

How to Improve the Protection of Employees-Whistleblowers in Slovenia by Implementing the EU Whistleblower Protection Directive

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Introduction

Workers and public employees often become aware of decisions and practices that are unlawful or corrupt or have a negative impact on the environment, on public finances, and the like when performing their work or in relation to their work. Some keep such information to themselves, while others decide to disclose it in order to suspend or eliminate such conduct. As a result, they become the so-called whistleblowers. The employee's decision on whether or not to inform the competent authority, a state authority or another institution or the public of these irregularities is influenced by several factors,² among which the extent and effectiveness of legal protection against retaliatory measures granted to the whistleblower by the employer are especially important.³

Taking into account the importance of whistleblowers for the disclosure of violations (of EU law) and the fact that whistleblower protection is fragmented across the Member States and uneven across policy areas,⁴ 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 was adopted (hereinafter: the Directive).⁵

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2 For example, the value system of such person or of the society in which he or she lives. See D. Banisar, *Whistleblowing: International Standards and Developments*, [in:] Sandoval I. (ed.), *Corruption and transparency: Debating the frontiers between state, market and society*, World Bank-Institute for social research, UNAM, Washington D.C., 2011, p. 12, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180, accessed 01/09/2021; see also Council of Europe, 2014, p. 14.

3 See Transparency International, 2016, pp. 23, 24.

4 See recital 4 of the Directive. For more on the situation in individual countries, see also Transparency International, 2013.

5 OJ L 305/17, 26 November 2019, pp. 17–56.

It aims to improve the implementation of Union law and policies by ensuring a high level of protection of persons reporting violations.⁶ In this regard, the Directive derives from the case law of the European Court of Human Rights and the Council of Europe recommendation concerning the protection of whistleblowers,⁷ whereas the phrasing of particular solutions adopted under the Directive is a result of coordination between the Parliament (which argued for stronger protection) and the Council (which defended a more restrictive position).⁸ The effectiveness of the Directive – which otherwise broadly defines the circle of protected persons, covers reports of violations in several areas, imposes the obligation to establish internal and external channels of reporting, prohibits all retaliatory measures, and provides a variety of protective measures – in enhancing the protection of whistleblowers will largely depend on how successfully it will be transposed into national legal systems by the Member States. The Directive stipulates only the minimum common standards of protection, while the Member States, which must not reduce the existing level of protection at the national level as a consequence of the Directive, have the option to implement provisions that are more favourable to whistleblowers than those set out in the Directive.⁹

The chapter considers the protection of whistleblowers in the Republic of Slovenia under applicable legislation and case law. Based on the analysis of particular aspects of this legislation, it addresses some dilemmas concerning the implementation of specific provisions of the Directive and offers perspectives directed to the preservation or improvement of the existing (mainly labour-law) protection of whistleblowers.¹⁰

1. Legal sources

There is no special legal act in Slovenia that would provide comprehensive protection for whistleblowers. Instead, provisions relating directly or indirectly to whistleblowers are found in several acts. Some of them implement obligations arising from international documents binding on Slovenia.

The Republic of Slovenia (RS) ratified the Civil Law Convention on Corruption of the Council of Europe¹¹ and the United Nations Convention against Corruption¹² and adopted the Integrity and Prevention of Corruption Act (*Zakon o integriteti in*

6 See Article 1 of the Directive.

7 Council Of Europe, 2014.

8 See M. Šepec et al., *The European whistleblowing directive: a legislative barrier between journalists and their sources?*, Media, Culture & Society 7–8/2020, pp. 1530–1533.

9 See Article 25 of the Directive.

10 At the time this contribution was submitted, no proposal for the act that would implement the Directive in Slovenia has yet been drafted, or at least it has not yet been presented to the public.

11 Official Gazette of the Republic of Slovenia – MP, No. 8/2003 of 11 April 2003.

12 Official Gazette of the Republic of Slovenia – MP, No. 5/2008 of 4 March 2008.

preprečevanju korupcije, ZIntPK) in 2010.¹³ The latter act governs the reporting of corruption and the protection of the person reporting corruption (Article 23), the reporting of unethical or illegal conduct (Article 24), and measures to protect the person filing a report (Article 25).

The reporting of unethical and illegal conduct or influence is also governed by the Slovenian Sovereign Holding Act (*Zakon o slovenskem državnem holdingu, ZSDH-1*),¹⁴ whereas the protection of persons reporting corruption and other unethical or illegal practices is subject to the provisions of the ZIntPK.

As an EU Member State, Slovenia is also bound by regulations and directives in the field of banking (credit institutions), insurance, stock market, etc., which impose upon the Member States the responsibility to regulate the obligations of legal entities and their supervisory authorities regarding the establishment of internal channels for reporting irregularities and ensuring the protection of reporting persons. Slovenia fulfilled the requirements referred to in these EU acts by adopting the Banking Act (*Zakon o bančništvu, ZBan-2*),¹⁵ the Insurance Act (*Zakon o zavarovalništvu, ZZavar-1*),¹⁶ the Market in Financial Instruments Act (*Zakon o trgu finančnih instrumentov, ZTFI-1*),¹⁷ and the Investment Funds and Management Companies Act (*Zakon o investicijskih skladih in družbah za upravljanje, ZISDU-3*).¹⁸

The Prevention of Money Laundering and Terrorist Financing Act (*Zakon o preprečevanju pranja denarja in financiranja terorizma, ZPPDFT-1*),¹⁹ which governs the internal notification system and the system of notifying supervisory authorities of violations and provides for limited protection of the reporting person (the protection of reporting person's identity), likewise complies with the EU directives in this field.

The same applies to the Trade Secrets Act (*Zakon o poslovni skrivnosti, ZPosS*),²⁰ implementing the Directive (EU) 2016/943, which grants protection against civil sanctions to a person disclosing business secrets in order to protect the public interest.

Slovenian labour legislation provides no special protection for whistleblowers from retaliatory measures by their employers. However, the Employment Relationships Act (*Zakon o delovnih razmerjih, ZDR-1*),²¹ which complies with binding international acts of the ILO, the EU, and the Council of Europe, provides all workers (as well as public employees) with protection against unlawful practices

13 Official Gazette of the Republic of Slovenia, No. 45/2010, 26/11 and 43/11.

14 Official Gazette of the Republic of Slovenia, No. 25/14.

15 Official Gazette of the Republic of Slovenia, No. 25/15, 44/16 – ZRPBB, 77/16 – ZCKR, 41/17, 77/18 – ZTFI-1, 22/19 – ZIUOSOL and 44/19 – odl. US).

16 Official Gazette of the Republic of Slovenia, No. 93/15, 9/19 and 102/20.

17 Official Gazette of the Republic of Slovenia, No. 77/18, 17/19 – popr. and 66/19.

18 Official Gazette of the Republic of Slovenia, No. 31/15, 81/15, 77/16 and 77/18.

19 Official Gazette of the Republic of Slovenia, No. 68/16, 81/19 and 91/20.

20 Official Gazette of the Republic of Slovenia, No. 22/2019.

21 Official Gazette of the Republic of Slovenia, No. 21/2013. Special regulation of certain issues is provided for public employees under the Public Employees Act (*Zakon o javnih uslužbencih, ZJU*; Official Gazette of the Republic of Slovenia, No. 63/2007 UPB-1, 65/2008).

by employers (such as harassment and mobbing) and the unfounded termination of the employment contract. It is worth mentioning that Slovenia has ratified the ILO Convention No. 158 on the termination of employment at the initiative of the employer (1983), Article 5 of which includes, among other reasons that may not be considered a serious reason for the termination of the employment relationship, point c), which reads: “the filing of a complaint or the participation in proceedings against an employer involving the alleged violation of laws or regulations or recourse to competent administrative authorities”.

Indirectly, the protection of whistleblowers is also addressed by the Mass Media Act (*Zakon o medijih*, Zmed),²² which guarantees the journalists the right not to disclose their sources; the Inspection Act (*Zakon o inšpekcijskem nadzoru*, ZIN),²³ which imposes a duty on inspectors to protect the source of the report or the source of other information, as well as the Witness Protection Act (*Zakon o zaščiti prič*, ZZPrič)²⁴ and the Criminal Code (*Kazenski zakonik*, KZ-1).²⁵

Even though the system of collective bargaining in Slovenia is highly developed, and collective agreements are an important source of labour law,²⁶ sectoral collective agreements and professional service collective agreements do not govern the protection of whistleblowers, nor is this issue generally covered by collective agreements at the level of the employer or by general acts governing the rights and obligations of employees.²⁷

The definition of unlawful, unfair, or unethical practices, the methods of reporting, and the protection of reporting persons at the level of employers are governed by the so-called codes of conduct, ethical codes, or corporate integrity policies of larger companies. A considerable part of these companies are state-owned;²⁸ most of them are also signatories to the 2014 Slovenian corporate integrity guidelines.²⁹

22 Official Gazette of the Republic of Slovenia, No. 110/06 – official consolidated text, 36/08 – ZPOmK-1, 77/10 – ZSFCJA, 90/10 – odl. US, 87/11 – ZAvMS, 47/12, 47/15 – ZZS-DT, 22/16, 39/16, 45/19 – odl. US and 67/19 – odl. US.

23 Official Gazette of the Republic of Slovenia, No. 43/07 – official consolidated text and 40/14.

24 Official Gazette of the Republic of Slovenia, No. 81/06 – official consolidated text, 117/06 – ZDoh-2, 110/07 and 30/18.

25 Official Gazette of the Republic of Slovenia, No. 50/12 – official consolidated text, 6/16 – popr., 54/15, 38/16, 27/17, 23/20 and 91/20.

26 See K. Kresal Šoltes, *Vsebina kolektivne pogodbe (Content of the collective agreement)*, GV Založba, Ljubljana 2011.

27 Although these collective agreements and general acts (as opposed to the sectoral collective agreements and professional service collective agreements that have been published in the Official Gazette) are not publicly available, this can be inferred based on the information obtained from practice.

28 For example, Petrol, Telekom, Luka Koper, Elektro, also Talum. However, such codes are also found in larger privately owned companies.

29 The guidelines were prepared by the Chamber of Commerce and Industry of Slovenia (GZS), the Managers' Association of Slovenia (ZM), and the Slovenian Directors' Association (ZNS) upon the initiative of the Faculty of Economics, University of Ljubljana, and were signed by 28 major

Given the fragmentation and partial nature of the existing regulation of whistleblower protection, the Directive should be implemented by adopting a special act, as proposed by the Ministry of Justice to the government of the RS.³⁰ Such proposals were also made by legal theorists, both before and especially after the adoption of the Directive.³¹ For the new law to upgrade the existing protection instead of reducing it, the special act on whistleblower protection will have to refer to other legal acts (for example, the ZDR-1), as well as the amendments and additions to the applicable legislation (where this is necessary to ensure compliance with the minimum level of protection granted by the Directive or to enhance the protection of whistleblowers).

2. Personal scope of protection

The ZIntPK stipulates that anyone can report corrupt conduct to the competent authority. Any person reporting in good faith³² is entitled to protection with regard to their identity (which may not be established or disclosed), provided that the conditions are met, and to protection under the ZZPrič. Specific measures for the protection of a person reporting corruption against retaliation by the employer apply to both workers and public employees, whereas the right to be transferred to another post is only guaranteed to public employees (Article 25 of the ZIntPK).

The ZBan-2, ZZavar-1, ZTFI-1, and ZISDU-3 impose on banks, insurance companies, financial sector entities, management companies, and their supervisory authorities the obligation to establish a notification system for violations for the employees (workers). They, too, protect only workers from retaliation.

Only the ZPDFT-1 imposes the obligation on persons responsible for establishing a notification system for violations for employees (workers) and persons having a comparable status to that of a worker. The prohibition of disclosure of identity applies to both categories, as well.

companies. The guidelines are based on the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance.

30 See the Government of the RS, Response to the parliamentary question, No. 00104-4/2020/6 of 6 February 2020.

31 See I. Vuksanović, *Poziv za specialno zakonsko ureditev zaščite »žvižgačev«* (Call for special regulation of "whistleblowers"), *Pravna praksa* 45/2010, A. Sedlar, *Zgodovinska prelomnica pri zaščiti žvižgačev v EU (A historic turning point for whistleblower protection in the EU)*, *Pravna praksa*, št. 13, 2019.

32 The Commission for the Prevention of Corruption takes into account the good faith of the reporting person, and thus only protects the identity of the reporting person who has filed a report in good faith or has reasonably concluded that his or her information regarding the report is true. Furthermore, only a reporting person who has acted in good faith enjoys protection against his or her employer, while malicious filing of a report is also considered an offence punishable under provisions of the ZIntPK, or can even result in criminal charges if the elements of a criminal offence have been established.

Labour legislation provides protection against unlawful conduct by employers and against unlawful termination of employment contract mainly to workers (and public employees). The provisions of the ZDR-1 relating to the prohibition of harassment and discrimination apply also in the case of voluntary internship and temporary and occasional work of students (Article 212(7) of the ZDR-1), whereas in the case of economically dependent persons, provisions referring to the prohibition of the termination of a contract for unjustified reasons (Article 214 of the ZDR-1) apply in addition to these ZDR-1 provisions.

Codes of conduct adopted by companies generally apply only to persons employed by those companies (irrespective of the nature of the employment contract) in terms of the reporting of violations and the protection of reporting persons.

As a general rule, all these acts extend the protection against retaliation only to whistleblowers, but not to their family members or persons assisting the whistleblower. The exception is the ZInPK, which stipulates that in cases when the reporting person and their family members are at risk due to having filed a report of corruption, they may be included in the programme for the protection of witnesses and other persons who are endangered on account of their co-operation in criminal procedures if the conditions under the ZZPrič are met, and they have given their consent.³³

A broader scope of protection, namely concerning the prohibition of harassment, is also provided by the ZDR-1. An employee who is a victim of harassment, as well as persons who offer their assistance to the victim, must not be exposed to unfavourable consequences because of actions aimed at asserting the prohibition of harassment.³⁴

Moreover, the new law on the protection of whistleblowers will have to define a wide range of protected persons. Only thus will it follow the Directive, which provides protection against retaliatory measures by the employer to a wide range of persons who are economically vulnerable in relation to their employer due to their work.³⁵ The protection will have to be granted to all whistleblowers who, on various legal grounds, directly or indirectly, in return for payment or free of charge, perform work for employers in the public or private sector or are associated with them (such as employees, public employees, self-employed, employed by a third party, shareholders, members of the company's bodies, volunteers, unpaid interns, as well as former employees and candidates for employment), as well as to persons associated with the person reporting violations (family members, workers' representatives, etc.).³⁶ Even though the protection will depend in part on the nature of the relationship,³⁷ it is essential to grant labour-law protection not only to whistleblowers who have

33 Article 23(6–7) of the ZIntPK.

34 See Article 6(7) of the ZDR-1 in connection with Article 7(2) of the ZDR-1.

35 Recital 36 of the Directive.

36 See Article 4 of the Directive, as well as recitals 36 to 41 of the Directive.

37 For example, shareholders will not need labour-law protection, but will instead require protection in relation to claims for compensation and other procedures.

concluded a contract of employment with the employer, but to all who, like workers, are in need of protection.³⁸ This is indicated by a broad definition of the concept of worker in the Directive (the concept of worker as defined by the CJEU case law).³⁹ Similar solutions can already be found in the ZDR-1 (extension of a particular type of protection to economically dependent persons, voluntary interns, etc.).

Laying down the conditions for the protection of whistleblowers will be necessary, as well. It is worth pointing out that in this regard, the Directive follows the Council of Europe's recommendation and provides protection to all those who "had reasonable grounds to believe that the information reported was true at the time of reporting",⁴⁰ regardless of their motive for the report. Therefore, the Directive does not provide for the condition of good faith, while the Member States are also explicitly discouraged from including it by Transparency International.⁴¹ There is no reason for this (or similar) condition to be included in the new Slovenian law.⁴²

3. Material scope of protection

Legal acts governing the reporting of violations and the protection of persons reporting such violations in particular areas specify, among other things, the violations themselves.

The ZIntPK protects persons reporting corrupt practices. Consideration Article 4(1) of the ZIntPK, corruption is any violation of due conduct of the official and responsible persons in the public or private sector, as well as the conduct of persons who were the initiators of the violation or of persons who may benefit from the violation due to a directly or indirectly promised, offered or given, or required, accepted or expected benefit for themselves or another person.

38 This will also protect disguised employees. For more on this problem, see D. Senčur Peček, *The self-employed, economically dependent persons or employees?*, [in:] I. Florczak, Z. Góral (eds.), *Developments in labour law from a comparative perspective*, Lodz University Press, Lodz, 2015, pp. 223–248.

39 See Article 4 and recital 38 of the Directive. For more on the concept of worker in EU law, see the article D. Senčur Peček, *Novejša sodna praksa Sodišča EU in njen vpliv na uveljavljanje in obseg delovnopravnega varstva* (Recent case law of the Court of Justice of the EU and its impact on the enforcement and scope of labor law protection), *Delavci in delodajalci*, 2–3/2020, pp. 169–203.

40 Article 6(1)(a) of the Directive.

41 Transparency International, 2019, page 3.

42 Although the ZIntPK provides for the protection of the reporting person's identity when the conditions of reasonable grounds to believe that the information reported was true and good faith are fulfilled (derived from the unclear Article 23), the KPK has only considered five malicious reports between 2011 and 2018 (out of 10,170 reports submitted). See A. Nabernik, *Preden prijavim goljufijo, želim vedeti, kakšno zaščito bom dobil* (Before I report fraud, I want to know what protection I will get), *Pravna praksa*, No. 33, 2019, pp 23–24.

The ZBan-2, ZZavar-1, ZTFI-1, ZISDU-3, and ZPPDFT-1 determine violations whose reporting is subject to protection by referring to breaches of the provisions of the relevant act⁴³ or to breaches of the provisions of other legal acts. As a general rule, this means the violations of the provisions of national law and the internal acts of legal entities (banks, management companies),⁴⁴ but also violations of the provisions of regulations and other EU legal acts.⁴⁵

Codes of conduct adopted by individual companies define the violations that should be reported by the employees (who are protected in doing so) more generally, so as to cover corrupt practices, unlawful conduct, or conduct in violation of legislation and internal acts, as well as unethical conduct, conduct contrary to good business practices and unprofessional conduct.

Labour legislation protects workers (and, to a limited extent, other persons) against unlawful measures taken by the employer regardless of the cause for these measures (reporting corruption, unlawful or unethical conduct, etc.).

A shortcoming of the current Slovenian regulation lies in the fact that it grants special protection only to persons reporting certain irregularities or irregularities in a particular area, meaning that the protection is partial instead of comprehensive. Even the Directive, which otherwise determines a whole range of areas (more precisely, twelve) – EU policies covered by protection, retained the sectoral approach. However, if a horizontal approach was not possible at the EU level due to the lack of competence,⁴⁶ comprehensive protection of whistleblowers is possible at a national level.⁴⁷ The European Commission is encouraging the Member States to do so.⁴⁸ Therefore, the protection provided by the new law should include all persons reporting the breaches of law, violations of human rights, or any other actions contrary to the public interest, regardless whether they represent a breach of EU law or national law, and regardless of the field to which the violation relates (public health, environmental protection, the use of public funding, etc.).⁴⁹ Providing protection only for reports of specific types of violations or violations in certain areas would,

43 See, for example, Article 280a. of ZZavar; the first paragraph of Article 159 of ZPPDFT-1.

44 See the first paragraph of Article 140 of ZBan-2; the first paragraph of Article 73č. of ZISDU-3.

45 See, for example, the first paragraph of Article 239 of ZBan-2 in connection with the second paragraph of Article 9 of ZBan-2; Article 432 of ZTFI-1.

46 M. Šepec et al., *The European whistleblowing directive: a legislative barrier between journalists and their sources?*, Media, Culture & Society 7–8/2020, p. 1537, V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, Industrial Law Journal, Volume 49, Issue 4, December 2020, pp. 653–654.

47 The possibility for Member States to extend protection beyond the areas listed in the Directive is already noted in the second paragraph of Article 2 of the Directive.

48 See European Commission (2018). It seems that this is also the position of the Slovenian Ministry of Justice, which supposedly “proposed to the government the adoption of a comprehensive new law that will include a complete protection of whistleblowers, therefore, not only of persons reporting breaches of the EU law, which are covered by the Directive”. See Government of the RS (2020).

49 Except where specific areas would be explicitly excluded.

on the one hand, deter the reporting of those violations that would not be included and, on the other hand, present a risk to whistleblowers, who, as non-professionals, might not be able to assess the nature of the violation properly and could be left without protection upon reporting it.⁵⁰

4. Internal reporting

Labour legislation does not determine a general obligation of employers to establish internal systems for reporting violations detected by employees or other persons.

The ZIntPK likewise fails to impose on employers the obligation to establish internal channels for reporting corrupt practices, but only regulates the procedure of reporting to the Commission for the Prevention of Corruption (KPK).

However, the obligation to establish internal channels for reporting violations is imposed on certain legal entities (banks, asset management companies, financial sector entities, entities liable under the ZPPDFT-1) by the ZBan-2, ZTFI-1, ZISDU-3, and ZPPDFT-1. The regulation under all these acts is almost identical. Employers are required to set up a notification system for violations which allows the employees to report infringements internally through “independent and autonomous”⁵¹ or “independent and anonymous”⁵² reporting channels. A notification system must provide for a simple and easily accessible method for the transmission of employees’ reports, and the procedures for the acceptance and processing of reports must be clearly determined and must include reporting on the findings in respect of the received reports and activities performed. The ZBan-2, ZTFI-1, and ZISDU-3 also provide employers with a legal basis (for the purposes of processing reports and reporting on findings and activities resulting from this report) for processing the personal data of the reporting person.⁵³ The employer must ensure that any data regarding the reporting person is treated as confidential and may not disclose any such information without the reporting person’s consent (except where the disclosure of the reporting person’s identity is considered necessary for the purposes of criminal proceedings under the law). The ZPPDFT-1, which otherwise requires the employers to establish anonymous reporting channels, also requires an employer who discovered the reporting person’s identity to treat the reporting person’s personal data in a confidential manner and prohibits them from disclosing the reporting person’s identity without his or her consent.

Generally, the codes or policies of employers specify in more details the procedure for reporting violations, which may be done verbally (personally or by telephone) to

50 See also Transparency International, 2019, p. 4.

51 See Article 140 of the ZBan-2, Article 432 of the ZTF-1, and Article 73č. of the ZISDU-3.

52 See Article 159 of the ZPPDFT-1.

53 In doing so, the employer must comply with the Personal Data Protection Act (*Zakon o varstvu osebnih podatkov*, ZVOP-1), Official Gazette of the Republic of Slovenia, No. 94/07 – UPB1.

the compliance officer (the corporate integrity officer or another authorized person) or in writing (by regular mail or by e-mail). An anonymous report can also be made through a special web portal, a special free telephone number, or even by submitting a written report into a special box. Moreover, they regulate the procedure for processing the report, while some of them also stipulate the deadlines for responding to the report (for example, seven working days). Furthermore, they govern actions to be taken after the violation is established (for example, a recommendation concerning the elimination of the violation, a proposal for the improvement of the situation, a notification of the violation to the authorities), as well as the obligation of the employer's competent department to notify the reporting person. The obligation to treat the reporting person's personal data in a confidential manner and the prohibition of disclosing his or her identity is also determined in general terms.

The Directive provides for the obligation to establish internal channels for certain employers in both the public and the private sector. However, the particularities of the employers' obligation are within the discretion of the Member States.⁵⁴ When regulating internal reporting channels, the Slovenian legislature should consider the experience of employers who have already established such channels, based on either legislation regulating the banking and financial sector or their own codes. Nevertheless, in addition to the framework regulation of procedures for internal reporting, further actions, and the employer's obligation regarding the preservation of the confidentiality of the whistleblower's identity,⁵⁵ it is also necessary to establish the employer's obligation regarding the protection of whistleblowers against retaliatory measures⁵⁶ as well as effective and dissuasive sanctions (for the employer and responsible persons) for the cases of non-compliance with these obligations.⁵⁷ In the case of internal reporting, whistleblowers are very vulnerable in relation to management if their identity is disclosed.

Detailed regulation of these procedures should be left to employers (in cooperation with the workers' representatives),⁵⁸ while the manner of participation of workers' representatives should be further specified by law.⁵⁹ Appropriate communication with workers' representatives and their participation in establishing internal channels could significantly contribute to their practical application.⁶⁰

Internal channels are often the first choice for whistleblowers;⁶¹ however, employers are also interested in resolving violations internally. The prerequisite for

54 See Articles 7–9 of the Directive.

55 Both can also be derived from the Directive – see Articles 8 and 16 of the Directive.

56 See also Transparency International, 2019, pp. 9–10.

57 While legal acts in the fields of banking and finance determine those regulations (in more or less general terms), they fail to define their infringements as offences or to impose sanctions.

58 The same follows from Article 8(1) of the Directive.

59 For more on this topic, see the subchapter on workers' representatives.

60 See also V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, *Industrial Law Journal*, Volume 49, Issue 4, December 2020, p. 655.

61 Transparency International, 2019, p. 9.

a whistleblower's decision to submit an internal report is mainly his or her confidence in the established internal reporting system. The choice of the person or persons responsible for receiving reports is just as crucial as establishing procedures and the obligation to preserve the whistleblower's identity. This has already been demonstrated in Slovenian practice in relation to the reporting of workplace mobbing.⁶² In practice, it is difficult to expect the employer's workers to be completely independent of management. As a result, independent external consultants, external platform providers, or workers' representatives seem to be a better solution.⁶³

From the perspective of the risk of retaliatory measures, the most reliable option for a whistleblower is the possibility to submit an anonymous report. The obligation to establish anonymous channels and consider anonymous reports, which is already established in the Slovenian banking and financial sector, as well as in certain codes should also be stipulated in the new act.⁶⁴ It should be emphasized that with the new technology, it is possible to obtain additional information from an anonymous whistleblower later and to keep him or her informed even in the case of anonymous reporting (for example, via online platforms).⁶⁵

Nevertheless, it should be kept in mind that, despite a functioning internal reporting system, the decision regarding the choice of the reporting channel must be left to the whistleblower. Legal protection of the whistleblower should not depend on whether he or she first submitted an internal report or instead immediately approached an external institution.⁶⁶

5. External reporting

Individual acts also regulate the procedure for reporting violations to external institutions for their respective areas or impose on those institutions the obligation to establish a system for accepting reports. These external institutions are the KPK (ZintPK), the Bank of Slovenia (ZBan-2), the Insurance Supervision Agency (ZZavar-1), the

62 Employers have a duty under labour law to regulate the procedure and to designate a person responsible for receiving and handling reports of mobbing. The labour inspection finds that, despite the existence of internal procedures, workers often do not wish to exercise their rights related to mobbing before the employer, but prefer to turn directly to the inspection. See Inšpektorat RS za delo, 2019, pp. 71–72.

63 See point recital 54 of the Directive. Some major Slovenian employers have also hired external consultants for the position of confidential person in relation to mobbing reports, who are also geographically separated from the employer's place of business.

64 The Directive leaves the decision on whether anonymous reports will be considered to the Member States (see Article 6(2) of the Directive).

65 Transparency International, 2019, p. 8; A. Nabernik, *Preden prijavim goljufijo, želim vedeti, kakšno zaščito bom dobil (Before I report fraud, I want to know what protection I will get)*, Pravna praksa, No. 33, 2019, p. 25.

66 Article 7(2) and Article 10(1) of the Directive can also be understood in this context.

Securities Market Agency – ATPV (ZTFI-1, ZISDU-3), and supervisory authorities under Article 139 of ZPPDFT-1.

Article 23(1) of the ZIntPK provides that any person may report corrupt practices to the KPK or to another competent authority. The KPK and other competent authorities have to inform the reporting person of their actions or procedures at his or her request. Nonetheless, this provision does not interfere with the reporting person's right to inform the public of corrupt practices.⁶⁷

The identity of the reporting person may not be established (if the report was anonymous) or disclosed, but only if the commission considers that the reporting person made the report in good faith or was justified in believing that the information regarding the report is accurate.⁶⁸ Only the court may decide that the information or identity of the reporting person should be disclosed if this is strictly necessary to protect the public interest or the rights of others.⁶⁹ Otherwise, establishing or disclosing the reporting person's identity is defined as a misdemeanour, which is punishable by a fine (Article 77(1)(3), Article 77(2) and Article 77(6) of the ZIntPK).⁷⁰

In addition to the identity of the protected reporting person, which remains protected after the end of the procedure, all documentary materials relating to the procedure for reporting corruption are protected, as well. Pending the completion of the procedure before the commission or before another competent authority, such materials (documents, files, records, and others) are not considered public information. This applies even if the material is delegated to another authority.

Other special acts (ZBan-2, ZZavar-1, ZTFI-1, ZISDU-3, and ZPPDFT-1) determine the obligation of supervisory institutions to put in place an effective and reliable notification system for violations for persons employed by legal entities controlled by these supervisory institutions (banks, insurance companies, management companies, and others). In this respect, the acts impose on the supervisory institutions the obligation to ensure a simple and secure method for transmitting reports of violations, to determine internal procedures for accepting and examining the reports, including reporting on the findings in respect of the received reports and activities performed, to ensure adequate protection of personal data of the reporting persons, to not disclose such information without the reporting person's consent (except where it is considered necessary for the purposes of criminal proceedings under the law), and to seek to prevent the disclosure of the reporting person's identity. The most detailed is the regulation under the ZTFI-1, which also imposes on the ATPV the obligation to determine the appropriate number of employees who

67 This is explicitly stated in Article 23(1) of the ZIntPK.

68 See Article 23(4) of the ZIntPK. When assessing the good or bad faith of the reporting person, the commission takes into account especially the nature and gravity of the reported conduct, the damage caused by the reported conduct or impending damage, possible breach of the reporting person's duty of protecting certain data, as well as the status of the authority or of the person to whom the issue was reported.

69 Article 23(8) of the ZIntPK.

70 Article 77(1)(3), Article 77(2) and Article 77(6) of the ZIntPK.

are trained to provide interested persons with information on the procedure of informing the ATVP of violations, employees who are trained to accept reports, and employees who are trained to maintain contact with the reporting person. It explicitly provides for the obligation of the ATVP to publish on its website information about the communication channels for accepting reports, the procedure for the examination of reports, the appropriate way to protect the confidentiality of the reporting person and the procedures for the protection of the reporting person, as well as a disclaimer that the reporting person shall not be liable for damages or subject to criminal charges for disclosing information to the ATVP.⁷¹ The Act explicitly directs the ATVP regarding the establishment of the reporting procedure,⁷² which should allow for the acceptance of anonymous reports, reports submitted by telephone,⁷³ by e-mail, or by regular mail,⁷⁴ and in the course of a personal meeting of the reporting person with an ATVP employee.⁷⁵ Moreover, it needs to establish the type, content and timeline for feedback on the outcome of the report, whereas the communication channel for accepting reports should be separated from other communication channels of the ATVP. The rules on the protection of confidentiality of the reporting person's data are laid down in detail, too.

In Slovenia, the identity of whistleblowers is also protected in the case of reporting a violation to inspections and certain other authorities. Article 16(2) of the Inspection Act (*Zakon o inšpekcijskem nadzoru*, ZIN), which binds the inspectorates in all areas, imposes on the inspectors a duty to protect the source of reporting and the source of other information.⁷⁶ The Police Tasks And Powers Act (*Zakon o nalogah in pooblastilih policije*, ZNPPol)⁷⁷ stipulates in Article 118(4) that in the case where the police already ensure the anonymity of the reporting person or where the reporting person so requires, his or her personal information may not be disclosed (and may be disclosed only upon an order issued by the court). Such provisions on the protection of the source are likewise contained in some other legal acts.⁷⁸ Even if someone wishes to obtain the information on the source of reporting under the Public Information Access Act (*Zakon o dostopu do informacij javnega značaja*,

71 The ATVP must send all this information to the reporting person no later than upon receipt of the report.

72 See Article 431(6) of the ZTFI-1.

73 It is explicitly stipulated that the reporting person should be notified of any recordings being made at the beginning of the interview and that (in the event that he or she has revealed his or her identity) he or she should be informed of the possibility to authorize the written record of the interview.

74 The e-mail address must be secure and preserve confidentiality.

75 If the reporting person has disclosed his or her identity, he or she should be allowed to examine, correct and agree with the record of the interview by signing it.

76 In this respect, see the judgment of the Administrative Court of the RS U 313/2004.

77 Official Gazette of the Republic of Slovenia, No. 15/13, 23/15 – popr., 10/17, 46/19 – odl. US and 47/19.

78 For example in the Financial Administration Act, the Prevention of Restriction of Competition Act etc.

ZDIJZ),⁷⁹ the Information Commissioner will deny access to this information in such cases on the basis of Article 51(3) of this Act.⁸⁰

We can conclude that external channels for reporting certain types of violations are already in place in Slovenian sectoral legislation and practice and that the protection of the reporting person's identity is widely established, as well. When implementing the Directive, which imposed upon the Member States the obligation to establish independent and neutral external reporting channels, to regulate procedures for actions to be taken in response to these reports, and to protect the reporting person's identity, the starting point should be the well-established solutions, which should be (where necessary) completed or upgraded in accordance with the Directive.⁸¹ The ZIntPK⁸² is especially noteworthy in this regard, as it allows for anonymous reporting,⁸³ provides an appropriate legal basis for the protection of the reporting person's identity,⁸⁴ which is implemented by the KPK (concerning reports of corruption),⁸⁵ and determines sanctions for the cases of determining or disclosing the identity of the reporting person (as well as for the cases of retaliatory measures against the reporting person). All these solutions should be incorporated into the new regulation.

6. Public whistleblowing

The concept of public whistleblowing became the subject of a public discussion in Slovenia when an employee of the Agency of the Republic of Slovenia for Commodity Reserves revealed irregularities in the procurement of safety equipment in

79 Official Gazette of the Republic of Slovenia, No. 51/06 – official consolidated text, 117/06 – ZDavP-2, 23/14, 50/14, 19/15 – odl. US, 102/15 and 7/18).

80 In this regard, see UPRS judgement II U 456/2016-13, UPRS judgement II U 433/2016-13.

81 See provisions of Articles 10–14 and 16 of the Directive.

82 Slovenia falls within the group of countries with the most suitable legal protection granted to persons reporting corruption. See Transparency International, 2013, p. 8.

83 As is the case with internal reporting, I believe that it is also necessary to legally determine the obligation to accept anonymous reports and act upon such reports when reporting through an independent institution. In this regard, see also Transparency International, 2019, p. 8; V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, Industrial Law Journal, Volume 49, Issue 4, December 2020, p. 652.

84 Of course, when granting protection to whistleblowers, only the condition of reasonable grounds to believe that the information reported was true should be taken into account, without the requirement of good faith, as derived from the ZIntPK.

85 *Inter alia*, the reporting person can request special protection – they become a so-called disguised reporting person, who is designated a pseudonym or a code name when first contacting a KPK official, which is then used throughout the entire process. In this way, the identity of the reporting person is known only to the person responsible for the case. Between 2011 and 2018, the KPK designated 51 code names. See A. Nabernik, *Preden prijavim goljufijo, želim vedeti, kakšno zaščito bom dobil (Before I report fraud, I want to know what protection I will get)*, Pravna praksa, No. 33, 2019, p. 25.

a television show.⁸⁶ The term is generally understood as a public disclosure (typically through the media) of unlawful practices or other irregularities detected by the whistleblower in their working environment and disclosed in the public interest.⁸⁷

Slovenian legislation offers very limited answers concerning the question whether a whistleblower should first use internal or external channels to communicate these violations before publicly disclosing them. Only Article 23(1) of the ZIntPK, which refers to the possibility of reporting corrupt practices to the KPK or other competent authorities, expressly provides that this provision has no impact on the reporting person's right to inform the public of corrupt practices. The ZBan-2, ZZavar-1, ZTFI-1, ZISDU-3, and ZPDFT-1, which govern internal and external reporting channels do not regulate the relationship between these communication channels and possible public disclosure. In other areas, such reporting channels are not foreseen, so the conditions for the admissibility of public disclosure are not regulated, either.

A whistleblower publicly disclosing violations is protected in this respect by constitutionally guaranteed freedom of expression,⁸⁸ which, like other fundamental human rights, is not unlimited. The disclosure of various facts and data could harm the reputation, honour, good repute, and privacy of individuals, or could interfere with the material and non-material sphere of legal persons, i.e. with other constitutionally protected rights.⁸⁹ In the event of a collision of fundamental rights, the court has to decide in a particular case, based on all the relevant circumstances, "which right should be given protection and which right should yield to this right in order to activate the necessary, constitutionally protected content thereof"⁹⁰ or assess the (dis)proportionality of the infringement of one right to protect another.

The weighting of two fundamental rights might be needed where an individual (for example, a manager) files a claim for damages against the whistleblower or for publication of the judgment in the case of defamation or proliferation of false

86 See <https://www.delo.si/novice/slovenija/v-tarci-razkrili-dokumente-o-vmesavanju-politike-v-dobave-zascitne-opreme-302856.html>, accessed 01/09/2021, <https://www.delo.si/novice/slovenija/zaposleni-na-zavodu-za-blagovne-rezerve-pozivajo-k-zasciti-ivana-galeta-306797.html>, accessed 01/09/2021, <https://www.ostro.si/si/razkrinkavanje/objave/zvizgastvo-ni-javno-tozarjenje>, accessed 01/09/2021.

87 The notion is also defined in this sense in the few professional and scientific contributions on the topic of whistleblowing. See I. Vuksanović, *Poziv za specialno zakonsko ureditev zaščite »žvižgačev«* (Call for special regulation of "whistleblowers"), *Pravna praksa* 45/2010; D. Senčur Peček, *Delovnopravno varstvo žvižgačev* (Labour law protection for whistleblowers), *Delavci in delodajalci*, 2–3/2015.

88 See Article 39 of the Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121, 140, 143, 47/13 – UZ148, 47/13 – UZ90, 97, 99 and 75/16 – UZ70a.

89 See Articles 34, 35 and 38 of the Constitution of the RS, as well as Article 67 of the Constitution of the RS.

90 See judgement VS RS II Ips 61/2017, point 31. In the present case, the court weighted the rights set out in Articles 35 and 39 of the Constitution of the RS.

claims⁹¹ under the provisions of the Obligations Code (*Obligacijski zakonik*, OZ),⁹² or where the employer requests compensation for the damage from the whistleblower (worker) in accordance with the ZDR-1 (by applying, *mutatis mutandis*, the provisions of the OZ).⁹³ Article 37 of the ZDR-1 prohibits the employee from acting in a way that could cause material or moral damage to the employer's interests, whereas Article 177 governs the liability for damages of the employee who causes damage to the employer deliberately or out of gross negligence, at work or in connection with work.⁹⁴ The weighting between the employee's right to the freedom of expression and the right to respect for the reputation and business interests of the employer also constitutes grounds for decisions issued by labour courts on the legality of the termination of a whistleblower's employment contract due to a breach of the prohibition of causing harm under Article 37 of the ZDR-1. In several similar cases, the labour courts regarded the termination of the employment contract as a disproportionate interference with the freedom of expression,⁹⁵ following the criteria laid down in the decisions of the European Court of Human Rights in cases concerning Article 10 of ECHR (*Guja v. Moldova*, *Heinisch v. Germany*, *Rubins v. Latvia*, *Kharlamov v. Russia*, *Sanches v. Spain*, and *Langner v. Germany*).⁹⁶

Also the provisions of the Directive (regarding the question of the whistleblower's freedom of expression) are based on the case law of the ECHR and on the principles deriving from the Council of Europe Recommendation (2014).⁹⁷ It follows from both the ECHR's judgments and the Recommendation that the decision – whether freedom of expression was (un)lawfully restricted – depends on, *inter alia*, whether the whistleblower had (and used) other options for disclosure before making the public disclosure.⁹⁸ The Directive protects the whistleblower only if public disclosure⁹⁹

91 See Articles 177 to 179.

92 Official Gazette of the Republic of Slovenia, No. 97/07 – UPB1.

93 In the first case, the decision is issued by a regular court, while in the second case, it is issued by the labour court.

94 Taking into account Article 132 of the OZ and the case law, this damage includes both pecuniary and non-pecuniary losses, even in the event of damage caused to the reputation of a legal person (see Article 183 of the OZ).

95 See, for example, VDSS judgement Pdp 486/2011 of 26 October 2011 and VDSS (judgement and decree) Pdp 505/2012 of 14 June 2012.

96 Among the most important is the judgment and decree VIII Ips 109/2015 of 8 December 2015, issued in a case where a public employee was dismissed for the infringement of Article 37 of the ZDR-1 that he had supposedly committed by submitting a proposal for the dismissal of a manager (in which the manager was accused of several irregularities, including those related to the use of budget resources), which was previously sent to the president of the council of the defendant, to be published in a newspaper.

97 See recital 31 of the Directive.

98 See Council of Europe, 2017; see also Council of Europe (2014), pp. 10 and 40.

99 Public disclosure includes also disclosure to the media. Thus, this kind of solution, which discourages whistleblowers from direct disclosure to journalists, is considered as undermining the supervisory role of the media (M. Šepec et al., *The European whistleblowing directive*:

is used as a last resort, in the event of either inaction by the competent authorities (based on an internal or external report) or an imminent threat to the public interest or risk of retaliation (or inaction by the competent institution) in the case of external reporting.¹⁰⁰ The actual protection of the whistleblower in the event of public disclosure will thus depend on the CJEU's wide or restrictive interpretation of the concepts of imminent and obvious danger to the public interest, the risk of retaliation, and the risk of failure to address the infringements. It is possible to agree with the argument that the CJEU should follow the case law of the ECHR when assessing these issues.¹⁰¹ However, even in this case, whistleblowers will continue to be exposed to considerable uncertainty regarding the granting of protection in the event of public disclosure. The question is whether this uncertainty could be reduced by more concrete national arrangements, perhaps also by providing temporary safeguards in any case of public disclosure, in order to prevent any immediate action by the employer before the circumstances are clarified.¹⁰²

7. Protection against reprisal measures

7.1. The current legal framework of protection (*de lege lata*)

Legal acts governing the reporting of violations in various areas contain a general provision on the protection of whistleblowers against retaliation (without specifying retaliatory measures in more detail), and some (especially the ZIntPK and the ZTFI-1) additionally regulate the protection against particular retaliatory measures.

According to provisions of the ZintPK, employees or public employees who have reported corrupt practices are protected against retaliatory measures of the employer.¹⁰³ Since the Act does not specify retaliatory measures, all practices and conduct of the employer can be considered as such, including termination of the employment contract. If an employee or a public employee has been subjected to retaliatory measures by their employer and such measures have resulted in damage, the ZIntPK provides the basis for the employee's right to claim compensation for

a legislative barrier between journalists and their sources?, Media, Culture & Society 7–8/2020, p. 1542). However, the Directive is without prejudice to any specific national protection regime in the event of direct disclosure to the media. See Article 15(2).

¹⁰⁰ See Article 15 of the Directive.

¹⁰¹ Abazi, 2020, p. 651.

¹⁰² The danger of abusing the rule of primary use of other channels for disclosure (in order to justify the dismissal of the worker) is also pointed out by the Council of Europe, 2014, p. 40.

¹⁰³ Article 25 of the ZIntPK.

the damage caused unlawfully by the employer.¹⁰⁴ Especially significant is the role of the KPK when establishing a causal link between the report and the retaliatory measures (disciplinary measures, termination of the employment contract) and the authority of the KPK to demand immediate discontinuation of such conduct.¹⁰⁵ Another important provision stipulates that in the event of a dispute (due to mobbing or unlawful termination of the employment contract), the burden of proof rests with the employer. The employer will thus have to prove that his or her conduct was not a retaliatory measure resulting from the report. In addition, public employees have the option of being transferred to another equivalent work post, which is often the most efficient measure.

The ZBan-2, ZZavar-1, ZTFI-1, and ZISDU-3 contain almost identical provisions obliging employers (banks, insurance companies, financial sector entities, and management companies) to establish measures to prevent any retaliation, discrimination, or other inappropriate treatment of employees who have filed a report, as well as measures to remedy the consequences of retaliation if the inappropriate treatment has already occurred.

Furthermore, the ZTFI-1 explicitly protects the reporting person against the termination of the employment contract and liability for damages. Namely, it stipulates that the reporting of the employer or a person in a contractual relationship with the employer does not constitute a breach of the employment contract or statutory obligations of the employees. Such report is considered an unfounded reason for the termination of the employment contract. Moreover, the reporting person is not liable for any damage caused by the report to the employer or a third party, unless the damage is caused intentionally or through gross negligence.¹⁰⁶

In all the other cases (when they report other wrongdoings), employees and public employees are protected under general provisions of labour legislation. Protection concerning harassment and mobbing and termination of employment contracts is particularly crucial for whistleblowers.

The ZDR-1 regulates the prohibition of sexual and other harassment and workplace mobbing.¹⁰⁷ These provisions also stipulate that the burden of proof rests with the employer, who has to prove that he or she has not violated his or her duty to provide a work environment free of harassment and mobbing. In the case of harassment

104 The employer and the responsible person acting on behalf of the employer who cause damage to the reporting person or subjects him or her to retaliatory measures are also punishable by a fine for offence.

105 If they should fail to comply, the ZIntPK imposes on the responsible person acting on behalf of the employer and on the employer a fine for the offence.

106 See Article 431(14) and (15) of the ZTFI-1.

107 Harassment is defined as any undesired behaviour associated with any personal circumstance with the effect of adversely affecting the dignity of a person or creating intimidating, hateful, degrading, shaming or insulting environment or with the intent to achieve such effect. Workplace mobbing is any repeated or systematic, wrong or clearly negative and offensive treatment or behaviour directed at individual employees at the workplace or in connection with work.

or mobbing, an employee (public employee) is entitled to compensation¹⁰⁸ or may also extraordinarily terminate the employment contract.¹⁰⁹ Additionally, a fine for the offence can be imposed on an employer who fails to provide protection against harassment or mobbing under the law.

Moreover, the protection of whistleblowers against unlawful termination of an employment contract falls under the scope of general provisions of labour legislation. The ZDR-1 and ZJU both stipulate that the employer may only terminate an employee's or a public employee's employment contract if there is a substantiated reason provided in these acts, and only in accordance with provisions of these acts (relating to the employee's possibility of defence, to the role of employee representatives, the form and content of termination and the service of notice of termination). The burden of proof rests with the employer. These acts, moreover, determine the circumstances or the conduct that may not be considered a justified reason for termination, for instance, trade union membership, participation in a strike, participation in trade union activities, as well as filing an action or participating in proceedings against the employer due to allegations of their violations of contractual or other obligations arising from the employment relationship before arbitration, court or administrative authorities, and others (Article 90 of the ZDR-1).

If an employee believes that the termination of the employment contract was unlawful (either because reasons were not justified or for procedural grounds), he or she may request before the competent labour court to establish the illegality of termination within 30 days of the day of the service. If the employer fails to prove the existence of reasons for termination or if there are procedural reasons, the court establishes that the termination of the employment contract was unlawful and determines that the employee shall return to work, or under certain conditions, grants the employee adequate compensation instead of reintegration.¹¹⁰ The court determines the amount of monetary compensation according to the criteria laid down by law,¹¹¹ but it should not exceed the amount of 18 monthly wages of the employee.¹¹²

108 Where the awarded damages must be sufficiently high to be effective and to discourage the employer from committing further violations. See Article 8 of the ZDR-1.

109 In that case, the employer pays to the employee severance pay (in the same amount that would be granted to the employee in the case of ordinary termination of the employment contract for business reasons by the employer) and compensation amounting to no less than the amount of lost remuneration during the notice period.

110 The proposal can be made by either the employee or the employer, and the court may grant compensation instead of reintegration, if it has been established that with regard to all the circumstances and interests of both contracting parties, the continuation of the employment relationship would no longer be possible. See Article 118 of the ZDR-1.

111 The criteria or circumstances that the court takes into account when determining the amount are the duration of the employee's employment, the employee's options with regard to finding new employment, the circumstances that led to the unlawfulness of the termination of the employment contract and the rights invoked by the employee in the period up to the termination of the employment relationship.

112 See Article 118(1) and (2) of the ZDR-1.

A public employee may file an appeal against the termination of their employment contract with the appellate commission, whereas a judicial review is only allowed if the public employee has exhausted the right to appeal. A public employee may request a judicial review within 30 days of being served the decision of the appellate commission or of the expiration of the deadline for issuing the decision by the appellate commission. If the unlawfulness of the termination of the employment contract is established, the public employee shall also be ordered to return to work or granted compensation instead under the same conditions as the employee.

The continuation of work in his or her current work environment can very often become difficult for the reporting person; therefore, the most efficient protective measure is a change of the work post. The ZIntPK only provides this possibility in the case where the person reporting corruption is a public employee.¹¹³ They can request to be transferred to another equivalent work post.¹¹⁴ Such request may be made if they continue to be the focus of retaliation despite the KPK's demand that such conduct is discontinued, making it impossible for them to continue working in their current work post. A public employee requests to be transferred away from the employer and informs the KPK of this request. The employer has an obligation to ensure that the public employee's demand is met within 90 days at the latest and to inform the KPK of this fact. If the employer fails to transfer the public employee without providing justified reasons, the ZIntPK imposes on the employer and the responsible person acting on behalf of the employer a fine for the offence.

7.2. The proposed new legal framework of protection (*de lege ferenda*)

In accordance with the Directive, which obliges Member States to prohibit any form of retaliation measures against whistleblowers,¹¹⁵ the new Slovenian legislation should also contain a properly worded general ban on any retaliation against whistleblowers¹¹⁶ and at the same time exemplificatory list of the most important possible retaliatory measures.¹¹⁷

Subject to Article 21 of the Directive, Member States must take the necessary measures to protect whistleblowers from retaliation measures. Given that the Slovenian sectoral legislation contains some very good solutions regarding the protection

113 Article 25(4) and (6) of the ZIntPK.

114 Even though this is not explicitly stipulated by the law, transfers to another body will mainly be suitable (for example, from one ministry to another).

115 See also Council of Europe, 2014, p. 9 (principle 22).

116 The term "whistleblowers" covers also persons associated with whistleblowers who are provided with protection.

117 The examples listed in the Directive include contract termination, discrimination, harassment etc. See Article 19.

of reporting persons, it would be advisable to provide these protective measures to all whistleblowers under the new law. It would also be advisable to supplement labour/employment legislation (which already guarantees the right to adequate judicial protection and reintegration of unlawfully dismissed workers) with a more concrete whistleblower protection regime and to extend the validity of labour law provisions relating to these safeguards to all workers in the broadest sense. The measures that could be enacted are (*inter alia*) the following: the presumption that a measure against a whistleblower (dismissal, transfer, degrading treatment, infliction of damage, etc.) is a retaliatory measure, with shifting of the burden of proof – that the measure is not related to the report of the infringement – onto the employer;¹¹⁸ if necessary, providing the whistleblower with the assistance of the competent authority¹¹⁹ in establishing a causal link between the retaliation and the report of the infringement;¹²⁰ providing the competent authority with the legal possibility to withhold retaliation measures (e.g. dismissal);¹²¹ explicitly classifying the reporting of infringements as an unfounded reason for termination;¹²² or the classification of the whistleblower as a specifically protected category with a general non-regression clause,¹²³ the possibility of transfer within the employer or to another body in the case of the public sector,¹²⁴ and the whistleblower's right to adequate compensation that fully covers the suffered damage and will act as a deterrent.¹²⁵

Even when enforcing measures explicitly provided for in the Directive (for example, eliminating contractual liability in relation to disclosure of information and eliminating liability in certain proceedings), which sets special conditions for their application,¹²⁶ it would be advisable to take into account already established legal

118 See Article 21(5) of the Directive; see also Transparency International, 2019, p. 7.

119 The authority responsible for receiving applications (such as the Commission for the Prevention of Corruption) or the labour inspectorate could be responsible.

120 Similar to Article 25(2) of the ZIntPK. Among the rare cases of implementation of this provision was the case when the Commission for the Prevention of Corruption prepared an expert opinion on the existence of a causal link in the procedure of termination of an employment contract as a consequence of a report of corruption. See Nabernik, *Preden prijavi goljufijo, želim vedeti, kakšno zaščito bom dobil (Before I report fraud, I want to know what protection I will get)*, Pravna praksa, No. 33, 2019, p. 25.

121 The ZDR-1 provides the labour inspector with the general possibility of withholding the effect of a dismissal (if necessary to prevent arbitrary conduct and prevent irreparable damage). The latter is possible until the lapse of the time limit for judicial protection or until a decision of the court on a proposal for the issuing of an interim order in the event that the worker requires an interim order in judicial proceedings (see Article 215 of the ZDR-1).

122 As already provided by the ZTFI-1.

123 Similarly, the ZDR-1 provides for workers' representatives (see Article 207 of the ZDR-1).

124 As stipulated in Article 25(4) of the ZintPK.

125 In the sense of Article 8 of the ZDR-1.

126 Article 21(2), (7) and (5). A special condition is the well-founded belief that "the notification or disclosure was necessary to disclose an infringement under this Directive".

solutions¹²⁷ and grant such protection to whistleblowers subject only to the fulfilment of the general conditions for protection.¹²⁸

8. Whistleblowing and anti-discrimination measures

Article 6 of the ZDR-1 governs the prohibition of discrimination and retaliation. The employer must ensure equal treatment of the candidate for employment and the employee in respect of entering into an employment relationship, during the employment relationship, and upon termination of the employment contract, regardless of various (non-exhaustively listed) personal circumstances (nationality, race, ethnic origin, gender, skin colour, health condition, disability, religion, age, sexual orientation, family status, membership in a trade union, or financial situation). They do not include whistleblowing.

Given that the circle of possible personal circumstances on the basis of which discrimination is prohibited is not listed exhaustively, whistleblowing could also be considered among these circumstances. While Slovenian legislation fails to define the notion of “personal circumstances”, Slovenian legal doctrine provides a broad definition, referring to “the circumstances or characteristics that significantly co-create the individual’s identity or represent an essential integral part of the identity”.¹²⁹

The ZDR-1 prohibits both direct and indirect discrimination on the grounds of personal circumstances as well as retaliatory measures related to invoking the prohibition of discrimination, stipulates that the burden of proof lies with the employer, and defines a deterring and effective compensation.

The burden of proof is distributed so that in the event of a dispute, the employee (or the candidate for employment) has to indicate the facts that justify the presumption that they were a victim of discrimination, whereas the employer must then prove that there was no discrimination and that, therefore, he or she has not violated the principle of equal treatment.¹³⁰

As follows from Article 8 of the ZDR-1, in the case of violation of the prohibition of discrimination, the employer is liable to pay compensation to the employee or the candidate under general rules of civil law. Non-pecuniary damage includes mental pain suffered as a result of the unequal treatment of the employee or discriminatory conduct

127 For example, Article 431 of the ZTFI-1 regarding relief from civil liability; provisions of the KZ-1 relating to exemption from criminal liability in connection with the criminal offences of insult, defamation, as well as the criminal offence of leaking classified information and illegal disclosure of professional secrets.

128 Stronger whistleblower protection in civil and criminal proceedings is also proposed by Transparency International, 2019, p. 6.

129 B. Kresal, [in:] I. Bečan et al., *Zakon o delovnih razmerjih s komentarjem*, Lexpera GV založba, Ljubljana, 2019, p. 51.

130 See Article 6(6) of the ZDR-1.

by the employer. When determining the amount of compensation for non-pecuniary damage, the court should ensure that the compensation is effective and proportionate to the damage suffered by the candidate or employee and that it will discourage the employer from further violations.

The employee's claim for damages is subject to a limitation period under Article 352 of the OZ. The claim for damages expires within three years of the time the injured party (employee) became aware of the damage and the person who caused it. In any case, the statute of limitations for this claim expires within five years of the damage occurring.

In the case of an unsuccessful candidate, the ZDR-1 provides a shorter period for filing a claim for damages. If the unsuccessful candidate considers that the choice was accompanied by an infringement of the prohibition of discrimination, they may, within 30 days of being served with the employer's notification, request judicial protection before the competent labour court.¹³¹ They may claim compensation under Article 8 of the ZDR-1.

Under the Directive, discrimination against the whistleblower is one of the forms of prohibited retaliation.¹³² A way to ensure that whistleblowers are protected from less favourable treatment could also be to explicitly classify "whistleblowing" as one of the personal circumstances on the basis of which less favourable treatment is prohibited.¹³³ Consequently, all the protection mechanisms in relation to non-discrimination would apply to whistleblowers.

9. Whistleblowing and workplace representative bodies

In Slovenia, there are two types of workers' representations representing the workers' interests before their employer: the trade union and the directly elected works council (or the worker representative). The matters about which the employer has to inform workers' representatives, consult them or even obtain their consent, are governed by the ZDR-1 (for trade unions and partly also for works councils) and the Worker Participation in Management Act – ZSDU¹³⁴ (for works councils). These are issues that are important for the position of workers (such as collective redundancies, restructuring of the employer, working time, inclusion of atypical forms of work, the field of safety and health at work etc.).¹³⁵

131 They may claim compensation under Article 8 of the ZDR-1.

132 Article 19(h).

133 Such solutions can be found, for example, in Slovak and French law.

134 Official Gazette of the Republic of Slovenia, No. 42/07 – UPB1.

135 See K. Šoltes, [in:] Bečan et al. (eds.), *Zakon o delovnih razmerjih s komentarjem (Labour Relations Act with Commentary)*, Lexpera GV založba, Ljubljana, 2019, p. 1096, also p. 1107; and also V. Franca, *Sodelovanje zaposlenih pri poslovnem odločanju (Employee participation in business decision making)*, Planet GV, Ljubljana, 2009.

Neither the ZDR-1 nor the ZSDU contain provisions on protecting whistleblowers or the role of workers' representations in their protection. Given the fact that under Article 10(1) of the ZDR-1, the employer is required to obtain the opinion of trade unions of the employer on any proposals of general acts regulating the organization of work or specifying the workers' obligations,¹³⁶ the employer will have to fulfil the same obligation in the case of a general act setting out internal reporting rules (if such trade union of the employer exists).

Given the importance of the rules concerning internal reporting channels and the protection of whistleblowers for the rights of workers, it would be appropriate (in this connection) to introduce an obligation to consult the directly elected workers' representatives (works councils). Such an obligation is determined (in the ZSDU), for example, regarding the adoption of acts in the field of safety and health at work.¹³⁷ It would also be possible to leave the regulation of these issues to the parties to collective agreements (at the industry/branch/sector or company level), as this is not just a question about work obligations and organizational issues, but also about interfering with workers' rights, which could already fall into the field of collective bargaining.¹³⁸

10. Institutional framework

There is no special institution dealing with the protection of whistleblowers in Slovenia.

Considering sectoral legislation, the most important institution which (among other things) protects whistleblowers who report corrupt practices is the Commission for the Prevention of Corruption (KPK). It is an autonomous and independent state body aiming to curb corruption, strengthen the rule of law, and promote integrity and transparency in society.¹³⁹

While the Securities Market Agency has no direct authority in terms of ensuring the protection of whistleblowers who report violations in the field of financial instruments, it plays an important role in providing information to reporting persons. The ZTFI-1 requires the Agency to publish on its website information about the procedures for the protection of reporting persons and provide the reporting person

136 A trade union of the employer is any representative trade union whose members are the employer's workers that elects a trade union representative. See Article 10(7) of the ZDR-1.

137 This is an area that covers also the protection of workers from harassment and other psychosocial risks.

138 On the relationship between the employer's general acts and collective agreements, see K. Šoltes and S. Peček, [in:] Bečan et al., *Zakon o delovnih razmerjih s komentarjem (Labour Relations Act with Commentary)*, Lexpera GV založba, Ljubljana, 2019, pp. 91–97.

139 See Article 5 of the ZIntPK.

at their request with comprehensive information and advice on legal remedies and procedures available to them for the protection of their rights.¹⁴⁰

According to the Directive, Member States must designate authorities competent for receiving reports of irregularities and adopting follow-up measures¹⁴¹ as well as an information centre or an independent administrative body to provide whistleblowers with support measures (information and advice, assistance in proceedings etc.).¹⁴² This can be a newly established body or an already existing one. According to the powers exercised by the KPK in relation to the protection of whistleblowers (acceptance of reports of corrupt practices, protection of the identity of the whistleblower, protection of the whistleblower against retaliation, as well as forwarding reports to other competent bodies when alleged infringements fall within their jurisdiction),¹⁴³ it can be expected that the KPK will be designated as the body for receiving applications and forwarding them to the competent authorities, as well as for providing support measures. Even if a new body is established, it will be able to use the KPK's experience in carrying out certain tasks.¹⁴⁴

NGOs also play an important role in raising public awareness as well as in advising potential whistleblowers.¹⁴⁵ Such an organization is Transparency International Slovenia (TI Slovenia).¹⁴⁶ It is a non-governmental and non-profit organization with a status in the public interest of the Ministry of Public Administration. The TI established the Center Spregovori!, which receives reports of suspected irregularities, especially corruption and unethical practices, for the purpose of advising individuals who detected suspected irregularities in the public interest. TI Slovenia is also very active in the field of whistleblower protection. Among other things, it is actively involved in discussions regarding the implementation of the new Directive.¹⁴⁷

Recently, a Whistleblower Help Centre was established in Slovenia.¹⁴⁸ It will address the issue of remedying the consequences of retaliatory measures that often afflict whistleblowers. The Centre will use donations to create a fund which will provide assistance in the form of monetary compensation for loss of income, coverage of legal representation or professional advice in the field of psychosocial support, IT security, possible communication with the media, possible physical

140 See Article 431(3) and (17) of the ZTFI-1.

141 Among possible bodies, recital 63 of the Directive lists, *inter alia*, the anti-corruption body.

142 See Article 20 of the Directive.

143 See the KPK, 2019, p. 44 and the following.

144 In this sense also A. Nabernik, *Preden prijavit goljufijo, želim vedeti, kakšno zaščito bom dobil* (Before I report fraud, I want to know what protection I will get), *Pravna praksa*, No. 33, 2019, p. 27.

145 See recital 89 of the Directive.

146 See <https://www.transparency.si/>, accessed 1/09/2021.

147 See <https://www.transparency.si/novica/zaskrbljujouce-pomanjkanje-napredka-pri-zasciti-zvizgacev/>, accessed 01/09/2021.

148 It was founded by Ivan Gale, a former employee of the Agency of the Republic of Slovenia for Commodity Reserves (who publicly revealed irregularities and later lost his job), and the European Institute for Compliance and Business Ethics from Ljubljana.

protection, etc. The whistleblowers' requests for protection will be examined by a committee made up of three eminent individuals. According to the Centre's website, it will also be active in raising awareness, establishing a positive attitude towards whistleblowing, advocating in the form of dialogue with the competent institutions and preparing initiatives and proposals for individual and systemic (including legislative) solutions.¹⁴⁹

Conclusion

The current protection of whistleblowers in Slovenia is limited in terms of content and scope, as individual sectoral laws only regulate the protection of whistleblowers who disclose certain types of irregularities (e.g. corruption practices) or in certain areas (violations of laws regarding financial institutions, securities markets etc.). The labour law legislative framework is appropriate. Nonetheless, it is general (it does not explicitly protect whistleblowers) and therefore less effective in protecting whistleblowers. The obligation to implement the Directive is an opportunity to enact a new law to comprehensively regulate the protection of whistleblowers, which will cover a wide range of protected persons in relation to the disclosure of all irregularities and will extend to the fields of labour, civil and criminal law. In doing so, it would be advisable to use many already established sectoral solutions and extend the application of some provisions of the amended labour legislation. However, in order to improve the protection of whistleblowers – in addition to proper regulation of employers' obligations and punitive sanctions for their breach – effective supervision is essential.

Abstract

Workers and public employees reporting unlawful or harmful conduct in Slovenia are granted special protection only by specific acts, whereas they also enjoy general labour-law protection as employees. The paper addresses the state of their protection as provided by the applicable sectoral legislation relating to the prevention of corruption and to reporting of irregularities in banking and financial sectors, as well as by general labour legislation. Based on the analysis of the material and personal scope of the existing protection, the regulation of reporting channels, the possibility of public disclosure, the legally defined protective measures, and the institutional framework, the author adopts a position on the possibility to update this protection by proper implementation of the EU Directive 2019/1937.

149 See <https://center-zvzgaci.si/>, accessed 01/09/2021.

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