



MEMORANDUM

To: All parties concerned
From: Dr Vigilenca Abazi, Executive Director, European Whistleblowing Institute
Tom Devine, Legal Director, Government Accountability Project
Date: 22 December 2023
Re: Breaches of EU law by the proposed Amendment to Act No 54/2019 Coll. on the Protection of Whistleblowers as amended by Act No 189/2023 Coll.

I. INTRODUCTION

This memorandum examines the legislative amendments proposed to the Slovak Whistleblower Protection Act within the context of EU law and principles safeguarding whistleblower rights. The amendments pose a tangible conflict with the EU Whistleblower Directive¹, particularly concerning the non-regression clause, and risk invoking state liability for non-compliance with EU law. Moreover, the accelerated legislative process undertaken bypasses procedural safeguards, infringing upon the Conditionality Regulation², potentially jeopardizing Slovakia's access to the Union budget and inviting further legal consequences as delineated within the Regulation.

II. VIOLATION OF EU WHISTLEBLOWER DIRECTIVE

The proposed amendments violate several provisions of the EU Whistleblower Directive, as outlined below, and result in the reduction of the legal protections afforded to whistleblowers in Slovakia. As a result, the proposed amendments violate non-regression stipulated in Article 25, EU Whistleblower Directive.

1. Necessity Condition

The stipulation of 'necessity' as a criterion for a qualified whistleblowing report, as proposed in the draft amendment, presents substantial legal challenges. First, the threshold of necessity is

¹ 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, *OJ L 305*, 26.11.2019, p. 17–56.

² Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L 433I*, 22.12.2020, p. 1–10.

impractical, often unattainable early in the investigative process when whistleblowers typically report suspicions of misconduct. Criminal investigations rely on the accumulation of these early warning signals and subsequent assessment of all relevant information, not just information deemed *ex-ante* as 'necessary'. Consequently, the necessity criterion is too rigid, potentially excluding pertinent information that could prove vital as an investigation unfolds.

Second, this necessity requirement introduces considerable legal uncertainty, with the potential to deter whistleblowers from coming forward. This is due to the subjective nature of necessity, which could lead to unpredictable and non-reviewable decisions by authorities regarding the protection status of whistleblowers. Whistleblowers would have to guess if they agree about necessity, which will create an inherent chilling effect.

Such a legal environment is antithetical to the spirit of recital 43 of the EU Directive, which advocates for the protection of persons who report breaches that have not yet materialized or are likely to take place. Article 5(2) explicitly protects “reasonable suspicions, about actual or potential breaches...” irrespective of the evidence's immediate apparent necessity which except in extreme circumstances may be impossible to know until an investigation is complete. However, it *is* realistic to have a reasonable suspicion about illegality or abuse of authority. That is all the Directive requires. There is no “necessity” prerequisite, hence the legislation would weaken the Directive’s mandatory minimum requirements.

2. Vagueness concerning “apparent abuse”

In the draft amendment under Section 2(k), whistleblowers are disqualified from protection based on an "apparent abuse of the right to make a whistleblowing report." This new barrier is nowhere in the Directive and raises significant concerns regarding legal certainty—a principle that is fundamental to EU law and enshrined in the European Whistleblower Directive. The lack of a precise definition for "apparent abuse" stands in stark contrast with the Directive, which mandates that information regarding reports should be "transparent, easily understandable and reliable" to advance the Directive’s aim of encouraging reporting rather than deterring it (Recital 75). The ambiguity engendered by such general wording is irreconcilable with the requirements for clarity and predictability outlined in the EU Directive. This creates a substantial risk of inconsistent interpretation and application, thus introducing unnecessary obstacles that may dissuade potential whistleblowers, in direct violation of the Directive’s objectives. Quite simply, based on wholly subjective standards, they can be stripped of all rights against retaliation.

Moreover, the Directive, particularly Recital 75, emphasizes the need for clarity in the application of whistleblower protections to avoid creating a chilling effect on reporting. The draft amendment’s language concerning the "apparent abuse" fails to meet this standard, potentially leading to arbitrary or subjective determinations that could penalize well-intentioned whistleblowers. The core issue is further compounded by the draft amendment's conflict with

Recital 32 of the Directive, which establishes the irrelevance of a whistleblower's motives provided they have "reasonable grounds to believe" in the accuracy of the information reported at the time of disclosure. This Directive's provision is intended to protect whistleblowers from adverse consequences if their reports, made in honest error, are later found to be inaccurate. Similarly, an otherwise meritorious report could be deemed abusive, due to allegedly nefarious motives, which is forbidden by the Directive. The draft amendment's approach could be construed to penalize whistleblowers for non-malicious inaccuracies and malicious accuracies, both violating the Directive's explicit protections for good faith reporting found in Article 5(7). Whistleblowers must have non-ambiguous, clear boundaries to prevent that chilling effect. Guessing about subjective judgment whether they even have rights calls creates a chilling effect that undermines the legal safeguards intended to support and encourage the reporting of breaches. For purposes of clarity, it is imperative that the amendment be revised to align with the EU Whistleblower Directive's Articles 5(7), 6, and Recitals 32 and 75 to ensure that whistleblowers are adequately protected and encouraged to report in the public interest.

Most fundamental, the legislation's subjective standard for abuse of whistleblowing falls far below the Directive's minimum. There only is one provision, Article 23(2) and Recital 102 that disqualifies whistleblowers for protection and permit accountability for whistleblowing reports supported by a reasonable suspicion -- that they include "knowingly false" information. That is the proper boundary. There is no discretion to make whistleblowing even more dangerous through vulnerability to open-ended attacks on a whistleblower's motives.

Finally, the exclusion is unnecessary. If a reporter engages in abuse of the right, the action inherently cannot qualify as protected speech under the reasonable suspicion test.

3. Disclosure and Review

The draft amendment's requirement to disclose the justification for granting whistleblower protection, as necessitated by Sections 4 para 1 and 6 para 1, directly contradicts the confidentiality provisions safeguarded by Articles 16 and 17 of the EU Whistleblower Directive. These articles advocate for measures that prevent retaliation, including safeguarding the identity of the reporting person. Allowing employers to review and potentially challenge the grounds of protection undermines the protection's preventive nature and exposes whistleblowers to retaliation, thereby contravening the Directive's intent to provide robust and secure channels for reporting breaches of Union law.

The draft amendment enabling employer review of whistleblower protections misunderstands the preventive nature of such protections as delineated in the EU Whistleblower Directive. The Directive, through Articles 5-7 and Recitals 21, 23, and 24, mandates confidentiality to insulate whistleblowers from retaliation. By allowing employers to challenge protection decisions, the draft

amendment risks breaching these provisions, potentially jeopardizing investigations and exposing whistleblowers to retribution.

4. Changing Personal Scope

The draft amendment's exclusion of Police Corps members from whistleblower protections raises significant legal issues when measured against the EU Whistleblower Directive's framework. The Directive robustly defines the scope of who qualifies as a 'worker', explicitly including public sector employees to ensure comprehensive protection across member states. This inclusive definition is supported by the jurisprudence of the Court of Justice of the European Union (CJEU), which has historically interpreted the term 'worker' to encompass a wide array of employment relationships within the public sector, including civil servants and law enforcement personnel. Furthermore, the Directive sets out a minimum standard of protection, articulated in Article 25(1), that member states must meet or exceed. There was no police exemption in Slovakia's law prior to the transposition. The proposed amendment's exemption for Police Corps members in the transposition law would represent a regression from prior standards, which is expressly prohibited under Article 25(2) of the Directive. This non-regression clause is vital to maintain the level of protection previously established and ensure that legal reforms do not erode existing rights and safeguards for whistleblowers.

5. Prohibition of Retroactivity

Section 25aa's retrospective repeal of protections for Police Corps members raises three primary legal challenges: Firstly, such retroactivity undermines the principle of legal certainty, which is fundamental to EU law and enshrined in the EU Charter of Fundamental Rights, specifically in Article 49, which provides for the right not to be tried or punished twice in criminal proceedings for the same criminal offence. Secondly, this provision contravenes Article 25 of the EU Whistleblower Directive, which safeguards against the regression of established protections, ensuring that any legislative changes do not diminish the rights previously guaranteed to whistleblowers. Lastly, the draft amendment's allowance for post hoc review of granted protections may violate the acquired rights of individuals, a concept protected under the general principles of EU law as interpreted by the CJEU. The case-law on retroactivity is based on the principle of protection of legitimate expectations and the principle of legal certainty, which form part of the EU legal order. A new legal rule does not apply to legal situations which have arisen and become definitive before.³ The retroactive application could potentially disenfranchise individuals who relied on the existing legal framework to report serious crimes, compromising the integrity of whistleblower protections, and weakening the rule of law within the member state.

³ Case law is extensive, see e.g., Judgments of 16 December 2010, *Stichting Natuur en Milieu and Others* (C-266/09, EU:C:2010:779, paragraph 32); of 7 November 2013, *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, paragraph 22); and of 14 May 2020, *Azienda Municipale Ambiente* (C-15/19, EU:C:2020:371, paragraph 57).

III. VIOLATION OF CONDITIONALITY REGULATION

The EU Conditionality Regulation, articulated in Article 1, is designed to safeguard the Union's financial interests when Member States breach the principles of the rule of law. The Regulation's central aim is to ensure that EU funds are not misappropriated or misused in countries where the rule of law is undermined.

1. Violation of Rule of Law Principles

The key question pertains to the alignment of the expedited procedure with the rule of law principles as defined in Article 2 of the EU Conditionality Regulation. It is imperative to emphasize that the rule of law, as per this Article, encompasses various fundamental principles. The principle necessitates a transparent, accountable, democratic, and pluralistic law-making process. The expeditious nature of the procedure here raises concerns about whether there was adequate transparency and public participation. There was none, not even with the nation's whistleblower office. The rule of law principle demands legal certainty. Rapid amendments may create uncertainty for stakeholders, including whistleblowers, as they may find it challenging to keep up with the evolving legal framework. It is crucial to ensure that the executive powers do not act arbitrarily. The haste in secretly preparing this legislation creates vulnerability to arbitrary decisions, as proper scrutiny and evaluation have been circumvented.

2. Indicative Breaches

Article 3 of the EU Conditionality Regulation provides indicators of breaches of the rule of law principles. The expedited procedure raises concerns about whether it allowed sufficient time for proper oversight. A rapid amendment process may lead to incomplete scrutiny, potentially allowing arbitrary decisions to go unaddressed. If the expedited procedure restricts access to legal remedies or judicial review, it may be seen as limiting the availability and effectiveness of legal remedies, thus violating the Regulation.

3. Legal Action and Remedies

In light of these concerns, individuals and the European Commission may explore several legal remedies and measures. Individuals who believe that their rights are infringed upon by the expedited procedure may file complaints with relevant national authorities. The European Commission, empowered by Article 5 of the EU Conditionality Regulation, can initiate an investigation to determine whether there has been a breach of the rule of law principles. If a breach is confirmed, the Commission can propose measures, including financial sanctions, as outlined in Article 4.

IV. RECOMMENDATIONS

Recommendation 1: Repeal or Revise Problematic Amendments

It is strongly advised that the Slovak government takes immediate action to address the legal deficiencies within the proposed amendments to Act No 54/2019 Coll. on the Protection of Whistleblowers. These amendments are in violation of the EU Whistleblower Directive, which sets out minimum essential protections for whistleblowers across the European Union. The following specific steps should be taken:

Repeal Problematic Provisions: The government should consider the outright repeal of the provisions within the proposed amendments that are in clear contravention of the EU Whistleblower Directive. These provisions include those related to the necessity condition, the vague definition of "apparent abuse," the disclosure and review process, and the exclusion of Police Corps members from protection even in pending litigation. Repealing these provisions is essential to bring the national legislation into alignment with EU law.

Revision for Compliance: Alternatively, if the government wishes to retain certain aspects of the proposed amendments, a thorough revision process is required. This revision should involve removing any language or requirements that are inconsistent with the EU Whistleblower Directive. For instance, the necessity condition should be revised to align with the Directive's standards, which emphasize the importance of protecting whistleblowers who report based their reasonable suspicions of wrongdoing, irrespective of immediate necessity.

Recommendation 2: Ensure Compliance with the EU Whistleblower Directive

To remedy the identified violations of the EU Whistleblower Directive and uphold Slovakia's obligations under EU law, the following actions are recommended:

Alignment with Directive Provisions: The Slovak government should prioritize aligning its national legislation with the provisions of the EU Whistleblower Directive. This entails a comprehensive review of the draft amendment to ensure that it fully complies with the Directive's requirements on legal certainty, good faith reporting, confidentiality, and the scope of protection.

Removal of Ambiguities: The vague language concerning "apparent abuse" must be removed or clarified in line with the Directive's mandate for transparency and reliability in whistleblower reporting. Ambiguities in the legal framework can lead to inconsistent interpretations, which is contrary to the Directive's objective of encouraging reporting and deterring wrongdoing.

Recommendation 3: Review and Amend the Expedited Procedure

In light of concerns regarding the expedited legislative procedure and its alignment with EU rule of law principles, the following steps should be taken:

Rule of Law Compliance: The Slovak government should undertake a thorough review of the expedited legislative procedure to ensure that it complies with the rule of law principles as defined in Article 2 of the EU Conditionality Regulation. This review should focus on whether the

procedure upholds transparency, accountability, democratic processes, and the avoidance of arbitrary decisions.

Transparency and Public Participation: To address concerns related to transparency and public participation, the expedited procedure should be extended in duration to allow for meaningful engagement and input from stakeholders, including the public. Enhancing transparency in the legislative process is essential to demonstrate a commitment to EU values and principles.

V. CONCLUSION

The proposed amendments to Act No 54/2019 Coll. on the Protection of Whistleblowers in Slovakia are incompatible with EU law, particularly the EU Whistleblower Directive. These amendments, if enacted, risk diminishing the legal protections afforded to whistleblowers and undermining the Directive's fundamental principles. The violation of the non-regression clause, the introduction of vague terminology, unrealistic prerequisites to qualify for protection the disclosure and review requirements, the exclusion of Police Corps members from protection, and the retrospective repeal of protections all stand in stark contrast to the robust framework established by the Directive. Addressing these issues is imperative not only to bring national legislation in line with EU standards but also to protect the rights of whistleblowers and promote a culture of transparency and accountability.

Furthermore, the expedited legislative procedure undertaken for these amendments raises concerns about its alignment with EU rule of law principles as outlined in the EU Conditionality Regulation. Transparency, accountability, and the avoidance of arbitrary decisions are essential components of the rule of law that must be upheld. To ensure compliance with EU values and principles, it is crucial that the expedited procedure is thoroughly reviewed and, if necessary, revised to allow for meaningful public participation, judicial oversight, and adherence to the rule of law. In light of these concerns, it is incumbent upon the Slovak government to take prompt action to address these legal deficiencies and safeguard both whistleblower rights and the integrity of the legislative process in Slovakia.