability and endangering the respect of the rule of law.

As a successful example from Croatia, one can mention that several Croatian and international NGOs in 2016 organised a campaign for freedom of speech rights including whistleblowing. Its main goal was through discussions and presentations to improve the general knowledge about the topic. Croatia can really benefit from positive experiences related to the activities of the Labour Inspection Authority from Norway regarding increase the knowledge and awareness of the topic. Furthermore, Norway presented experience of successful inclusion of social partners in the implementation of various activities related to the protection of whistleblowers are more than valuable for Croatia.

4.2 The beginning of developing a successful legal framework

As mentioned, Croatia is almost at the beginning of developing a successful legal framework for the protection of whistleblowers. Thus, there are no specific success stories in this issue. A positive element is the introduction of strategic-management tools that has begun recently in public administration. This included a new system of civil servants' selection and remuneration according to the results of the selection process, the introduction of measures to make the recruitment of civil servants less political and more based on their professional skills; fighting against corruption and strengthening of civil servants' ethics; developing a better system of development and human resources management, primarily through lifelong learning and training in public administration. At the central-government level, strategic planning over the last decade has been dominated by the goal of EU accession. Since entering into the EU in 2013, the strategic planning capacity has increased substantially, in part due to the learning process that was realised during the accession period, but also thanks to Croatia's inclusion in the EU strategic planning exercise, primarily related to the EU accession and the implementation of the European Semester. Furthermore, praiseworthy is the planned regulation in the draft of the Act where the Ombudsman office is a coordinating body that collects complains and submits them to the responsible institutions. When it comes to whistleblowers in Croatia, there is insufficient awareness of the need for action. This also happens because of the fact that the sometimes documentation submitted by employers to the workers' representatives (which is not sufficiently detailed) cannot be a good source of information to point to corruption or any other irregularity. The role of the trade union in alerting the workers to these issues should be more active than it is now. The legislative and institutional framework can be improved by the new Act, but if there is not enough social awareness and courage to point to corruption and other illegal activities, there will be no positive movement in this area.

5 Questions

- Very useful are activities of the Labour Inspection Authority regarding increase the knowledge and awareness (page 7). Is it possible to provide more information about results and/or possible evaluation of these activities, or at give least impressions about the outcome?
- Is it possible to explain more about the reasons for significant lower proportion of respondents that were not familiar with available provision?
- Was there are public campaign and/or targeted media awareness raising programmes related to whistleblowers protection?
- According to the Norwegian report, results of whistleblower regulation and activities are very positive. Is there any negative case or experience, for example, the accusation of innocent employer or when employees was not reporting in the good faith?

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Annex 1 Summary table

The main points covered by the paper are summarised below.

Overview of key trends

- Croatia has high level of undeclared work and suffers from widespread corruption.
- Croatian public is becoming increasingly concerned about corruption
- The Croatian legal system puts heavy emphasis on the rule of law. However, in practice legal certainty is often limited as regulation is sometimes inconsistent and prone to constant changes, what causes legal insecurity.
- There is a need to increase social awareness and courage to point to corruption and other illegal activities.

National policy / measures

- There is no special law that regulates the legal position and protection of the whistleblowers.
- There are several laws that regulate this topic, primarily the Labour Act, which protects workers reporting wrongdoing in good faith.
- The expected date of the Act on whistleblowers protection to come on force is January 2020.
- The protection of whistleblowers in Croatia is a new area, which will be improved with the new Act.

Assessment of public policy implications and success factors

- The improvement of the rule of law and better governance are indirectly related to the whistleblowers issue.
- A positive element is the introduction of strategic-management tools that has begun recently in public administration. This included a new system of civil servants' selection and remuneration according to the results, the system design on measures of de-politicization and professionalization.
- Particular attention is given to fight against corruption and strengthening of civil servants' ethics.

Questions

- The activities of the Labour Inspection Authority regarding increasing the knowledge and awareness (page 7) are very useful. Is it possible to provide more information about results and/or possible evaluation of these activities, or at give least impressions about the outcome?
- Is it possible to explain more about the reasons for significant lower proportion of respondents that were not familiar with available provision?
- Was there are public campaign and/or targeted media awareness raising programmes related to whistleblowers protection?
- Is there any negative case or experience, for example, the accusation of innocent employer or when employees were not reporting in the good faith?

Annex 2 Example of relevant practice

Name of the practice:	A campaign for freedom of speech rights including whistleblowing
Year of implementation:	2016
Coordinating authority:	Several Croatian and international NGOs
Objectives:	To improve the general knowledge about the topic
Main activities:	Public discussions, panel presentation, lecturing on whistleblowing
Results so far:	No official evaluation, but fuelled by the enhanced public profile of whistleblowing, the media is increasingly presenting whistleblowers in a positive light, and more journalists are reporting on whistleblowers' disclosures. According to Transparency International, two-thirds of Croatians say they would report instances of corruption, and nearly a third would use government hotlines. However, more than half Croatians say they expect whistleblowers to regret their actions and that no substantial changes would result from making a disclosure.

