

WHAT PROTECTION FOR WHISTLEBLOWERS?

*Analysis of the legal framework and
implementation of the whistleblower
protection law*

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KEY FINDINGS

The areas in which the Slovakia's whistleblower protection law meets the recognized principles of best practice in whistleblower protection:

- The law's scope of application extends to both public and private sectors
- The law entails a sufficiently inclusive definition of reportable wrongdoing, including offences related to corruption
- legal protection from adverse employment action applies (also preventively) to employees who report wrongdoing to the competent institutions (police, prosecutor's office)

The areas in which the Slovakia's whistleblower protection law falls short in recognized principles of best practice:

- The legal protection does not extend to whistleblowers who disclose the information about wrongdoing externally, i.e. to the media or third parties
- Narrow definition of retaliatory actions from which the whistleblower is protected: only adverse employment action is included; however, the whistleblowers still may be legally liable, prosecuted or face other forms of reprisals

In the 18 months of the law's effectiveness in Slovakia, the whistleblower protection law remains far from fulfilling the potential it has on paper. The implementation has been marked by very low public awareness and weak performance of responsible state agencies, resulting in extremely small number of incoming requests for protection – protection was provided to only to 11 persons. The employers were found to meet the requirement of introducing internal reporting channels only on the formal level – but with little or no impact on the actual disclosing of malpractice in their organisations.

BACKGROUND

The law on certain measures related to reporting of anti-social activities¹ (hereinafter, the whistleblower protection law, or briefly the law) entered into force on January 1, 2015. As the first standalone whistleblower law in Slovakia, it grants protection to those who report malpractice in their workplace. Secondly, the law obliges subjects from both public and private sector to create conditions for accepting and investigating complaints filed by their employees by establishing internal complaint handling mechanisms.

The adoption of the whistleblower protection law is, at least on paper, one of the first important steps towards establishing and fostering the culture of zero-tolerance to various forms of malpractice, including corruption, in both public and private sectors.

The novel form of protection available to the persons reporting misconduct and the recently established mechanisms for reporting wrongdoing need to be set in the broader context of internationally recognized principles and best practices in whistleblowing. **Only then we can fully understand the potential and limitations of the present legal framework in Slovakia**, i.e. to identify the areas in which the law provides adequate protection to whistleblowers and where it falls short in its comprehensiveness.

¹ Act No.307/2014 Coll. On Certain Aspects of Whistleblowing (Act on some measures related to the reporting of anti-social activities)

METHODOLOGY

The analysis of the legal framework evaluates the scope and comprehensiveness of Slovakia's whistleblower protection law against the 14 criteria² derived from the internationally recognized principles and recommendations for best legislative practice. The analysis jointly applies the same set of criteria to the public and private sector, as the whistleblower protection law applies to both of them.

In line with precaution raised by the authors of the study, we distinguish between the positive assessment on presence and comprehensiveness of legal provisions on one hand and the extent or quality of actual whistleblower protection on the other.³ **The state of whistleblower protection in Slovakia is a case in point.**

To evaluate the progress in implementation of the whistleblower protection law, we submitted FOIA requests to the National Labour Inspectorate and regional labour inspectorates inquiring about the number of protected whistleblowers, the number of received requests for suspension of an adverse employment action, number of infringement fines imposed on employers. We also complement the data on implementation by the state agencies with qualitative information about the public awareness and knowledge about the whistleblower protection and its instruments.

I. ASSESSMENT OF LEGAL FRAMEWORK:

This study applies the rating of comprehensiveness as follows:

- 1 Very / quite comprehensive
- 2 Somewhat / partially comprehensive
- 3 Absent / not at all comprehensive

1. Broad coverage of organizations

Rating: 1

The whistleblower protection law in Slovakia applies to both public and private sectors. It covers a wide range of organizations – organizations that hold the status of a public authority⁴ and employers that have more than 50 employees have certain legal obligations related to whistleblower protection. The law lays down the requirement for these organizations to establish internal complaint handling mechanisms in order to receive and investigate complaints about possible wrongdoing.

² S.Wolfe, Mark Worth, Suelette Dreyfus, AJ Brown. 2014. Whistleblower Protection Laws in G20 Countries – Priorities for Action.

³ *ibid* p.1

⁴ State administration body, municipality or higher territorial unit, 2. juridical person legally set up by state administration body, municipality or higher territorial unit in accordance with the special law 3. juridical person set up by the person in the first instance or the second instance, 4. juridical person or natural person, which is legally entitled to decide about rights and duties of both natural persons or juristic persons in the public administration sphere

2. Broad definition of reportable wrongdoing

Rating: 1

The law specifies that protection is provided to persons reporting *serious anti-social activity* to the police, the prosecutor's office or other body competent to receive such reports. The anti-social activities include: criminal offences detrimental to the financial interests of the European Communities, the criminal offence of machination in public procurement and public auctions, the criminal offences committed by public officials, or the criminal offences of corruption, criminal offence that is punishable under the criminal code by a custodial sentence with a maximum length over three years, or an administrative offence punishable by a fine with a maximum amount of at least EUR 50,000.

Secondly, the law what kinds of wrongdoing shall be reported to the employer. This definition is especially comprehensive to include any type of misconduct that may have detrimental effect on the organization. The wrongdoing that shall be reported to the employer includes: misuse of vested power for personal gain, conflict of interests, unprofessional conduct, neglect of duties, mismanagement or wasteful management of resources, obstruction of justice, unprofessional behavior or reprisals against whistleblowers.

3. Broad definition of whistleblowers

Rating: 2

The law sets out two preconditions for a person to be considered a whistleblower. The person has to be in an employment relationship with the organization against which she is raising the complaint. Secondly, the person needs to act in good faith (discussed in more detail below).

Protection is provided also to those employees who work in institutions where there are no internal reporting channels established.

In case of reporting of serious anti-social activities (criminal and administrative offences), the law also extends the provision of protection to a person who is closely related to the whistleblower who first raised the complaints, if that person is an employment relationship with the same employer⁵.

The law, however, does not provide legal protection to persons associated by other type of work arrangement or relationship, who still might learn information about malpractice in connection with the performance of their work, e.g. consultants or suppliers⁶. Former or temporary employees, by the same token, are not guaranteed legal protection if raising a claim about malpractice against their (former) employer⁷.

4. Range of internal / regulatory reporting channels

Rating: 1

A misconduct that constitutes a criminal offence shall be reported to the police, a prosecutor's office, or other regulatory body. Alongside of filing such a report a person may also submit a request for protection as a whistleblower. Likewise, a person may claim for whistleblower protection at the start or during a proceeding concerning administrative offence, and file the request for protection to an institution to which she has made the disclosure.

⁵ 307/2014 Coll.

⁶ OECD. Committing to effective whistleblower protection. 2016. p.42

⁷ ibid

On the other hand, the law introduces the obligation to establish internal reporting channels in some organizations. The employer is obliged to designate a responsible person. The responsible person has to be directly subordinated to the employer's statutory body.

Furthermore, these employers are obliged to issue an internal rule laying down details of making a disclosure within the organization, inform the employees about this internal rule and establish reporting channels. At least one channel has to be available 24 hours a day. All filings by employees must be handled within 90 days and the complainant has to be informed about the results of investigation no later than 10 days after its conclusion. Confidentiality in reporting must be respected.

5. External reporting channels (third party / public)

Rating: 3

The mechanisms for disclosing wrongdoing follow a two-tiered structure in which a *minor offence* shall be reported via the internal organizational channels. If such a channel is not available, the report can be made to the police. Disclosures about *serious anti-social activities*, constituting a criminal or administrative offence as specified by the law, shall be made to the police, the prosecutor's office or other competent regulator. However, whistleblowers who disclose information about wrongdoing to third parties or to the media are not entitled to protection under the present whistleblower provisions.

6. Thresholds for protection

Rating: 2

The whistleblower protection law lays down the precondition of disclosing the information in good faith, i.e. the person has to be convinced that the matters reported are true in light of the circumstances and knowledge of that person in time of the reporting. In case of doubt, conduct in good faith shall be respected until proved otherwise.

An additional condition is included in connection to filing a request for the suspension of the adverse employment action – the whistleblower has to file the request no later than 7 days after learning about the employment action. Later than that, anti-discrimination remedies are still available.

7. Provision and protections for anonymous reporting

Rating: 1

The law allows the possibility to file a report of wrongdoing anonymously⁸, as the information, which is the subject matter, is central to the disclosure itself.

8. Confidentiality protected

Rating: 1

When a request for protection is filed in a proceeding on serious antisocial activity, constituting a criminal or administrative offence, the whistleblower may ask the authority to issue a confirmation of the protected whistleblower status into her own hands, rather than notifying the employer.

If an employee files a complaint using the internal complaint handling mechanisms at their workplace, the responsible persons shall keep her identity confidential throughout the whole investigation process.

⁸ Sec. 2, 307/2014 Coll.

9. Internal disclosure procedures required

Rating: 1

All public authorities and private employers with more than 50 employees are required to have introduced internal complaint handling mechanisms, i.e. to lay down internal regulation and establish safe communication channels for receiving reports.

10. Broad retaliation protections

Rating: 2

The law primarily stipulates the legal protection from reprisals in form of adverse employment action⁹. Secondly, in the light of creating the legal protection for whistleblowers, the antidiscrimination law was amended to expressly prohibit discrimination on the grounds of reporting of serious anti-social activities, creating a possibility to file an anti-discrimination lawsuit.

The whistleblower protection under the present legal framework, however, applies without prejudice to bank or trade secrecy¹⁰. If such information is disclosed, the whistleblower may still be liable in criminal or civil proceedings and or be prosecuted.

11. Comprehensive remedies for retaliation

Rating: 2

In case an employment action is undertaken towards a protected whistleblower, with which she does not agree, the labour inspectorate must approve of that action. In this case, the burden of proof to demonstrate that the employment action is not connected to the reporting is on the employer.

If a whistleblower's work contract was terminated while the protection was in place, rendering the action invalid, the whistleblower is entitled to receive compensation for the lost salary for the time period between the invalid termination and the return to work. The length of providing such compensation is not limited.

12. Sanctions for retaliators

Rating: 2

The current legal framework outlines possible sanctions for inflicting retaliation upon whistleblowers.¹¹

13. Oversight authority

Rating: 2

The regional labour inspectorates, working under the umbrella of the National Labour Inspectorate, are the designated state agencies responsible for the implementation of the whistleblower protection. Their competences in enforcing the whistleblower legislation are exercised in relation to the oversight of the employers and the fulfillment of their obligations, provision of protection to whistleblowers who

⁹ Sec. 1, 307/2014 Coll.

¹⁰Sec. 1(3), 307/2014 Coll.

¹¹OECD. 2016. Committing to Effective Whistleblower Protection. p.83

reported wrongdoing to the police or prosecutor's office, and suspension of retaliatory employment actions against whistleblowers.

14. Transparent use of legislation

Rating: 2

The Slovak National Centre for Human Rights¹² is tasked with evaluating the implementation of the law and publishing the relevant information on a regular basis.¹³ Ministries and other public authorities are obliged to cooperate in providing relevant information to the Centre.

¹² <http://www.snsip.sk/>

¹³ Sec. 19, 307, 2014 Coll.

II. IMPLEMENTATION OF THE WHISTLEBLOWER LAW

This section outlines the main outcomes of the implementation of the whistleblower protection law after almost 18 months of the law's effectiveness in Slovakia. The overall evaluation is that the impact of the law has in practice been limited, leaving the potential of the whistleblower legal framework unfulfilled.

Providing Protection to Whistleblowers

Our previous analysis ¹⁴ of the readiness of labour inspectorates to respond to potential whistleblowers showed serious shortcomings in the early implementation of the law. The labour inspectorates did not obtain any extra finance to strengthen the capacities in order to deal with the newly created whistleblower protection agenda. It was found that none of the eight regional labour inspectorates answered to queries by potential whistleblowers within the 7-day limit. Moreover, 5 out of 8 inspectorates did not recognize that incoming queries were related to the reporting of wrongdoing and consequently, they did not provide adequate information on how to proceed in such a case.

From January 2015 until end of May 2016, the labour inspectorates provided protection to 11 persons who had reported wrongdoing to the police, a prosecutor's office or other competent institution.

In the same time period, the labour inspectorates received 2 requests for suspension of an adverse employment action. Both of these requests were rejected.

The trend of receiving an extremely small number of requests for protection has been present throughout the first year and a half of the law's effectiveness. It seems to be the result of the labour inspectorates' performance, as some of the claims for protection may not have been identified properly and the low public awareness about the law and its instruments (more detail below).

Investigation of Employers and Infringement Fines

The labour inspectorates investigate whether the employers have the internal complaints handling mechanisms established and functional. If the investigation proves otherwise, the labour inspectorates may impose an infringement fine of up to €20,000. The obligation to have the mechanisms in place arose 6 months after the law's entry into force, i.e. is enforceable since July 2015.

The communication with the NLI shows that the labour inspectorates carried out 54 investigations by the end of May 2016. However, no infringement fines were imposed on employers¹⁵.

Implementation of internal complaint handling mechanisms

Another shortcoming in the implementation of the whistleblower protection law may also be the formalistic approach on the employers' side towards the implementation of the whistleblower protection law. The survey of employers carried out by the Slovak National Centre for Human Rights showed that most internal complaint handling mechanisms remain unused, i.e. zero complaints were

¹⁴ Transparency International Slovakia. 2015. *Whistleblower protection is only on paper. Plus three cases from abroad.*

¹⁵ Communication with the NLI. 02.June 2016

received by the end of year 2015¹⁶. Even more intriguing is that 30% of employers from both public and private sector expressed that they did not see any contribution of the whistleblower protection law in practice.¹⁷

For effective reporting of wrongdoing in a workplace, and the securing an adequate protection of those who disclose it, the organizations should not stop at establishing the communication channels. The ethical culture within an organization should be actively fostered and whistleblowing should be encouraged as a means to prevent losses due to inefficiencies and misconduct.

Public awareness about the whistleblower protection

The extremely small number of requests for protection and suspension of adverse employment action may have been caused by low public awareness. The results of the public opinion survey¹⁸ identified that 3 out of 4 respondents did not have prior knowledge about the existence of a law in Slovakia that protected whistleblowers from being dismissed from work. Not knowing about the existence of the whistleblower protection law, the actual procedural steps to be taken when making a claim for protection after blowing the whistle remain incomprehensible for the citizens. Most respondents (almost 80%) did not indicate correctly which institution or organization they would turn to if they were dismissed from work as a reprisal for their reporting of malpractice and wanted the job back. Only 22% of respondents indicated that they would turn to a labour inspectorate, which indeed holds the competences over the implementation of the whistleblower protection and provide assistance to whistleblowers.

¹⁶ Slovak National Centre for Human Rights. 2016. *Hodnotiaca správa k problematike chráneného oznamovania v Slovenskej republike za rok 2015*.

¹⁷ *ibid*

¹⁸ Agentura FOCUS. 2016. Public opinion survey for Transparency International Slovakia on whistleblowing. May 2016.

RECOMMENDATIONS

- Increase disposable budget for labour inspectorates to strengthen capacity for implementation of the whistleblower protection law
- Raise awareness about the existence of the whistleblower protection through targeted campaigns and measure the impact
- consider extending the 7-day limit for filing a request for suspension of an adverse employment action, as it may effectively obstruct the access to protection for whistleblowers
- Gather data and publish annual reports on number of reports received in public authority institutions, indicating the length of investigation of individual reports and the outcomes of investigation
- Review the effectiveness and outcomes of the law's implementation on a regular basis

Recommendations for employers

- review effectiveness of the internal systems in organizations on a regular basis
- complement the fulfillment of the formal criteria with creating an environment open to making disclosures about possible wrongdoing internally, rather than externally or not at all
- tone at the top – organizational ethics is determined and formed by the attitudes of the higher management, board members and statutory bodies

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