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PROTECTION OF THE RULE OF LAW THROUGH WHISTLEBLOWING

The EU Whistleblowing Directive is the first binding European instrument that explicitly recognizes the protection of whistleblowers as a necessary mechanism to improve the application of EU law. Strong whistleblower`s protection is seen as one of the preconditions for the rule of law especially in the context of the fight against corruption, free media reporting, and freedom of expression in democratic societies. The term whistleblower is generally understood as a person who has disclosed information about a threat to or violation of the public interest. The determination of the public interest traditionally belongs to the domain of state sovereignty. Even before the adoption of this Directive, "acting in the public interest" was the main criterion for the protection of whistleblowers in many European instruments, such as the Council of Europe Resolutions 1729(2010), 2060(2015), 2171(2017) and especially the Recommendation 7 (2014) which even states that it is up to each member state to determine which information is in the public interest and to which disclosure should be given special protection. However, categories such as national public interest, higher national interest, and the like often depend on the structures of powers that be and daily political events. A striking example of this situation is the "Luxleak" case, in which, in the midst of the criminal prosecution of the whistleblower Antoine Deltour in Luxembourg, the EU awarded him the "European Citizens' Prize" award because of the same whistleblowing acts that led to criminal proceedings in his country. To overcome such obstacles, the author argues that the Whistleblowing Directive introduces the concept of whistleblowers as protectors of community public interest by setting common minimum standards for material scope of what information should be considered in the national public interest to enhance the rule of law both at the national and EU level. Thus, in the event of a conflict between the national public interest of a Member State and the community public interest of the EU, the judicial authorities will be obliged to protect the latter as the predominant one.

Keywords: whistleblowing, EU Directive 2019/1937, public interest, rule of law, supremacy.

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1. INTRODUCTION

The Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons who report infringements of European Union law was adopted in December 2019, and the period for its transposition into the national legislation of the Member States is December 17th, 2021 (hereinafter: Whistleblowing Directive -WD).[69] The primary reason for the adoption of the WD was the improvement of the implementation of European Union (EU) sectoral policies, protection of freedom of expression, and contribution to the adequate functioning of the single market.[70]. Article 1 of the WD states that the purpose is to enhance the enforcement of the Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law.

Nevertheless, under the veil of ensuring equal application of the basic principles of its functioning, the EU has recognized the importance of whistleblowers for the rule of law, especially in the fight against corruption, freedom of media, and in the expression of civil rights protest in democratic societies. Their balanced and efficient protection has become one of the priorities since persons working in the public or private sector or associated with these organizations based on their professional and business activities are at the forefront of the rule of law by warning about endangering or violating the public interest.

"Acting in the public interest" is the main criterion for the protection of whistleblowers in many European instruments, such as the Council of Europe (CoE) Recommendation 7(2014), its Resolutions 2060/2015 and 2171 (2017), as well as the European Parliament Resolution from March 12th, 2014. However, all these international instruments have traditionally determined that the public interest belongs to the domain of state sovereignty, which is why the notion of whistleblowing as the detection of a violation of the public interest inevitably varies in relation to the definition of the state public interest. Moreover, the Resolution 1729 (2010) and the Recommendation 7(2014) of the CoE state that it is up to each member state to determine which information is in the public interest and to which disclosure should be given the special protection.

However, categories such as national public interest, higher national interest, and the like often depend on the structures of powers that be and daily political events, which is

[69] This step was taken after an intensive campaign of the professional and general public to protect whistleblowers in the EU. („The EU must take action to protect whistleblowers" https://edri.org/eu-must-take-action-protect-whistleblowers/, 31.05.2017; „Protecting whistleblowers – protecting democracy", https://edri.org/protecting-whistleblowers-protecting-democracy/, 25.01.2017.). The impact analysis accompanying the Proposal for Directive 2019/1937 found that the existing regulation of whistleblower protection in EU instruments is fragmentary, as certain provisions were introduced as an urgent response to the financial crisis and other scandals that actually revealed serious inconsistencies in transposition and application of EU instruments in national Member States' systems. (Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on the Protection of Persons Reporting on Breaches of Union Law SWD/2018/116 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2018:116:FIN).

[70] COM 2018. Communication from the Commision to the European Parliament, the Council and the European Economic and Social Committee Strenghening Whistleblower Protection at EU Level COM/2018/214 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0214.

why we believe that the WD represents a significant turn by introducing the concept of whistleblowers as protectors of the community public interest, i.e., the interests of the EU. Thus, in the event of a conflict between the national public interest of a member state and the public interest of the EU, judicial authorities will be obliged to protect the latter as the predominant one.

In this article, the author examines the hypothesis that the WD introduces the concept of whistleblowers as protectors of community public interest by setting common minimum standards for the material scope of what information should be considered in the national public interest to enhance the rule of law both at the national and EU level. In testing the hypothesis, the author will use the doctrinal method to determine the theoretical definition of the term whistleblower, which will be compared with the personal scope of the WD. A comparative analysis of the material scope of disclosed information that qualifies for whistleblower`s protection should prove the author's opinion that whistleblower`s protection inevitably depends on the question of national interest. Further analysis is conducted to determine the extent of those minimum standards of national public interest outlined in the WD, which the author argues to construe the notion of whistleblowing in international, i.e. common public interest.

2. THEORETICAL DEFINITION OF WHISTLEBLOWER AND PERSONAL SCOPE OF THE WHISTLEBLOWING DIRECTIVE

The term "whistle-blower"[71] means a person who has disclosed information about a threat to or violation of the public interest. The doctrine mainly perceives this term through the prism of labor law and the legal protection of whistleblowers from termination of employment. Still, the necessity of their protection is increasingly emphasized in criminal law, media law and in the field of fight against corruption. In parallel, there is a great variety of national normative solutions with a common absence or insufficient recognition of this concept.

Definitions of whistleblowing can be classified into three groups: 1. those that define this concept as a real, factual existing phenomenon; 2. those who view it as a legal phenomenon, as a relationship between different legal rights of different legal entities; 3. those who observe the whistleblowing through its function which it has for the rule of law and democracy in society (Jubb, 1999, pp. 77–94; Mijatović, 2016, pp. 265–287; Miceli & Near, 1992, pp. 1–332).

Thus, for the purpose of this article, a whistleblower will be defined as a person who has disclosed information about a threat or violation of the public interest, which he/she learned due to his/her privileged position (Martić, 2016, pp. 201-214). Thus, it is the tripartite definition, since it encompasses three constitutive elements: 1. the privileged

[71] The discussion of the terminological determinant of the term whistleblower inevitably begins with the mention of Ralph Nader, a well-known American lawyer and activist who significantly influenced the improvement of whistleblower protection in America. He coined the term "whistleblower" to change the negative perception of society carried by terms such as informer or rat, snitch. (Nader *et al.* 1972, 1-302; Macey, 8/2007, pp. 1910, ft. 53.) Ralph Nader's activism is directly credited with the adoption of certain crucial laws, especially in the field of whistleblower protection, including the "Whistleblower Protection Act" of 1989. (https://en.wikipedia.org/wiki/Ralph_Nader, 15.11.2017)

position of the whistleblower, 2. the whistleblowing, i.e., the act of disclosing information, and 3. the content of the whistleblowing, i.e., the information on endangering or violating the public interest (Martić, 2020, pp. 7 -10).

The personal scope of application of the WD is defined in Article 4. It falls under the first theoretical element and includes a wide range of persons who, in the context of their work engagement, learn about the content of whistleblowing information.

Examples include employees and civil servants; persons who have the status of entrepreneurs; shareholders and members of the administration, management, or supervisory body of the company, including their staff; volunteers, paid or unpaid trainees; any person working under the supervision and instruction of a contractor, subcontractor or supplier.

Persons whose employment was terminated after reporting the violation, as well as applicants in the process of employment or negotiation for the purpose of establishing employment who report the violation in connection with that process, are also protected.

The protection provided for in the WD will, in addition to the above-mentioned persons who report violations of EU law (whistleblowers), also apply to: facilitators, third parties related to whistleblowers, and those who may therefore be harmed in terms of employment such as colleagues or relatives of whistleblowers; a legal entity whose owner is a whistleblower or in which he/she works or with whom he/she is otherwise connected in the context of employment.[72]

3. THE MATERIAL SCOPE OF DISCLOSED INFORMATION THAT QUALIFIES FOR WHISTLEBLOWER`S PROTECTION IN THE WHISTLEBLOWING DIRECTIVE

When it comes to the definition of whistleblowing, the *prima facie* conclusion is that it is about protecting general social benefit and not pursuing personal interest or benefit. If someone discloses information that concerns only him/her or tries to influence the outcome of the procedure that personally affects him/her, such a person could not be a whistleblower, i.e., it would not be information of public interest. However, if this information alleges the violation of basic human rights or more people suffers the same consequences that have a greater social significance, it could be argued that this information may still be relevant to the public interest.[73]

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[72] The personal scope of application of Directive 2019/1937 coincides with the scope of application of the Serbian Law on Protection of Whistleblowers ("Official Gazette", No. 128/2014), and in that sense, we hold the opinion that there is no need for harmonization, except that it may be explicitly stated that facilitators (persons providing confidential assistance to whistleblowers in reporting - Article 5, paragraph 1, item 8 of this Directive) are protected if they suffer retaliation.

[73] In the case of Heinisch v. Germany (ECHR No. 28274/08), the applicant, Brigita Heinisch, pointed out that due to the insufficient number of employees she had too many work obligations which affected her health and caused frequent absences from work. However, although Ms. Heinisch complained about her personal position, the ECtHR found that such information was still of public importance because it could not otherwise be established that the users of the geriatric home (where she worked) were medically and possibly vital endangered due to inadequate care caused by insufficient number of employees. This example describes a

The common denominator of almost all definitions of whistleblowing is the content of information that mainly refers to illegal acts or omissions, regardless of whether they violate the law or other regulations. In addition, the literature often points out that the information could also contain data on illegitimate, unethical, and immoral practices (Miceli & Near, 1-322; Brink *et al.*, 87-104), which all fall within the commonly used general term "wrongdoing."

Whistleblowing can also exist in the case when the legal regulation regarding a particular issue is not adequate (e.g., when specific standards in health care are inadequate, outdated in relation to recent research), and then it is seen as a form of activism, i.e., as a way to initiate a public debate and put pressure on the state to amend existing regulations and adapt them to particular needs of society, new requirements for maintaining health and safety, etc. (Leiter, p. 435).

In addition to the content of the information, its significance is also relevant, so it is generally stated that it should be of public importance. The term primarily used in theory and practice to denote both characteristics of information (content and significance) is "information about endangering or violating the public interest." Myers points out that a distinction should be made between the information of public interest and information that may be of interest to the public, between which there does not always have to be a sign of equality (Myers, 2013).

Some authors advocate an approach according to which only "significant" or "non-trivial" threats or violations of the public interest (P. B. Jubb 1999, 77–94.; Miceli & Near, 1–322) should be included because all the effort and sacrifice of whistleblowers do not make sense if they reveal trivial issues. It could be argued that this attitude is not justified, especially bearing in mind that disclosed wrongdoing may be objectively trivial but have a high value for the whistleblower or the group of people. Moreover, whistleblowing is considered as part of the fundamental human right to freedom of expression that exists regardless of the "triviality" of the information being disclosed. The protection of whistleblowers can be seen as the absence of restrictions or obstacles to freedom of expression as one of the fundamental human rights.

Given that whistleblowing falls within the realm of the fundamental human right to freedom of expression, the European Convention on Human Rights (ECHR)[74] in every case assesses whether there was an interference by the public authorities with freedom of expression, whether it was prescribed by law, and whether it served a legitimate purpose, i.e., preventing the disclosure of confidential information. However, in the event of interference, the ECHR established in its jurisprudence the following principles which determine

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situation in which the court assessed facts that may not have been the focus of the whistleblower, and which created a complete picture that indicated that it was information of public importance. On the other hand, there are legal systems in which the argument is made that when determining the public interest, the content, form, as well as the context of the information of the whistleblower should be assessed from his point of view, and not only from the factual aspect. In this way, the public interest is determined in the USA, i.e. the balance of freedom of expression and business efficiency, the so-called Pickering test. (J. H. Conway, 797–798.)

[74] Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, Službeni list SCG – Međunarodni ugovori, br. 9/03, 5/05 i 7/05.

whether such an interference was necessary for a democratic society: 1. whether there were alternative channels for the disclosure of information; 2. whether there is a public interest in disclosing information; 3. authenticity of published information; 4. damage caused by disclosure of information; 5. whether the disclosure was in good faith; and 6. the seriousness of the sanction for disclosing the information.[75]

It follows from the above that notion of whistleblowing encourages dynamic discussion in the literature but even so, there is no single concept, nor are there universal international standards (Thüsing & Forst, 2016, pp. 3-30). Achieving a unique and universal definition of the term whistleblower is an unattainable goal because it depends on the public interest of each individual state, which is usually covered by an imprecise general legal standard and is variable depending on political and economic factors (Martić, 2020, p. 7).

In any case, it is advisable to determine as precisely as possible in legal systems what information of endangering or violating the public interest can be regarded as relevant because otherwise, there would be a place for discretionary decision-making and arbitrary action, which would have a discouraging effect on whistleblowing. Certain guidelines can be found in the United Nations (UN) Convention for the fight against corruption[76], and the CoE Criminal Law Convention[77]. Both conventions consider relevant information in the context of whistleblowing when related to the scope of their regulation, i.e., criminal offenses. The broadest range of pertinent information in the framework of whistleblowing is contained in the CoE Resolution 1729 (2010) and its Recommendation 7 (2014), thus covering various types of misconduct, including all serious human rights violations that threaten or endanger the life, health, liberty or any other legitimate interest of a public entity, administration or taxpayer, or owner of capital, employee or user of private companies.[78]

The WD streamlined this general standard by prescribing a list of information that can fall within the realm of its application. The first criterion prescribed in Article 2 of the WD states that revealed information should relate to a violation of EU law. The second criterion is that reported violations fall within the scope of the precisely prescribed areas of EU law covered by the WD. These are: public procurement; financial services, products and markets and the prevention of money laundering and terrorist financing; product safety, and in particular human nutrition; traffic safety; protection of the environment, fauna and flora, and public health; radiation protection and nuclear safety; public health protection; consumer protection; protection of privacy and personal data; security of network and information systems; state aid and the protection of the EU single market and market competition, and in particular the protection of competition; protection of

[75] Guja v. Moldova (ECtHR No. 14277/04, 12.12.2008.); Guja v. Moldova (ECtHR No. 1085/10, 27.02.2018.) Heinisch v. Germany (ECtHR No. 28274/08, 21.07.2011.) Also: European Court of Human Rights, Research Division, National Security and European case-law, 2013. www.echr.coe.int

[76] UNODC, „State of Implementation of the United Nations Convention against Corruption - Criminalization, Law Enforcement and International Cooperation", Vienna, 2015, 133.

[77] CoE Criminal Law Convention and Additional Protocol to the Criminal Law Convention on Corruption, CoE, No. 191, Strasbourg, 15.05.2003.

[78] 6.1.1. Paragraph 6 Resolution. http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17851&lang=en,

the EU's financial interests, and the member states may, within the framework of national law, extend this protection of Union law to other areas and activities.

The material scope of application of the WD covers both the public and private sectors and not only in violation of EU instruments but also in their misuse. The WD did not repeal provisions on the protection of whistleblowers listed in EU specific sectoral instruments, which were fragmented and diverse. This is the reason why Article 3, paragraph 1 of the WD prescribes that it will apply unless otherwise provided by these sectoral instruments, which are still in force. From the above, it can be noticed that the WD regulates only the content of information and that it does not mention its significance anywhere.

4. CONCEPT OF WHISTLEBLOWING IN COMMON PUBLIC INTEREST AND THE SCOPE OF ITS PROTECTION

Considering the legal nature of directives and their sistematization in Union law, their provisions don't have direct effect on individuals in national legal system but on member states, which should take national measures for its transposition. The legal rights and obligations of individuals, therefore, are regulated in national laws that implement directives (Knežević-Predić et al., 2009, 146).

The guiding principle of the EU is the idea that it "should not encroach further upon the member state's prerogatives than is necessary to attain its objectives "(Zwiers, 2011, 10). Article 6 of the Treaty on European Union (Treaty of Lisbon – TEU) states that "the Union shall respect the national identities of its Member States."

In that regard, the WD's purpose is in line with the principle of subsidiarity and proportionality of EU law, because it stipulates minimum standards for the high protection of reporting persons in the breach of the explicitly listed areas of EU policies. Namely, Article 1 states that "the purpose of this Directive is to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law." Nevertheless, whistleblowing is by its definition inseparably linked to the national public interest, which covers the area of national security, protection of classified information, and other areas that traditionally fall within the national sovereignty of a member state.

One could argue that the WD remains outside this line of national sovereignty in Article 3 which governs the relationship with other EU acts and national provisions. Paragraph 2 of this article of the WD stipulates that "This Directive shall not affect the responsibility of Member States to ensure national security or their power to protect their essential security interests". In particular, it shall not apply to reports of breaches of the procurement rules involving defense or security aspects unless they are covered by the relevant acts of the EU. Moreover, paragraph 3 of said article of the WD states that: "This Directive shall not affect the application of Union or national law relating to any of the following: (a) the protection of classified information; (b) the protection of legal and medical professional privilege; (c) the secrecy of judicial deliberations; (d) rules on criminal procedure."

On the contrary, it can be argued that the WD has made a significant impact in "unifying" or "setting minimum standards" of substantive national criminal law, even though it falls

into the area of freedom, security, and justice where the EU has competencies to approximate and not to unify national legal systems by setting minimum common standards.[79]

Article 4 of the Treaty on the Functioning of the Union (TFEU) which states that the EU "shall respect their essential State functions, including (...) maintaining law and order (...), and Article 67 of the TFEU that states that "the Union shall constitute an area of freedom, security, and justice with respect for fundamental rights and the different legal systems and traditions of the Member States", should be recalled.

It seems that the WD surpasses the proclaimed goals and intentions defined in its Article 1 through the provisions of protection of reporting persons from criminal liability in the course of reporting or publicly disclosing information of breaching EU law, i.e. information in the interest of the EU, and not necessarily in the national public interest. Thus, the WD directly interferes in the sovereignty of Member States to define the public interest in a certain way for the purposes of criminal law protection of whistleblowers. In that regard, Article 21, paragraph 2 states: "Without prejudice to Article 3(2) and (3), where persons report information on breaches or make a public disclosure in accordance with this Directive they shall not be considered to have breached any restriction on disclosure of information and shall not incur a liability of any kind in respect of such a report or public disclosure provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to this Directive."[80] It may be concluded from this paragraph read in conjunction with Article 3 paragraphs 2 and

[79] Exept for instances like criminal offences against financial interest of the EU or protection of environment.

[80] Paragraph 3 of the cited article stipulates also that reporting persons shall not incur liability in respect of the acquisition of or access to the information which is reported or publicly disclosed, provided that such acquisition or access did not constitute a self-standing criminal offence. In the event of the acquisition or access constituting a self-standing criminal offence, criminal liability shall continue to be governed by applicable national law. This is related to the means of acquiring of the disclosed information by the whistleblower. In this regard, author points out that whistleblowing encompasses two phases, acquiring information on wrongdoing and latter phase, reporting or publicly disclosing that information. By definition, whistleblower is a person that acquired information legally, in the context of his/her work-related relationship with the organization that is a source of information, but had no authority to disclose it to unauthorized person or public.(Martić, 2020, 5-20) This is to differentiate with "reporting persons" that has acquired information illegally and disclosed it also illegally. Therefore, cited Paragraph 3 of Article 3 WD regulates criminal liability to those reporting persons that acquired disclosed information illegally, which cannot be qualified as whistleblowers. This is also explained in recital 92 of the WD Preamble which states: "Preambula 92. Where reporting persons lawfully acquire or obtain access to the information on breaches reported or the documents containing that information, they should enjoy immunity from liability. This should apply both in cases where reporting persons reveal the content of documents to which they have lawful access as well as in cases where they make copies of such documents or remove them from the premises of the organisation where they are employed, in breach of contractual or other clauses stipulating that the relevant documents are the property of the organisation. The reporting persons should also enjoy immunity from liability in cases where the acquisition of or access to the relevant information or documents raises an issue of civil, administrative or labour related liability. Examples would be cases where the reporting persons acquired the information by accessing the emails of a co-worker or files which they normally do not use within the scope of their work, by taking pictures of the premises of the organisation or by accessing locations they do not usually have access to. Where the reporting persons acquired or obtained access to the relevant information or documents by committing a criminal offence, such as physical trespassing or hacking, their criminal liability should remain governed by the applicable national law, without prejudice to the protection granted under Article 21(7) of this Directive. Similarly, any other possible liability of the reporting persons arising from acts or omissions which are unrelated to the reporting

3, that the application of the WD is exempted in case of criminal procedure, but not when it comes to criminal substantive law itself. With that respect, recital 28 of the Preambule of the WD, which states: "While this Directive should provide, under certain conditions, for a limited exemption from liability, including criminal liability, in the event of a breach of confidentiality, it should not affect national rules on criminal procedure, particularly those aiming at safeguarding the integrity of the investigations and proceedings or the rights of defense of persons concerned."

The application of the WD is also exempted in case of classified information, but not in the event of disclosing other confidential information, such as trade secrets. With that regard, recital 91 of the Preamble of the WD states: "It should not be possible to rely on individuals' legal or contractual obligations, such as loyalty clauses in contracts or confidentiality or non-disclosure agreements, so as to preclude reporting, to deny protection or to penalize reporting persons for having reported information on breaches or made a public disclosure where providing the information falling within the scope of such clauses and agreements is necessary for revealing the breach. Where those conditions are met, reporting persons should not incur any liability, be it civil, criminal, administrative, or employment-related. It is appropriate that there be protection from liability for the reporting or public disclosure under this Directive of information in respect of which the reporting person had reasonable grounds to believe that reporting or public disclosure was necessary to reveal a breach pursuant to this Directive. Such protection should not extend to superfluous information that the person revealed without having such reasonable grounds." To put it in short terms, the WD has narrowed national public interest to national security or power of member states to protect their essential security, defense, and military interests.

Reporting or publicly discovering covered information of member states, or companies in the member states, especially in so-called tax havens states, that can damage, underline, or in any way circumvent EU single market rules, definitely falls within the scope of application of the WD.[81]

In that case, we are of the opinion that member states should not be able to invoke the protection of national sovereignty, national public interest, or national market as an excuse to retaliate against the whistleblower to deter future alike whistleblowers who may jeopardize the national economic and other public interest, which is contrary to the community public interest of ensuring the proper functioning of the EU single market.

In that regard, recital 3 of the Preamble of the WD is relevant stating that "In certain policy areas, breaches of Union law, regardless of whether they are categorized under national law as administrative, criminal or other types of breaches, may cause serious harm

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or are not necessary for revealing a breach pursuant to this Directive should remain governed by theapplicable Union or national law. In those cases, it should be for the national courts to assess the liability of the reporting persons in the light of all relevant factual information and taking into account the individual circumstances of the case, including the necessity and proportionality of the act or omission in relation to the report or public disclosure."

[81] For example, a study on the financial implications of the lack of an adequate framework for reporting irregularities and protecting whistleblowers, conducted in 2017, estimated that the EU is potentially losing, especially in the area of public procurement, between 5.8 and 9.6 billion euros per year. (Milieu, 2017).

to the public interest, in that they create significant risks for the welfare of society. Where weaknesses of enforcement have been identified in those areas, and whistleblowers are usually in a privileged position to disclose breaches, it is necessary to enhance enforcement by introducing effective, confidential, and secure reporting channels and by ensuring that whistleblowers are protected effectively against retaliation."

A possible conflict of national public interest with the "EU public interest" lies in the area of reporting or publicly disclosing information of acts or omissions that "defeat the object or the purpose of the rules in the Union acts and areas falling within the material scope referred to in Article 2." (Article 5, Paragraph 1, Point 1 of the WD). As an example of such conflict, it can be recalled the context in which the WD was adopted. The protection of whistleblowing in "community public interest" proved necessary in cases like "Luxleaks"[82] and "Panama Papers"[83] - which showed the consequences of distorted competition in the field of taxation which damaged the national and EU budget; the "Dieselgate" case[84], which showed that a lack of whistleblower protection could have far-reaching consequences in the other member states, given that there was an internal report of harmful diesel car emissions that had not been dealt with; the case of a French company that made industrial silicone breast implants, which endangered the health and caused medical problems in 300,000 women in 65 countries;[85] the case of "Cambridge Analytica"[86] which revealed the massive misuse of personal data, etc.

A striking example that the WD goes beyond the proclaimed goals of better implementation of sectoral policies (Article 1) is the provision of Article 21 of the WD, which directly introduces a defense from criminal liability of the whistleblower for disclosing information, which is a question of national criminal substantive law that falls within the realm of national sovereignty and national public interest. Paragraph 7 of Article 21 stipulates: "In legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labor law, persons referred to in Article 4 (reporting persons – author added) shall not incur the liability of any kind as a result of reports or public disclosures under this Directive. Those persons shall have the right to rely on that reporting or public disclosure to seek dismissal of the case, provided that they had reasonable grounds to believe that the reporting or public disclosure was necessary for revealing a breach, pursuant to this Directive. Where a person reports or publicly discloses

[82] BBC News, "LuxLeaks scandal: Luxembourg tax whistleblowers convicted", published 29 June 2016, https://www.bbc.com/news/world-europe-36662636, 14.10.2021.

[83] Suddeutsche Zeitung, Panama Papers The secrets of dirty money", https://panamapapers.sueddeutsche.de/en/, 14.10.2021.

[84] PhysOrg: 5,000 'Dieselgate' deaths in Europe per year: study, 2017. https://phys.org/news/2017-09-dieselgate-deaths-europe-year.html#jCp, 02.03.2019.

[85] BBC News: Q&A: PIP breast implants health scare, 2013. http://www.bbc.com/news/health-16391522, 02.03.2019.

[86] The New York Times, Cambridge Analytica and Facebook: The Scandal and the Fallout So Far, By Nicholas Confessore
April 4, 2018, https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html, 14.10.2021.

information on breaches falling within the scope of this Directive, and that information includes trade secrets, and where that person meets the conditions of this Directive, such reporting or public disclosure shall be considered lawful under the conditions of Article 3 paragraph 2 of the Directive (EU) 2016/943."

Summarizing all cited provisions, it can be argued that under the veil of the proclaimed purpose of better implementation of the EU instrument in specific sectoral policies stipulated in Article 1, the WD sets community (single market) public interest as prevailing to the national interest in order to prevent undue advantage for member state under state aid or any other specific sectoral instrument.

Moreover, by setting the common minimum standard for whistleblowers protection, the WD is also addressing cross-border whistleblowing since the application of national legal provisions is limited to one state jurisdiction. In the Impact Assessment accompanying the WD, the European Commission states that: "Uneven protection may thus dissuade reporting and can result in gaps in the protection of whistleblowers who work for foreign-based companies or in another Member State than the one whose law governs their employment relationship and who risk "falling through the cracks".[87]

Even though one may argue for the possibilities to improve provisions of the WD, it can be stated that such regulation undoubtedly presents a significant step in the protection of whistleblowers, but also points to the possible new trend in the interpretation of subsidiarity and proportionality principle, especially in criminal substantive law.

Nevertheless, the transposition period expires on 17.12.2021. Therefore it is yet to be analyzed the adequacy of national implementation measures and the question of state liability for failing to adopt or improper adoption of its provisions. In that context, it should be emphasized that in the event that a member state violates its obligation to implement the WD or fails to adopt implementation measures or adopt improper implementation measures within the prescribed time frame, individuals will have the right to invoke directly the provisions of the WD in the proceedings against the state before the national court, and the national court will be obliged to protect the rights arising from them for individuals. The court shall directly apply the provisions of the directive, which means that they will have a direct effect."(Knežević-Predić et al., 2009, 146).[88]

5. WHISTLEBLOWER'S PROTECTION AS A TOOL FOR ENHANCING THE RULE OF LAW IN THE EUROPEAN UNION

According to Kant's moral ethics, "the act of lying is never allowed" - so telling the truth, that is, whistleblowing, could be considered obligatory. On the other hand, according to Roger Crisp, the role of truth affects our autonomy, or that the truth enables an informed

[87] Paragraph B1 of the Commission staff working document impact assessment cccompanying the document Proposal for a Directive of the European Parliament and of the Counci on the protection of persons reporting on breaches of Union law SWD/2018/116 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018SC0116), 14.10.2021.

[88] The first case in which the ECJ accepted the direct effect of the directive was Van Duyn v. Homme Office (Case 47/74, 1974, ECR1337 – according to: Knežević-Predić, et al., 2009, p. 146).

decision, and according to Foucault, the truth enables criticism, which is a necessary condition for democracy (F. Mijatović, 2016, pp. 271–272).

If whistleblowing is comprehended as Foucault's ethic of true speech (Foucault, *1982. –1983.*, p. 65, in: F. Mijatović, 2016, pp. 271–272), its protection is undoubtedly in the interest of the whole society because the truth is a precondition for criticism, informed decision-making, and democracy. However, the valuation of whistleblowing as a virtue in modern society is variable from different understandings of the role that truth should play in society.

In the literature, there are views that protection should be provided to the whistleblowing that is morally justified, whereby this moral ethics is viewed from different aspects and with the influence of opposing interests of the state and individuals. Kovacevic also points out that the values that the whistleblower defends are more important than loyalty to the employer, which is the foundation of protection (Kovačević, 2013, 104–106). Delmas even links the question of the moral justification of whistleblowing to the form of government, thus emphasizing that the moral justification of whistleblowing can be set in "democratic societies where the rule of law is a matter of respecting democratically enacted acts," while whistleblowing in "non-democratic societies or other does not require any special justification"(Delmas, pp. 77–105).

In addition to the academic discussion on the moral justification of whistleblowing as a tool for enhancing the rule of law in a legally regulated state, the literature also states that whistleblowing is a social lever for change, i.e., improvement of the existing legal order. Leiter also believes that "soft whistleblowing" should be protected, which differs from "traditional" whistleblowing in that it does not refer to illegal, unethical behavior (malfeasance) but to the expression of disagreement with public policy course (Leiter, 2014, p. 433).

These attitudes illustrate the trend that in assessing the justification of whistleblowing (understood as telling the truth), the role of truth is more predominant than the truth itself. Due to that, whistleblowers are at the forefront of the rule of law and transparency by disclosing information in the international (community) public interest.

6. CONCLUSION

The WD is the first binding European instrument that explicitly recognizes the protection of whistleblowers as a necessary mechanism to improve the application of EU law. Apart from the indisputably great importance of this Directive for the protection of whistleblowers, it also urges member states for conditioned protection of whistleblowers who disclosed information of abuse or breach of EU instruments in explicitly listed policy areas. In this way, the WD circumvents usage of a general standard of public interest whose definition traditionally belongs to the domain of state sovereignty.

In this paper, the author verified the hypothesis that the WD introduces the concept of whistleblowers as protectors of community public interest by setting common minimum standards for material scope of what information should be considered in the national public interest to enhance the rule of law both at the national and EU level. Thus, in the

event of a conflict between the national public interest of a member state and the community public interest of the EU, the judicial authorities will be obliged to protect the latter as the predominant one.

Through its provisions, the WD introduces strong protection for reporting persons that are at the forefront of the rule of law by disclosing information of international (community) public interest. In a given way, the EU can enhance basic principles of the rule of law in democratic societies such as equal treatment before the law and accountability of states for adequate law enforcement.

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