# The Analysis of the Reporting Persons Protection Act Through the Prism of the OECD Indicators

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ABSTRACT

The article presents an analysis of the Reporting Persons Protection Act as an example of a methodology for the substantive evaluation of a new law. The article is divided into three parts. In the first part, standards and examples of good practices in the legislation of countries with a longer tradition in whistleblower protection are collected. In the second part, we analysed the Reporting Persons Protection Act through the indicators of the Organisation for Economic Co-operation and Development (OECD). We found that the Reporting Persons Protection Act fully complies with thirteen indicators, partially complies with four indicators, and ignores eight out of twenty-five indicators. Therefore, in the concluding part of the article, we sought the proponent's arguments for not considering these indicators and suggested some other improvements to the law.

*Keywords:* Reporting Persons Protection Act, whistleblowing, protection of reporting persons, whistleblower protection

## Analiza Zakona o zaščiti prijaviteljev skozi prizmo kazalnikov OECD

POVZETEK

Članek predstavlja analizo Zakona o zaščiti prijaviteljev kot primer metodologije za vsebinsko oceno novega zakona. Članek je razdeljen na tri dele. V prvem delu so zbrani standardi in pri-

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meri dobrih praks v zakonodaji držav z daljšo tradicijo zaščite prijaviteljev. V drugem delu prispevka pa smo Zakon o zaščiti prijaviteljev analizirali skozi kazalnike Organizacije za ekonomsko sodelovanje in razvoj (OECD). Ugotovili smo, da Zakon o zaščiti prijaviteljev v celoti sledi trinajstim kazalnikov OECD, delno izpolnjuje štiri kazalnike, osem izmed petindvajsetih kazalnikov pa popolnoma zanemarja. Zato smo v sklepnem delu članka poiskali argumente zakonodajalca za neupoštevanje teh kazalnikov ter predlagali nekaj drugih izboljšav zakona.

*Ključne besede:* Zakon o zaščiti prijaviteljev, žvižgaštvo, zaščita prijaviteljev, zaščita žvižgačev

# 1. Introduction

At the beginning of 2023, Slovenia enacted the Reporting Persons Protection Act (hereinafter: RPPA), which is the first standalone law in the country in the field of whistleblower protection against retaliatory measures. Consequently, 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 (hereinafter: the Directive) was implemented in the Republic of Slovenia. RPPA introduces a system for establishing internal and external reporting channels for reporting violations of all regulations in force in the Republic of Slovenia that whistleblowers become aware of in their work environment. Additionally, it introduces protective and supportive measures to prevent or eliminate possible retaliatory measures by employers that whistleblowers might face due to a report.

According to the Treaty on the Functioning of the European Union, directives are binding on every member state of the EU in terms of the goal to be achieved, but national authorities are left to choose the form and methods to achieve it. Slovenia decided to implement the Directive through the RPPA, which aims to »further strengthen proper application and respect for EU law and national legislation« (Ministrstvo za pravosodje, 2022, p. 27) and »[...] ensure the effective handling and resolution of violations« (Ministrstvo za pravosodje, 2022, p. 106).

RPPA is not limited to the areas highlighted by the Directive, but rather, to protect the public interest. It applies to violations of all regulations in force in the Republic of Slovenia. For this

purpose, the law establishes an additional leverage of control by encouraging individuals who detect irregularities in their work (the ones that they believe to be true and threatening to the public interest) to report them through the established channel. The encouragement is shown in the law by ensuring protection from the moment of the report until the conclusion of the procedure (Ministrstvo za pravosodje, 2022, p. 106).

The legislation in the field of whistleblower protection must, therefore, empower and protect whistleblowers and ensure appropriate legal remedies for reporting irregularities. Since laws on whistleblower protection reflect the prevailing standards of a community and only facilitate access to legal protection, they themselves do not guarantee success in terms of increasing the number of reports of violations. RPPA does indeed impose an obligation on employers to establish internal reporting channels, but it does not oblige employees to report possible irregularities in the company. Therefore, the question arises of how to persuade employees in companies to decide to speak up. The adoption of general acts by employers, carefully written and strictly confidential reporting procedures, the appointment of well-trained trustees, and threatened fines will certainly help establish employees' trust in the employer that the latter genuinely cares and will respond appropriately to the reported irregularities, and that the whistleblower will not face retaliatory measures. However, will this really increase the number of reports in companies?

## 2. Standards and Good Legislative Practices in the Field of Whistleblower Protection

The adoption of RPPA is an important step for Slovenia toward protecting the public interest and comprehensively regulating the protection of whistleblowers from retaliatory measures in work environments. Whistleblower protection has been scattered across at least thirteen regulations in the existing Slovenian legislation so far, each one regulating only a narrow part of the problem and therefore does not provide comprehensive protection for whistleblowers from possible retaliatory measures.

Some authors (Vaughin, Devine and Henderson, 2003; Thomas, 2008) attempted to answer the question what the principles of an ideal whistleblower protection law are. They highlighted:

focusing on the disclosed information instead of the whistleblower, connection with freedom of expression, enabling disclosures to various authorities, inclusion of compensation or incentives for disclosure, protection of every disclosure - internal or external - by citizens or employees, inclusion of whistleblowers in the process of assessing their disclosure, and standards for disclosure.

To help countries that do not yet have standalone legislation in the field of whistleblower protection, or it is (still) not adequate, the OECD later issued six guiding principles with thirty-one examples of good practice, which allow countries to apply them in their legal systems effectively (OECD, 2011).

International principles for whistleblower legislation have also been issued by Transparency International, which was later followed by a guide to help policymakers and whistleblower advocates in how to implement these international principles into national legislation (Transparency International, 2013).

Whistleblower protection legislation has also been the subject of interest of many researchers. After reviewing whistleblower protection laws in thirty-seven countries, these authors (Feinstein, Devine et al., 2021) summarized twenty examples of good practices that, according to their findings, ensure that the whistleblower protection law works in practice. They took the number of reports in a particular country after the adoption of such a law as one of the main indicators of the success of whistleblower protection laws in practice and compared it with the number of reports before the adoption of the law.

Many authors (Bron, 2023; Stephenson and Vandekerckhove, 2014 etc.) even deal with expert assessments of existing and emerging whistleblower protection laws professionally. Transparency International is also inclined to this, having developed an extremely precise methodology for the assessment of whistleblower protection laws (McDevitt and Terracol, 2020).

## 3. The Analysis of the Reporting Persons Protection Act

For the sake of clarity and systematicity, we have selected six OECD (2011) principles for the analysis of RPPA and, following an example in Sedlar (2017), we have grouped the thirty-one cor-

responding examples of good regulatory practice into twenty-five indicators. These are identified in the remainder of the paper by a capital I and a sequence number from 1 to 25.

**OECD Principle No 1: Clear Legislation and an Effective Institutional Framework are in Place**

I1: *Enactment of dedicated legislation*

With the adoption of RPPA, Slovenia has met this indicator. RPPA represents the first standalone law in the Republic of Slovenia in the field of whistleblower protection, which »[...] for the purpose of protecting the public interest, determines the methods and procedures for reporting violations of regulations that individuals have learned about in the work environment« (RPPA, Article 1).

I2: *Requirement or strong encouragement for companies to implement control measures to provide for and facilitate whistleblowing*

Internal controls, ethics and compliance programmes, anti-corruption programmes, fraud risk management, etc. are not explicitly mentioned in RPPA. The fourteenth paragraph of Article 9 only requires entities to adopt an internal act in which they describe the internal reporting channel and define a confidant, contact details for receiving reports, the procedure for receiving an internal report and its handling, etc.

**OECD Principle No 2: The Legislation Clearly Defines Protected Disclosures and the Individuals Entitled to Protection Under the Law**

I3: *Protected disclosures include a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, a substantial and specific danger to public health or safety or types of wrongdoing that fall under the term »corruption«, as defined under domestic law(s)*

RPPA does not list protected disclosures, as »the scope of this law includes violations of all regulations in force in the Republic of Slovenia« (Ministrstvo za pravosodje, 2022, p. 102). The extension of the scope of the law is justified in the government's explanation of the bill, stating that limiting it solely to the areas covered by the Directive »would create uncertainty for both the whistleblower and the trustee regarding the eligibility for protec-

tion in case of violations exceeding the scope of the Directive« (Ministrstvo za pravosodje, 2022, p. 102).

I4: *Individuals are not afforded whistleblower protection for disclosures that are prohibited by domestic laws in the interest of national defense or the conduct of foreign affairs*

This indicator is considered in the second paragraph of Article 21 of RPPA, which provides for exceptions regarding the disclosure of confidential information, professional secrecy of lawyers, secrecy of judicial consultations, and rules of criminal procedure. These data may only be disclosed to the competent supervisory authorities. According to Feinstein, Devine et al. (2021), whistleblower protection laws should also prohibit all types of restrictions on freedom of expression that arise from various ethical codes, internal rules, policies, and non-disclosure agreements in companies. This principle, in their opinion, should also encompass the supremacy of whistleblower protection laws over conflicting laws. This requirement could apply, for example, to the so-called »non-interference zone« (Vandekerckhove, 2022), which is shared by the EU Whistleblower Protection Directive and the EU Trade Secrets Directive due to the undefined scope of the material application of both. RPPA resolves this »battlefield« by stating that a whistleblower (provided they did not report or disclose false information and provided they had reasonable grounds to believe that the disclosure was necessary to reveal the violation) does not violate any restrictions or prohibitions regarding the disclosure of information and does not bear any responsibility associated with such disclosure or public revelation. Some authors are concerned that this second condition will cause problems in practice, as they believe it will be difficult to define the reasonableness of the grounds that justify the necessity of the disclosure (Turk, 2023).

I5: *Public and private sector employees are afforded protection, including not only permanent employees and public servants, but also consultants, contractors, temporary employees, former employees, volunteers, etc.*

Feinstein, Devine et al. justify this indicator with the vividly expressed argument that »it takes a village to blow the whistle responsibly and effectively« (2021, p. 16). In their opinion, such a provision is crucial in deterring potential whistleblowers from remaining silent and preventing the ostracism of those who decide to speak up. We believe that RPPA considers this indicator

adequately, as the protection of persons who could secondarily be subjected to retaliatory measures is set very broadly. Protection under RPPA is granted to intermediaries, persons associated with the whistleblower, as well as volunteers, interns, apprentices, contractors, suppliers, students, candidates for employment, shareholders, members of the management/supervisory body—in short, everyone who forms part of the work environment of an organization.

I6: *Clear definition of »good faith« or »reasonable belief«*

According to Feinstein, Devine et al. (2021), the motive for the disclosure should not be an important factor if the whistleblower genuinely believes that their information is true. Protection should also apply to whistleblowers who disclose inaccurate information, as long as the accuracy of the disclosed information has not been confirmed or refuted. Therefore, the OECD recommends a clear definition of good faith and reasonable belief which RPPA does not contain.

**OECD Principle No 3: The Legislation Ensures that the Protection Afforded to Whistleblowers is Robust and Comprehensive**

I7: *Due process for both parties (the whistleblower and the respondent), including, inter alia, the need for protecting confidentiality*

The prohibition on disclosing the identity of the whistleblower is the most important measure of whistleblower protection to achieve the goal of the law. It is therefore understandable that RPPA pays significant attention to protecting the whistleblower's identity (Article 6), while it does not directly regulate the protection of the identity of the respondent as explicitly as the Directive requires. The protection of the identity of the respondent is indirectly ensured, as entities must establish such a reporting process that prevents unauthorized persons from accessing the content of reports and the data about the whistleblower and the respondent (RPPA, Article 9). The data concerning the respondent is protected by provisions related to the storage of records and the informing of the individual about his/her rights, as explained in the government's proposed law. The respondent also has access to all legal remedies available in both civil and criminal law as well as in labour law (Ministrstvo za pravosodje, 2022, p. 51).

I8: *Protection from any form of retaliatory action*

Regarding retaliatory measures, RPPA, like the prohibition on revealing the identity of the whistleblower, employs a prohibitive normative modality, and even a threat of retaliatory action or an attempt to retaliate is considered a retaliatory measure (RPPA, Article 9). Explicitly prohibited retaliatory measures are taken from the Directive, but they, of course, »do not represent an exhaustive list« (Ministrstvo za pravosodje, 2022, p. 120) given that the types and forms of retaliatory measures a whistleblower can suffer are limited only by the employer's imagination (Feinstein, Devine et al., 2021, p. 19).

To ensure the best flow of information about violations in work environments, reliable and appropriately protected reporting channels must be available for those who do not wish to reveal their identity. This applies both to anonymous disclosures, where the identity of the whistleblower is unknown to anyone, and to cases where the whistleblower's identity is known, but must be adequately protected by the trustee and must not be disclosed without the whistleblower's written consent. Both require the use of the best available technology for privacy protection, which, despite the anonymity of the whistleblower, allows secure two-way communication.

The proposer of RPPA slightly hesitated on the question of anonymity, as the original bill, published on the E-demokracija portal in December 2021, did not foresee the handling of anonymous reports and, consequently, did not provide protection for anonymous whistleblowers with the justification that »it is not possible to issue a receipt for the report if the whistleblower is not known, nor can they be informed of the outcome of the procedure« (Ministrstvo za pravosodje, 2021, p. 54). The fear that anonymous reports would be largely useless or even malicious is unnecessary, as »anonymous reports are already deeply rooted in our culture« (Nabernik, 2022, p. 54), based on the fact that every third report received by the Commission for the Prevention of Corruption in the last six years is anonymous, and every fifth one is also justified (Nabernik, 2022, p. 54). Many studies (see Scott and Rains, 2005) confirm that the possibility of anonymous reporting can protect whistleblowers from retaliatory measures without silencing them, therefore, the legislator should ultimately include the handling of anonymous reports and the protection of anonymous whistleblowers in RPPA.

I9: *Clear indication that, upon prima facie showing of whistleblower retaliation, the employer has the burden of proving that measures taken to the detriment of the whistleblower were motivated by reasons other than the disclosure*

The institution of the reversed burden of proof in legal proceedings is, according to both OECD recommendations (OECD, 2011) and the findings of Feinstein, Devine et al. (2021), an important factor in effective whistleblower protection. This indicator is considered in the fifth point of Article 22 of RPPA: in legal proceedings, the whistleblower must present facts justifying the presumption that he/she was subjected to retaliatory actions by the employer due to the report, while the employer is the one who must prove that it did not carry out or exercise retaliatory actions (Ministrstvo za pravosodje, 2022, p. 72).

I10: *Protection of employees whom employers mistakenly believe to be whistleblowers*

The protection of workers whom employers mistakenly believe to be whistleblowers is not provided by RPPA. So-called non-whistleblowers are, in our opinion, indirectly protected, as the employer is not allowed to ascertain the identity of the whistleblower, meaning they should not mistakenly believe anyone to be a whistleblower. However, we are aware that in practice this is easier said than done.

**OECD Principle No 4: The Legislation Clearly Defines the Procedures and Prescribed Channels for Facilitating the Reporting of Suspected Acts of Corruption**

I11: *Provision of protection for disclosures made internally or externally*

RPPA fully considers this indicator, as it provides for a three-tiered model of reporting violations, whether the whistleblower has the option to choose the most appropriate reporting channel according to the circumstances of each case and will still receive appropriate protection. The law is based on the premise that business entities in both the public and private sectors are interested in addressing violations within themselves first (Ministrstvo za pravosodje, 2022, p. 108). That's why the law primarily encourages »reporting within the legal entity in the private or public sector where the violation occurred" (RPPA, Article 4). External reporting is »reporting to external reporting bodies«

(RPPA, Article 4), RPPA lists twenty-four of them (RPPA, Article 14). The whistleblower can file an external report if the internal reporting channel is not established, if the internal report cannot be effectively handled, or if, in their opinion, there is a risk of retaliatory actions (RPPA, Article 13). In the case of public disclosure of violations, the whistleblower is entitled to protection under RPPA only on the condition that they first filed an internal or external report, and no action was taken to address the reported violation within three months of the report, or if he/she reasonably believes that the violation poses an immediate danger to the public interest, life, public health and safety, etc. (RPPA, Article 18).

I12: *Establishment of internal channels for reporting within the public sector and strong encouragement for companies to establish internal reporting channels*

That RPPA truly wants to encourage internal reporting is demonstrated by the entire fourth chapter of the law, which precisely prescribes the establishment of an internal reporting channel, the duties of the trustee, and the procedure for handling internal reports, both for the public and private sector. We believe that a strong incentive for the use of internal reporting channels is that the whistleblower is not entitled to protection if the violation is not first reported to the trustee at the employer. Only if there is no adequate response from the employer can they initiate an external report or publicly disclose the alleged violation.

The risk to the effective functioning of the law, as noted by the proposer of the law itself, is the relatively narrow circle of only around three thousand obligated entities (Ministrstvo za pravosodje, 2022, p. 110).

I13: *Protection afforded to disclosures made directly to law enforcement authorities*

The police and the public prosecutor's office are not listed among the external reporting bodies, and consequently, they are not obligated to establish an external reporting channel. However, a whistleblower who reports a criminal offense to the police or the public prosecutor's office is still entitled to protection in accordance with Articles 19 to 25 of RPPA. Support measures and assistance to the whistleblower in asserting protective measures in these cases are provided by the Commission for the Prevention of Corruption.

I14: *Specific channels and additional safeguards for dealing with national security or state secrets-related disclosures*

In the case of a report related to the protection of classified information, RPPA does not apply. The whistleblower is provided protection as regulated by the Inspection Control Act. The third paragraph of Article 21 of RPPA regulates the specifics regarding liability for the disclosure of classified information.

I15: *Allowing reporting to external channels, including to media, civil society organisations etc.*

The whistleblower can turn directly to the media if no appropriate action was taken to address the violation within three months of his/her internal or external report, or if he/she reasonably believes the violation poses an immediate or obvious danger to the public interest, particularly danger to life, public health, and safety, or if there is a risk of irreversible damage, or if there is a risk of retaliatory actions in the case of an external report, or if, due to the specific circumstances of the case, there is little chance that the violation will be appropriately addressed, especially when evidence could be hidden or destroyed, or when the external reporting body colludes unlawfully with the perpetrator of the violation or is involved in the violation (RPPA, Article 18).

Non-governmental organizations are not external reporting bodies, but the Ministry of Justice can grant them the status of a non-governmental organization in the public interest in the field of integrity if they meet the conditions and if they provide counselling, legal assistance, representation in retaliation cases, or psychological support to whistleblowers (RPPA, Article 20, paragraph 4).

I16*: Incentives for whistleblowers to come forward, including through the expediency of the process, follow-up mechanisms, specific protection from whistleblower retaliation, etc.*

One of the criteria for the effectiveness of whistleblower protection laws is also the deadlines for action, as procedures must proceed quickly to minimize the damage to the public interest caused by the violation. Although whistleblower protection laws in some countries require employees to act within one to two months, six months is roughly the minimum functional deadline for reporting irregularities. A one-year statute of limitations is recommended, but some jurisdictions allow even three years (Feinstein, Devine et al., 2021). RPPA provides for a two-year statute

of limitations, which is consistent with the statute of limitations under the Minor Offences Act (Article 42, paragraph 1) and procedures for internal or external reporting must be concluded within three months at the latest (RPPA, Article 12, paragraph 5).

In practice, it will probably not be entirely possible to avoid a certain percentage of retaliatory actions. The proposer of the law, based on past practice and the practice of comparable countries that have already introduced a system of whistleblower protection, estimates that authorities will handle about ten cases of retaliatory actions against whistleblowers annually. It is estimated that in approximately five cases per year, employment relationships will be terminated, leading to the assertion of judicial protection and other support measures (Ministrstvo za pravosodje, 2022, p. 3). To mitigate the consequences of retaliatory actions, Feinstein, Devine et al. (2021), based on the experiences of countries with long-established whistleblower protection, recommend informing whistleblowers of their rights, education on how to act in case of retaliatory actions, free legal aid, the establishment of special agencies that can neutralize possible retaliatory actions, a greater role for the Ombudsman, etc. RPPA does not change the existing judicial protection of whistleblowers; in addition, it provides for numerous additional so-called »protective and supportive measures« (RPPA, Article 20).

I17: *Positive reinforcements, including the possibility of financial rewards for whistleblowing*

Offering financial rewards or a certain percentage of recovered assets, according to Hajn and Skupień's opinion (2021), requires a great deal of caution so that reporting violations, which should represent an act of social conscience, does not turn into a business activity, i.e., informing in exchange for compensation, which has negative historical connotations in Central and Eastern Europe.

The Directive does not mention rewards for whistleblowers, nor does RPPA provide them. American Kantian philosophy professor Davis explains that the reward for whistleblowers, as provided by American legislation, can be understood in three not entirely independent ways: a reward as compensation, a reward as deterrence, and a reward as an incentive (Davis, 2012, p. 270). The reward as compensation is an acknowledgment that reporting violations is associated with high costs, such as

job loss and the disruption of many personal relationships. The purpose of the reward as compensation is to reimburse these costs, if they can be reimbursed at all, and, equally importantly, to inform the potential whistleblower in a timely manner of the possibility of receiving this compensation, which they can consider when deciding whether to report a violation (Davis, 2012, p. 270). Such a reward may seem unacceptable to some, as American legislation, like RPPA, prohibits retaliatory actions against whistleblowers. Theoretically, due to the legal prohibition of retaliatory actions, such compensation is unnecessary, but in practice, a reward as compensation is far from superfluous. Proving retaliatory actions is very difficult and requires either a deep pocket for the whistleblower or a lawyer willing to work pro bono for some time. Of course, the legislation does not provide compensation for other problems in life that the whistleblower and his/her family may suffer due to sudden unemployment, for mental anguish, and other suffering or damage caused to the whistleblower's reputation or other life opportunities (Davis, 2012, p. 271).

The reward as deterrence is closely related to the reward as compensation. Because a potential whistleblower can receive a substantial reward for their report, company management has much less power over him/her to deter them from reporting. Management, therefore, also has an additional reason to try to eliminate the violation the whistleblower has pointed out (Davis, 2012, p. 271). Davis finds neither the reward as compensation nor the reward as deterrence conceptually problematic. It is quite different if we see the reward as a mechanism intended to encourage employees to report violations, for instance a reward for regular work performance (Davis, 2012, p. 271). But »when there are financial incentives and awards offered to encourage whistleblowing, the moral ambiguity of the activity is increased because it can be seen as being done for the rewards« (Thomas, 2008, p. 152). This is similar to promising that we will pay the Good Samaritan for helping the wounded on the desert road between Jerusalem and Jericho. If the Good Samaritan helps because he will be paid for his effort, he cannot be the Good Samaritan (Davis, 2012, p. 271).

I18: *Provision of information, advice and feedback to the whistleblower on action being taken in response to disclosures*

We believe that the legislator has well anticipated the procedures for responding to a report. Counselling whistleblowers is within the domain of trustees, official persons for external reporting, the Commission for the Prevention of Corruption, non-governmental organizations, and even centres for social work (psychological support).

**OECD PRINCIPLE No 5: The Legislation Ensures that Effective Protection Mechanisms are in Place**

I19: *Appointment of an accountable whistleblower complaints body responsible for investigating and prosecuting retaliatory, discriminatory, or disciplinary action taken against whistleblowers*

The tasks specified in this indicator have been assumed by the Commission for the Prevention of Corruption, which, as a centre of knowledge and excellence in the field of whistleblower protection, plays a central role in the new system. In addition to being the body for handling internal and external reports, it has also been given responsibilities regarding providing information, advice, and assistance to whistleblowers in asserting protective and supportive measures, as well as formulating recommendations and explanations on issues related to the contents of RPPA. It will also supervise the establishment and operation of internal reporting channels at obligated entities in both the public and private sectors and assist and advise the appointed confidants at obligated entities and official persons of external reporting bodies. A special internal organizational unit called the Centre for the Protection of Whistleblowers has been established to carry out these new tasks.

I20: *Rights of whistleblowers in court proceedings as an aggrieved party with an individual right of action*

Both the OECD (2011) and Feinstein, Devine et al. (2021) emphasize the importance of ensuring fair legal proceedings involving whistleblowers, particularly in terms of the right to a hearing and confrontation with violators, as well as in terms of reasonable deadlines and timely decisions. For weak judicial systems and in international disputes, they also recommend alternative dispute resolution.

In the Republic of Slovenia, the right to fair judicial protection of rights, duties, or legal interests is broadly protected by several

constitutional provisions. As noted by Jambrek (2002), Slovenian constitutional protection of the right to a court and fair trial is even broader than the European protection, as it is not limited to the protection of civil rights and obligations or against criminal charges, but encompasses any rights, duties, or legal interests. Due to the almost proverbial slowness of Slovenian courts, reasonable deadlines and the timelines of decisions pose a risk. As noted by the proposer of the law (Ministrstvo za pravosodje, 2022, p. 30), it is anticipated that in legal proceedings in the case of a lawsuit for the protection of a whistleblower, the whistleblower will quickly obtain a temporary injunction (the conditions are eased), and that the proceedings will be concluded quickly (the urgency of the procedure is specified).

A recent study on public satisfaction with the functioning of Slovenian courts found the rating regarding the speed of case resolution has declined to the same level as it was four years ago (Vrabec, 2024, p. 26). The lowest satisfaction among users of court is with the time between filing a case in court and the scheduling of the first hearing for the main proceedings (Vrabec, 2024, p. 29). In 2023, user satisfaction with judges slightly dipped for the first time, after several years of growth. The highest ratings were given for the clarity of the judge's language, the appropriateness of the judge's conduct, and the impartiality of the judges. The rating for the statement regarding the judge's independence from external influences is also high (Vrabec, 2024, p. 30). The general public rates judges highest for their expertise, followed by their understanding of people and fairness, while impartiality and independence are rated the lowest (Vrabec, 2024, p. 6).

However, RPPA does not specifically refer to alternative dispute resolution.

I21: *Penalties for retaliation inflicted upon whistleblowers*

Effective whistleblower protection laws also provide for penalties for both individuals and legal entities in cases of obstruction or attempted obstruction of reporting, implementation of retaliatory measures, initiation of malicious proceedings against whistleblowers, and violation of the obligation to maintain the confidentiality of whistleblowers (Directive, Article 23). Personal responsibility of decision-makers is particularly important, as otherwise, they have nothing to lose (Feinstein, Devine et al., 2021). RPPA does indeed provide for fines, but Transparency Interna-

tional Slovenia questions whether these fines are »effective, proportionate, and dissuasive« (Peterka, 2022). For some authors it is also problematic the RPPA includes a wide range of fines that can be imposed on legal entities and responsible persons within legal entities if they violate various provisions of the law, whereas the whistleblower is only subject to a »one single fine« (Turk, 2023, p. 20).

However, high fines as a mechanism for controlling corruption are only effective when the illegally acquired financial gain is relatively low compared to the salary of the violator. The higher the value of the illegally acquired financial gain, the less likely it is that high fines will long-term deter, for example, corruption (Quinteros, Villena in Villena, 2022).

**OECD PRINCIPLE No 6: Implementation of Whistleblower Protection Legislation is Supported by Awareness-Raising, Communication, Training and Periodic Evaluation of the Effectiveness of the Framework of Protection**

I22: *Promoting awareness of whistleblowing mechanisms, provide general advice, monitor and periodically review the effectiveness of the whistleblowing framework, collect and disseminate data, etc.*

Promotional activities began immediately after the adoption of RPPA, reporting, data collection, and analysis were planned. Obligated entities must report to the Commission for the Prevention of Corruption by March 1 of the current year for the previous year on the number of received, anonymous, and substantiated reports, as well as the number of addressed retaliatory measures for the previous year. External reporting bodies must report on the number of reports, anonymous reports, handled violations with the measures taken, handled retaliatory actions, an assessment of the financial damage if determined, and the amounts recovered after investigations and procedures related to the reported violations. The Supreme Court must also report to the Commission for the Prevention of Corruption on the number of new cases due to retaliatory actions, final decisions, and the type of court decision. Based on the annual reports of trustees, external reporting bodies, the Supreme Court of the Republic of Slovenia, and its own records of procedures with whistleblowers, the Commission for the Prevention of Corruption prepares a joint annual report (see

Komisija za preprečevanje korupcije, 2024). Data will help continuously assess the achievement of the law's purpose and monitor the effectiveness of the protection system and the development of practice in the field of whistleblower protection (Ministrstvo za (pravosodje, 2022, p. 117).

I23: *Raising awareness with a view to changing cultural perceptions and public attitude towards whistleblowing, to be considered an act of loyalty to the organisation*

RPPA does not address the issue of whistleblowers' loyalty. This issue has both supporters and opponents, so it goes beyond the scope of this paper and will certainly be the subject of our further research.

I24: *Training to ensure managers are adequately trained to receive reports, and to recognise and prevent occurrences of discriminatory and disciplinary action taken against whistleblowers*

RPPA does not provide for specific training for the management of obligated entities. Immediately after the adoption of the law, a wide range of training courses for trustees was launched, while the offer of training for managers is non-existent. Regarding the training of management, we believe that the practice of Australia (see in Feinstein, Devine et al., 2021) is a good one, where company management is legally required to prevent retaliatory measures, and non-compliance is also considered a violation of the law.

I25: *Requirement in the law that employers post and keep posted notices informing employees of their rights in connection with protected disclosures*

Notifying internal organizational units responsible for addressing violations and informing employees and other persons in the work environment of the obligated entity are provided for in the Article 9(14) and (15) of RPPA.

# 4. Conclusion

Based on the analysis of the RPPA, we conclude that the law follows most of the good practices recommended by the OECD and the International Bar Association. Of the twenty-five indicators, thirteen indicators are followed, four are partially followed and eight are not followed. The following indicators have been assessed as indicators taken into account: stand-alone legislation

(I1), disclosure exemptions (I4), protected persons (I5), handling of anonymous whistleblowing (I8), reversed burden of proof (I9), protection of internal and external disclosures (I11), internal reporting channels (I12), reporting to law enforcement authorities (I13), whistleblower counselling (I18), whistleblower complaints body (I19), fair trials (I20), penalties (I21), and informing workers and other persons in the work environment (I25).

The indicators we assessed as partially taken into account are protection of both sides (I7), disclosures to the media and NGOs (I15), encouragement to report, deadlines and specific protection (I16), and monitoring of the effects of the law (I22). I7 refers to the protection of the identity of both parties - the whistleblower and the person concerned by the notification. The protection of the identity of the person concerned is not directly mentioned in the RPPA but is implicitly provided for in Article 9(13) of the RPPA. »The register of applications must be kept in such a way that persons other than trustees do not have access to it. Where the documentary material constituting the application record is stored in an information system (e.g. a document system), the data from and about applications (metadata) must be accessible only to authorised persons and not to others (including management). Where such separation cannot be ensured, the records may be kept in physical form in a locked cabinet (Ministrstvo za pravosodje, 2022, p. 107). The above means that the trustees must, in the spirit of the dictum »The sin shall be told, but not the sinner« protect the identity of the (alleged) offender with the same care as the identity of the whistleblower. This seems to us particularly important in cases where the reports turn out to be false or even malicious. However, it remains unclear how to deal with the identity of the person concerned once the procedure is over. This is because information about the whistleblower is not public information even after the end of the procedure, whereas the Directive in Article 22(2) states that »the identity of persons concerned is protected for as long as investigations triggered by the report or the public disclosure are ongoing.«

I15 refers to the public disclosure of infringements. The external reporting bodies are listed in detail in the RPPA, but it is not clear to whom the whistleblower can publicly disclose information about the infringement. Is it exclusively the media, or can the

whistleblower also contact civil society organisations, legal associations, trade unions, or business/professional organisations, etc. (Transparency International, 2013, p.7).

I16 provides for the encouragement of whistleblowers to disclose through the provision of fast-track procedures, follow-up mechanisms and specific protection against retaliation. The proposer of the law is aware that »an increase in the number of reports may occur with adequate publicity« (Ministrstvo za pravosodje, 2022, p. 3), but almost two years after the entry into force of the RPPA, there is no evidence of any encouragement in the public domain for citizens to disclose information about violations in their working environments.

I22 discusses promoting awareness of whistleblowing mechanisms, providing general advice, monitoring and periodically reviewing the effectiveness of the whistleblowing framework, collecting and disseminating data, etc. The RPPA provides the collection of data on whistleblowing, regular monitoring of the implementation of the law by the Commission for the Prevention of Corruption, but what is lacking is the heavier public information and awareness raising that would help change the culture and public attitudes towards whistleblowers.

We evaluated the following indicators as not considered: compliance programs (I2), the list of protected disclosures (I3), the definition of good faith and reasonable belief (I6), the protection of non-whistleblowers (I10), national security and classified information (I14), rewarding whistleblowers (I17), whistleblowing as an act of loyalty (I23), and training of management (I24).

I2 relates to encouraging business entities to manage risks, establish internal controls, compliance programs, and ethical codes. Following examples from banking, insurance, and foreign-owned companies, which, according to our experience, already have well-established internal reporting channels, the law could have prescribed that the internal act on whistleblower protection be adopted as part of the compliance program of each company or institution. The proposer of the law did not choose this option due to the lack of »specialized personnel in risk management and compliance« (Ministrstvo za pravosodje 2022, p. 81) at (smaller) obligated entities. The proposer of the law believes the proposed regulation is »flexible enough to allow all entities to implement a system that will meet the needs of the obligated entity and

achieve the purpose of the Directive and the law« (Ministrstvo za pravosodje 2022, p. 81).

I3 lists the protected disclosures. RPPA does not list protected disclosures, thus expanding the scope of the law compared to the Directive. The proposer of the law justifies the »broader scope of this law by considering the public interest, which is expressed through the handling of violations of all regulations in force in the Republic of Slovenia« (Ministrstvo za pravosodje 2022, p. 102). However, this creates a problem, as the concept of public interest is a »vague term« that needs to be filled with content in each case (Letnar Černič, 2013). This would mean for RPPA, for example, that it would be beneficial to further define or perhaps limit the concept of violations of all regulations, as not every violation of regulations necessarily threatens the public interest.

I6 recommends a clear definition of good faith and reasonable belief. From the explanation of the bill, we can infer that RPPA presumes good faith as a condition for whistleblower protection, as it states that »protection is provided to the whistleblower who, based on reasonable grounds, believed that the information about the violations reported was true at the time of reporting and that such information falls within the scope of this law« (Ministrstvo za pravosodje, 2022, p. 104). The problem and deficiency of whistleblower protection laws, as noted by Feinstein, Devine et al. (2021), is that good faith must be proven when disclosing irregularities, as merely a genuinely reasonable belief in wrongdoing is not sufficient. Moreover, in their opinion, »the good faith standard puts the whistleblower's motives on trial« (Feinstein, Devine et al., 2021, p.13). Good faith is indeed a kind of subjective, intimate (morally valuable) conviction of the individual, not every inner conviction of an otherwise honest person is good faith. This belief must have some tangible basis, some rezón (sense, justification, reason), explanation, justification. It is also not cognisable, not accessible to the outside world. It is therefore always necessary to identify the circumstances that prove this belief and to judge it in the light of the ordinary behaviour of the average person in similar circumstances (Višje sodišče v Ljubljani, 2014).

I10 relates to the protection of employees whom employers mistakenly believe to be whistleblowers. RPPA does not provide protection for non-whistleblowers, nor does provide protection for employees who refuse to participate in corrupt, illegal, or

fraudulent activities. Such provision is included in the whistleblower protection laws of Kenya and the United States (Feinstein, Devine et al, 2021). This provision protects individuals who reasonably believe that they are being asked to engage in illegal behaviour at work. The authors argue that individuals in many organizations are unprotected if they refuse to comply with a management order on the grounds that it is illegal. In Slovenian law, a worker who refuses to perform work following the instructions or request of the employer if this would mean illegal behaviour or omission is protected by the Article 43(2) of Employment Relationships Act.

I14 recommends the establishment of specific reporting channels for disclosures related to national security and state secrecy. Transparency International also recommends that special procedures and protective measures be used for disclosures of matters related to national security, official or military secrets, or classified information. These should consider the sensitive nature of the subject while encouraging successful internal monitoring and preventing unnecessary external exposure. These procedures should allow for internal disclosures, disclosures to an autonomous oversight body that is institutionally and operationally independent of the security sector, or disclosures to bodies with appropriate security clearance. Public disclosure to the media or non-governmental organizations should only be permitted in demonstrable cases of urgent or serious danger to public health, safety, or the environment if internal disclosure could cause personal harm or destruction of evidence, if the disclosure was unintentional, or if it would significantly harm national security or individuals (Transparency International, 2013, p. 8).

I17 speaks of rewarding whistleblowers. If this is acceptable in the national context, whistleblowers can receive a portion of the financial resources recovered due to their disclosure. Other rewards may include public recognition, promotion at work, or an official apology for retaliatory measures (Transparency International, 2013, p. 9). Rewarding whistleblowers does not yet seem acceptable in the Slovenian context. Ten years ago, the entire Slovenian media was flooded with news that the Nova Ljubljanska Banka (hereinafter: NLB) had offered a reward of up to 50,000 EUR for an authorized (i.e., non-anonymous) internal report of irregularities. The media reported that such a measure

was »unknown in banking,« that employees were outraged by the management's actions, that »trade unions were up in arms,« and that »NLB confused whistleblowers and informants« (Zadravec, 2014). Some even wondered whether the promised reward was high enough (Damijan 2014). NLB then explained that rewarding whistleblowers was »an international practice also paid by the American FBI,« and later stated: »NLB will, as our vision for 2020, be a sustainable and profitable bank, recognized for transparent communication and good financial indicators. To this end, we have established a system for protecting whistleblowers and using information« (EFnet, 2015).

In the areas of raising awareness and changing the public attitude towards whistleblowers in terms of loyalty to the employer (I23) and training management to prevent retaliation (I24), RPPA seems weak, even though managers are the ones who can change a culture of non-compliance into a culture of integrity. For this reason, it might be worth considering expanding the list of persons entitled to protection under this law. »The value of whistleblower laws is the evidence, not who provided it« (Feinstein, Davis et al. 2021, p. 17). Therefore, policies for protecting whistleblowers should protect all those engaged in activities within a company that are essential to carrying out its mission.

In addition, a potential risk to the effectiveness of RPPA in practice is the narrow circle of obligated entities. We believe it would be appropriate for RPPA to apply to smaller employers as well, whose employees could be encouraged to make external reports rather than internal ones. And finally, a word on the level of fines. Perhaps they should be regulated following the model of the General Data Protection Regulation (GDPR), which, in our experience, has a very effective deterrent effect. If the threatened fine is too low, it might be even profitable for companies and their responsible persons to pay it.

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