

## DISPATCH NO. 27 - POLAND

### POLAND ON THE PATH TOWARDS WHISTLEBLOWER PROTECTION

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#### INTRODUCTION

A whistleblower is a person who, acting as an informant, reveals information or activities that are reasonably believed to be illegal, unethical, or otherwise improper within a private or public organization. The words “violations” and “irregularities” are used in this article to collectively denote such actual or perceived illegal, unethical, or otherwise improper activities. It must be noted that Poland does not currently provide whistleblower protection in its labor laws. However, in 2019 a European Union Directive gives Member States like Poland two years to implement whistleblower protections for employees. This paper deals with the role of whistleblowers and the consequences of the European Union Directive on Polish Labor Law.

#### PROTECTION OF WHISTLEBLOWERS UNDER PRESENT LAWS

Reporters of violations not only in the private sector workplace, but also in government institutions, are very important players in national and global efforts to detect and prevent corruption or other abuses.<sup>1</sup> The disclosure of irregularities can sometimes lead to the prevention of social or economic tragedies or even disasters. Such disclosures can often result in a high price: people who reveal irregularities run the risk of exclusion from social and public life and even loss of employment.<sup>2</sup> Current European Union legislation protects informants to a very limited extent. This protection is

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<sup>1</sup> See Łucja Kobroń-Gąsiorowska, *Czy Polskę Czekają Era Etycznych Donosów? Socjologiczno-Prawne Aspekty Działania [Is Poland Waiting for an Era of Ethical Denunciations? Socio-Legal Aspects of Whistleblower Action]*, 10 ZESZYTY NAUKOWE TOWARZYSTWA DOKTORANTÓW UJ NAUKI SPOŁECZNE 81, 82 (2015) (Pol.); Łucja Kobroń, *Informator: Strażnik Wartości czy Donosiciel [Whistleblower: Value Guardian or Informer?]*, no. 11-12 PALESTRA 296, 296-300 (2013) (Pol.).

<sup>2</sup> See David Banisar, *Whistleblowing: International Standards and Developments*, in WORLD BANK INSTITUTE FOR SOCIAL RESEARCH, UNAM, CORRUPTION AND TRANSPARENCY: DEBATING THE FRONTIERS BETWEEN STATE, MARKET AND SOCIETY 201 (Irma Sandoval, ed., 2011).

fragmentary or entirely absent.<sup>3</sup> In some cases, such as in Poland, protection is based on labor law provisions that cannot be fully utilized in the aspect of whistleblower protection.<sup>4</sup> The directive on the protection of whistleblowers in the European Union summarizes the way in which EU law is harmonized in the field of whistleblower protection, which will be briefly presented in the next section.<sup>5</sup> The directive shows that whistleblowers revealing infringements committed in both the private and public sectors risk not only job loss but also a career, and in some cases they suffer from serious and long-term financial, health, image or social consequences. The benefits of introducing comprehensive protection of whistleblowers throughout the European Union may be far greater than the concerns associated with it.

Due to historical events, the definition of whistleblower in Poland is marked by very negative associations. In Polish legal culture, the issue of whistleblowing is still very controversial and criticized for the lack of adequate legal safeguards for the whistleblower, who can be anyone, i.e. an employee, trainee, apprentice, former employee, but also a person who does not have a typical employment relationship. Reporting irregularities is a key mechanism in the fight for integrity and public interest. Its role as a mechanism for reporting misconduct, fraud and other forms of illegal or unethical behavior allows the public to be aware of infringements that otherwise might not be detected. This applies especially to democratic countries, in which responsibility and transparency, strengthened by reporting irregularities, are basic values supporting the functioning of the state apparatus. Therefore, protecting the whistleblower against retaliation, disproportionate penalties, unfair treatment or mobbing is necessary because it enables employees to use the appropriate channels in the fight against abuse.<sup>6</sup>

#### EUROPEAN UNION PERSPECTIVE

In a way that paves the way for comprehensive EU legislation in the field of whistleblower protection, the following legal acts are in force:

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<sup>3</sup> See DILARA HUSEYNOVA, KATERINA PIPERIGOS, JUSTICE FOR JUSTICE: PROTECTING WHISTLEBLOWERS IN THE EU (2017), [http://transparency.eu/wp-content/uploads/2018/04/WB\\_Transparency-Group-CoE-17-18.pdf](http://transparency.eu/wp-content/uploads/2018/04/WB_Transparency-Group-CoE-17-18.pdf).

<sup>4</sup> See Łucja Kobroń-Gąsiorowska, *Czy Polskę Czekają Era Etycznych Donosów? Socjologiczno-Prawne Aspekty Działania [Is Poland Waiting for an Era of Ethical Denunciations? Socio-Legal Aspects of Whistleblower Action]*, 10 ZESZYTY NAUKOWE TOWARZYSTWA DOKTORANTÓW UJ NAUKI SPOŁECZNE 81, 82 (2015) (Pol.).

<sup>5</sup> See Directive 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 Directive, 2019 O.J. (L 305) (“Whistle-Blower Directive”). Member States, i.e. Poland, have two years to implement new regulations in the national legal orders.

<sup>6</sup> Kobroń-Gąsiorowska, *supra* note 1, at 82.

- Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse;<sup>7</sup>
- Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to reporting actual or potential infringements of this regulation to competent authorities;<sup>8</sup>
- European Parliament resolution of 24 October 2017 on reasonable measures to protect whistleblowers acting in the public interest when disclosing confidential information held by companies and public authorities (2016/2224 (INI)).<sup>9</sup>

In 2018 the Commission pointed out that some of these standards have already been implemented by several EU Member States as reflected in comprehensive legislation by those Members (e.g. France, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Sweden and Slovakia).<sup>10</sup> In turn, other Member States only offer specific as opposed to broad protection. For example, in the fight against corruption or only those violations which are in the public sector. However, some principles of protection for whistleblowers have already been included in specific EU instruments in areas such as financial services, transport safety and environmental protection.<sup>11</sup>

An important issue emerging on the canvas of extending protection of informants is the fact that the position of informants employed in large corporations might automatically change. I deliberately use the term “employed” because the redefinition of the term employee is a widely accepted phenomenon. There is currently no workplace or institution that is free from the risk of any abuse or questionable practice or activity that may not necessarily be improper. Good faith whistleblowing occurs mainly where threats appear within formalized organizational structures of public, private or social entities.<sup>12</sup>

Whistleblowing even in countries with a very long tradition of revealing irregularities and protecting informants does not always lead to the glorification of such a person. On the contrary, such persons might be isolated

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<sup>7</sup> Regulation 596/2014 of the European Parliament and of the Council of 16 April 2014 on Market Abuse, 2014 O.J. (L 173) (“Market Abuse Regulation”).

<sup>8</sup> Commission Implementing Directive 2015/2392 of 17 December 2015 on Regulation (EU) No. 596/2014 of the European Parliament and of the Council with Regard to Reporting Actual or Potential Infringements of this Regulation to Competent Authorities.

<sup>9</sup> European Parliament Resolution of 24 October 2017 on Reasonable Measures to Protect Whistleblowers Acting in the Public Interest when Disclosing Confidential Information Held by Companies and Public Authorities (2016/2224 (INI)).

<sup>10</sup> See Communication from the Commission to the European Parliament the Council and the European Economic and Social Committee Strengthening Whistleblower Protection at EU level, COM (2018) 214 final (Apr. 23, 2018).

<sup>11</sup> Łucja Kobroń-Gąsiorowska, *Informator w Prawie Europejskim: Ochrona Whistleblowera czy Informacji [Whistleblower in European Law: Whistleblower Protection or Information Protection]*, XVIII(2) ROCZNIKI ADMINISTRACJI I PRAWA 132-138 (2018) (Pol.).

<sup>12</sup> *Id.*

in the workplace, and even bullied or harassed. Noteworthy here are widely publicized cases of whistleblowing in the United States.<sup>13</sup>

Member States' implementation of the Directive on whistleblower protection in the European Union is the culmination of the creation of a universal whistleblower protection framework by EU member states. On November 26, 2019, the Official Journal of the European Union published Directive (EU) 2019/1937 of the European Parliament and of the Council on the protection of persons reporting violations of Union law, commonly known as the whistleblower directive. As of December 17, 2019, Member States have two years to implement regulations providing for whistleblower protection in their national legal orders. The directive provides for the implementation of internal (internal channels) and external (external channels) reporting processes that will enable employees and external persons, such as job candidates, citizens or even volunteers, to report violations of EU law and ensure monitoring of such reports. The obligation to implement the informative reporting processes will apply in the private sector to companies with more than 50 employees or an annual turnover of at least EUR 10 million, as well as to all companies in the financial sector, regardless of their size. Here comes the basic threat to the real protection of informants, i.e., the limitation of the number of workplaces in the private sector.

The Directive adopted a means for grading the methods of reporting irregularities, as indicated by the editors of Art. 13; the person making the external declaration shall be eligible for protection under the Directive if one of the following conditions is met:

(a) the person first reported the breach internally, but no appropriate action was taken in response to their report within a reasonable period of time;

(b) the reporting person did not have access to internal reporting channels or could not reasonably be expected to be aware of the availability of such channels;

(c) in accordance with Art. 4 paragraph 2 the reporting person was not required to use internal reporting channels;

(d) in light of the report's subject, it could not reasonably be expected to use internal reporting channels;

(e) he or she had reasonable grounds to believe that the use of internal reporting channels may compromise the effectiveness of investigations by competent authorities;

(f) under Union law, that person was entitled to report infringements directly to the competent authority through external reporting channels. Importantly, the Directive itself does not provide for negative legal consequences for intentionally providing false information.

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<sup>13</sup> *Id.*

The full analysis of the Directive is not the subject of this article.

Whistleblowing in the workplace is unfortunately a very complex issue because its perception in post-communist countries (like Poland) has a history based on forbiddance and even punitive action against informants. This was especially true during the period of German occupation of these countries during World War II. Informants were treated in totalitarian countries as a “traitor to the nation”. It must be indicated that whistleblowing was often perceived positively and beneficial in countries with a totalitarian past, through the lens of disclosed information and the motivation of the informer. The controversy that whistleblowing evokes is enormous and familiar to countries with a very long tradition of protecting “ethical informers”.<sup>14</sup> W. Rogowski indicates that “the condition for success (whistleblowing) is above all to build employee unmasking into a coherent ethical system of strategic management of a company”.<sup>15</sup> Similar observations involving unequal protection of informants are pointed out by the European Commission where it emphasizes that the protection currently available in the European Union is unevenly divided among Member States. What is more, it is insufficient and the protection provided in one country may not only negatively affect the application of EU policy there, but also go against or disrupt policies and laws of other Member States.<sup>16</sup>

#### LEGAL PROTECTION OF HARASSED WORKERS UNDER POLISH LABOR LAW: SELECTED PROBLEMS

The data of the PwC report, “Global Economic Crime Survey 2020”, prepared on the basis of the ninth study of economic crime, corruption and bribery indicates that such abuses are much more common in Polish enterprises than in companies in some other parts of the world. In turn, the 2019 survey, in which 5018 respondents participated, including 76 from Poland, shows that as much as 54% of Polish companies that experienced abuse admitted that they were affected by the occurrence of corruption. These data changed unfavorably, as in 2018 it was only 17%. One of the reasons for this is the so-called low detection of fraud due to the culture prevailing in the organizations where a critical objective is to build trust among employees. As many as 72% of the surveyed companies did not implement anti-corruption programs, and what is more, almost half do not have formal procedures and do not carry out a formal risk assessment process in this respect. Only 6% of Polish companies admitted that they have a dedicated compliance expert, and consider the implementation of anti-fraud programs

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<sup>14</sup> *Id.*

<sup>15</sup> See Wojciech Rogowski, *Informator, czyli Czego się nie Robi dla Pozyskania Zaufania Inwestorów [Whistleblowing, or What is not Done to Gain Investor Confidence]*, 2(10) PRZEGLĄD CORPORATE GOVERNANCE I (2007).

<sup>16</sup> *Id.*

as a significant budget expenditure. Unfortunately, the survey results clearly indicate that the social process of building information on irregularities will be very difficult and long-lasting.<sup>17</sup>

A Polish whistleblower, regardless of his position in the company's organizational structure, can only seemingly count on the extensive protection that the Polish Labor Code provides him. As practice shows, Polish whistleblowers in most cases report observed irregularities of superiors who are reluctant to take bold and confidential actions. In Polish practice, you can also meet an unusual type of reporting irregularity, which may be an appeal to the labor court against an employer's termination of an employment contract or financial penalty by an employee who has decided to defend his rights. Situations of this type take place in large corporations, where "collective penalties" may be applied to employees. The consequences for such an employee can be drastic, especially in large corporations, because they quit their job from the so-called wolf ticket and are then often forced to work below their qualification level. They can even have difficulty finding a new job.<sup>18</sup> All this can be avoided by introducing appropriate legal provisions protecting whistleblowers against such negative consequences. Even if the whistleblower is not dismissed from work, unfortunately he must take into account the potential negative consequences not only on the part of the employer, but above all on the part of employees who, by their behavior, can commit mobbing against the whistleblower, and eventually shun him.<sup>19</sup>

The perspective of the Polish Labor Code.<sup>20</sup> emphasizes the protection of an employee as the weaker entity in standing with respect to labor law. The law refers to the relationship of two contractors in which the weaker laborer is protected by the umbrella of the labor code. As a consequence, the

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<sup>17</sup> High Scale of Economic Crimes in Polish Companies, PWC, <https://www.pwc.pl/pl/media/2020/2020-03-05-badanie-przestepczosci-gospodarczej-2020.html> (last visited Sept. 5, 2020).

<sup>18</sup> Łucja Kobroń, *Informator: Strażnik Wartości czy Donosiciel [Whistleblower: Value Guardian or Informer?]*, no. 11-12 PALESTRA 296, 296, 296-300 (2013) (Pol.).

<sup>19</sup> See *Sosinowska v. Poland*, App. No. 10247/09 (Oct. 18, 2011), <http://hudoc.echr.coe.int/fre?i=001-148571>; *Frankowicz v. Poland*, App. No. 53025/99 (Dec. 16, 2008), <http://hudoc.echr.coe.int/fre?i=002-1800>. Barbara Sosinowska was a specialist in lung diseases at the hospital in Ruda Śląska. A few years ago (in 2004) she critically assessed the decisions of her supervisor regarding the diagnosis and therapy of patients. She wrote in this case, among others, a letter to a regional medical consultant in the field of lung diseases. Disciplinary proceedings were instituted against the doctor, accusing her of violating the rules of professional ethics. This was to happen through open criticism of the diagnostic and therapeutic decisions of the superior in the presence of other colleagues from the hospital - this was what the medical courts recognized, condemning Sosinowska to a reprimand. The doctor lodged a complaint against this decision with the ECtHR. The Court held that there had been a violation of the doctor's freedom of expression. According to the Tribunal, her criticism was substantive, and the action aimed to draw the attention of the competent authorities to the serious, in her opinion, dysfunction in the work of her supervisor. The Court noted that the medical courts did not take into account at all whether the doctor's opinion was justified and expressed in good faith and whether it was intended to protect the public interest. Disciplinary courts focused solely on criticizing another doctor, which the Code of Medical Ethics considered a disciplinary offense. This interpretation, as stated by the Court, creates the risk that doctors will refrain from providing patients with objective information about their health in fear of disciplinary sanctions.

<sup>20</sup> Labor Code, Act of June 26, 1974 [Dziennik Ustaw., 1974 Nr 24 poz. 141].

essence of the labor code is reduced to “specifying” the nature of the individual employment relationship in the direction of defining minimum employee standards.<sup>21</sup> In the context of the presented issue, one should consider whether the Polish Labor Code contains vital protective provisions that can effectively protect whistleblowers against the negative effects of reporting irregularities.

The starting point for consideration of the protection of informants must be Art. 100 of the Polish Labor Code. Article 100 defines and specifies the obligations of an employee, but its list of employee obligations provides only examples. From the point of view of these considerations, the most important duty from which one can deduce the employee’s desire to disclose irregularities in the workplace to his supervisor is the duty of care for the proper functioning of the workplace. By using this interpretation, a whistleblower would gain “residual” protection. That is, it would require the protection of informers who provide the employer with good faith information on any irregularities they have observed or perceived. One can only be tempted to state that Art. 94 of the Labor Code also indicates an open catalog of employer’s obligations. We can make a broad interpretation of this provision and conclude that the employer is obliged to protect the employee informer and his identity against negative consequences resulting from the disclosure of irregularities. I am aware that this is a far-reaching interpretation. With some distance we should approach the possibility of protecting a whistleblower in Polish law apart from the regulations contained in the Labor Code, which in no place specifies the protection of employees against unjustified punishment including dismissal due to reporting irregularities.<sup>22</sup>

At this point one more worker protection should be considered, which is included in the Polish Labor Code, i.e. retribution which includes harassment, bullying, intimidation, retaliation and unfair and even punishing treatment of an employee. Here, in this article, all of this type of adverse treatment is collectively referred to as “retribution” or “intimidation.” Article 94 (3) of the Polish Labor Code defines it as actions or behavior directed at or against a worker, consisting of persistent and long-lasting harassment, bullying or intimidation, causing them doubts about their professional suitability, and causing or aiming to cause humiliation or ridicule or isolating or eliminating them from team meetings or from their colleagues. Such adverse behavior is the most severe manifestation of the violation of personal rights, because it is a type of persecution and psychological harm used by one

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<sup>21</sup> See ARKADIUSZ SOBCZYK, RÓZNICOWANIE PRAW (OCHRONY) ZATRUDNIONYCH: WYBRANE KRYTERIA I ICH OCENA [DIFFERENTIATION OF EMPLOYEES' RIGHTS (PROTECTION): SELECTED CRITERIA AND THEIR ASSESSMENT] 1 (Maria Bosak et al. eds., 2014).

<sup>22</sup> Kobrań, *supra* note 18, at 296-300.

or more people against an individual.<sup>23</sup> The case law of the Supreme Court clearly indicates that it is the employer that is obliged to shape relations within the workplace in such a way as to prevent situations that allow psychological viciousness or other forms of intimidation against employees.<sup>24</sup> The qualifying conditions for specific intimidating behavior indicates that the object of such behavior is an employee within the meaning of labor law, which at the same time excludes other persons performing work on the basis of civil law contracts, the self-employed or other persons. Premises include: "perseverance" and "constancy" The doctrine emphasizes that intimidation in the form of persistence or long-term activities of the perpetrator or perpetrators is difficult to determine, which can lead to great freedom in assessing the degree and effect of intimidation.<sup>25</sup> According to the case law of the Supreme Court, the length of harassment or intimidation of an employee within the meaning of Art. 94 (3) § 2 of the Labor Code must be considered in an individualized manner and taking into account the circumstances of a particular case. It is therefore not possible to rigidly indicate the minimum period necessary for intimidation to occur.<sup>26</sup> Until 7 September 2019, in order for an employee wanting to apply for compensation for mistreatment pursuant to § 5 art. 94 (3) of the Labor Code, they had to indicate in the statement on their termination that retribution was the reason for termination of the employment contract. The content of the cited provisions indicates that the premise for an employee to bring an action for compensation was their termination of employment due to retribution as justification for the termination of the contract. The dependence of claiming compensation for acts of retribution on the necessity of prior termination of employment was assessed negatively. Therefore, in the amended act in Art. 94 (3) § 4 of the Labor Code<sup>27</sup> this provision has been supplemented to allow an employee to claim compensation from the employer even if the employee's employment relationship was not terminated.<sup>28</sup> The above protection is, however, insufficient. It is difficult to explain the essence of whistleblower protection, which is almost absent, from the perspective of a limited range of protection in an intimidation situation. The institution of the prohibition of retribution in the workplace due to whistleblowing only protects employees who work under an employment contract.

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<sup>23</sup> Wojciech Cieślak, Jakub Stelina, *Definicja Mobbingu oraz Obowiązek Pracodawcy Przeciwdziałania temu Zjawisku [Definition of Mobbing (group intimidation) and the Employer's Obligation to Counteract this Phenomenon]* 12 PAŃSTWO I PRAWO 64, 68 (2004).

<sup>24</sup> See I PR 16/75 of March 3, 1975 of the Supreme Court (Pol.).

<sup>25</sup> Monika Gładoch, *Mobbing a Praca Pod Kierownictwem Pracodawcy [Mobbing (group intimidation) and Work Under the Direction of an Employer]* 4 PRACA I ZABEZPIECZENIE SPOŁECZNE 18 (2006).

<sup>26</sup> See I PK 176/06 of January 17, 2007 of the Supreme Court (Pol.).

<sup>27</sup> Labour Code, Act of June 26, 1974 [Dziennik Ustaw., 1974 Nr 24 poz. 141], as amended by the Law of May 16, 2019 (entered into force on Sept. 7, 2019).

<sup>28</sup> See A draft bill amending the Act - Labor Code and some other acts submitted by the President of the Republic of Poland, <http://www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=1653> (Pol.).

It should be pointed out that the two most important components of the Code's definition of employment harassment: persistence and the longevity of the oppressor's behavior are vague and indistinct, also found in other branches of law including criminal law. Determining their significance often encounters difficulties in the practice of applying the law. There are no shaped judicial decisions in this respect.

#### CONCLUSION

As has already been emphasized by me, the Directive on the protection of whistleblowers in the European Union is to summarize the way in which EU law is harmonized in the field of whistleblower protection. It is a huge challenge for the Member States, because they must implement the provisions of the Directive in their legal systems. My remarks lead to the conclusion that potential whistleblowers are employed persons who have direct access to various information. The Polish Labor Code does not play any role in protecting whistleblowers. As can be seen from the remarks contained in this article, the existing provisions of the Polish Labor Code cannot protect employees or other persons performing work under civil law contracts against possible retaliation by the employer or co-workers. The lack of relevant provisions in this respect is even more significant in Poland, where for historical reasons the provisions on reporting irregularities may be mistakenly perceived as informing for the purpose of protecting their personal interests and not guaranteeing disclosure of the identity of the person reporting. Therefore, the legal protection of whistleblowers must form part of a long-term protection plan not only at the European Union level, but above all in the Member States. However, creating such protection is a challenge because effective protection of whistleblowers requires a well-synchronized legal framework on criminal, labor, administrative and procedural law. In other words, whistleblower protection requires the harmonization and reconciliation of various interests and measures. It will be extremely important for Member States to transpose the Directive in full spirit and even if possible to increase protection, providing a comprehensive and coherent framework at the national level. We will wait for the effects of this protection.