

## The Whistleblower. Evolution and Perspectives

Emil BĂLAN, Mihaela-Miruna TUDORAȘCU

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### ABSTRACT

*Though different nations have different whistleblower protection laws, many of them offer protection to those who report wrongdoing. We'll examine in the present study some of the various warning provisions at European level and the national level.*

*The whistleblower Protection Directive was adopted by the EU in 2019 - Directive (Eu) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. The adoption of laws implementing the Directive is still a work in progress for EU Member States. In the current study we will make an analysis over Romania case.*

**KEYWORDS:** *whistleblower, public organization, private organization, protection.*

### 1.Introduction

A whistleblower is someone who informs the public or a higher authority about any wrongdoing, such as fraud, corruption, etc. They could be an employee of a firm or a government agency.

Typically, it deals with issues of general concern that affect more individuals than just those employed by the corporation. Most whistleblowers make their discoveries public within the business. But those who have revealed the sources of the media are the ones we hear about most frequently.

At European level it was a real concern in connection with the protection institution of the whistleblower. After years of struggle, in 2019 was framed the Directive (Eu) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (called EU Whistleblower Directive). The EU Whistleblower Directive closes a critical legal loophole. Its adoption came about because of Europe's several decades of gradual transformation toward strengthening whistleblower protection<sup>1</sup>.

The whistleblower Protection Directive must be implemented by businesses with more than 250 workers by December 2021. Businesses with 50 to 250 employees were given a further two years to align. However, the adoption of laws implementing the Directive is still a work in progress for EU Member States.

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<sup>1</sup> V. Abazi, 'Whistleblowing in Europe: A New Era of Legal Protections' in P. Czech, L. Heschl, K. Lukas, M. Nowak and G. Oberleitner (eds), *European Yearbook on Human Rights* (Cambridge: Intersentia, 2019), 92-94.



In 2004, in Romania there was settled the Law No. 571 of 14<sup>th</sup> of December, on the protection of personnel in public authorities, public institutions and other units reporting violations of the law, published in Official Gazette No 1.214 of 17 December 2004, that provided, in article 1: *“This law regulates some measures regarding the protection of persons who have complained or reported violations of the law within public authorities, public institutions and other units, committed by persons with management or execution positions in the authorities, public institutions and other budgetary units...”*. In article 2 of the same law, there were provisions that settled which are these budgetary units: *“(1)...public authorities and institutions within the central public administration, local public administration, Parliament apparatus, presidential administration working apparatus, government working apparatus, autonomous administrative authorities, public institutions of culture, education, health and social assistance, national companies, autonomous regies of national and local interest, as well as national companies with state capital. (2) this law shall also apply to persons appointed to scientific and advisory councils, specialized commissions and other collegial bodies organized in the structure or in the public authorities or institutions.”*

What we observe is that this law provided rules for public organization only.

So, with these provisions, according to the Association for the Defense of Human Rights in Romania – Helsinki Committee (APADOR-CH), Romania became the first nation in Europe to enact legislation protecting "whistleblowers" as they are often known. The law was one of the strategies used to combat corruption in the public sector. The general findings of the monitoring of the national Anti-corruption Strategy 2016-2020's implementation, 15 years after the law's introduction show that, regrettably, the European legislative premiere has remained merely a statistical outcry<sup>2</sup>.

Because of the European provisions in connection with the whistleblower and the deadlines for the domestic law harmonization with the EU rules, because of the gaps in the national legislation (e.g. private organization lack of regulation in this area) etc., in Romania, on 29<sup>th</sup> of June 2022, ‘The Law on the Protection of Whistleblowers in the Public Interest’ was adopted by the Chamber of Deputies and sent for promulgation to the President on 1<sup>st</sup> of July 2022.

## 2.The legislative process and the whistleblower mechanism

Before debating the new Romanian law that is processed to be settled and the discussion in connection with this law, we will underline some technical aspects, the mechanism, over the whistleblower protection institution and the new regulation that Europe imposed. Before the Whistleblower Directive was adopted, there were some provisions in EU law regarding the reporting and disclosure of wrongdoings<sup>3</sup>. By Article 21(7) EU Whistleblower Directive: *“In legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data*

<sup>2</sup> <https://apador.org/avertizor-de-integritate-sau-tradator-de-institutie/>, accessed at 1<sup>st</sup> of November 2022.

<sup>3</sup> V. Abazi, The European Union Whistleblower Directive: A ‘Game Changer’ for Whistleblowing Protection?, *Industrial Law Journal*, (Oxford: Oxford University Press, Vol. 49, Iss. 4, 2020), 640–656.

*protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law, persons referred to in Article 4 shall not incur 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.”*

So, The EU Whistleblower Directive uses specialized language to convey the safeguards it offers. In actuality, the Directive makes no mention of, or provides a definition for "whistleblowing." The Directive instead talks about safeguarding people who report violations of EU law. The Directive views whistleblowing less as a direct means of protecting those who speak up at work and more as a means of implementing EU law.

The whistleblowing is defined as “the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations, including perceived or potential wrongdoing – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action”<sup>4</sup>. The exposure or reporting of wrongdoing is covered by this definition, including but not limited to corruption.

Turning back to EU Whistleblower Directive, according to article 1, the rules are applicable to the next areas: ‘public procurement; financial services, products and markets, and prevention of money laundering and terrorist financing; product safety and compliance; transport safety; protection of the environment; radiation protection and nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; protection of privacy and personal data, and security of network and information systems; breaches affecting the financial interests of the Union as referred into Directive; breaches relating to the internal market, as referred to in legislation, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law’.

The reporting party must be an employee of either the public or commercial sector who discovered of a breach while doing their duties. This Directive also applies to anyone who report or publicly reveal information about violations they knew about during a work-related connection that has ended.

According to article 6(1) of EU Whistleblower Directive: if the reporting person had reasonable grounds to think that the information about breaches was accurate at the time of reporting and that the information was covered by this Directive, they would be eligible for protection under this Directive. When a breach can be effectively handled internally and the reporting party believes there is no danger of reprisal, Member States shall encourage reporting through internal reporting channels before reporting through external reporting channels.

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<sup>4</sup> Marie Chêne, Whistleblowing Protection In Romania And Hungary, *Transparency International*, International Principles for Whistleblower Legislation (2015).

So, The Directive adheres to what Vandekerckhove calls the three-tiered whistleblowing reporting paradigm, which consists of internal, external, and public reporting channels<sup>5</sup>. Simply said, internal reporting refers to the whistleblower's place of employment, external reporting to pertinent authorities outside the place of employment, and public reporting to the media<sup>6</sup>.

Internal reporting is provided in article 8 of EU Whistleblower Directive, which settles that the most specific requirements on both private and public organizations are those relating to internal reporting. An internal reporting process can be created by the department or person responsible for reporting. Companies with more than 50 employees must set up internal reporting channels. Municipalities with fewer than 10,000 residents or local governments with fewer than 50 workers are excluded from the requirement to establish internal channels. The employer must follow up within three months of receiving the report to ensure compliance, and the authority is required to notify the whistleblower that it has received the report within seven days of the reporting.

External reporting is found out in Chapter III of EU Whistleblower Directive, where it's settled that is the term for reporting done out from one's place of employment. The authorities responsible for external reporting are chosen by Member States. Law enforcement agencies, judicial authorities, Ombudsmen, or authorities with a broader range of competencies at the central level in the MS can all fall under this category. Additionally, external authorities may include organizations whose primary function is administrative oversight, such as anticorruption organizations or regulatory or supervisory agencies qualified in the policy fields covered by the Directive<sup>7</sup>.

According to article 15 of EU Whistleblower Directive, there is the regulation for the public disclosures, through press, social networks etc. For the protection to be under the Directive provisions, there are a few conditions to fulfil: (1) only after exhausting all other internal and external channels and failing to get anywhere with them someone can submit material publicly, inside of the Directive's purview; (2.1) in cases when there is an emergency or a risk of irreparable harm, the breach may represent an immediate or an obvious danger to the public interest; (2.2) due to the unique circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach, external reporting carries a risk of retaliation or a low likelihood that the breach will be effectively addressed.

In article 20 of EU Whistleblower Directive, there are stated provisions for the whistleblowers that the Directive is referring to, such as: 'comprehensive and independent information and advice, on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned, free of charge'; before any pertinent authorities involved in their protection against reprisal, effective assistance from competent authorities; legal assistance in criminal and international civil cases.

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<sup>5</sup> W. Vandekerckhove, 'European Whistleblower Protection: Tiers or Tears?' in D. Lewis (ed.), *A Global Approach to Public Interest Disclosure* (Cheltenham: 2010).

<sup>6</sup> V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, *Industrial Law Journal*, (Oxford: Oxford University Press, Vol. 49, Iss. 4, 2020), 640–656.

<sup>7</sup> *Idem*.

Farther more, in article 21 of EU Whistleblower Directive, we find the protection against retaliation measures, specially in connection with the liability. The regulations establish safeguards to stop the whistleblower from being suspended, demoted, threatened, or subjected to other forms of reprisal. They also expressly forbid retaliation. Facilitators, co-workers, and family members who encourages whistleblowers are also protected.

### 3.The current legal situation of the whistleblower in Romania

In the present, in Romania there is a full process to harmonize the European Directive with national provisions.

To understand the evolution of the legal steps for contouring the new law, we will present the chronology of the Law Project (PL)<sup>8</sup> so far.

Date	Action
19 <sup>th</sup> of April 2022	Adopted by the Senate Adoption in compliance with the provisions of Article 76 paragraph (1) of the Romanian Constitution
26 <sup>th</sup> of April 2022	Presentation in the Standing Bureau of the Chamber of Deputies
29 <sup>th</sup> of April 2022	Adopted by the Chamber of Deputies result vote for=216, contra=55, abstentions=9
29 <sup>th</sup> of April 2022	Submission to the Secretary-General for the exercise of the right of referral on the constitutionality of the law
1 <sup>st</sup> of July 2022	Reference to the President of Romania for promulgation
6 <sup>th</sup> of July 2022	Complaint of unconstitutionality
13 <sup>th</sup> of July 2022	The Constitutional Court decides: (D.C. no.390/2022)
29 <sup>th</sup> of July 2022	The President of Romania requests the review of the Law; the request for reviewing is submitted to the Senate
1 <sup>st</sup> of September 2022	Adopted by the Senate (following the request for reviewing)
6 <sup>th</sup> of September 2022	Presentation in the Standing Bureau of the Chamber of Deputies
27 <sup>th</sup> of September 2022	On the agenda of the plenum of the Chamber of Deputies (Current status: On the agenda of the sessions of the Chamber of Deputies)

Table 1. Follow the law-making process<sup>9</sup>.

In several instances, in Romania, the major corruption prosecutions from recent years were founded on anonymous whistleblower reports. Their admissions contributed to several systemic issues being resolved. So, the importance of a new law, in accordance with the EU Directive was

<sup>8</sup> PL-x nr. 219/2022 - Draft law on the protection of whistleblowers in the public interest.

<sup>9</sup> [http://www.cdep.ro/pls/proiecte/upl\\_pck2015.proiect?cam=2&idp=19995](http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=19995), accessed on 3<sup>rd</sup> of November 2022.

necessary. The deadline for each EU country was December 2021, but unfortunately, this deadline was not respected, in Romanian's case we can see the steps in the previous table inserted before.

24 Member States, including Romania, received letters of formal notice from the Commission in January 2022 for failing to transpose the Directive and for failing to inform the Commission of the transposition measures by the required time. A reasoned opinion was sent by the Commission to 15 Member States in July 2022 who had not yet communicated full transposition. The EU Whistleblower Directive was not completely implemented further by some States, thus the European Commission decided on September 29 to initiate infringement actions against Belgium (INFR(2022)0011), Austria (INFR(2022)0004), Romania (INFR(2022)0167), and Slovenia (INFR(2022)0181)<sup>10</sup>.

Those four States have two months to reply at this point. The Commission may choose to send these cases to the Court of Justice of the European Union in the event of unsatisfactory responses.

What brings new the actual form of Romanian Law?

For establishing that, first we must mention the Decision of the Romanian Constitutional Court No. 390/13<sup>th</sup> of July 2022. The Constitutional Court determined that the provisions of article 1 para. (4), (6), and (7) and article 19 of the Law on the Protection of Whistleblowers in the Public Interest, as well as the law as a whole, are constitutional in relation to the criticisms made at its meeting on July 13, 2022, within the framework of the constitutional review a priori.

The legislation penalizes the whistleblower's actions without impairing his or her right to make the information that is the subject of the law public knowledge or influencing the provisions of the rules of criminal procedure relating to the referral of the criminal investigation bodies. Such procedural guidelines only enhance the whistleblower's social role and increase their accountability for the work they do.

The legal protection of the whistleblower is unaffected by the establishment of a procedure for carrying out the activity of reporting/public disclosure of information falling within the ambit of the legislation, or by the delimitation according to objective criteria of specific phases associated to this activity. In addition, the Court determined that the new Regulation, which establishes protection, assistance, and remedy procedures for the whistleblower's benefit, enshrines an appropriate standard of legal protection for the whistleblower.

As we précised in the Table, on 29<sup>th</sup> of July, The President of Romania requests the review of the Law, because "Whistleblower protection is an important component of the prevention of corruption and inadequate transposition of the Directive entails both the risk of an infringement procedure and the risk of activating the mechanism for making European funds conditional on compliance with the principles of the rule of law." The President showed that a mismatch between the project's requirements for anonymous reports, the two-year retention period for reports, which is deemed insufficient to ensure the law's finality, the requirement for public disclosures regarding the three-month period following internal/external reporting, among other things. Specialists have faulted them all equally, pointing out that the Directive is being misapplied.

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<sup>10</sup> Stefan Turcu, <https://romania.representation.ec.europa.eu/news>, accessed on 7<sup>th</sup> of November 2022.



The project of the law<sup>11</sup> settles, in article 1 para. (2): *“This law regulates the procedure for receiving, examining and resolving reports, the rights and obligations of persons who report or publicly disclose information on violations of the law, their protection measures, the obligations of authorities, public institutions, other legal entities governed by public law, as well as legal entities governed by private law, the rights of the data subjects and the powers of the competent authorities”*.

In accordance with article 2 of the Project, (1) *“this law shall apply to persons who make reports and who have obtained information about violations of the law, in a professional context, such as: workers; self-employed persons (article 49 of the TFEU); shareholders and persons belonging to the management body, the management or supervision of an undertaking, including its non-executive board members, as well as remunerated or unpaid volunteers and trainees; d) any person who works under the supervision and the direction of the natural or legal person with whom the contract was concluded, the subcontractors and its suppliers”*. According to the same article, para. (2), *“the law shall also apply to persons who make reports, including anonymous ones, through internal or external reporting channels, or publicly disclose information about violations of the law, information obtained during the time of the recruitment process or other pre-contractual negotiations or where the employment report or service report has ceased”*.

The principles that are governing this law are: the principle of legality (respect for the fundamental rights), the responsibility principle (data and information about the reported facts – the whistleblower’s obligation), impartiality principle (no subjective interpretation), good administration principle, the principle of equilibrium.

The law essentially is applying to people who have obtain legal infractions while working, including employees, independent contractors, company shareholders, volunteers, and trainees. Secondly, the regulations also are applying to people who report violations, including anonymous ones, that they become aware of during pre-contractual discussions or recruitment.

If we are talking exclusively about private businesses, then, starting on December 17, 2023, private businesses will also have to establish internal reporting channels for whistleblowers and reporting management procedures; however, only businesses with at least 50 employees will be subject to this obligation. The proposed law also provides that *“private legal companies with between 50 and 249 employees may group together and use or share resources in respect to receiving reports of violations of the law and in relation to follow-up actions”<sup>12</sup>*.

However, private businesses will also be required to adhere to this requirement regardless of the number of employees they have. People who operate in industries like banking, investing, participatory financing, the oil industry, insurance, or payment services are targeted<sup>13</sup>.

Whistleblowers will report violations of the law through internal or external channels. These will be communicated in writing, via a written or electronic document, over the phone, via

<sup>11</sup> Law on the protection of whistleblowers in the public interest.

<sup>12</sup> Article 9, para. (4) - Law on the protection of whistleblowers in the public interest (project).

<sup>13</sup> The full list is in Annex no. 3 to the project.

voicemail, or at in-person encounters. Whistleblowers' initial and last names, as well as contact information, must be included in reports. Contact information will also be needed if we're talking about anonymous reports, among other things. The reports will be collected in one place and preserved for five years in a unique electronic registry that also contains information on how they were resolved.

*“The person appointed to resolve the reporting is required to do not disclose the identity of the whistleblower in the public interest or the information that it would allow for direct or indirect identification of it, except in the case of who has his express consent<sup>14</sup>.”* Only if this is a requirement imposed by law, according to the conditions and restrictions set forth therein, may the identity of the whistleblower in the public interest and any other information provided for in the normative act be divulged.

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Regarding the external reporting routes, this group includes the National Integrity Agency as well as public institutions and authorities that, in accordance with the law, are tasked with receiving and resolving reports of violations of the law in the specific areas.

The Agency will have the authority to make requests, gather data, and process information about reported incidents. The agency also has the power to request the documents and information necessary to resolve the reporting from motivated authorities, public institutions, other people, and legal entities controlled by both public and private law, with the responsibility to maintain secrecy<sup>15</sup>. After the investigation is complete, the designated person must create a report that includes the following components: an explanation of the circumstances that led to the need for reporting, a description of the information provided to The Agency by registered reporting and, as necessary, by communication to the relevant authorities, public institutions, other legal entities governed by public law, as well as legal entities governed by private law, conclusions, and recommendations.

Regarding the public disclosures, article 19 of EU Whistleblower Directive settles that: if one of the following requirements is met, a whistleblower who publicly discloses evidence about a legal wrongdoing is protected: *‘has first reported internally and externally or directly externally, but considers that no appropriate measures have been ordered within the deadline provided by law’*, or *‘has reasonable grounds to believe that: (1) the violation may constitute an imminent or obvious danger to the public interest or the risk of damage that can no longer be remedied; or (2) in the case of external reporting there is a risk of retaliation or a low probability that the infringement will be effectively remedied by having in the specific circumstances of the reporting.’* The notification can be made to the press, professional organizations, trade unions or employers union, non-governmental organizations, parliamentary committees, or in any other way in the public space.

In connection with the liability<sup>16</sup> we will underline a few aspects. There is the possibility, that in case of violation of the law provisions, to intervene civil, disciplinary, contravention or

<sup>14</sup> Article 8, para. (1) - Law on the protection of whistleblowers in the public interest (project).

<sup>15</sup> Article 17, para. (5) - Law on the protection of whistleblowers in the public interest (project).

<sup>16</sup> Chapter VII of the EU Whistleblower Directive.





criminal liability. For example, if there are situations that attract the contravention liability, fines will be imposed.

#### 4. Whistleblower in the World. A few examples

Most states appear to lack the motivation necessary to enact and implement integrity whistleblower laws. Other laws that forbid the revelation of information may replace the referral statute, and in many places, regulations on defamation and libel deter whistleblowers from filing complaints<sup>17</sup>. To make an ensemble image, we will underline some aspects over other countries systems outside Europe.

In **United States of America**, there are a lot of provisions in connection with the whistleblower protection. These laws are accompanied by a "rewards" program. Therefore, if a whistleblower issues a valid warning, they may be compensated financially. Issues must be reported either online through certain portals, via email, or on a specific form to be eligible for this program. Even whistleblowers outside the United States may be eligible for some of these awards<sup>18</sup>.

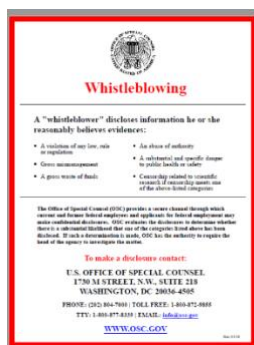


Figure 1.  
*States' whistleblower awareness poster<sup>19</sup>.*

However, unlike the EU, federal law does not mandate any specific procedures or warning channels for private enterprises. Another crucial element is that the labour union movement is very robust in the US, and members of unions can receive additional legal protection.

In **United Kingdom**, strong warning laws, like the Public Interest Disclosure Act of 1999, have a lengthy history in the UK (PIDA). Similar to New Zealand's regulations, they put more emphasis on safeguarding the whistleblower from reprisal than on following specific protocols<sup>20</sup>.

<sup>17</sup> Transparency International-“The alternative to silence: Protection of whistleblowers in 10 European countries”, <https://www.transparency.org.ro/sites/default/files/download/files/Alternativa.pdf>, accessed on 9<sup>th</sup> of November 2022.

<sup>18</sup> <https://www.whistlelink.com>, accessed on 9<sup>th</sup> of November 2022.

<sup>19</sup> Source: <https://osc.gov/Pages/SearchResults.aspx?k=whistleblowing%20poster>, accessed on 9<sup>th</sup> of November 2022.

<sup>20</sup> <https://www.gov.uk/whistleblowing>, accessed on 9<sup>th</sup> of November 2022.

Since the UK's warnings are now more specifically defined, the identified problems must be deemed to be of public concern (affecting the broader public) to qualify as integrity warnings. Criminal offenses, breaking the law, injustices, safety and health violations, environmental harm, and even covering up illegal conduct that fall under these categories are all examples of complaints. Except in cases when your specific complaint is in the public interest, whistleblowing law does not apply to personal concerns (such as bullying, harassment, or discrimination).

In **Australia**<sup>21</sup>, whistleblowers are crucial in spotting and reporting wrongdoing and harm to the public, customers, and the community. The Corporations Act of 2001 (Corporations Act) grants specific people legal rights and protections as whistleblowers to encourage them to come forward with their concerns and to protect them when they do.

The Corporations Act's whistleblower provisions have been enhanced as of 1 July 2019 to offer stronger protection for whistleblowers. This involves mandating a whistleblower policy for public companies, sizable proprietary businesses, and corporate trustees of superannuation institutions under APRA regulation starting on January 1, 2020.

## 5. Conclusions

The aim of the present study is in fact to underline if the trend in Romania in connection with the whistleblower is proper, legislatively and procedural speaking, if it follows the EU Whistleblower Directive, if the protection assured by the law frame will be enough for the whistleblowers.

The answer to all these issues it is not an absolute one yet, because the legislative loop is not closed at the present, as we presented in Table 1, showed in the text. We will carefully follow this process at Romanian level, but also in EU States, and for sure another door for new research will be opened.

So far, with all the comparisons that we made, there is a need of protection for the whistleblowers, not only in Romania, but all over the EU, being a proper tool to fight against corruption, if the complaints are made with good faith.

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<sup>21</sup> <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/>, accessed on 9<sup>th</sup> of November 2022.

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## ABOUT THE AUTHOR

**Emil BĂLAN**, PhD, Professor at the National University of Political Studies and Public Administration, Bucharest, Romania.

Email: [emil\\_balan2005@yahoo.fr](mailto:emil_balan2005@yahoo.fr)

**Mihaela-Miruna TUDORAȘCU**, Associate Professor at the “1 Decembrie 1918” University, Alba Iulia, Romania.

Email: [miruna.tudorascu@uab.ro](mailto:miruna.tudorascu@uab.ro)

