Часопис Національного університету "Острозька академія". Серія "Право". – 2017. – №2(16)

UDC 343

István Ambrus

Ph.D., senior lecturer

Lecturer, Eötvös Loránd University, Department of Criminal Law

Counselor, Penal Board of Supreme Court

Budapest, Hungary

ISSUES REGARDING THE HUNGARIAN REGULATION OF PUBLIC INTEREST DISCLOSURES

1. Introduction

In 2014, a cross-continental group of researchers released the *International Handbook on Whistleblowing Research.* It defines a whistleblower as "an organizational or institutional 'insider' who reveals wrongdoing within or by that organization or institution, to someone else, with the intention or effect that action should then be taken to address it".[1] The cradle of (modern) whistleblowing is undoubtedly the United States. Not only is it true that America has the most extensive body of regulation relating to the field as well as the most comprehensive academic coverage,[2] but it was here that whistleblowing went through its greatest transformations, often as a result of historical circumstances. Initially, the whistleblower was viewed as a "spy" or "informer," and his or her

[1] David Lewis, A. J. Brown, Richard Moberly, Whistleblowing, its Importance, and the State of Research, In: A. J. Brown et al. (editors), International Handbook on Whistleblowing Research, Edward Elgar Publishing, Cheltenham, 2014. p. 33.

[2] Beyond a legal analysis, the issue is also examined from an ethical perspective by Michael L. Rich, Lessons of Disloyality in the World of Criminal Informants, American Criminal Law Review, 2012/3. p. 1498-1507.

▪ Issues regarding the hungarian regulation of public interest disclosures / Ambrus, István // Часопис Національного університету «Острозька академія». Серія «Право». – 2017. – № 2(16) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2017/n2/17aiipid.pdf.

disclosure was more likely to be considered treacherous than benevolent.[3] With the passage of time, the term turned increasingly neutral, while the literature started to depict the whistleblower as a simple "informant."[4] Lately, in no small part thanks to the corporate scandals effected by such disclosures, the whistleblower grew into an object of public admiration. This explains why scholars unanimously states that public interest (or company) disclosures should be defended by the law. Nevertheless, the topic is also significant for criminal lawyers because the wrongdoing reported by the whistleblower often constitutes a criminal offence (eg. fraud, corruption, etc.).

In this study I will analyze the relevant regulation of Hungary. While examining these rules, it becomes evident that its roots reach back to the middle of the socialist period. Then, after a brief legislative detour, the lawmaking initiatives of the most recent period opened a fundamentally new chapter in the story of reporting abuses. In the end of the study I share some thoughts according to the recent regulation and about whistleblowing in general.

2. The Beginnings

The nearly analogous – although not entirely accurate – Hungarian terminology for whistleblowing may be the categories of *public interest discloser* or *company discloser* (*közérdekű bejelentő* and *vállalati bejelentő,* respecty*)*. The first appearance of these was a legislation in effect from 1977 until Hungary's 2004 EU accession: *Act I of 1977 on Public Interest Disclosures, Recommendations, and Complaints*. According to § 4(1) of this law, "a public interest disclosure highlights circumstances, errors, or deficiencies the remedying of which serves the interests of the community or society as a whole.

[3] Orly Lobel, Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems, South Texas Law Review, 2012/1. p. 40.
[4] Mary-Rose Papandrea, Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment, Boston University Law Review, 2014/2. p. 483.

▪ Issues regarding the hungarian regulation of public interest disclosures / Ambrus, István // Часопис Національного університету «Острозька академія». Серія «Право». – 2017. – № 2(16) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2017/n2/17aiipid.pdf.

It draws attention to behaviors or facts which are illegal, contrary to socialist morals or the principles of socialist economy, or otherwise offend or endanger the interests of society." The addressee can be a state agency, a company, an institution, an association, an oversight body, etc. (Act I of 1977, § 2). It must be highlighted that this law already emphasized the protection of the discloser, and, as such, allowed anonymous reports. If, however, it became clear that the discloser acted in bad faith, his or her identity had to be revealed [Act I of 1977, § 15(3)].[5]

3. The Regime of Act CLXIII of 2009

The next stop was *Act CLXIII of 2009 on the Protection of Fair Procedure and Related Amendments*. This was not at all akin to the previous regulation, but, as the relevant parliamentary memorandum states,[6] it utilized certain solutions from the US. It an be emphasized, that the law's general Explanatory Memorandum referred to, on the one hand, the Hungarian Constitutional Court's position on fair trial [primarily to decisions 6/1988. (III. 11.) and 14/2004. (V. 7.)]. On the other, it mentioned *expressis verbis* the *whistleblowing phenomenon*, which it defined as "an employee of an organization, who sets aside his/her personal interests, acts to avert harm (prevention) threatening others (the community in a narrow or broad sense) by revealing an irregularity (misconduct) detected at his/her place of employment." The law prescribed a procedural fine ranging from 50,000 to 500,000 HUF for offenders (or, in the case of legal persons, from 100,000 to 5 million HUF) [Act CLXIII of 2009 §

[5] Of the academic legal literature of the era, cf. Aczél György, A közérdekű bejelentésekről, javaslatokról és panaszokról szóló 1977. évi I. törvényről, [Act I of 1977 on Public Announcements, Proposals and Complaints] Magyar Jog, 1977/5. pp. 374-386. After the democratic transition Vass György, Panasz, törvény; panasztörvény, avagy úton a petíciós jog kiteljesedése felé, [Complaint, law; Complaint law or otherwise, towards the completion of the petition's right] Magyar Közigazgatás, 1997/1. pp. 20-26.

[6] Samu Nagy Dániel, Infojegyzet 2013/26. p. 3. http://www.parlament.hu/documents/10181/59569/Infojegyzet_2013_26_kozerdeku_bejelentesek.pdf/ca01a3dd-abca-446a-a12a-60ec33ea7f69>

11(1)]. For a person making an unfounded claim, the sanction may be between 50,000 and 300,000 HUF (a falsely disclosing organization can receive a charge stretching from 200,000 to 1 million HUF). Furthermore, echoing its American forerunner, § 16(1) of the 2009 Act states that "if the Authority imposed a fine due to a failure to fulfill the requirement of fair procedure, the Authority's president may award the discloser 10% of the fine." As it can be discerned from the quote above, § 4 of the law intended to establish a Public Procurement and Advocacy Authority (according to the preamble to increase efficiency in combating corruption), but this never materialized.

4. Developments in the 2010s

Primarily because of the legal guarantee it offers, it is necessary to highlight Article XXV of the Fundamental Law of Hungary, according to which "[e]veryone shall have the right to submit, either individually or jointly with others, written applications, complaints or proposals to any organ exercising public power."

The current legal environment was created by *Act CLXV of 2013 on Complaints and Public Interest Disclosures* ("the complaint law"), which came into force on 1 January 2014. This law can be described as one enabling disclosures in both the state and private sectors.

According to the definition in § 1(3), a disclosure "calls attention to a circumstance the remedying or discontinuation of which is in the interest of the community or the whole society. A public interest disclosure may also contain a proposal." The public interest disclosure must be evaluated within thirty days [complaint law, § 2(1)].

Moreover, the general Explanatory Memorandum – in addition to referring to the above-quoted passage from the Fundamental Law – also notes that "[a] characteristic of the new regulation is that it supports anti-corruption

▪ Issues regarding the hungarian regulation of public interest disclosures / Ambrus, István // Часопис Національного університету «Острозька академія». Серія «Право». – 2017. – № 2(16) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2017/n2/17aiipid.pdf.

measures in the private sector in addition to those in the public sector, and thus it allows organizations to formulate distinct procedures for handling disclosures and to enter into agency contracts with lawyers for the receipt of disclosures (discloser protection lawyer).”[7] The goal of this legal institution is for “the principal (typically a business organization) to engage the discloser protection lawyer within a tripartite legal relationship to receive in its name disclosures relating to the principal either from its employees or external partners” (detailed Explanatory Memorandum).

A similarly novel solution is the creation of w*histleblowing systems* sketched out in §§ 13-16, in connection with which the law “records the most important guarantees for the operation of the system (finality, entry into a data protection register, the prohibition on processing of special personal data, the requirements for terminating data handling, notification of employees, and containment of misuse). That legal persons in a contractual relationship with the employer (subcontractors, suppliers) can also make reports in the whistleblowing system is an important requirement, as this aids the more comprehensive information of management” (detailed Explanatory Memorandum). What is more, § 14(6) decrees that “persons having a legitimate interest in making a whistleblower report or in remedying the conduct concerned” may also make reports.

5. Significant Theoretical and Practical Issues in Whistleblowing

In this section, I will highlight the most notable characteristics that must be considered during the legal regulation of whistleblowing and the creation of whistleblowing systems. My primary aim is not to evaluate the Hungarian legal environment, however, but to present common questions within a broader

[7] For more on this, see Papp D. Gábor, A közérdekű bejelentő védelme [Protection of public disclosures] Ügyvédek lapja, 2013/4. pp. 23-27.

perspective.

5.1. Who Can Blow the Whistle?

The first obvious question which may arise concerns *who* is entitled to make a disclosure. According to the main rule, natural persons (or the representatives of legal persons) employed or in other employment-oriented legal relationships with the company have standing. Thus, according to general opinion, a personal qualification is necessary. In addition to the above-referenced § 14(6), a clause which expands the category of qualified persons, it may also be possible to make an exception based on *chronology:* On the basis of an overriding interest, it is possible for a person previously employed by the company to disclose, too, though his or her legal relationship might have been terminated already at the time of the disclosure.[8]

5.2. The Object of Whistleblowing

Dividing whistleblowing according to its object is primarily based on whether the misconduct to be disclosed is legally or morally objectionable. If the issue in question happens to be unlawful, it must be decided whether the given activity or omission violates or compromises criminal law rules or, perhaps, another field of law (e.g. regulatory offences). According to the correct position, which I already quoted, public interest disclosures may also play a role in the previously-mentioned cases, as well as in civil law-related detriments such as negligence or violations of personal rights (e.g. those concerning reputation). Nonetheless, the most common forms of misconduct pertain to malfeasance in connection with financially valuable data. The future of whistleblowing will, increasingly, lie in criminality of this nature.[9]

5.3. The Areas of Whistleblowing

[8] In the subject's Hungarian literature, this is explicitly referred to by Szente Zoltán, A bennfentes informátorok (whistleblower-ek) alkalmazásának lehetőségei a korrupcióellenes küzdelemben, [Opportunities for using whistleblowers in the fight against corruption] Közigazgatás-tudományi Közlöny, 2010/1. pp. 19-20.

[9] Elletta Sangrey Callahan, Terry Morehead Dworkin, David Lewis, Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest, Virginia Journal of International Law, 2003/3. pp. 903-904.

▪ Issues regarding the hungarian regulation of public interest disclosures / Ambrus, István // Часопис Національного університету «Острозька академія». Серія «Право». – 2017. – № 2(16) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2017/n2/17aiipid.pdf.

The establishment of a whistleblowing system, as demonstrated by the effective Hungarian legal environment, can occur within both the private or public sector. In connection with the latter, the only criteria that must be noted is that such a system, due to parallelism, may sometimes conflict with disciplinary regulations in a given field, thus special attention must be paid to harmonization.[10] This can be particularly relevant in policing.[11]

5.4. The Direction of Disclosure

When speaking of the direction of disclosure, I intend to differentiate between whether it should occur internally within the company's own regime or if it is to be targeted towards an external forum. Academic literature indicates that both solutions can have drawbacks. If the only available option is external whistleblowing, this can easily turn into fertile ground for retaliation against the discloser. On the other hand, if the opportunity is exclusively external, it can serve as a path for a disappointed employee's vendetta, perhaps after failing to receive a much-anticipated promotion. This can result in a damaged reputation, which is an essential factor in determining a company's competitiveness.[12] Keeping this in mind, our position is that a combination of internal and external whistleblowing may be the most effective solution. The Hungarian complaint law is thus especially forward-thinking in its introduction of a "middle man," the disclosure protection lawyer.

5.5. Is a Criminal Complaint Mandatory?

If the internal investigation conducted as a result of whistleblowing yields suspicions of a crime, the question arises whether the company has a *duty to make a criminal complaint*. § 16(3) of the complaint law states a fairly clear rule

[10] Cf. e.g. Act CXCIX of 2011 on Public Officials §§ 155-159

[11] E.g. chapter 15 of Act XLII of 2015 on the Service Status of Professional Members of Law Enforcement Agencies ("Hszt.")

[12] Meghan Elizabeth King, Blowing the Whistle on the Dodd-Frank Amendments: the Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes-Oxley, American Criminal Law Review, 2011/3. p. 1483.

pertaining to this point: “If the investigation of the conduct reported by the whistleblower warrants the initiation of criminal proceedings, arrangements shall be taken to ensure that the case is reported to the police.” Our attitude in relation to the appropriateness of this solution is highly skeptical. Although § 171(1) of Act XIX of 1998 on Criminal Procedure states that “[a]nyone may lodge a complaint concerning a criminal offence,” the main rule in Hungary's system of criminal law is that an absolute duty to this effect only exists under exceptional circumstances. Consequently, establishing this duty in connection with misconduct of *any severity* hardly seems justified. On our part, to increase the efficiency of investigations, *I would endorse legislative amendments that would allow exceptions from the ex officio principle by considering it an impediment to punishability if a lesser non-violent offence was uncovered through an employer's whistleblowing system, if it can be handled “in-house,” and if a criminal procedure in connection with the matter does not serve a pressing social interest.* It should be noted that the timeliness of criminal proceedings would also improve if, for example, a small-scale workplace embezzlement did not necessarily warrant the use of the state's punitive powers.

5.6. Protecting and Countering the Whistleblower

The complaint law states already in its preamble that the protection of public interest disclosers must be ensured as much as possible. Furthermore, § 11 includes the guarantee that all measures disadvantageous for the whistleblower and arising as a result of the disclosure will be unlawful (notwithstanding cases of bad faith), even if they would otherwise be legal. § 12(3) extends forms of assistance contained in Act LXXX of 2003 on Legal Aid to whistleblowers as well.

It must be noted that § 257 of Act IV of 1978 (the previous criminal code) criminalized the initiation of any disadvantageous measures against a person making a public interest disclosure up until 31 January 2013 (the offence of

▪ Issues regarding the hungarian regulation of public interest disclosures / Ambrus, István // Часопис Національного університету «Острозька академія». Серія «Право». – 2017. – № 2(16) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2017/n2/17aiipid.pdf.

"persecution of a public interest discloser"). This act is now only a regulatory offence (as per § 206/A of Act II of 2012 on Regulatory Offences, Regulatory Offences' Procedure and the Regulatory Offence Registry System). Determining which field of law should criminalize an act dangerous to a given society is fundamentally a legislative prerogative. Instead of undertaking such an endeavor, our position is that it is efficiency which must be increased in relation to both criminal and regulatory offences. Perusing the anonymized decisions available from the judiciary's database, I was only able to find a single case where judicial proceedings have been carried through to completion due to persecution of a public interest discloser, and that case ended in an acquittal.[13] This ascertains that procedural efficiency must somehow be increased.

5.7. Incentivizing the Whistleblower

This is a widespread solution in English-speaking countries, and, as I have seen, Hungarian lawmakers have also toyed with the idea of introducing whistleblower rewards in 2009, thus providing motivation for disclosures.[14] Due to present circumstances in Hungary, however, the introduction of such a system presumably will be delayed – at least until whistlelowing regimes are so common and developed that it can be assumed that the majority of claims are authentic reports of abuse and not simply venal and baseless allegations.

5.8. Abusing Whistleblowing

To conclude this section, I may declare that a position, which would not only support penalizing courses of action against whistleblowers (either with tools meant for felonious or petty offences) but would also create the possibility – if a *sui generis* case is established and in addition to liability for damages – of

[13] The procedure was started based on a substitute legal action at the Csongrád City Court, and it was concluded on 20 January 2009 with an acquittal contained in decision 2.B.94/2008/10. When this verdict was appealed, the Csongrád County Court upheld it in decision 1.Bf.96/2009/2, delivered on 18 March 2009. When the appellant turned to the Supreme Court, the highest court in the land maintained both rulings from Csongrád on March 18 2010.

[14] For the latest American solutions, see Kathryn Hastings, Keeping Whistleblowers Quiet: Addressing Employer Agreements To Discourage Whistleblowing, Tulane Law Review, 2015/2. pp. 497-500.

▪ Issues regarding the hungarian regulation of public interest disclosures / Ambrus, István // Часопис Національного університету «Острозька академія». Серія «Право». – 2017. – № 2(16) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2017/n2/17aiipid.pdf.

sanctioning bad-faith whistleblowers involved in severe instances of abuse, would be a respectable one to hold.

6. Summary

In this study I examined the Hungarian regulation of public disclosures briefly. The Act CLXV of 2013 on Complaints and Public Interest Disclosures can be considered modern, because it regulates eg. the legal institution of discloser protection lawyer and whistleblowing systems both in public and private sectors. In summary, it can be stated that Hungarian law follows the developed trends in this respect, so it can provide effective assistance to the widespread use of whistleblowing.

Bibliography

ACZÉL György, A közérdekű bejelentésekről, javaslatokról és panaszokról szóló 1977. évi I. törvényről, [Act I of 1977 on Public Announcements, Proposals and Complaints] Magyar Jog, 1977/5.

CALLAHAN, Elletta Sangrey – Dworkin, Terry Morehead, Lewis, David, Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest, Virginia Journal of International Law, 2003/3.

HASTINGS, Kathryn, Keeping Whistleblowers Quiet: Addressing Employer Agreements To Discourage Whistleblowing, Tulane Law Review, 2015/2.

KING, Meghan Elizabeth, Blowing the Whistle on the Dodd-Frank Amendments: the Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes-Oxley, American Criminal Law Review, 2011/3.

LEWIS, David – Brown, A. J. – Moberly, Richard, Whistleblowing, its Importance, and the State of Research, In: Brown, A. J. et al. (editors), International Handbook on Whistleblowing Research, Edward Elgar Publishing,

▪ Issues regarding the hungarian regulation of public interest disclosures / Ambrus, István // Часопис Національного університету «Острозька академія». Серія «Право». – 2017. – № 2(16) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2017/n2/17aiipid.pdf.

Cheltenham, 2014.

LOBEL, Orly, Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems, South Texas Law Review, 2012/1.

PAPANDREA, Mary-Rose, Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment, Boston University Law Review, 2014/2.

PAPP D. Gábor, A közérdekű bejelentő védelme, [Protection of public disclosures] Ügyvédek lapja, 2013/4.

RICH, Michael L., Lessons of Disloyality in the World of Criminal Informants, American Criminal Law Review 2012/3.

SAMU Nagy Dániel, Infojegyzet 2013/26. [source: http://www.parlament.hu/documents/10181/59569/Infojegyzet_2013_26_kozerdeku_bejelentesek.pdf/ca01a3dd-abca-446a-a12a-60ec33ea7f69> accessed 26 June 2017]

SZENTE Zoltán, A bennfentes informátorok (whistleblower-ek) alkalmazásának lehetőségei a korrupcióellenes küzdelemben, [Opportunities for using whistleblowers in the fight against corruption] Közigazgatás-tudományi Közlöny, 2010/1.

VASS György, Panasz, törvény; panasztörvény, avagy úton a petíciós jog kiteljesedése felé, [Complaint, law; Complaint law or otherwise, towards the completion of the petition's right] Magyar Közigazgatás, 1997/1.

▪ Issues regarding the hungarian regulation of public interest disclosures / Ambrus, István // Часопис Національного університету «Острозька академія». Серія «Право». – 2017. – № 2(16) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2017/n2/17aiipid.pdf.

Іштван Амбрус

До питання про регулювання розкриття інформації в громадських інтересах в Угорщині

У дослідженні коротко розкрито угорське регулювання розкриття інформації в громадських інтересах. Закон CLXV 2013 року «Про суспільні інтереси розкриття інформації та скарги» можна вважати сучасним, оскільки він регулює, наприклад юридичний інститут захисту від розголошення адвокатської таємниці та системи інформування як у державному, так і в приватному сферах. Таким чином, можна стверджувати, що законодавство Угорщини слідує відповідним започаткованим тенденціям, і тому він може надати ефективну допомогу широкому використанню інформування про конфіденційність.

Ключові слова: розкриття, угорське регулювання, розкриття громадських інтересів, розголошення

Иштван Амбрус

К вопросу о регулировании раскрытия информации в общественных интересах в Венгрии

В исследовании коротко раскрыто венгерское регулирование раскрытия информации в общественных интересах. Закон CLXV 2013 года «Об общественных интересах раскрытия информации и жалобы» можно считать современным, поскольку он регулирует, например юридический институт защиты от разглашения адвокатской тайны и системы информирования как в государственном, так и в частном сферах. Таким образом, можно утверждать, что законодательство Венгрии следует соответствующим начавшимся тенденциям, и поэтому он может оказать эффективную помощь широкому использованию информирования о конфиденциальности.

- Issues regarding the hungarian regulation of public interest disclosures / Ambrus, István // Часопис Національного університету «Острозька академія». Серія «Право». – 2017. – № 2(16) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2017/n2/17aiipid.pdf.

Ключевые слова: раскрытие, венгерское регулирование, раскрытие общественных интересов, разглашение

István Ambrus

Issues regarding the Hungarian Regulation of Public Interest Disclosures

This study examined the Hungarian regulation of public disclosures briefly. The Act CLXV of 2013 on Complaints and Public Interest Disclosures can be considered modern, because it regulates eg. the legal institution of discloser protection lawyer and whistleblowing systems both in public and private sectors. In summary, it can be stated that Hungarian law follows the developed trends in this respect, so it can provide effective assistance to the widespread use of whistleblowing.

Key words: disclosures, Hungarian regulation, public interest disclosures, whistleblowing

▪ Issues regarding the hungarian regulation of public interest disclosures / Ambrus, István // Часопис Національного університету «Острозька академія». Серія «Право». – 2017. – № 2(16) : [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2017/n2/17aiipid.pdf.