Policy Brief no. 113, April 2021.

In March 2021, the Ministry of Justice launched for public debate the draft Law on the protection of whistleblowers, transposing Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law. The deadline for transposing the Directive is 17th of December 2021. EFOR sent the Ministry of Justice its position and recommendations regarding the draft law.

Draft Law on the protection of whistleblowers. EFOR's comments and position

1. General considerations

EFOR believes that the debate on transposing the directive should start from a wider discussion about how efficient the enforcement of the current law has been. Such a discussion allows for the identification of the vulnerabilities of the legislative framework governing the protection of whistleblowers not only in terms of the law, but especially in terms of practice.

Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law sets a minimum standard of protection for all EU Member States, allowing Member States to maintain a higher standard of protection if the national legislation in force provides for such higher standard.

Thus, on particular aspects, Romania already has in force a higher standard of protection under the current legislation, for instance in relation to the public disclosure procedure.

EFOR believes that the higher standard of protection, which is already provided under Law 571/2004, should be preserved – namely, we should let the whistleblower choose the path they wish to pursue, without restrictions.

The debate on transposing the directive into national law should be much wider and include the private sector as well, since the directive regulates protection of whistleblowers, regardless of whether they work in a public or **private** institution. Thus, the private sector should be included in these debates in order to contribute to the development of legislation and

understand the mechanisms introduced and the impact it has on the private sector.

EFOR has doubts about the appointment of the **National Integrity Agency** (ANI) as the competent authority to receive reports on breaches of the law – ANI's attributions do not allow it to take measures in the matter of whistleblowers, especially when they come from the private sector. It is our opinion that the **Romanian Ombudsman (Avocatul Poporului)** is in a better position to manage such issues. In any case, a comprehensive debate on this topic is necessary.

Furthermore, EFOR deems that the ethics counselors (which should exist in every public institution) should be included in this process. These ethics counselors could play an important part in the actual enforcement of the provisions of the future law, especially in relation to the internal reporting mechanisms.

2. Specific considerations

2.1. Interpersonal conflicts

Art. 2(3) of the draft law[1] stipulates that interpersonal conflicts between the whistleblower and another worker do not fall within the scope of this law. Actually, whistle-blower reports are a mixture of elements related to the organisation of the institution and the relationships with various co-workers. Law no. 571/2004 does not differentiate in this respect in any way, thus establishing a higher standard of protection compared to the Directive. EFOR considers that transposing the Directive should not result in lowering the standard of protection that Romania is already offering.

2.2 Public disclosure

Art. 4(3) of the draft law stipulates:
"Reports on breaches of the law shall be made directly through external reporting channels:
a) if the whistleblower deems that there is a risk of retaliation and that the reported breach cannot be efficiently solved using the internal reporting channels;
b) under the assumption that no internal reporting channels are in place in legal entities of private law with less than 50 employees, other than those set forth at art. 8(4)."

The requirements imposed by the draft law for a person to be able to disclose the information publicly, without going through the internal channels, will operate as a **deterrent** against the whistleblowers. The whistleblower will have to prove that there was an actual risk of retaliation or that the breach could not be solved using the internal reporting channels. The subjectivity of this judgement will discourage the whistleblower from going public and, if they do not trust the internal channels, they will be discouraged from disclosing the information at all. Last, but not least, we reiterate that the law currently in force gives the whistleblower the possibility to choose among various reporting channels freely.

2.2. Dismissing anonymous reports

Art. 10 of the draft law stipulates that anonymous reports, as well as reports that do not contain all the identification elements requested under art. 5 are to be dismissed. EFOR deems that Romania needs a system for processing anonymous reports, especially within a context where, although we have a law on the protection of whistleblowers since

[1] http://www.just.ro/proiect-de-lege-privind-protectia-avertizorilor-in-interes-public/

2004, such law was not enforced efficiently until now.

It is the task of the authorities that receive the reports to distinguish between reports that contain elements of essence and reports that need to be dismissed.

2.3. Exemption from liability

Art. 20 of the draft law, on exemption from liability, does not fully transpose all the cases set forth in the directive.

2.4. Presumed good faith of the whistleblower

Art. 7(1)(a) of Law no. 571/2004 presumes the whistleblower acts in good faith. The draft law transposing the Directive no longer includes this presumption explicitly. We deem that it is necessary to keep it.

"*Art. 7(1)(a) Whistle-blowers for the public interest are presumed to be acting in good faith, subject to art. 4(h), until proven otherwise*".

2.5. Retaliation

Art. 21 of the draft law does not transpose all the cases of retaliation listed under art. 19 of the Directive. The following instances are missing: furlough (art. 19 (a)); transfer of responsibilities; change of workplace; salary cut-down; change of working hours (art. 19(c)), issuing of a negative performance evaluation or negative recommendation for their professional activity (art. 19(e)).

Proportionality test

Art. 9(2) of Law 571/2004 stipulates that the court is to check the proportionality of the punishment applied to the whistleblower for a disciplinary offence, by comparing with the practice of applying punishments or with similar cases within the same public authority, in order to eliminate the possibility of subsequent, indirect punishment for whistleblower acts .We believe that this provision should be included in the new law as well.

Assumed bad faith of those who take retaliatory measures

The draft law provides for the joint liability of those who take retaliatory measures, subject to proving their bad faith (art. 23). We deem that the condition of bad faith in relation to taking retaliatory measures is unnecessary. Namely, if the whistleblower was subject to retaliation, a connection should be presumed between such retaliation and the whistleblower's report, and the burden of proving that the two events are independent should be on those who took retaliatory measures.

Actually, art. 21(5) of the Directive stipulates that it shall be presumed that the damaged caused to the whistleblower was made in retaliation for their report. Therefore, the burden of proof should not be on the whistleblower in connection with the bad faith of the person taking such measures:

"In proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure. In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds."

2.7. Participation of the press and social partners in the disciplinary commissions

We believe that, pursuant to art. 26, disciplinary commissions or other similar bodies of the public authorities should be able to invite, upon request of the whistleblower, not only representatives of the trade union and the press, but anyone else that the whistleblower deems relevant, such as a non-government organisation, for instance.

Semilunei 7, ap. 1
Bucharest
www.expertforum.ro

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