

European Commission

Subject: Possible infringement of Directive 2019/1937 on the protection of persons who report breaches of Union law by the Hungarian Government

Budapest, 21 December 2023

On 25 May 2023 the Parliament of Hungary voted Act XXV of 2023 on complaints, public interest announcements and rules relating to reports on wrongdoing (hereinafter referred to as “Whistleblower Protection Act”). Article 53(2) of the Whistleblower Protection Act defines that the Whistleblower Protection Act serves to transpose Directive 2019/1937 on the protection of persons who report breaches of Union law (hereinafter referred to as “Whistleblower Directive”).

Article 46(1) of the Whistleblower Protection Act defines cases when measures on the protection of reporting persons apply to public disclosures, in accordance with Article 15(1) of the Whistleblower Directive.

Article 46(2) of the Whistleblower Protection Act excludes the application of measures on the protection of reporting persons in cases when the reporting person concerned shares the information relating to a breach as defined in Article 5(1) of the Whistleblower Directive with a media content provider (i) or with an employee of a media content provider (ii) or with a person working for or on behalf of a media content provider (iii) (media content provider, employee of a media content provider and person working for or on behalf of a media content provider hereinafter jointly referred to as “Journalist”). As a consequence, a person who shares information relating to a breach as defined in Article 5(1) of the Whistleblower Directive with a Journalist shall not benefit from the protection measures applicable to reporting person as defined in Article 5(7) and Chapter VI of the Whistleblower Directive.

We firmly hold that the exclusion of the applicability of protection measures to persons who report breaches of the union law to Journalists clearly violates the Whistleblower Directive. In support of our argument, we invoke recital (45) of the Whistleblower Directive, which clarifies that protection against retaliation as a means of safeguarding freedom of expression and the freedom and pluralism of the media should be provided both to persons who report information about acts or omissions within an organisation (‘internal reporting’) or to an outside authority (‘external reporting’) and to persons who make such information available in the public domain, for instance, directly to the public through online platforms or social media, or to the media, elected officials, civil society organisations, trade unions, or professional and business organisations.

We equally rely on recital (46) of the Whistleblower Directive, which underlines that whistleblowers are, in particular, important sources for investigative journalists, and adds that providing effective protection to whistleblowers from retaliation increases legal certainty for potential whistleblowers and thereby encourages whistleblowing also through the media. Recital (46) of the Whistleblower Directive leaves no doubt that protection of whistleblowers as journalistic sources is crucial for safeguarding the ‘watchdog’ role of investigative journalism in democratic societies.

The endeavours enshrined in recitals (45) and (46) enumerated above are reflected in Article 15(2) of the Whistleblower Directive, in which it is stated that provisions of Article 15(1) of the Whistleblower Directive shall not apply to cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information. Article 15(2) of the Whistleblower Directive enables the derogation of the applicability of provisions enshrined in



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Article 15(1) of the Whistleblower Directive on condition that specific national provisions establish a system of protection. Relevant provisions of the Hungarian legal system do not fulfil this criterion.

Article 46(2) of the Whistleblower Protection Act invokes Article 6 of Act CIV of 2010 on freedom of press and on fundamental rules of media content, which defines the requirements of protection of journalistic sources as follows:

“(1) The media content provider, and the person employed by or acting for or on behalf of the media content provider, in accordance with provisions defined in an act, may, during the course of judicial or administrative procedures, withhold the information relating to the identity of the person who shares information with her or him (hereinafter referred to as “source of information”) and may refuse to hand over any document, object or data carrier that would reveal the identity of the source of information.

(2) The court, in order to uncover an act of crime, may, in exceptionally justified cases defined in an act, oblige the media content provider, or the person employed by or acting for or on behalf of the media content provider to identify the source of information or to hand over the document, object or data carrier that identifies the source of information.”

Article 174 of Act XC of 2017 on the criminal procedure code translates, on the one hand, this principle into a witness privilege, in accordance with which Journalists may refuse to testify, while on the other hand it defines the events in which the court may oblige Journalists to identify the source of information. Article 174 of Act XC of 2017 on the criminal procedure code reads as follows:

“(1) The media content provider, or the person employed by or acting for or on behalf of the media content provider may refuse to respond to specific questions, if her or his testimony would reveal the identity of a person who shares information with her or him [i.e.: the source of information], unless the court orders the identification of such person.

(2) The court may oblige the media content provider, or the person employed by or acting for or on behalf of the media content provider to identify the source of information if all three following conditions are simultaneously fulfilled

- a) it is indispensable to reveal the identity of the source of information in order to uncover an intentionally committed criminal offence punishable with minimum three years imprisonment*
- b) the evidence originating from the identification of the source of information is irreplaceable*
- c) the legal interest to uncover the criminal offence concerned is outstanding and with regard to especially the material gravity of that criminal offence concerned, it clearly outweighs the legal interest to keep the identity of the source of information in secret.”*

Article 290(1)(f) of Act CXXX of 2016 on the civil procedure code provides the same privilege to witnesses in civil law litigations as follows:

“(1) The following ones may refuse to testify:

f) the media content provider, or the person employed by or acting for or on behalf of the media content provider, if her or his testimony would reveal the identity of a person who shares information with her or him [i.e.: the source of information], concerning the specific, concrete question”

Article 78(1) of Act I of 2017 on the code of administrative litigations provides for the application of the rules on evidence enshrined in Act CXXX of 2016 on the civil procedure code in administrative litigations. Consequently, the same standards as outlined in the above



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cited provision of Act CXXX of 2016 on the civil procedure code shall apply in administrative litigations.

It is beyond doubt that the provisions quoted above serve to protect freedom of expression and freedom of the press by providing procedural guarantees that enable Journalists to keep their sources of information secretive. The obligation to do so follows from resolution 165 of 2011 of the Hungarian Constitutional Court, which, in addition to concluding that the provisions on the protection of the source of information originally enshrined in Article 6 of Act CIV of 2010 on freedom of press and on fundamental rules of media content violated Hungary's Constitution, found that the Parliament fell into legislative omission for having failed to adopt laws necessary to establish procedural guarantees of protection of journalistic sources. With the adoption of the above quoted provisions, the Parliament redeemed its responsibility for legislative omission.

It is equally obvious that only Journalists can invoke the regime to protect their source of information, which empowers them to practically remain silent unless, in cases defined in the law, otherwise ordered by the court. Although the protection of their identities is an undeniable benefit for the source of information, it entirely neglects the forms and modalities of protection foreseen by the Whistleblower Directive, let alone the fact that the person who qualifies as source of information cannot invoke the regime on the protection of the source of information on her or his own. Hungary's regime on the protection of the source of information does not offer any protection to persons who report breaches to Journalists, except for the secrecy of their identity, moreover, even the latter one, i.e.: the secrecy of their identity is made dependent on the decision of the Journalist whether to invoke the regime on the protection of the source of information or to testify. Therefore, Hungary's regime on the protection of the source of information does not correspond to Article 15(2) of the Whistleblower Directive, which allows derogation from the provisions of Article 15(1) of the Whistleblower Directive in cases where specific national provisions establish a system of protection relating to freedom of expression and information. Consequently, Article 46(2) of the Whistleblower Protection Act wrongly refers to Article 6 of Act CIV of 2010 on freedom of press and on fundamental rules of media content and, through that, to Hungary's regime on the protection of the source of information in an attempt to substantiate the derogation.

In favour of our conclusion, we invoke the findings of the fifth meeting held on 14 June 2021 of the Commission expert group on the Whistleblower Directive as contained in this meeting's minutes.¹ Point 4 of the minutes reads as follows:

“Upon enquiry about the scope of Article 15(2), COM explained that this provision is intended to allow Sweden to maintain – in parallel with the system of the Directive – its constitutional regime, aimed at respecting freedom of expression and information, which provides, under certain conditions, specific forms of protection to civil servants who make disclosures directly to the press. As a consequence, a person who meets the relevant conditions may choose to disclose information to the press under the Swedish constitutional system and benefit from the protection of that system (instead of relying on the protection regime of the Directive).”

With regard to the above cited conclusion no doubt arises that Hungary's regime on the protection of the source of information as invoked by Article 46(2) of the Whistleblower Protection Act does not fulfil the requirements of Article 15(2) of the Whistleblower Directive, therefore Article 46(2) of the Whistleblower Protection Act wrongly enables derogation of Article 15(2) of the Whistleblower Directive by the exclusion of the applicability of protection measures to persons who report breaches of the union law to Journalists.

¹ Ref. Ares(2021)478032 – 26/07/2021



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Considering all the above, we deem indispensable that the European Commission examine Article 46(2) of the Whistleblower Protection Act whether it complies with EU principles and with Article 15(2) of the Whistleblower Directive. We hold that Article 46(2) of the Whistleblower Protection Act contradicts to Articles 15(1)(2) of the Whistleblower Directive and therefore it seriously endangers the European Union as an area of freedom, security and justice.

On behalf of K-Monitor

On behalf of Transparency International Hungary

Sandor Lederer, executive director

Miklos Ligeti, head of legal