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WHISTLEBLOWING AND PROTECTING WHISTLEBLOWERS

(LEGAL ANALYSIS FOR WHISTLEBLOWERS AND
PROTECTION OF WHISTLEBLOWERS)

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ABOUT KLI

KLI, Kosovo Law Institute, is a non-governmental and non-profit organization of public policy, a think tank specialized in the justice sector.

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I. Executive Summary

Until the end of 2011, Kosovo has had no legislation for the protection of persons who have reported violations within public institutions of the Republic of Kosovo.

Regarding this area, on 24 September 2011 the Law on Protection of Informants entered into force. This law, which had a total of 11 articles, set out the basic principles in the area of informants, responsibility of institutions, deciding on unlawful action and some other procedural and technical aspects. But, in essence, this law did not build a reporting and protection system for reporters, who were referred to as whistleblowers. Furthermore, the unlawful act whose reporting was protected by this law was limited to the act or omission of the person violating the provisions in force, either in the form of a criminal offense or a misdemeanour

This law was in force until 2 January 2019, when the Law No. 06/L-085 on Protection of Whistle-blowers (LPW).

With this law, Kosovo has built a reporting system, or whistle-blowing of violations in public or private institutions, specifying the areas for which they may be alerted, institutions or addresses where a whistleblower should be directed, whistleblower procedures, protection and rights of whistleblowers, and even other persons related with the whistle-blower, judicial protection of whistleblowers, misdemeanour provisions up to annual reporting. In this law, apart from whistleblowing from public institutions, also pays special attention to the private sector, provisions that come into force on 2 January 2020.

According to LPW, whistle-blowing can be in the form of reporting and disclosure in the public interest regarding abuses in both the public and private sectors. . The LPW also specifies the areas for which whistle-blowing is protected. Unlike the prior law, the LPW has significantly chosen the range of fields suitable for whistle-blowing. According to the LPW, each alert has three types of alerts available: internal (to the employer), external (to the competent authority) and public (Media, NGO, Internet, etc.). The LPW sets out the provisions for protecting the legitimate interests of whistle-blowers. This law also stipulates the protection of the interests of persons related to the whistle-blower. To whistle-blow, the LPW requires only "reasonable suspicion", which is not the same as "evidence", a legal term that implies facts that go beyond the suspicion that something has happened. No evidence is expected from the person reporting.

However, the Ministry of Justice has not fulfilled its legal obligation for drafting a regulation which specifies procedure for receiving and treating whistleblower cases. Consequently, the former Government has failed to adopt such regulation within the legal deadlines.

Since LPW entered into force, ACA has not has had no case of whistleblowing as an external whistle-blowing body, since then there has been no public whistleblowing.

II. Legal Framework

Up until 2011, Kosovo had no legislation for the protection of persons, whom have reported violations within public institutions in the Republic of Kosovo.

Regarding this field, on 24 September 2011 the Law on the Protection of Informants entered into force, according to this law, an informant means “any person whom is a citizen or employee, informs in confidence the relevant authority within the public institution at central or local level, institutions, public or private enterprise for any reasonable suspicion for the existence of unlawful actions”¹

The purpose of this law was the creation of a legal framework for inciting officials to file unlawful actions²

This law which has a total of 11 articles determines the basic principles in the area of informants, institutions responsibility, deciding on unlawful action and some other procedural and technical aspects. But in essence, this law did not build a reporting and protection system for reporters, who were referred to as informants.

Furthermore, the unlawful act, reporting that is protected with this law, was limited to the action or inaction of the person with which the provision in force were violated, whether criminal or minor offences.

This law was in force until 2 January 2019, when Law No. 06/L-085 on Protection of Whistle-blowers (LPW) entered into force.

The purpose of this this law is the opportunity of whistle-blowing violations in the public and private sector and protection of whistleblowers.³ This law determines the rules for whistle-blowing, whistle-blowing procedure, whistleblowers rights and protection and public institution and private entities obligations regarding whistle-blowing⁴

By this law, Kosovo has established a system of reporting, or whistle-blowing, violations in public or private institutions, where it has defined the areas for which a whistle can be blown, the institutions or addresses where a whistleblower should be directed, whistle-blowing procedures, protection and the rights of whistleblowers, and even other persons, associated with whistle-blowers, the judicial protection of whistleblowers, misdemeanour provisions, up to annual reporting.

In this law, apart from whistle-blowing from public institutions, importance is also given to the private sector, provisions coming into force on 2 January 2020⁵.

¹ Law no. 04/L-043 on Protection of Informants, Article 1.1.

² Ibid. Article 1

³ Law no.06/L-085 on Protection of Whistle-blowers

⁴ Ibid. Article 2.

⁵ Ibid. Article 32

III. Whistle-blowing opportunities

According to LPW, whistleblowing can be a form of reporting and disclosure in the public interest. The LPW also specifies the areas for which whistleblowing is protected. Unlike Law No. 04/L-043 on Protection of Informants which stipulates violations of legal provisions only when dealing with criminal and minor offenses, the LPW has significantly selected the range of appropriate whistle-blowing areas.

In addition, the LPW refers to three periods relevant to each area, namely the breach that has occurred, is occurring or is likely to occur. Apart from violations that consist of criminal and minor offences, according to LPW, the adequate area for whistleblowing is also improper-administration of justice, serious improper management of institutions, health and environmental harm. Among other things, an appropriate area for whistleblowing is information intended to show that any of these issues have been, are or are likely to have been concealed or destroyed⁶.

With regard to assessing whether a particular situation falls within these areas, namely a public interest, according to the LPW, this is assumed in each case and does not need to be proven but that the opposite can be proved, namely that an issue designated did not enter these areas⁷.

According to LPW, every whistle-blower has at their disposal three types of whistle-blowing:

- Internal whistle-blowing (*to employer*);
- External whistle-blowing (*to competent authority*); and
- Public whistle-blowing (*media, NGO, internet etc.*).

With regards to internal whistleblowing, public employer whom has more than 15 employees and private employer whom has over 50 employees are obligated to assign a responsible officer for whistle-blowing cases. If the whistleblower has reasonable doubts that the responsible officer could be involved in the case because the investigation is not effective or is not the adequate person, the whistleblower can address the direct employer. The same situation stands even if the employer does not have an adequate responsible officer or has not determined and published internal procedures for receiving and treating whistle-blowers.

Whereas, if the whistleblowing is about the employer, is of urgent character, there is doubt that damaging actions could be taken against the whistle-blower or proof that the doubts or evidence provided by the whistleblower could be deleted, then the whistleblower can blow the whistle externally. Public sector whistleblowers can blow the whistle externally to the Anti-Corruption Agency (ACA), while the private sector should follow this type of whistleblowing through regulations according to the areas of responsibility.

⁶ Ibid. Article 5.1.

⁷ Ibid. Article 5.2.

Beyond external whistleblowing, in cases where the whistle-blower reasonably believes that he or she will be subject to punishment if they do internal or external reporting, he believes that in these two types of reporting his evidence will be erased or destroyed, that there are threats to life, public health, safety, the environment, or where large or irreparable damage is caused or where the authorities responsible for internal and external reporting have not taken appropriate action, the whistle-blower may disclose the information to the public, respectively public whistle-blowing.

Whereas, when internal or external whistleblowing under this law concerns classified information, national security, defence, intelligence and international relations, the whistleblower shall submit it to the competent authority in these areas

In this manner, the assessment of the transition from one type of whistleblowing to another type of whistleblowing largely depends on the whistleblower himself, provided that the same within the meaning of Article 10 of the LPW does not abuse whistle-blowing.

After internal or external whistleblowing, the whistleblower is notified regarding the course of the case that they blew the whistle for.

IV. Procedures and legal deadlines in treating whistle-blowing cases

Article 16 of LPW has defined that the legal deadlines for treating whistleblowing cases. This article stipulates that internal procedures for administrative investigation of whistleblowing is initiated from the moment the whistleblower reports the information.

After the report of information by the whistleblower, the employer shall notify the whistleblower within 15 of receiving the report, if it was accepted or rejected⁸.

Regarding the administrative investigation phase, in terms of hasty action, the LPW has initially determined that this phase ends "as soon as possible". However, in any case, the administrative investigation must be completed within 45 days of the reporting of the whistleblowing information, unless the circumstances of the case require the extension of this deadline, which may be a maximum of 45 days.⁹

During the administrative investigation phase, the responsible officer reviews and evaluates allegations raised by the whistleblower, may request additional information, conduct inspections, obtain statements from relevant persons, consult with experts in the field, etc. During the administrative investigation phase, the whistle-blower or a third person who is believed to be aware or possess the relevant documentation for a specific case may also participate. The employer is also obliged to make available for the investigation the data, documentation and evidence that it possesses¹⁰.

⁸ Ibid. Article 16.2.

⁹ Ibid. Article 16.3.

¹⁰ Ibid. Article 16.8.

If upon completion of the administrative investigation of the whistleblowing by the employer it turns out to be a legal violation, the employer shall notify the competent body as well as take immediate measures to prevent and stop the continuation of harmful consequences from suspected action or practice that was whistle-blown¹¹.

The same procedure as in the case of internal whistle-blowing applies to cases of external whistle-blowing, both in the public and private sectors¹².

The rest of the procedure not regulated by the LPW is covered by the Law on General Administrative Procedure.

LPW determined provisions for the protection of the legitimate interests of whistleblowers. It also provides for the protection of the interests of persons related to the whistleblower, which the law defines as "the person who aids the whistleblower or may provide evidence related to the whistle-blower or any other person who may be harmed by any connection to the whistleblower".

Article 7 of LPW stipulates that the whistle-blower has the right to: protection of his identity during the whistleblowing process, protection of the source of information of the whistleblower and protection from retaliation. This article stipulates that in certain circumstances the whistleblower rights are protected during administrative investigation, after administrative investigation and after the end of after the administrative investigation as well as after the termination of employment relationship with his employer, when, under reasonable circumstances, the whistleblower has sought protection under this law.

On the other hand, article 9 of LPW stipulates that "the whistleblower that reports and discloses information in compliance with the provisions of the law cannot be subject to criminal or civil liability or disciplinary procedures" and "a whistleblower has the right to protection under this law in cases where he/she: 1) reports or discloses information, as defined in this law, 2) reasonably believes that the information reported or disclosed is true".

With regards to "reasonably believes", this term is not the same as "evidence", a legal term which implies facts that go beyond the suspicion that something has happened. No evidence is expected from the person reporting¹³.

Furthermore, the whistleblower is not required to prove the reliability and authenticity of the whistleblower information¹⁴ until the responsible officer has to obtain the whistleblower's written consent in the event that he is required to provide information that may disclose the

¹¹ Ibid. Article 16.9 and 16.10.

¹² Ibid. Article 18.2 and 19.

¹³ "Whistleblower Protection". Instruction. Project against Economic Crime (PECK II). 2019. F.9. (See: <https://rm.coe.int/handbook-on-protection-of-whistleblowers-alb/168097ed0c?fbclid=IwAR3AaNNPS2Py3xf9sei4ycpGQ8xcxaOEVAzXh-KNC-DujOPQeToZaDdvF-A>). (lastly accessed on 7 December 2019).

¹⁴ Law no.06/L-085 Protection of Whistleblowers. Article 9.3.

whistleblower's identity to a competent authority for actions that cannot be taken without revealing the identity of the whistle-blower¹⁵.

Article 22 of LPW determines 12 detrimental actions that are forbidden to be taken against whistleblowers, including the group of words “including but not limited to...” in a manner that apart from 12 acts explicitly numbered in this article, to stop other detrimental acts against whistleblowers, whilst the following article of this law determines the rights of the whistle-blower to damages. Regarding judicial protection, article 24.5 of LPW stipulates that “all cases related to whistleblowing shall be handled with priority by the Court”

Important is the burden of proof for these cases. Article 25 of LPW stipulates that “In all cases when the whistleblower or person related to the whistleblower considers that he/she has suffered from detrimental acts due to whistleblowing, the **employer shall bear the burden of proof in order to prove that the detrimental act has no causal link with the whistleblowing**”.

On the other hand, whistleblowing is protected with misdemeanour and criminal offences provisions. Article 27 of LPW determines the severity of misdemeanour sanctions in cases of violations in report to whistle-blowers and the whistleblowing process itself, in which case the fine reaches 20,000 euro.

Provisions for whistleblower protection are also in-cooperated in the Criminal Code no.06/L-074 of the Republic of Kosovo, which entered into force on 14 April 2019. In chapter 31 of this Code, are listed the criminal offences against administrative justice and public administration, where among them is “Retaliation”, a criminal offence sanctioned by article 388 of this Code. Paragraph 2 of this article stipulates that “Whoever takes any action harmful to any person with the intent to retaliation for reporting or disclosing information for acts and missions that pose a threat or violation of public interest shall be punished by fine or imprisonment of up to two (2) years.”

V. Lack of secondary legislation for the implementation of LWP

Article 17.5 of LWP stipulates that “The Government, upon proposal of the Ministry of Justice, shall determine by a sub-legal act the procedure for receiving and handling whistleblowing cases” whereas article 30.1 of this law stipulates that “Sub-legal acts for the implementation of this Law shall be issued within six (6) months from the day of entry into force of this Law”. Pursuant to this the regulation should have been adopted by Government according to the draft proposal by the Ministry of Justice (MoJ) no later than 2 July 2019.

The legal deadline was not respected by the previous Government, respectively Ministry of Justice who until the end of its mandate did not submit this draft regulation to Government. On 19 July 2019 the former Prime Minister Haradinaj handed in his resignation, after the resignation, The Republic of Kosovo Government is outgoing. In this manner, after this date, this regulation has not been able to be adopted.

¹⁵ Ibid. Article 11.3.

Whereas, Article 30.2 of LWP stipulates that “Within six (6) months after the entry into force of this Law, the employers shall, according to this Law, appoint the responsible officials for whistleblowing and notify the ACA for the public sector, respectively the Labour Inspectorate for the private sector”. With regards to the public sector, ACA notified responsible persons are assigned for over 200 institutions¹⁶.

In addition, with the purpose of harmonisation of organisation structure respectively regarding new competences in the area of whistle-blowing, ACA on 10 May 2019 amended the Regulation for the Internal Organisation and Systematisation of Jobs in ACA.¹⁷

Technical challenges in implementing LWP

Article 11 of LWP determines confidentiality of whistleblowing and whistleblowers. Furthermore paragraph 2 of this article stipulates that “Responsible official and any other person shall not inform any person mentioned in the whistleblowing, unless otherwise provided by Law.”

However, keeping confidentiality is a challenge in practice due to technical reasons.

Responsible persons for cases of whistle-blowing in every institution are persons whom are employed by the respective institution. In this case, institutions do not have special offices for treating these cases or special open spaces for keeping the documents as a result of whistle-blowing.

In this case, the fact that in majority of institutions there are two or more employees in an office, this makes it impossible to secure the principle of confidentiality. This for the reason that every person, within right hesitates to whistleblow a case if in the office of the responsible person for whistle-blowing has another person in there that is not part of the process. Moreover, in majority of institutions, the corridors to the responsible persons or to their office are monitored by cameras, an aspect that threatens to reveal the identity of the whistleblowers.

Furthermore, the lack of special spaces for keeping the files from the whistleblowing, threatens that these files fall into the hands of irrelevant third persons and violates the principle of confidentiality.

On the other hand, article 14.3.2 of LWP stipulates that whistleblowing can be submitted via email. Responsible persons for whistle-blowing cases in certain institutions use official e-mail of these institutions, in which emails, information technology officials have access to. The accessibility of these officials to these files is another risk of the principle of

¹⁶ "Whistle-blowing challenges in Kosovo". Betimi për Drejtësi. 23 November 2019. (<https://betimiperdrejtesi.com/emisionet/sfidat-e-sinjalizuesve-ne-kosove/>). (Lastly accessed on 9 December 2019).

¹⁷ "REGULATION NO. 01/2019 FOR AMENDING AND SUPPLEMENTING REGULATION NO 01/2013 FOR INTERNAL ORGANISATION AND SYSTEMATIZATION OF JOBS IN THE ANTI CORRUPTION AGENCY ". ACA. 10 May 2019. (See: <https://akk-ks.org/assets/cms/uploads/files/Dokumente/ALB%20Rregullore%20Nr%2001%202019%20per%20ndryshimin%20dhe%20plotesimin%20e%20rregullores%2001....pdf>). (Lastly accessed on 9 December 2019).

For this reason, institutions must address all these challenges in practice, in a manner that these conditions and special spaces for whistle-blowers to blow the whistle on cases that they have information on.

VI. Cases of whistle-blowing according to LWP

Since the LWP entered into force, ACA did not have any cases or whistleblowing as a body for which external whistleblowing can be done, until that time, there were also no public whistle-blowing cases.

According to the ACA Director, Shaip Havolli, since there is not official whistleblower yet, there is an interest, he added that the lack of regulation for the receiving and treatment of whistle-blowing cases presents a huge barrier in this area.

Whereas, in regards to internal whistleblowing, the number of this cases is still not public, since the preparation and publishing of an annual report for cases of whistleblowing, ACA has a legal deadline until 31 March 2020.

VII. Compensation for whistleblowers

“Sometime crime pays”, is the first sentence of the “New York Times” article, which speaks about an American citizen, whom because of whistleblowing was rewarded with 104 million dollars.

Bradley C. Birkenfeld, blew the whistle on American tax fraud. The information he uncovered resulted in a huge success, he was rewarded by the American state with 104 million dollars¹⁸.

This was because the United States of America foresees compensation for whistleblowers in cases where it results in their success. Regardless of the relevant facts, the sum that a whistleblower can be compensated on for the whistleblowing case varies from 15 to 30% of the sum confiscated¹⁹.

Based on this compensation scheme, in another case, a whistleblower in the United States of America was compensated with 250 million dollars.

In this case, it is clear that the compensation of the whistleblower had a positive effect in the United States of America. In USA there are good whistleblowing practices, protection of whistleblowers and compensation for whistleblowers that could be used and included in the

¹⁸ "Whistle-Blower Awarded \$104 Million by I.R.S.". 11 September 2012. (See: <https://www.nytimes.com/2012/09/12/business/whistle-blower-awarded-104-million-by-irs.html>). (Lastly accessed on 9 December 2019).

¹⁹ "Can I Be Compensated For Being a Whistleblower?". 7 June 2019. (See: <https://www.whistleblowersattorneys.com/blogs-whistleblowerblog-compensated-for-being-a-whistleblower>). (Lastly accessed on 9 December 2019).

Kosovo legislation in order to stimulate cases of whistleblowing²⁰. In the case of the Republic of Kosovo, implementation of a whistleblowing system and opportunity for a compensation scheme must be reviewed.

In such a case the risks and complications of this policy must be taken into account. MoJ must initially conduct a detailed analysis prior to delving into the process of legislative changes which regulate the whistleblowing compensation scheme.

VIII. Unheard cases of whistleblowing

Until the LWP entered into force, there were certain cases where different officials reported and denounced abuse and violations within institutions. Yet, these reports were not even treated with the least seriousness by justice system bodies, whose action only demotivates people whom know of unlawful action within the institutions to report violations that they are aware of.

Furthermore, the Police Inspectorate of Kosovo (PIK) in July 2017 published a vacancy announcement for 17 open places in this institution, in which vacancy announcement the Ministry of Internal Affairs (MIA) auditor found a total of 15 legal violations in recruitment procedures of this vacancy announcement.

The audit of this vacancy announcement was conducted with the request of the former MIA Minister Flamur Sefaj from the Internal Audit Unit in MIA and after “Betimi për Drejtësi” transmitted an audio recording where wrong-doings were evident that occurred during recruitment procedure regarding the vacancy in question. After the audit findings, on 18 December of the previous year, former MIA Minister of that time, Flamur Sefaj requested that this vacancy to be annulled and such a thing occurred on 29 December 2017.

The whole case was recorded in November of last year, when MIA received a complaint regarding this vacancy announcement from the recruitment committee member, Qerim Bytyqi, once head of investigations in Prizren/Peja Division, within PIK whom through a letter notified the ministry of the committees violations in the recruitment procedure.

The whistleblower of that time, Qerim Bytyqi, Chair of the Committee for selection using the Law on the Protection of Informants, Law on PIK and Criminal Code, informed the Ministry of Internal Affairs and Prosecutors Office about the irregularities in this vacancy announcement. After this, research was also conducted by “Betimi për Drejtësi”, of which after the transmitted show, former minister of MIA, Bejtush Gashi dismissed from office the Executive Head of PIK, Hilmi Mehmeti²¹. During this time, Qerim Bytyqi was faced with various pressures due to his whistleblowing.

²⁰ “Exclusive documentary from USA “Corruption whistleblowers” (Full documentary)”. 9 December 2019. www.betimiperdrejtesi.com (<https://betimiperdrejtesi.com/dokumentari-ekskluziv-nga-shba-sinjalizuesit-e-korrupsionit-dokumentari-i-plote/>)

²¹ “After research conducted by TV show “Betimi për Drejtësi”, Minister of Internal Affairs dismisses the suspended head of PIK, Hilmi Mehmeti”. Betimi për Drejtësi. 3 July 2019. (See

IX. Conclusions

- Until 2011, Kosovo did not have legislation for the protection of persons, whom have reported violations within public institutions.
- From 2011 to 2019, this area was regulated with by poor law, respectively the Law on Protection of Informants.
- From 2 January 2019 the Law on the Protection of Whistleblowers, a law which builds and advanced system of reporting or whistleblowing on violations within institutions, whether public or private. Provisions that have to do with whistleblowing in the private sector enter into force on 2 January 2020.
- Different from Law no.04/L-043 on the Protection of Informants, which determined legal violations only when it has to do with a criminal or minor offence. LPW has significantly expanded the range of fields suitable for whistleblowing.
- According to LPW, every whistleblower has at their disposal three types of whistleblowing: internal (*to employer*), external (*to competent authority*) and public (*Media, NGO, internet etc.*).
- LPW established provisions for the protection of legal interest of whistleblowers. Moreover, this law determines the protection of interest of persons involved in whistleblowing.
- Article 22 LPW determines 12 detrimental actions that are forbidden to be undertaken against whistleblowers, including the group of words “including but not limited to...” in a manner that apart from 12 acts explicitly numbered in this article, to stop other detrimental acts against whistleblowers.
- Whistleblowers are protected by criminal provisions incorporated in the new Criminal Code of the Republic of Kosovo.
- The Ministry of Justice has not fulfilled its legal obligation for drafting a regulation which determines the procedure to receiving and treating cases of whistleblowing. Consequently, the former Government failed that within the legal deadline to adopt this regulation.
- Institutions have not addressed the creation of technical conditions for whistleblower coordinators, to have working conditions so that the principle of confidentiality for whistleblowers and whistleblowing is protected.
- Since LPW entered into force, ACA has not had any whistleblowing case as a body for which external whistleblowing is conducted.
- Until the LWP entered into force, there were certain cases where different officials reported and denounced abuse and violations within institutions. Yet, these reports were not even treated with the least seriousness by justice system bodies, whose action only demotivates people whom know of unlawful action within the institutions to report violations that they are aware of.
- The whistleblower compensation scheme has proven to be effective in the United States of America. Once the whistleblowing system prescribed in LPW reaches

stability and the Republic of Kosovo must review the possibility of building a whistleblowing compensation scheme.

X. Recommendations

1. The Ministry of Justice as soon as possible draft a Regulation that determines the procedure for receiving and treating whistleblowing cases. In this regards, the minister/ministry of Justice and new Government must take into account the delays created in drafting this regulation and must urgently act in its adoption.
2. All institutions to address the technical needs for the opportunity to whistleblow, in a manner that the principle of confidentiality of whistleblowers and whistleblowing is protected.
3. For every eventual detrimental act in regards to whistleblowers, the State Prosecutor conform article 388 of CCRK to act with efficiency, affectivity and in a proactive manner to protect the whistleblower from detrimental acts against them.
4. Immediately after LPW provisions enter into force that regulates whistleblowing in private institutions, the latter to assign responsible persons for whistleblowing cases.
5. All public institution heads to notify their staff about the LPW provisions and other sub-legal acts that regulate this area.
6. Pursuant to Article 30.3 of LPW, ACA and Labour Inspectorate to initiate proceedings under the Law on Minor Offences against employers and responsible officials who have not fulfilled their obligations pursuant to the law.
7. Institutions responsible for the areas of classified information, national security, defence, intelligence and international relations shall, as soon as possible, promulgate bylaws defining the rules and procedures for receiving and treating types of whistleblowing.
8. Within a relatively short period of time, MoJ to conduct a detailed analysis on future legal amendments regarding compensation schemes for whistleblowers, based on practices from the USA.