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Łucja Kobroń-Gąsiorowska*
Nr ORCID: 0000-0002-8669-452X

EVALUATION OF THE WHISTLEBLOWER PROTECTION DIRECTIVE IN THE LIGHT OF POLISH PREPARATIONS FOR THE TRANSPOSITION OF THE REPORTING MODEL

OCENA DYREKTYWY W SPRAWIE OCHRONY SYGNALISTÓW W ŚWIETLE POLSKICH PRZYGOTOWAŃ DO TRANSPOZYCJI MODELU *WHISTLEBLOWINGU*

Summary: On October 23, 2019, the European Union adopted the Directive on protecting whistleblowers. The Directive was intended to be a groundbreaking tool in protecting whistleblowers. The Directive introduces essential and correct standards to protect the interests of the European Union and whistleblowers who report breaches of EU law. The whistleblower protection model is designed to go beyond any standards of whistleblower protections in the Member States. Nevertheless, the effectiveness of the Directive is difficult to assess without complete transposition in the Member States. The process did not end with the saying as of December 17, 2021 in Poland, which is only at the draft bill stage. The author notes that the Directive does not provide a comprehensive model for reporting irregularities, which results in an incomplete conceptualization of this institution.

Keywords: model of whistleblowing, whistleblower, reporting, European Union, Directive

Streszczenie: W dniu 23 października 2019 r. Unia Europejska przyjęła dyrektywę o ochronie sygnalistów. Dyrektywa miała być przełomowym narzędziem w ochronie sygnalistów. Wprowadza ona niezbędne i prawidłowe standardy ochrony interesów Unii Europejskiej oraz sygnalistów, którzy zgłaszają naruszenia prawa unijnego. Model ochrony sygnalistów ma wykraczać poza wszelkie standardy ochrony sygnalistów w państwach członkowskich. Niemniej jednak skuteczność dyrektywy jest trudna do oceny bez pełnej transpozycji w państwach członkowskich. Proces implementacji nie zakończył się w dniu 17 grudnia 2021 r., kiedy upłynął termin jej wprowadzenia do krajowego porządku prawnego. Autorka zwraca uwagę, że dyrektywa nie zawiera kompleksowego modelu zgłaszania nieprawidłowości, co skutkuje niepełną konceptualizacją tej instytucji.

Słowa kluczowe: model sygnalizowania nieprawidłowości, sygnalista, raportowanie, Unia Europejska, dyrektywa

* dr; Uniwersytet Pedagogiczny w Krakowie, Instytut Prawa i Ekonomii. Źródła finansowania publikacji: środki własne autorki; e-mail: l.kobron@nckg.pl

INTRODUCTION

On November 26, 2019, Directive (EU) 2019/1937 on the protection of persons reporting on breaches of Union law, commonly known as the Whistleblower Protection Directive, was published in the Official Journal of the European Union. Starting from December 17, 2019¹, Member States have two years to implement in their national legal systems regulations providing, inter alia, new whistleblower protection provisions, which are primarily designed to make available legal protection to whistleblowers. Whistleblowing is intended to be an EU law enforcement tool and a key element in ensuring the effective enforcement of EU law. The Directive was created after pressure from the European Parliament to protect whistleblowers at the EU level. Moreover, scandals such as Luxleaks and the Panama Papers have influenced the European Parliament's legislative work, which has become an advocate of whistleblower protection.² The Directive's current text complies with international standards in this field, and its final version was influenced by the preceding Communications and Resolutions, which will be the subject of a narrow analysis in this article. The Commission has repeatedly indicated that whistleblowing will be a European law enforcement tool that will ensure financial markets' stability, the balance of EU economies, and their fair competition. Moreover, it indicated the need to introduce comprehensive protection for public and private sector employees who have access to up to date information concerning their workplaces' practices, and are usually the first to recognize irregularities.³ However, there is one element that is not widely discussed at the EU level: the impact of the Directive on individual legal systems of the Member States. The need to introduce protection of whistleblowers in the legal system of the Poland ensued from a number of international obligations and recommendations, by which the Poland is bound. Poland has so far taken minimal efforts to prepare regulations and solutions for the protection of whistleblowers⁴. The purpose of this article is to evaluate of the whistleblower protection directive in the light of Polish preparations for the transposition of the reporting model.

¹ See 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, <https://eur-lex.europa.eu/legal-content/PL/TX-T/?uri=CELEX:32019L1937>; See the articles published on 26 September 2018 by the Nordic Correspondent of the Financial Times Richard Milne, Danske Bank whistleblower was British executive in Estonian branch", available at <https://www.ft.com/content/32d47fd8-c18b-11e8-8d55-54197280d3f7>, and by Reuters for The Guardian, Whistleblower at Danske Bank was firm's Baltics trading head, available at <https://www.theguardian.com/world/2018/sep/26/danske-bank-whistleblower-was-ex-baltics-trading-head-howard-wilkinson>.

² European Parliament Resolution of 24 October 2017 on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies (2016/2224(INI)), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0402>.

³ See Communication from the Commission to the European Parliament the Council and the European Economic and Social Committee Strengthening whistleblower protection at EU level, available at <https://g8fip1k-plyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/WhistleCommunication.pdf>.

⁴ See On October 18, 2021, the Government Legislation Center published a draft act on the protection of persons reporting the infringement of law (No. UC101 list), hereinafter: the Act. The purpose of the introduction of a draft law is to implement Directive of the European Parliament and of the Council (EU) No 2019/1937 of 23.10.2019 on the protection of persons reporting infringements of Union law (Journal of Laws. EU L 305 of 26/11/2019 and Dz. . EU L 347, 20.10.2020), further as: Directive No. 2019/1937.

LOYALTY – A STILL ARISING PROBLEM IN THE WHISTLEBLOWING DEFINITION

This article will present the definitions of whistleblowing proposed by the foreign doctrine. The reason for such an operation is that Poland does not have a whistleblowing tradition, and therefore it is justified to use foreign doctrine achievements. Examining the Directive on whistleblower protection means first of all asking the question of whether the Directive has the complete and proper model of whistleblowing. To answer this question, however, it is useful to take a step back to already presented definitions of whistleblowing. At this point, it is appropriate to go beyond the definition presented in the European Union Directive.

According to J.P. Near and M.P. Miceli, reporting irregularities is a form of social control (and not only) of an organization. Whistleblowing is a complex process by which members of an organization (former or present) disclose information about irregularities or illegal practices (of which the employer is aware) to persons or organizations that may take action in this regard⁵.

R. Jonson gives an elaborate definition of whistleblowing, believing that whistleblowing is a form of objection that has three features: 1) It is about making information public individually. 2) This information is disclosed outside of the organization which makes it public. 3) The information disclosed relates to a severe irregularity found in the structures of this organization. After all, the person reporting the irregularity is, in principle, a member of the organization. The perspective presented by R. Jonson is narrow and does not cover all elements of the basic definitions of whistleblowing⁶.

D. Schultz and K. Harutyunyan⁷, in response to the definition presented by R. Jonson, indicate that there are two other possible characteristics of a whistleblower. Firstly, it is the motivation for revealing irregularities, which, as a rule, must assume good faith in the disclosure process. The authors exclude whistleblowers whose disclosure aims to achieve financial benefits or is made only for the damage to the other person or organization. However, it is not appropriate to exclude any financial advantage from reporting irregularities. Compensation or financial rewards are a characteristic element of the reporting process in, e.g., the United States. Such rewards either compensate for ostracization or loss of employment⁸. Second, the reporting person does so as a last resort. It is worth noting here that the D. Schultz and K. Harutyunyan indicate that the so-called „proper” reporting would refer to the disclosure of information outside the organization (so-called external reporting)⁹.

⁵ J.P. Near, M.P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, “Journal of Business Ethics” 1985, No. 4, p 1-16; P.V. Osland, R. Ferguson, D.J. Jr. Casadonte, Whistleblowing in Higher Education 2013, https://ttu-ir.tdl.org/bitstream/handle/2346/50651/Bard_Jennifer_Diss.pdf?sequence=1.

⁶ R. Johnson, *Whistle-blowing: when it works – and why* Lynne Rienner, Boulder 2003, p. 3.

⁷ D. Schultz, K. Harutyunyan, *Combating corruption: The development of whistleblowing laws in the United States, Europe, and Armenia*, “International Comparative Jurisprudence” 2015, Vol. 1, No. 2, pp. 87-97.

⁸ Ł. Kobroń-Gąsiorowska, *Dyrekcja Rady w sprawie ochrony osób zgłaszających przy- padki naruszenia prawa Unii (whistleblowing) – jej wpływ na polskie prawo pracy – wybrane uwagi* [in:] B. Godlewska-Bujok i K. Walczak (ed.), *Różnorodność w jedności. Studia z zakresu prawa pracy, zabezpieczenia społecznego i polityki społecznej. Księga pamiątkowa dedykowana Profesorowi Wojciechowi Muszalskiemu*, Warszawa 2019, pp. 75-87; L.P. Whitaker, *The Whistleblower Protection Act: An Overview 2007*, <https://sgp.fas.org/crs/natsec/RL33918.pdf>.

⁹ The subject of considerations in international literature is the so-called external reporting, i.e., by passing internal reporting channels; H. Park, B. Brojkelo, J. Blenkinsopp, *External Whistleblowers’ Experiences of Workplace Bullying by Superiors and Colleagues*, “Journal of Business Ethics” 2020, Vol. 161, pp. 591-601.

Their thesis is that organizations or institutions should develop a sound internal self-control system that should be shared. This allows organizations to undergo internal controls under normal circumstances to detect and correct illegal and improper behavior, as allowed by an organizations' reporting mechanisms. Whistleblowing intends to serve as an alternative another channel for reporting misconduct when the internal structure prevents or obstructs the possibility of otherwise reporting misconduct.

All the definitions, as mentioned earlier in international literature, deserve a few remarks. First, according to the definitions mentioned above if an employee comments or complains to his employer about some irregularities in the workplace, the employee is not a whistleblower. These definitions take the view that an individual becomes a whistleblower when he or she approaches a potentially influential third party (e.g., a trade union, newspaper, government agency) with a comment or complaint about an unfavorable workplace situation¹⁰. The whistleblower's intention is to force the employer to act under pressure from a third party. The whistleblower is the accuser. The employer is the accused. So why should the accused in any situation cooperate with the accuser? The defense (defendant) does not cooperate with the prosecutor as a rule.

Second, it is worth pointing to other critical issue here. If the whistleblower's reported irregularities prove to be false, the employer might not cooperate with him from the very beginning of the report. There is some doubt that an employer would be interested in potential cooperation with an employee who approaches him with a complaint about some unfavorable situation in the workplace. It would be reasonable for the employer to cooperate with the employee in such a situation, even if this cooperation is for a different reason than responding to reported irregularities. There are, however, many reasons (possibly many good reasons) why an employer may not be willing to address all of the complaining employee's allegations. Thus, it would be untrue to say that the employer is not cooperating. Perhaps he is not seeing what the employee does, or it may not be economical or wise to make changes. The bottom line is that the whistleblower's allegations must be relevant in order for the employer to do something to remedy the situation. At this point, it is good to open a parenthesis before a final conclusion on definition of whistleblowing. Whistleblowing definitions indicated above are subject to one fundamental mistake, namely, they completely ignore the principle of loyalty¹¹ that can combine an employee with the employer, the contractor with the client or self-employed with a contractor. Definitions mentioned above of whistle-blowing generally revolve around three problems: 1) attempts to define whistle-blowing more precisely, 2) debates about whether and when the whistleblower should report, and 3) debates about when one has an obligation to blow the whistle. Despite today's decentralized organizations of the private and public sector, there is a need to incorporate into a discussion on whistleblowing in the European Union,

¹⁰ The EU Directive allows internal reporting, but does not rule out external reporting.

¹¹ On the issue of loyalty, they followed mainly: R. Duska and R. Larmer. See: R.F. Duska, *Whistleblowing*, [in:] P. H. Werhane, R.E. Freeman (ed.), *Encyclopedic Dictionary of Business Ethics*, Oxford 1997, pp. 654-656; J. Corvino, *Loyalty in Business?*, "Journal of Business Ethics" 2002, vol. 41, pp. 179-185; R.A. Larmer, *Whistleblowing and employee loyalty*, "Journal of Business Ethics" 1992, 11 (2), pp. 125-128; W. Vandekerckhove, M.S.R. Commers, *Whistle Blowing and Rational Loyalty*, "Journal of Business Ethics" 2004, vol. 53, pp. 225-233; J. Corvino, *Loyalty in Business?*, "Journal of Business Ethics" 2002, vol. 41, pp. 179-185.

breeds some important issues of loyalty. I am ignored here to consider loyalty in the context of labor law or more broadly, this issue in the context of employment law. Currently, there is no discussion on this difficult loyalty dilemma¹², which as will be indicated later in this laboratory is overlooked by the directive. In my opinion, the current prospect of whistleblowing definition is not satisfactory. The contemporary definition of whistleblowing must provide information on whether the potential whistleblower will be obliged to loyalty or to the person (mostly employer) or a physically organization, or maybe a certain collection of organizational values of a given institution.

At this point, it is appropriate to summarize that anyone who discloses irregularities in a workplace or a public institution can be a whistleblower¹³. Among these, apart from the defining rules, each of them can feel a kind of loyalty to the organization in where the whistleblower works or with whom the whistleblower cooperates. A worker or civil servant is the only person or part of a small category of people aware of what is happening at work and is, therefore, best placed to act in the public interest by warning the employer or the general public¹⁴. With this in mind, whistleblowing is a crucial mechanism in fighting fairness and the public interest. Its role as a reporting mechanism for misconduct, fraud, and other forms of illegal or unethical behavior allows the public to be aware of violations that might otherwise remain hidden. This is especially true of democratic states, where accountability and transparency, reinforced by reporting on irregularities, are fundamental values supporting state apparatuses' functioning¹⁵. Therefore, it should be emphasized that employees within the meaning of traditional labor law or persons working based on the civil contract, is required to perceive the company as a subject of loyalty. This subject of loyalty may be an employer in the broad sense of this word. For example, the Polish Labor Code imposes on the employee's obligation to take care of the good of the workplace (art. 100 § 2. p. 4 of the Labour Code¹⁶), in that sense, the subject of loyalty is „employer”. Creating a proper reporting system will require the Polish legislature to recognize this aspect because it is essential to Polish labor law.

WHISTLEBLOWERS AND THE NEED FOR THEIR PROTECTION

In this article, I use the term employee; however, this term covers a wide group of people who perform paid work. As shown by the perspective and experience of countries with a long tradition of whistleblower protection laws¹⁷, effective whistleblower protection of-

¹² The author refers to the lack of literature in this area at present. However, he does not omit studies on loyalty in the aspect of whistleblowing. The literature is provided in footnote 11.

¹³ Ł. Kobroń-Gąsiorowska, *Interes publiczny jako element podstawowy funkcji ochronnej prawa pracy – w kontekście ochrony sygnalistów*, „Roczniki Administracji i Prawa” 2019, No. 1, pp. 333-343.

¹⁴ Case of Heinisch v. Germany, Application No. 28274/08.

¹⁵ S. Wolfe, M. Worth, S. Dreyfus, A.J. Brown, *Whistleblower protection laws in G2 countries: Priorities for action* (Melbourne, Transparency International Australia) 2014, <https://webarchive.nla.gov.au/awa/20140908101050/http://pandora.nla.gov.au/pan/148392/20140917-0713/blueprintforfreespeech.net/wp-content/uploads/2014/09/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf>.

¹⁶ The Act of June 26, 1974, the Labor Code, Journal Of Laws 1974 No. 24, item 141.

¹⁷ Mainly: United States of America; Ł. Kobroń-Gąsiorowska, *Ochrona prawna informatorów na przykładzie Stanów Zjednoczonych*, „Roczniki Administracji i Prawa” 2019, No. 2, pp. 241-251.

ten encounters various difficulties¹⁸. Such difficulties are related, but not exclusively, to the assessment of the veracity of reported violations and the choice between the protection of the public interest and the interest of the reporting person. The main problem concerns the effective protection of an employee-whistleblower against the negative consequences of reporting. And regardless of whether the whistleblower reports an irregularity relevant to the protection of the public good or there is information affecting the workplace, protecting the whistleblower from retaliation, disproportionate penalties, unfair treatment and other challenges is essential as it enables employees to use appropriate channels to speak out against abuses and other forms of retaliation. However, I note that implementing the provisions of the directive, as mentioned above will be a long effort and process, not in the legislative aspect, but mainly in the social aspect, although this perspective will not explain the new institution of whistleblower protection.

The Polish legislature has already missed an opportunity to implement this process much earlier by strengthening the importance of employee's protection from abuse in the labor code. However, employees who disclose inside information in Poland are at risk of retaliation¹⁹. Without protection from retaliation, many would-be whistleblowers will remain silent, thereby depriving investigators of the inside information they need. However, establishing such a system is a challenge for any country, as whistleblowers' effective protection requires a well-synchronized legal framework of criminal, administrative, procedural, and management provisions. In other words, protecting whistleblowers and fighting corruption and other irregularities requires the harmonization of different interests and resources. Although the directive represents an important step towards protecting whistleblowers, some crucial issues remain unresolved and addressed in the final considerations discussed in a final chapter.

PREPARATORY ACTIONS FOR THE PROTECTION OF WHISTLEBLOWERS IN POLAND

Recognizing the role of whistleblowing as one element of economic transparency and the functioning of the state, many countries, including Poland has taken preparatory activities to implement the provisions of the Directive²⁰. More and more governments, corporations, and non-profit organizations worldwide are introducing whistleblower policies and procedures. In Poland, one of the proponents of introducing the whistleblowing institution is the Batory Foundation, which a few years ago prepared a law on whistleblowers²¹. However, these countries must provide available channels for disclosing information to whistleblowers and signif-

¹⁸ Ibidem.

¹⁹ Judgment of the ECtHR of 18 October 2011 in the case of *Sosinowska v. Poland*, application no. 10247/09; See also Judgment of the ECtHR of 16 December 2008 in the case of *Frankowicz v. Poland*, application no. 53025/99.

²⁰ OECD Anti-Bribery Convention, 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Section IX. iii. and Section X. C. v., and Annex II to the Recommendation, *Good Practice Guidance on Internal Controls, Ethics and Compliance*, Section A.11.ii, OECD Recommendation on Improving Ethical Conduct in the Public Service, Principle 4, United Nations Convention against Corruption Art. 8,13 and 33, Council of Europe Civil Law Convention on Corruption, Art. 9, Criminal Law Conventions on Corruption, Art. 22.

²¹ The Law of on Whistleblower Protection available in English at: <http://www.sygnalista.pl/projekt-ustawy>.

icantly protect whistleblowers from all forms of retaliation. Protecting whistleblowers, mainly employees in the public and private sectors, from retaliation for reporting in good faith will be the main challenge facing, among others, for instance, Poland. Public and private sector employees have access to up-to-date information on practices in their workplaces and are usually the first to spot offenses. 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 only 6% of Polish companies admitted that they have a dedicated compliance expert, and consider the implementation of anti-fraud programs 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-lasting²². The transposition of whistleblower protection into legislation legitimizes and establishes mechanisms by which whistleblowers can expose misconduct in the public and private sectors and substantially protect them from any form of retaliation by their employer or colleagues. Only properly implemented whistleblower protection legislation can become a tool to detect and combat irregularities, fraud, and mismanagement. The lack of appropriate regulations makes it challenging to fight irregularities and exposes whistleblowers to the risk of retaliation, such as unjustified dismissal, harassment, direct and indirect disciplinary action and discrimination particularly with regard to remuneration, training, assignments, professional promotion, or contract renewal. In Poland the protection of certain types of whistleblowers is based on labor law provisions, such as the prohibition of mobbing, discrimination, or, finally, dismissal of an employee due to unjustified termination of employment²³.

The very concept of informing about irregularities is perceived with distrust in Poland, perceived as too close to spying and dishonest reporting. This is probably a remnant from the communist era when almost any report to the authorities was viewed as treason. While 70 percent of respondents in Poland recently said they were inclined to report misconduct, more than three-quarters said they expected a negative response due to social pressure and low trust in the legal system. When asked what would stop them from reporting, more and more people cited fear of being known as the snitch and the problem being „none of my business” than the possibility of retaliation. This places Poland in a minority of countries worldwide, where the majority of whistleblowers fear repression and inaction by the authorities. Worse still, Poland has virtually no legal protection for employees or citizens who report offenses or threats to public health. They are left to fend for themselves and defend themselves against the consequences of reporting an irregularity²⁴.

In April 2017, unexpected the Office of Competition and Consumer Protection (UOKiK) publicly launched an internet portal and a hotline for whistleblowers, enabling anonymous reporting of suspected anti-competitive practices²⁵. These mechanisms pro-

²² Available at <https://www.pwc.pl/pl/media/2020/2020-03-05-badanie-przestepczosci-gospodarczej-2020.html>.

²³ Ł. Kobroń-Gąsiorowska, *Dyrektywa Parlamentu Europejskiego...*, pp.75-87.

²⁴ The Polish Ombudsman has been paying attention to this for several years. See application of the Human Rights Defender of March 3, 2009 to the Minister of Labor and Social Policy (reference number: RPO-606960-III / 09 / RP / AF), also the statement of the Human Rights Defender of December 18, 2015 to the Minister of Labor and Policy Social (II.7040.104.2015AF / LN); Judgment of the ECtHR of 18 October 2011 in the case of Sosinowska v. Poland, complaint no. 10247/09; judgment of the ECtHR of 16 December 2008 in the case of Frankowicz v. Poland, complaint no. 53025/99.

²⁵ https://www.uokik.gov.pl/aktualnosci.php?news_id=16013.

tect whistleblowers who make protected disclosures of unfair business practices can be made. Then, on January 11, 2019, the new draft of law on criminal liability of legal persons was submitted to the Polish Parliament. In particular, it clearly states that organizations should seek to protect whistleblowers against repression, discrimination, and other unfair treatment. It also obliges organizations to conduct an internal investigation into information obtained from an employee-whistleblower and to rectify reported irregularities if they could be related to the criminal liability of the organization, subject to a heavy financial penalty of approximately EUR 14 million. However, the law is still in the legislative process²⁶. The government also proposed a law on transparency in public life, which includes several measures to protect whistleblowers²⁷. The shortcomings in the project opened the door for a group of NGOs to develop an opinion in this regard²⁸. In the opinion of the Helsinki Foundation for Human Rights (hereinafter referred to as HFHR), the proposed regulations protecting whistleblowers are far from sufficient, especially in the context of the protection of whistleblowers. The protection covers only reporting certain irregularities (including those related to corruption or money laundering). The whistleblower may be granted protection based on the prosecutor's discretionary decision. The draft contains insufficient regulation of internal reporting systems and too little protection in the field of labor law, as the draft act contains provisions protecting an employee against unjustified termination of employment, but also provides that when granting the status of a whistleblower, the employer is informed each time that a specific employee has received the status of a whistleblower. Such a situation may even worsen the situation of a whistleblower in the workplace. In its legal opinion, the HFHR emphasizes that such protection should be provided irrespective of the legal nature of the employment relationship (e.g., based on a mandate contract)²⁹. At this stage, I do not make a detailed analysis of the Acts mentioned above because, they are still in the legislative process. At this point, it will be reasonable to say that the provisions of the proposed act on the liability of collective entities for acts prohibited under penalty and openness in public life are only a foretaste of further adaptation of EU law in the field of whistleblower protection in Poland³⁰.

WHISTLEBLOWING – PERSPECTIVE OF THE EUROPEAN UNION

The considerations so far show that Poland is not prepared to start the process of implementing the whistleblower protection institution. I do not mean the lack of completeness of the Directive's provisions. I have a caveat about implementing the concept of whistleblowing, which can be much more difficult. Now is the time to develop an effective whistleblower legal protection system. In order to protect against the social exclusion of whis-

²⁶ Proposal of the law with justification; [http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1211-2019/\\$file/8-020-1211-2019.pdf](http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1211-2019/$file/8-020-1211-2019.pdf).

²⁷ Proposal of the law on transparency in public life, <https://bip.kprm.gov.pl/kpr/form/r83905103,Projekt-ustawy-o-jawnosci-zycia-publicznego.html>.

²⁸ <https://legislacja.rcl.gov.pl/docs//2/12304351/12465433/12465434/dokument324982.pdf>.

²⁹ See Opinion of the Helsinki Foundation for Human Rights, https://www.hfhr.pl/wp-content/uploads/2017/11/Ustawa_o_jawnosci_opinia_HFPC-f.pdf.

³⁰ https://www.uokik.gov.pl/aktualnosci.php?news_id=13102.

tleblowers, the legislature must establish an appropriate legal framework for channels to report corruption, strong protection against retaliation, disclosure mechanisms, and sanctions for violating them. The above complexity of whistleblower protection is a positive element. As I mentioned before, it should also be borne in mind that sometimes there may be different interpretations or definitions of the term „whistleblower”, due to its negative connotation in various European countries. No wonder then that the Member States of the European Union are facing the same challenge as other countries. EU members have a different and fragmented approach to the whistleblower protection system, as, until October 7, 2019, there was no EU legal act that would impose standards, limitations, and deadlines for implementing protection provisions into national legal orders³¹. However, this is not a rule, because, for example, Slovakia passed Act No. 307/2014 Coll., On Some Measures Related to the Reporting of Anti-Social Activities, which was amended in 2019 as an act on whistleblowing (Act No. 54/2019 Coll., On the Protection of Whistleblowers)³².

European legislation currently protects informants to a minimal extent. This protection is fragmented or absent³³. The Directive on the protection of persons reporting on breaches of European Union law shows once again that whistleblowers who disclose crimes committed in both the private and public sectors risk not only losing their jobs, but also their professional careers and, in some cases, suffer from severe and prolonged financial, health, image, and social consequences. The directive is the European Commission's response, which has been repeatedly called upon to intervene, promoting the establishment of common minimum standards of protection in the EU, the level of compliance with the case-law of the European Court of Human Rights on freedom of expression³⁴. It is often the case that those who choose to report whistleblowing turn to the media first, which plays a crucial role in protecting the whistleblower's reputation³⁵.

As already indicated, current European legislation on whistleblower protection is fragmented. Its application varies widely across the EU Member States, with countries such as Slovakia adopting a comprehensive regulatory framework, while others such as Italy are slowly widening the scope³⁶. Although on December 19, 2021, a two-year deadline for implementing the directive to the legal orders of the Member States was expired, the majority of legislative procedures did not even start³⁷.

The proposal for a directive on the protection of persons reporting on breaches of Union law published on 23 April 2018 by the European Commission was the first comprehensive attempt to create an institution aimed at harmonizing the Member States' legislation in the

³¹ See Building on the EU Directive for whistleblower protection analysis and recommendations, https://images.transparencycdn.org/images/2019_EU_whistleblowing_EN.pdf.

³² <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2019/54/>.

³³ D. Huseynova, K. Piperigos, *Piperigos, Justice for justice: Protecting whistleblowers in the EU; Protection of whistleblowers - the why and the how 2018*, http://transparency.eu/wp-content/uploads/2018/04/WB_Transparency-Group-CoE-17-18.pdf, p. 2.

³⁴ European Court of Human Rights, Case of Guja v. Moldova, Application No 14277/04 of 12 February 2008, pp. 1-29, in particular para 97, p. 27.

³⁵ In Poland (March 2020), a nurse was fired, who publicly reported hard working conditions in the hospital during the pandemic, for which she was dismissed from her job. <https://forsal.pl/artykuly/1463865,signalisci-z-zamknietymi-ustami-lekarze-informujacy-o-nieprawidlowosciach-dostaja-zakaz-rozmow.html>.

³⁶ D. Huseynova, K. Piperigos, *Piperigos, Justice for justice...*, p. 2.

³⁷ See more: <https://www.polimeter.org/en/euwhistleblowing>.

field of whistleblower protection. As already mentioned, the current level of protection across the Union does not adequately consider the constraints often faced by those who choose to report abuse, often by publicly disclosing the information obtained to the media³⁸.

Finally, on 16 April 2019, the European Parliament adopted the proposal for a directive on whistleblower protection at first reading by an overwhelming majority. The directive aims to improve the enforcement of Union law and policies in specific areas by establishing common minimum standards to protect whistleblowers. Protection is to be achieved primarily through their broad definition of whistleblowers, including those who, due to their work-related activities, both in the public and private sectors, have privileged access to information on breaches that may cause serious harm to the public interest. Besides, by providing precise and confidential channels or reporting, both internal and external (although internal reporting will be preferred), the whistleblower is to have a high level of protection against any form of retaliation (direct or indirect). The Directive „establishes common minimum standards of protection for persons reporting illegal activities or abuses of law”.

The fundamental introductory conclusion indicates that the European legislator excluded from the legal basis of the directive Art. 153 TFEU. It was indicated that this provision would also not be a reasonable legal basis for harmonizing the laws of the Member States on what constitutes legal reporting of irregularities. Finally, an initiative based on Art. 153 TFEU could result in a burden on employers that would not be justified by the additional benefits of improved enforcement of EU law. At this point, it will be justified to conclude that the directive “orders” reporting of irregularities disregarding the critical issue, ie, the sphere of relations and connections in the broadly understood employment law.

Chapter I contains Art. 1 - 4, which defines the material and personal scope of application of the directive, introducing definitions of the most important concepts related to reporting irregularities. For example, in Art. 2, The Commission has identified the areas of EU competence where the directive applies based on the considerations made in the impact assessment, i.e. public procurement, services, products and financial markets and the prevention of money laundering and terrorist financing, product safety and compliance, transport safety, environmental protection, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection and the protection of privacy and personal data, and the security of network and information systems. Moreover, the material scope also covers infringements affecting the financial interests of the Union, referred to in Art. 325 TFEU and set out in detail in relevant EU measures as well as infringements related to the internal market referred to in Art. 26 sec. 2 TFEU, including breaches of EU competition and state aid rules, as well as breaches of the internal market concerning activities that constitute an infringement of corporate tax law or to practices aimed at obtaining a tax advantage contrary to the object or purpose of the applicable law about corporate tax. The Directive itself leaves the Member States the discretion to decide whether legal entities in the private or public sector and competent authorities are required to receive and follow up anonymous reports of breaches, which should not, however, be considered a valid solution because this may, in the long run, contribute to the differentiation and “selection” of notifications and abuses in this respect.

³⁸ The competent authorities designated both at national and EU level could be law enforcement departments, ombudsmen, anti-corruption authorities, surveillance bodies or even trade unions.

Chapter II contains Art. 4-6 and sets out the provisions on the basic definitions of the Directive, the conditions for protection, and the rules for the mandatory establishment and operation of internal reporting channels. Particularly noteworthy is the obligation to introduce internal reporting channels, which all public legal entities must be introduced at a local, regional and national level, in proportion to their size. Where small public entities do not have internal reporting channels, Member States may introduce an internal reporting system at a higher administration level (i.e. regional or central level)³⁹. The potential whistleblower must exhaust the so-called internal channels for reporting irregularities, which is probably to improve the employer's confidence in the employee. Once again, it should be pointed out that the Directive not only does not explicitly specify, but completely ignores the existence of various dependencies between the whistleblower, who will most often be an employee, and an employer. Keeping in mind the complex, various dependencies in the workplace, a potentially significant practical impact, especially since from most whistleblowers' perspective, it will be very hard - if not close to impossible to betray an employer.

Chapter III contains Art. 7-9 and is dedicated to the procedures of the internal reporting system, considered the first level available to whistleblowers before the whistleblower uses external channels in case of ineffectiveness. Reporting channels may be operated internally by a designated person or department or provided externally by a third party. The directive provides for the so-called handling of notifications by external entities. Legal entities in the private sector with 50-249 employees must establish one of the types of channels for confidential reporting, feedback, and addressing the breach that is the subject of the report. Chapter IV, which includes Art. 15, can be considered as one of the elements of the central part of the Directive, as it contains the conditions for the protection of the so-called external whistleblowers, i.e., people who disclose outside the organization. Only a person who has reasonable grounds to believe that: the breach may constitute a direct or apparent threat to the public interest, e.g., in the event of an emergency or a risk of irreparable damage; or if an external report is submitted, it will be at risk of retaliation or the breach is unlikely to be successfully addressed due to the specific circumstances of the case, such as the possibility of concealing or destroying evidence or the possibility of collusion between the authority and the perpetrator or the authority's participation in the breach.

The catalog of retaliatory actions on the whistleblower is indicated in art. 19 should be considered entirely correct. The Commission has already indicated in its proposal that the lack of resistant whistleblowers to retaliation makes them reluctant to report⁴⁰. The Member States shall take the necessary measures to prohibit any form of retaliation against the persons, including threats of retaliation and attempts to take retaliation actions, including in particular retaliatory actions taken in the following forms: suspension; compulsory unpaid leave; exemptions or equivalent measures; demotion or suspension of promotion; handover of duties; job changes; wage cuts; changes in working hours; suspension of training; negative performance appraisal or job opinion; coercion, intimidation, mobbing or

³⁹ Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, COM/2018/218 final - 2018/0106 (COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018PC0218>, p. 11.

⁴⁰ Proposal for a Directive, p. 16.

exclusion or discrimination. Finally, the provisions on whistleblower protection measures specified in Art. 21 are the second most crucial point of the directive. Point 5 deserves special attention, as it expresses the procedural principle concerning the burden of proof. In proceedings before a court or other authority relating to the harm suffered by a reporting person, if the reporting person claims to have suffered harm as a result of the reporting or public disclosure, it is presumed that the harm was caused in retaliation for the reporting or public disclosure. In such cases, the person who took the harmful actions bears the burden of proving that he did so for duly substantiated reasons. At this point, it should be stated that the „burden of proof” so formulated is incorrect. In my opinion, a person who retaliated against a whistleblower must show that he or she would have retaliated against it, even though the employee made the report.

On the one hand, apart from the above-mentioned correct organization of the directive itself, it seems that some points have been ignored or even omitted during the negotiations on the text. First of all, the issue of applying for the „notification order” by the directive, disregarding an essential aspect of employment relations, including the important principle of loyalty, deserves attention. Second, assuming that the directive „orders notification”, the very definition seems laconic in such a perspective. The directive is intended to protect only those who report specific irregularities important to the EU. Finally, while “mandating reporting”, the directive does not mention whistleblower financial rewards. While the Commission considered the issue itself due to the expected costs to be borne by the public and private sectors, these were ultimately not addressed in the texts of the directive. On the other hand, the text agreed by the European institutions is a crucial step in determining the minimum threshold of whistleblower protection in the EU. The Directive is now an example of a minimal contribution to the long process of implementing whistleblowing institutions and is merely ‘correct: an example of cooperation between European institutions and EU citizens⁴¹.

SUMMARY

Reporting irregularities is a characteristic form of civic objection, in line with the postulates of institutional transparency in a constitutional democracy and serving to detect irregularities and repair a given organization or institution. While the new Directive is an essential step towards whistleblower protection, some key issues remain unresolved, such as anonymous reporting⁴², whistleblower financial compensation, and sanctions for intentionally false reports.⁴³

The Directive leaves this to the discretion of the Member States. Poland faces a considerable challenge in terms of implementing appropriate whistleblower protection laws. First of all, it will be of great importance in a post-communist country to introduce positive thinking about whistleblowers as persons acting in the common good’s interest, being sure

⁴¹ See also: A. Van Waeyenberge, Z. Davies, *The Whistleblower Protection Directive (2019/1937): A Satisfactory but Incomplete System*, “European Journal of Risk Regulation” 2020, 12(1), pp. 236-244; S. Gerdemann, N. Colneric, *The EU Whistleblower Directive and its Transposition: Part 1*, “European Labour Law Journal” 2021, 12(2), pp. 193-210.

⁴² The Directive leaves this to the discretion of the Member State.

⁴³ Ł. Kobrań-Gąsiorowska, *Dyrektywa Parlamentu Europejskiego...*, pp. 75-87.

of the case's facts, and not manipulated. Secondly, although Poland belongs to the group of post-communist countries, it should not be forgotten that the provisions protecting whistleblowers were introduced a long time ago, for example, by Slovakia, which should be considered a positive symptom of a change in awareness of reporting irregularities among post-communist countries. The Directive is a formal obligation for the Member States to implement protective provisions, which in this respect, will be of fundamental importance for whistleblower reports. From *de lege lata* legislative solutions in Poland, the Directive will be fundamental for unifying whistleblower protection provisions, which are rudimentary and based on labor law provisions. However, it should not be forgotten that effective reporting of irregularities will be based on the primary source of knowledge about irregularities, which are employees and other paid workers.

The Directive attaches great importance to observe the whistleblower's data requirements, which are hard to find, for example, in a trial before a labor court. Concerning the use of the reporting channels, it should be positively assessed that the whistleblower first uses the internal channel. Member States are now required to encourage internal channels without preventing whistleblowers from reporting outside the organization and, under certain conditions, also to the public media. The Directive unequivocally condemns all forms of direct, indirect, or attempted retaliation, such as dismissal, reduction of wages, discrimination, and abuse. On the other hand, there are still shortcomings in the text that could undermine the Directive's effectiveness. First of all, the fact that the scope of application of the Directive is limited to areas falling within the scope of EU competence may cause ambiguities and uncertainty in the case of court proceedings. The Directive is likely to improve and strengthen the rules on whistleblower protection and contribute to promoting a culture of transparency and accountability across Europe, not only to the benefit of workers and companies. However, these conclusions are too early, especially given that the level of whistleblower protection varies widely across the European Union.

Bibliography

Corvino J., *Loyalty in Business?*, "Journal of Business Ethics" 2002, vol. 41.

Brojkelo B., Blenkinsopp J., *External Whistleblowers' Experiences of Workplace Bullying by Superiors and Colleagues*, "Journal of Business Ethics" 2020, Vol. 161.

Duska R.F., *Whistleblowing*, [in:] P.H. Werhane, R.E. Freeman (ed.), *Encyclopedic Dictionary of Business Ethics*, Oxford 1997.

Gerdemann S., Colneric N., *The EU Whistleblower Directive and its Transposition: Part 1*, "European Labour Law Journal" 2021, 12(2).

Huseynova D., Piperigos K., *Justice for justice: Protecting whistleblowers in the EU; Protection of whistleblowers - the why and the how 2018*, Justice for justice: Protecting whistleblowers in the EU; Protection of whistleblowers – the why and the how 2018, http://transparency.eu/wp-content/uploads/2018/04/WB_Transparency-Group-CoE-17-18.pdf.

Johnson R., *Whistle-blowing: when it works – and why Lynne Rienner*, Boulder 2003.

Kobroń-Gąsiorowska Ł., *Dyrektywa Parlamentu Europejskiego i Rady w sprawie ochrony osób zgłaszających przypadki naruszenia prawa Unii (whistleblowing) – jej wpływ na polskie prawo pracy – wybrane uwagi*, [in:] B. Godlewska-Bujok i K. Walczak (ed.), *Różnorodność w jedności. Studia z zakresu prawa pracy, zabezpieczenia społecznego i polityki społecznej. Księga pamiątkowa dedykowana Profesorowi Wojciechowi Muszalskiemu*, Warszawa 2019.

Kobroń-Gąsiorowska Ł., *Interes publiczny jako element podstawowy funkcji ochronnej prawa pracy – w kontekście ochrony sygnalistów*, „Roczniki Administracji i Prawa” 2019, No. 1.

Kobroń-Gąsiorowska Ł., *Ochrona prawna informatorów na przykładzie Stanów Zjednoczonych*, „Roczniki Administracji i Prawa” 2019, No. 2.

Larmer Robert A., *Whistleblowing and employee loyalty*, “Journal of Business Ethics” 1992, 11 (2).

Near J.P., Miceli M.P., *Organizational Dissidence: The Case of Whistle-Blowing*, “Journal of Business Ethics” 1985, No. 4.

Nordic Correspondent of the Financial Times Richard Milne, *Danske Bank whistleblower was British executive in Estonian branch*, <https://www.ft.com/content/32d47fd8c18b-11e8-8d55-54197280d3f7>.

Osland Paton V., Ferguson R., Casadonte D.J., Jr., *Whistleblowing in Higher Education (2013)*, https://ttu-ir.tdl.org/bitstream/handle/2346/50651/Bard_Jennifer_Diss.pdf?sequence=1.

Schultz D., Harutyunyan K., *Combating corruption: The development of whistleblowing laws in the United States, Europe, and Armenia*, “International Comparative Jurisprudence” 2015, Vol. 1, No. 2.

The Law of ... on Whistleblower Protection available in English at: <http://www.sygnalista.pl/projekt-ustawy>.

Whistleblower at Danske Bank was firm's Baltics trading head, available at <https://www.theguardian.com/world/2018/sep/26/danske-bank-whistleblower-was-ex-baltics-trading-head-howard-wilkinson>.

Whitaker L.P., *The Whistleblower Protection Act: An Overview 2007*, <https://sgp.fas.org/crs/natsec/RL33918.pdf>.

Wolfe S., Worth M., Dreyfus S., Brown A.J., *Whistleblower protection laws in G2 countries: Priorities for action (Melbourne, Transparency International Australia) 2014*, <https://webarchive.nla.gov.au/awa/20140908101050/http://pandora.nla.gov.au/pan/148392/20140917-0713/blueprintforreespeech.net/wp-content/uploads/2014/09/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf>.

Van Waeyenberge A., Davies Z., *The Whistleblower Protection Directive (2019/1937): A Satisfactory but Incomplete System*, “European Journal of Risk Regulation” 2020, 12(1).

Vandekerckhove W., Commers M.S.R., *Whistle Blowing and Rational Loyalty*, “Journal of Business Ethics” 2004, vol. 53.