

# THE OBLIGATION OF CONFIDENTIALITY OF THE DESIGNATED PERSON ACCORDING TO THE PROVISIONS OF LAW NO. 361/2022 ON THE PROTECTION OF WHISTLEBLOWERS IN THE PUBLIC INTEREST

Sandra Sophie-Elise OLĂNESCU\*

## Abstract

*Law no. 361/2022 on the protection of whistleblowers in the public interest, entered into force at the end of 2022, is the instrument by which Romania fulfilled its obligation to transpose, into domestic law, Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 regarding the protection of persons who report violations of Union law.*

*In this respect, Law no. 361/2022 sets forth a general framework for the protection of persons who report violations of the law within authorities, public institutions, other persons under public law, as well as within persons under private law.*

*In other words, this legal act introduces new obligations, among others, for companies, so the first steps in understanding the new law were the clarification of the meaning of the notion of „whistleblower in the public interest”, its purpose and object, as well as emphasising new challenges that its addressees will face.*

*In addition, in practice, various problems have arisen in the implementation of the rules of compliance with Law no. 361/2022, among which is also the obligation of confidentiality of the designated person according to the provisions contained in Law no. 361/2022 on the protection of whistleblowers in the public interest.*

*This paper aims to present all these aspects and to provide the author's point of view on the meaning and extent of the obligation of confidentiality of the person designated according to the provisions contained in Law no. 361/2022.*

**Keywords:** *compliance, whistleblowers, obligation of confidentiality, violations of the law, public interest.*

## 1. Introduction

This paper addresses the obligation of confidentiality of the designated person according to the provisions contained in Law no. 361/2022 on the protection of whistleblowers in the public interest, which is of particular importance to all addressees of the said normative act.

Thus, Law no. 361/2022 entered into force on December 22, 2022, being the instrument for transposing Directive (EU) 2019/in national law/1937 Of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of Union law<sup>1</sup> [hereinafter referred to as „Directive (EU) 2019/1937”].

The new law introduces new obligations for companies, so it is imperative to clarify the meaning of the notion of „whistleblower in the public interest in the public interest”, its purpose and object, as well as highlighting the new challenges that companies will face.

The chosen topic is important from the perspective of authorities, public institutions, and other persons governed by public law, as well as in private law persons in their capacity as recipients of the provisions of Law no. 361/2022.

This legal document sets forth a general framework for the protection of persons who report violations of the law within the above mentioned recipients.

In this respect, the object of the new normative act, expressly provided in the content of art. 1 para. (2) of its content, must be emphasised:

- regulation of the procedure for receiving, examining and handling reports;
- provision of rights and obligations of reporting persons or publicly disclosing information on violations of law;

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\* PhD Candidate, Faculty of Law, „Nicolae Titulescu” University of Bucharest (e-mail: sandra.olanescu08@gmail.com).

<sup>1</sup> OJ L 305/26.11.2019.

- lays down measures to protect reporting persons or publicly disclose information on violations of the law;
- regulation of the obligations of public authorities, institutions, other legal persons governed by public law, as well as private legal persons;
- determination of the rights of the data subjects, as well as
- indication of the powers of the competent authorities.

For a better understanding of the notions and phrases it uses, Law no. 361/2022 expressly provides definitions of terms and expressions. Of these, probably one of the most important definitions is that of the whistleblower in the public interest, namely: the natural person who carries out a report or publicly discloses information regarding violations of the law obtained in a professional context.

In order to ensure the protection of these persons who have a vulnerable status in relation to the person to whom the reporting/disclosure has taken place, the legislator has provided numerous guarantees, including, establishing rules on the creation of a secure framework through which anonymous reporting can be carried out, as well as obligations regarding the receipt, examination, and resolution of reports.

Moreover, it is important to stress that the professional environment in which the whistleblower becomes aware of information on legal violations is widely defined, whistleblower can be any employee, and, the person performing a dependent activity, shareholder, person who is part of the management bodies, volunteer, trainee.

A very interesting aspect is the fact that whistleblowers can include candidates whose employment relationships have not yet started and who are conducting reports/ public disclosures in relation to information obtained during the recruitment process, as well as persons whose employment/service relationship has ceased.

Law no. 361/2022 also has an impact from the perspective of personal data protection, meaning in which companies need to analyse the current measures implemented and determine whether the current mechanism for processing and protecting personal data is sufficiently comprehensive and secure to ensure protection of personal data of all categories of whistleblowers in the public interest.

The author intends to answer the matter under consideration from the perspective of the correlative legal standards and the incidental ones in this matter, especially considering the sensitive field that Law no. 361/2022 regulates.

Furthermore, the paper addresses the relevant obligations of companies and risks to which they are subject under the provisions of Law no. 361/2022, as well as measures to protect the whistleblower in the public interest put in place by Law no. 361/2022.

## **2. The obligation of confidentiality of the designated person according to Law no. 361/2022**

### **2.1. Scope of Law no. 361/2022**

In terms of scope, Law no. 361/2022 establishes, on the one hand, that the rules contained therein apply, according to art. 1 para. (3), in situations where the regulations in the normative acts listed in Annex 1 to it do not contain special binding rules on reporting violations of the law.

By contrast, Law 361/2022 does not apply to reports of breaches of public procurement rules in the fields of defense and national security, where they fall within the scope of art. 346 TFEU<sup>2</sup>.

At the same time, Law no. 361/2022 expressly sets out that the new regulation does not affect the provisions on:

- protection of classified information;
- professional lawyer's secret;
- confidentiality of medical information;
- the secrecy of judicial deliberations;
- criminal procedure rules;
- the right of workers to consult with their representatives or trade unions;
- the rules relating to protection against any injurious measure, which are determined by such consultations;
- the rules relating to the autonomy of the social partners and their right to enter into collective

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<sup>2</sup> OJ C 326/26.10.2012, p. 0001-0390.

agreements or agreements.

On the other hand, the new normative act stipulates that its applicability concerns the reporting persons who obtained the information regarding the violations of the law, in a professional context, meaning in which the category of such persons implies at least the following: workers; persons engaged in self-employment within the meaning of art. 49 TFEU; shareholders and persons belonging to the management, management or supervisory body of an undertaking, including non-executive board members, shall, volunteers and trainees paid or unpaid; any person working under the supervision and direction of the natural or legal person with whom the contract is concluded, its subcontractors and suppliers.

At the same time, Law no. 361/2022 also applies to:

- persons whose employment relationships have not yet begun and who report through internal or external reporting channels or publicly disclose information about violations of the law obtained during the process recruitment or other pre-contractual negotiations, or where the employment relationship or service relationship has ceased,
- persons who report or publicly disclose information about violations of the law anonymously.

## **2.2. General principles governing reporting under Law no. 361/2022**

The principles governing the protection of reports of violations of the law are as follows:

- the principle of legality, according to which the authorities, public institutions, other legal persons governed by public law, as well as legal persons governed by private law, have the obligation to respect fundamental rights and freedoms, by ensuring full compliance, among others:
  - freedom of expression and information;
  - the right to the protection of personal data;
  - the freedom to conduct a business;
  - the right to a high level of consumer protection;
  - the right to a high level of protection of human health;
  - the right to a high level of environmental protection;
  - the right to an effective remedy;
  - the right of defense.
- the principle of responsibility, according to which the whistleblower in the public interest is obliged to submit data or information on the facts reported;
- the principle of impartiality, according to which the examination and resolution of reports is carried out without subjectivism, regardless of the beliefs and interests of the persons responsible for their resolution;
- the principle of good administration, according to which public authorities and institutions, other legal persons governed by public law are obliged to carry out their activity in the realisation of the general interest, with a high degree of professionalism, in conditions of efficiency and effectiveness of the use of resources;
- the principle of equilibrium, according to which no person can rely on the provisions of this law to diminish the administrative or disciplinary sanction for a more serious act that is not related to reporting;
- the principle of good faith, that the person who had good reason to believe that the information relating to the reported infringements was true at the time of reporting and that the information was within the scope of this law.

## **2.3. Reporting and disclosure according to the provisions contained in Law no. 361/2022**

According to the definition given by Law no. 361/2022, reporting constitutes oral or written communication of information on any act that is a violation of the law, carried out in writing, on paper or in electronic format, by communication to telephone lines or other voice mail systems, or by face-to-face meeting at the request of the whistleblower in the public interest.

In other words, reporting is a communication of information, which the whistleblower in the public interest can do by going through three procedures to benefit from the protection provided by Law no. 361/2022, namely:

- internal reporting - means the communication of information relating to infringements of the law within a company, carried out by means made available by the company (through its own channels). Thus, companies with at least 50 employees are required to identify/establish internal reporting channels and establish procedures for internal reporting. At the same time, Law no. 361/2022 provides the possibility for companies

with between 50 and 249 employees to group and use or share resources in receiving reports;

- external reporting - making available, in any way, in the public space information related to violations of the law. According to art. 12 of Law no. 361/2022, the external reporting channels are:

- public authorities and institutions which, in accordance with special legal provisions, receive and resolve reports of violations of the law in their area of competence;

- The National Integrity Agency, hereinafter referred to as the Agency;

- other public authorities and institutions to which the Agency transmits reports to competent resolution.

- public disclosure - is the making available in the public space, in any way, of information relating to violations of the law. However, public disclosure shall meet one of the following conditions:

- the whistleblower first reported internally and externally or directly externally, however, it considers that appropriate measures have not been ordered within 3 months of receipt of the report (6 months in justified cases); or

- has reasonable grounds to believe that: (i) the infringement may constitute an imminent or manifest danger to the public interest or the risk of damage that cannot be remedied; or (ii) in the case of external reporting there is a risk of retaliation or a reduced likelihood that the infringement will be effectively remedied in the light of the specific circumstances of the reporting.

#### **2.4. The main obligations of the companies and the risks they are subject to according to Law no. 361/2022**

The main obligation imposed by the new law on companies was to identify/establish internal reporting channels and establish procedures for internal reporting.

This obligation will enter into force on 17 December 2023 and is addressed mainly to companies with between 50 and 249 employees, and the failure to fulfill this obligation is sanctioned with a contravention fine of up to 30,000 lei.

Of course, nothing prevents employers with fewer employees from instituting such procedures or their employees from reporting on possible violations of the law. In this case, however, if there are no internal procedures, the whistleblower will have the right to conduct a direct reporting by using the external channel.

It should be noted that certain companies operating in specific areas (for example, oil field, oil field, insurance, or payment services) must fulfill the above obligation regardless of the number of employees.

Last but not least, the reports made must correspond to the truth, a contrary conduct being sanctioned by the new normative act. In this regard, it should be noted that, according to art. 29 of Law no. 361/2022, the reporting of information on violations of the law, knowing that they are unreal, is a contravention and is sanctioned with a fine from 2,500 lei to 30,000 lei, if the act was not committed in such conditions as to be considered, according to the law, a crime.

The finding and sanctioning of the above contraventions are made by the staff within the specialised structure of the Agency, provided in art. 16 of Law no. 361/2022.

#### **2.5. Measures to protect the whistleblower in the public interest established by Law no. 361/2022**

In terms of measures to protect the whistleblower, with the acquisition of this quality, it acquires more rights. Among them are:

- prohibition of retaliation - that is, of actions/omissions, direct or indirect, arising in a professional context, which are determined by the reporting/disclosure and which cause or may cause harm to the whistleblower, such as:

- the dismissal;

- extrajudicial unilateral termination of a contract for the provision of services (without fulfilling the conditions in this respect);

- the modification of the employment contract;

- reduction of salary or change of work schedule.

The whistleblower may contest retaliation by a request to the competent court, depending on the nature of the dispute. The burden of proof will be on the employer or entity that ordered the measures, which must prove that they are justified on grounds other than those related to reporting/disclosure<sup>3</sup>.

- advice, information, and assistance *i.e.*, the obligation of the Agency to provide advice and information on protection measures, rights, procedures, and remedies applicable to whistleblowers, whistleblowers, as well as providing assistance in relation to their protection against retaliation before any authority;
- the protection of the identity of the data subject and third parties - the rules on identity protection applicable to whistleblowers in the public interest are also incidents with regard to the identity of the data subject, moreover, the identity of the data subject shall be protected for as long as the follow-up to the public reporting or disclosure takes place, unless, as a result of the resolution of the report or disclosure, the following, it is found that the data subject is not guilty of violations of the law that were the subject of reporting or disclosure. Data subjects have the right to defense, including the right to be heard and the right to access their own file;
- disciplinary research conditions - at the request of the whistleblower in the public interest investigated disciplinary as a result of internal reporting, external or public disclosure, discipline commissions or other similar bodies within the authorities, or, public institutions, other legal entities of public law or private law legal entities have the obligation to invite the press and a representative of the trade union or professional association or a representative of employees, employees, as applicable; this announcement is made by communication on the website of the authority, public institution, public legal entity or private legal entity at least 3 working days before the meeting, under penalty of nullity of report and disciplinary sanction applied;
- prohibition of waiver of rights and remedies - the above-mentioned rights and measures may not be subject to waiver or limitation by contract, form, or conditions of employment, or including an arbitration agreement prior to a dispute. Any transaction aimed at limiting or waiving the above rights and measures is void of law.

## 2.6. Confidentiality obligation - limits and interpretation

The provisions with attached in Law no. 361/2022 should be emphasised/2022 Regulating the obligation to maintain confidentiality in the light of reports made by the whistleblower in the public interest (this is the result of the systematic interpretation of the provisions of the same chapter, which is, entitled „*Reporting rules and common provisions applicable to reports of infringements of the law*”).

From the analysis of art. 8 of Law no. 361/2022, a series of conclusions can be drawn, namely:

- art. 5 para. (1) - the obligation to keep confidential the identity of the whistleblower or any other information sour to allow its identification presents only one exception - the consent of the whistleblower;
- art. 5 para. (2) - the obligation to keep confidential the identity of the whistleblower or any other information allowing its identification presents another exception (this being an exception to the rule mentioned in the preceding paragraph) - disclosure is necessary for the fulfilment of a legal obligation. In this particular case, according to art. 5 para. (3), the whistleblower must be informed in writing, on disclosure and its reasoning (an obligation which does not persist if the information would jeopardise investigations or judicial proceedings);
- art. 5 para. (4) - trade secrets contained in the reports may not be the subject of any use or disclosure for purposes other than those necessary to resolve the report in question;
- art. 5 para. (5) - the obligation to keep confidential the identity of the whistleblower or any other information allowing its identification does not subsist if the person making the intended disclosure is the whistleblower itself in the public interest;
- art. 5 para. (6) - the obligation to keep confidential the identity of the whistleblower or any other information that allows its identification to be maintained and if the reporting reaches another person in error the framework of the private legal person (other than the designated person).

Therefore, in consideration of all the above-mentioned aspects, it can be easily ascertained that situations which exempt the person designated to resolve the reporting from the disclosure of the identity of the

<sup>3</sup> See S. Voiculescu, *Measures taken against those who claim violations of the law at work can be quickly suspended in court*, available at: [https://www.avocatnet.ro/articol\\_66914/M%C4%83surile-luate-impotriva-celor-care-reclam%C4%83-inc%C4%83lc%C4%83ri-ale-legii-la-locul-de-munc%C4%83-pot-fi-suspendate-rapid-in-istan%C8%9B%C4%83.html](https://www.avocatnet.ro/articol_66914/M%C4%83surile-luate-impotriva-celor-care-reclam%C4%83-inc%C4%83lc%C4%83ri-ale-legii-la-locul-de-munc%C4%83-pot-fi-suspendate-rapid-in-istan%C8%9B%C4%83.html), last time consulted on 10.05.2024.

whistleblower or other information which may lead to its identification are unrelated to the recipient of the disclosure, other than the designated person.

Moreover, the violation of the obligation to keep the identity confidential or of the information that allows the direct or indirect identification of the whistleblower in the public interest is sanctioned with a fine from 4,000 lei to 40,000 lei, according to the provisions of art. 28 para. (2) letter e) of the Law no. 361/2022.

In other words, the law does not distinguish whether such disclosure can be made to the legal representative of the private legal entity, reason why it can be appreciated that the disclosure or violation of the obligation of confidentiality towards the whistleblower, under the conditions provided by Law no. 361/2022 can be made/intended only for those authorised by the same normative act to solve the reports (the more so as, even in the event of an error in the transmission of the report to another person within that legal person, other than the designated person, the obligation of confidentiality subsists).

### **2.7. The relationship between the designated person and the legal representative of the private legal person**

As mentioned above, the designated person is the appointed person at the level of the authority, public institution or within private legal persons, as well as within other legal persons governed by public law.

This person has duties in relation to the receipt, registration, examination, follow-up actions and resolution of reports, and must act impartially and be independent in the exercise of these duties.

Depending on the number of employees, duties may be exercised by a person, a compartment or may be outsourced to a third party, hereinafter referred to as a designated third party.

In the light of the foregoing, it may be assessed, in particular in considering the obligation of the designated person to act impartially and independently in the exercise of the specific duties of that quality, and, pursuant to Law no. 361/2022, that the designated person is required to keep the identity of the whistleblower confidential in the public interest in relation to all and any person/person, and, of course, with the exceptions expressly provided by the provisions of art. 8 of the Law no. 361/2022.

Instead, it is appropriate to reiterate the situation in which the reporting arrives from error to another person than the designated person, in which case the person to whom these reporting reaches (*e.g.*, the legal representative of the legal entity) is obliged to keep the identity of the whistleblower confidential and to send the reporting further to the designated person.

So, then, it may be considered that the obligation of confidentiality regarding the identity of the whistleblower in the public interest subsists also with respect to the legal representative of the company (even if the reporting would arrive from error in it or in a person other than the designated person).

### **3. Conclusions**

This paper emphasises the importance of a double perspective: of presenting and analysing the rights and obligations of whistleblowers in the public interest, as well as regarding its recipients, namely authorities, public institutions, other legal persons governed by public law, as well as private legal persons.

Moreover, the legal provisions applicable in the matter that is the subject of this study are analysed, so that a series of problems faced in practice by the recipients of Law no. 361/2022 is clarified.

In consideration of all the aspects developed in this paper, the following conclusions can be drawn:

- Law no. 361/2022 on the protection of whistleblowers in the public interest is the general framework for the protection of persons who report violations of the law, which have occurred, or which are likely to occur, within authorities, public institutions, other legal persons governed by public law, as well as within private legal persons;
- the scope of Law no. 361/2022 concerns: the procedure for receiving, examining and handling reports; the rights and obligations of reporting persons or publicly disclosing information on breaches of law; and; their protection measures; the obligations of public authorities, institutions, other legal persons governed by public law, as well as legal persons governed by private law; the rights of the data subjects and the powers of the competent authorities;
- however, Law no. 361/2022 is without prejudice to the rules on the autonomy of the social partners and their right to conclude collective agreements or agreements;
- inter that, Law no. 361/2022 establishes the obligation of the person designated with the resolution of

reports to keep the identity of the whistleblower confidential in the public interest, except for the situations expressly provided by law, namely: the consent of the whistleblower; the whistleblower himself makes the disclosure of his own identity with intention; disclosure is necessary for the fulfilment of a legal obligation;

- at the same time, even if, by mistake, the reporting reaches a person other than the designated person, the obligation to keep the identity of the whistleblower in the public interest remains, in which case the erroneous recipient of the report is required to forward the reporting to the designated person, with the same obligation to keep confidential the identity of the whistleblower in the public interest;

- among the exceptions to the rule of preserving the confidentiality of the identity of the person who is a whistleblower in the public interest is not the hypothesis in which the recipient would be the legal representative of the legal person;

- the exceptions are strict interpretation and application and, where the law does not distinguish, neither the addressee, the interpreter, or the enforcer of the law must distinguish.

## References

- Directive (EU) 2019/in national law/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of Union law;
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