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Position of whistleblowers in Polish legal order

Pozycja sygnalisty w polskim porządku prawnym

Abstract

A whistleblower — "a person blowing a whistle" — the Polish language lacks a word to precisely express the meaning of that term. Procedures signaling irregularities are part of the organizational culture and have been known in the world for a long time. The activity of international organizations (UN, Council of Europe and European Union) in the process of creating regulations regarding whistleblower protection has also been witnessed for some time. Unfortunately, the Polish legislator has not taken effective measures yet to regulate the position of whistleblowers. The current legislation in this area is sectoral, very selective and limited, resulting in little activity in reporting irregularities. The main objective of this article is to determine the status of whistleblowers in the Polish legal order in the context of provisions of the Directive (EU) 2019/1937, under which Member States are obliged to implement its provisions into their legal orders until 17 December 2023. Selected acts of the Polish law and draft laws that contain regulations on the status of whistleblowers are discussed. In the background of the considerations, the Author also points to selected acts of international law and European Union law.

Keywords: whistleblower, protection of whistleblowers, procedures signaling irregularities, international standards

Streszczenie

Sygnalista, demaskator, informator, whistleblower — „osoba dmuchająca w gwizdek" — w języku polskim brakuje określenia oddającego precyzyjnie znaczenie tego terminu. Procedury sygnalizujące o nieprawidłowościach stanowią część kultury organizacji i na świecie znane są od dawna. Ważnym czynnikiem w procesie tworzenia regulacji dotyczących ochrony sygnalistów była i jest aktywność organizacji międzynarodowych (ONZ, Rada Europy i Unia Europejska). Niestety, polski ustawodawca nie podjął dotychczas skutecznych działań w celu uregulowania pozycji sygnalistów. Obecnie obowiązujące przepisy prawne w tej materii są sektorowe, bardzo wybiórcze i ograniczone, co w konsekwencji powoduje małą aktywność w zakresie informowania o nieprawidłowościach. Głównym celem niniejszego artykułu jest określenie statusu sygnalistów w polskim porządku prawnym w kontekście regulacji Dyrektywy 2019/1937, na mocy której państwa członkowskie mają czas na wdrożenie jej postanowień najpóźniej do 17.12.2023 r. Omówione zostały wybrane akty prawa polskiego oraz projekty ustaw, które implikują regulacje dotyczące statusu sygnalistów. W tle rozważań autorka wskazuje również na wybrane akty prawa międzynarodowego i europejskiego.

Słowa kluczowe: sygnalista, ochrona sygnalistów, procedury sygnalizujące nieprawidłowości, standardy międzynarodowe

JEL: K30, M14

Introduction

A whistleblower — "a person blowing a whistle" — there is no word precise enough, in Polish, to exactly reflect the meaning of the term. Whistleblowers are persons (employees in the broad sense) who, having regard to the good of their workplace and (or) the public good, provide (first to their superiors, and where this proves ineffective, to other instances, law enforcement agencies or the media) information about irregularities related to the functioning of their organizations (Makowski, 2016). As recommended, Transparency International stresses that whistleblowing rules should apply to all individuals at risk of retaliation (Transparency International). According to research conducted by the European Commission, the lack of protection for whistleblowers in the area of public procurement alone exposes the EU to losses of about 8 million Euros per year on the average (Sieradzka, 2020).

The concept of a whistleblower in the context of the issues discussed has been functioning in the Polish legal space for a relatively short time. Wherever legislative measures were taken to fight corruption, the institution of the whistleblower (whistleblower) appeared only marginally. It often was, and unfortunately still is, associated with snitching, being a tattletale, a canary. It obviously fails to evoke positive associations.[1]

The Polish legislator has not taken any effective steps to regulate the position of whistleblowers yet. The current legal regulations in this matter are very selective and limited, which in turn results in little activity in the area of reporting irregularities. Moreover, the position of whistleblowers is weak, first of all, in disputes with employers, in which they are forced to refer to general provisions protecting against discrimination in the workplace or mobbing. The provisions contained in the Polish Labor Code are ineffective too, providing insufficient protection against repercussions to employees who report irregularities in their workplace. Many European countries, even those that underwent systemic transformation in the same period as Poland, e.g. Hungary, Slovakia, have legal regulations in place, defining the status of a whistleblower. Other countries, such as Germany or Great Britain, can be seen as reference, with whistleblowers' position precisely defined and getting proper legal protection. Unfortunately, the Polish awareness of organizational culture and compliance remains low, and the idea of whistleblower protection is underestimated. Some employers and 'trade unions' circles are most resistant to and reluctant to creating a new protected group among employees, such as disabled people or pregnant women. Employers do not seem to understand that regulations of whistleblower protection are in their interest, and that in Western European countries such regulations have become standard for many years.

Whistleblower procedures are part of the organizational culture and have been known around the world for a long time. Legal protection of whistleblowers was first provided in 1989 in the United States. Following the US, other countries began to introduce into their legal systems provisions regulating the status of a whistleblower, including Great Britain — 1998, South Africa — 2000, Australia — 2013, Ireland — 2014, Romania — 2014, or Hungary 2013. The approach to these issues was diverse and depended on many factors. The debate in that area was heavily influenced, in individual countries, by their legal system, historical background and the level of public awareness. Over time, both universal and sectoral solutions were adopted.[2]

The awareness of the need to build and improve the organizational culture, to develop the rules enabling organizations to operate transparently, and thus more effectively, began to emerge in Poland at the turn of the 20th and 21st Centuries. The focus was slowly shifted to whistleblowers, in the belief this could help many other workers who were bullied and discriminated by their employers. Even ideas about creating in-house whistleblower protection systems were discussed. Reporting in good faith about irregularities in the workplace primarily achieves two important goals. The first is the protection of the common good, which is the workplace, and the second are the employer's interests (Kobroń-Kąsiorowska, 2019).

The main purpose of this article is to define the legal status of whistleblowers in the Polish legal system (legal status as of 02/14/2020) and indicate the direction of changes in regulations in this regard. Selected regulations of international and European Union law will serve as a background of the article.

Whistleblower protection under international obligations

One important factor in the process of creating regulations on the protection of whistleblowers was, and still is, the activity of international organizations. The legal acts that deserve attention include Civil Law Convention on Corruption established within the framework of the work of the Council of Europe on 4 November 1999, the UN Convention against Corruption adopted on 31 October 2003, and the Directive of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (hereinafter referred to as Directive 2019/1937), which imposed an obligation on states parties to create effective legal protection for whistleblowers. Poland is a party to both conventions. The adoption of acts on the basis of international and European law in this area has created greater opportunities to put pressure on politicians to take an interest in the issue (Makowski, 2016). In the context of the UN Convention, reference should be made to the content of Article 33, which provides: "Each State Party shall consider incorporating into its internal legal system appropriate measures to provide protection against any unjustified act to any person who reports in good faith and on reasonable grounds to a competent authority any facts concerning offences established in accordance with this Convention".

The content of the above-mentioned regulation does not impose an explicit obligation on the parties to implement the provisions of the Convention. By using the term "party to consider", the regulation leaves the states freedom to decide whether to undertake measures of legislation to protect whistleblowers. However, the direction in which the states parties to the convention are to go is clear. The subjective scope is defined broadly — as a proposal to provide protection to every person who reports irregularities. It is not limited to "employees" — quite importantly, in the author's opinion. Any person cooperating with the employer should be allowed to inform about irregularities, regardless of the legal basis of such cooperation. The Convention adopts the principle of good faith. Whistleblowers are to act in the public interest, rather than being prompted by revenge or pursuing their particular interests. The objective scope covers any incidents related to the prevention, detection and prosecution of corruption and the prohibition of trafficking, seizure, confiscation and recovery of the proceeds of crime in the public sector.

When analyzing the legal system developed within the Council of Europe, two legal acts deserve attention — the Convention on Corruption, and the Resolution of the Parliamentary Assembly of the Council of Europe on the protection of whistleblowers. The provision of the Convention relating to whistleblowers is included in its Article 9, which states: "Each Party shall provide in its domestic law adequate protection against any unjustified sanctions against employees who, having reasonable grounds to suspect corruption, report their suspicions in good faith to the appropriate persons or authorities." Noteworthy here is the wording "any unjustified sanctions", which means that any sanction resulting from reporting irregularities is a violation of the obligation of the State party to the Convention to protect whistleblowers. The resolution, similarly to the Convention on Corruption, emphasizes the role of the provisions of national legislation, pointing to the obligation to provide whistleblowers with adequate and effective protection from retaliation. Moreover, it points out that whistleblower protection increases the effectiveness of anti-corruption and mismanagement procedures in both the public and private sectors. It calls on the member states of the Council of Europe to take steps to settle issues related to whistleblower protection. It underlines that a person who makes a report in good faith should be granted protection at the level of national law. One should agree with the statement of D. Lewis and W. Vandekerckhove (Vandekerckhove, Lewis, 2012), according to which the content of the resolution is a very good starting point for the legislator on its way to establishing a comprehensive system of whistleblower protection. While the Resolution, due to its very nature, is not legally binding, it is undisputed that soft law has, for years now, played an increasingly important role in the law-making process (Biernat, 2012; Paunio, 2009). Standards created under the so-called soft law reflect the moods and trends that prevail on the international arena. They are often part of a practice that contributes to the creation of certain norms of international law.

The Directive 2019/1937, as an act of harmonization of EU law with the law of the Member States, contains solutions to basic issues related to the protection of whistleblowers. The choice, made by the national legislator in the scope of either the application of the minimum protection rules provided for in the Directive or its extension, is essential for their practical and actual protection (Jagura, Zdziarstek, 2020).

A whistleblower (Article 4(1) of the Directive) is defined as someone who reports or discloses breaches, information about breaches of EU law, which he/she becomes aware of in the work-related activities. The directive defines a group of entities that are entitled to protection, including: natural persons working in the private or public sector, and reporting infringements of the law — the so-called whistleblowers — as: employees, business persons, shareholders or members of the company's management body, volunteers, trainees and all persons working under the supervision and direction of contractors, subcontractors and suppliers. In its Article 4 (2 and 3), the Directive adopts the concept of extending whistleblowers to include people whose employment relationship with a given employer has already terminated or is yet to be established. In relation to such a person, protection will apply to information obtained in the course of recruitment or negotiations related to the acceptance for a given position. The protection also covers persons assisting whistleblowers with submitting a report and those who did not participate in the reporting itself but would still become exposed to retaliation due to the fact of reporting. At the same time, protection measures are provided for those assisting the reporting, third parties who are related to the reporting persons, who may experience retaliatory actions related to work, such as colleagues or relatives of whistleblowers, and legal entities owned by the whistleblower, who work with such a person or who are otherwise related thereto in the context of professional activities (Art. 4(4)). As a result, the EU legislator established a broad range of persons considered to be whistleblowers, granting protection to persons involved in professional, economic or actual relationships, regardless of the legal nature of such relationship.

It follows from recitals 1 and 2 that whistleblowers, thanks to their activities, play a significant role in revealing and preventing breaches of EU law and in protecting the social good. Such persons are often the first ones to learn about irregularities and dangers. Reports by whistleblowers and public disclosure of breaches are part of the bottom-up enforcement, investigation and prosecution of EU law. In Art. 2 which defines the material scope, the Directive refers only to infringements of EU law in the following areas: public procurement, services, products and financial markets, prevention of money laundering and terrorist financing, product safety, transport safety, environmental protection, radiological protection and nuclear safety, food safety and feed, animal health and welfare, public health, consumer protection, the protection of privacy and personal data, and the security of network and information systems. In addition, the Directive covers violations affecting the EU's financial interests as defined in Art. 325 TFEU[3] , and infringements related to the internal market as defined in Art. 26(2)[4] TFEU, including breach of EU competition and state aid rules, breach of the internal market in relation to activities violating legal tax provisions or practices aimed at obtaining a tax advantage contrary to the object or purpose of the applicable provisions on corporate tax. According to Art. 2(2) of the Directive, it is possible to extend the scope of protection under national law. Attention should be paid to the legitimacy of extending legal protection in the transposing act. Many authors argue that it is legitimate for the national order to open up the possibility of reporting all breaches of law (Trzaskowska-Michalska, 2019; Groß, Platzer, 2018).

The directive excludes certain sectors and does not affect the responsibilities of the Member States for, inter alia, ensuring national security. Its provisions do not apply to notifications concerning breaches of public procurement regulations related to aspects of defense or security (Art. 3(2)). At the same time, the directive does not affect the application of EU law and the national law of the Member States with

regard to the protection of classified information, legal protection of professional and medical secrets, the secret of judicial deliberation and the provisions of criminal procedure.

The directive also defines the conditions that must be jointly met in order for a whistleblower go get protection. First of all, the whistleblower must have reasonable grounds to believe that the irregularities reported are true (good faith), and secondly, he must report through internal reporting channels (Art. 7 of the Directive), external reporting channels (Art. 10 of the Directive) or through public disclosure (Art. 15 of the Directive). The provisions of the Directive define the framework and indicate the obligatory elements of procedures. It should be observed that the intention of the EU legislator is to use internal channels first (Art. 7(2)). It is usually easier for whistleblowers to use internal communication structures (recital 33). Most whistleblowers seem to report to the organization where they work. Internal reports communicated to appropriate persons may have an impact on minimizing threats to the public interest. At the same time, looking from the perspective of the organization itself, it is possible to indicate the benefits of using internal procedures on at least two levels: firstly, disclosure of irregularities, and secondly, the possibility of having an appropriate response on the part of the enterprise. The former factor influences the development of the organization's culture and speak up[5] , and the latter provides protection for the repute of the entrepreneur who reacts promptly and counteracts any leakage of information about the abuse.

The consequence of introducing the above regulations is to provide adequate protection to persons reporting irregularities. The potential for whistleblower protection, as provided for in the Directive, includes several measures. They include, among other things, protection of the whistleblower's identity (Art. 16 of the Directive), assured access to information on the procedures and to guidelines how to act in the event of a report, exemption from liability in connection with a report or public disclosure of irregularities. The whistleblower has also been protected in connection with obtaining the necessary information and ensuring access thereto, provided that such action does not constitute a crime.

A very important measure to protect the whistleblower is the prohibition of retaliation, as defined in Art. 19 of the Directive. This is confirmed first in its recital 87, which indicates that whistleblowers must be protected against all types of retaliation — direct or indirect — undertaken or tolerated by the employer, customer or service recipient and those working for or acting on his behalf. The list of prohibited retaliatory actions indicated in the Directive is not a closed catalog. Examples include the prohibition of suspension, compulsory unpaid leave, demotion or suspension of promotion, suspension of training, blacklisting, withdrawal of a license or permit. As already indicated, the catalogue of prohibited retaliation actions is not limited, therefore the national legislator, at the stage of establishing national measures, has the possibility to approach this issue individually and extend it.

The system of protection against retaliation is set out in Article 21 of the Directive. It is primarily based on the assumption that the person making the whistleblower report does not breach any disclosure restrictions and bears no responsibility for such report, provided he or she had a reason to believe that such a report must be disclosed. (Art. 21(2) of the Directive). Moreover, whistleblowers are exempt from liability in connection with obtaining information that is the subject of a notification or public disclosure, provided that such obtaining or access does not constitute a prohibited act under national law (Art. 21(3) of the Directive). According to the Art. 21(5), "in proceedings before a court or other authority relating to a detriment suffered by the reporting person, and subject to that person establishing that he or she reported or made a public disclosure and suffered a detriment, it shall be presumed that the detriment was made in retaliation for the report or the public disclosure". In such cases, it shall be for the person who has taken the detrimental measure to prove that that measure was based on duly justified grounds. In such a situation, therefore, the burden of proof to evidence that the action was carried out for duly substantiated reasons rests with the person who took the action, rather than the whistleblower.

This solution is very beneficial for employees, but may constitute grounds for abuse on their part, for fear of losing the job or not having a fixed-term contract extended.

The provisions of the Directive, which oblige the Member States to protect whistleblowers, especially in the context of the growing importance of ensuring compliance with legal regulations of business participants, should be assessed positively. However, only 10 Member States have a comprehensive whistleblower protection system, which is far from ideal when compared to the actual needs. Unfortunately, Poland is not yet in that group. According to Article 26 of the Directive, Member States have time to implement its provisions by December 17, 2021, except for legal entities operating in the private sector, employing 50 to 249 employees, where, by way of derogation, the deadline is extended to December 17, 2023.

The status of a whistleblower in the Polish legal system

As already mentioned, the Polish legislator has not established comprehensive whistleblower protection yet, which undoubtedly works to the detriment of employees who, acting in the public interest, reveal irregularities. Despite the lack of comprehensive protection, on the assumption that the legal system is multicentric, some norms of international and European law have been indicated above, which imply the obligation to establish norms setting the limits of legal protection for actions taken by whistleblowers (Łętowska, 2005). As a result of these acts, provisions regulating the status of whistleblowers appeared in Poland, but it should be emphasized that their number is small, and the protection is sectoral and selective. Below, we will briefly discuss the applicable regulations and draft legal acts in the field of whistleblower protection.

In November 2015, pursuant to Directive 2013/36/EU of the European Parliament and of the Council of June 26, 2013

on the conditions of admission of credit institutions to the activity and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, introduced the obligation of effective whistleblowing systems for credit institutions. In order to introduce whistleblower protection which applies to all companies operating on the financial services market, the Regulation (EU) No 596/2014 of the European Parliament and of the Council of April 16, 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC was adopted. These regulations have been in force in Poland since 03/07/2016 and apply only to financial market institutions. They are of a very general nature as they formulate some recommendations regarding whistleblower protection, but the mechanism of this protection and its implementation are left to the EU Member States.

Under the provisions of the Polish banking law, its Article 9(2a) guarantees the procedures of anonymous reporting, to the indicated member of the management board, and/or the supervisory board of the bank, of breaches of the law and/or of procedures and ethical standards applicable at the bank. On the basis of paragraph 2b, bank employees who report violations are provided with protection at least against repressive actions, discrimination or other types of unfair treatment. The Minister of Development and Finance, by the Regulation of March 6, 2011, introduced detailed provisions on the risk management system and internal control system, remuneration policy and the detailed method of estimating internal capital in banks. The procedures for anonymous reporting of violations of the law and the procedures and ethical standards in force at the bank are set out in § 45 and include, in particular: the possibility for employees to report violations through a special, independent and autonomous communication channel, while maintaining the whistleblower's anonymity, protection against repressive actions, discrimination or other types of unfair treatment, protection of his/her personal data in accordance with applicable regulations, identification of persons responsible for receiving reports of violations and the type and nature of follow-up activities. In order to ensure the effectiveness and efficiency of the implemented procedures, banks conduct preliminary and regular training of employees in reporting irregularities and the applicable procedures.

The obligation to have a procedure for anonymous reporting of violations of the law is also included in the Act on Counteracting Money Laundering and Terrorism Financing. Its Article 53 introduces the obligation to have procedures and technical and organizational solutions for anonymous reporting of irregularities, which should enable the processing of both actual and potential violations of the provisions on counteracting money laundering and terrorist financing. The procedure should enable reporting by employees of a given obligated institution and by employees of other persons performing activities for the obligated institution. The Act does not specify the form of the procedure. Pursuant to Art. 53(2), the scope of the elements of the procedure is defined, however it is an open catalog, so the obligated institution may adjust its scope to its needs and specificity of its functioning. The elements of the procedure specified in the Act include, among others, designating a person responsible for receiving reports, the manner of receiving reports, protecting the employee reporting an irregularity at least against repressive actions, discrimination or other types of improper treatment, protection of the employee's personal data in accordance with applicable regulations, maintaining confidentiality in the event of disclosure of the employee's identity, corrective and follow-up actions.

The Act of October 16, 2019 amending the Act on Public Offering and the Conditions for Introducing Financial Instruments to Organized Trading, and on Public Companies and Certain Other Acts in Art. 97d requires issuers to develop procedures for anonymous reporting of violations of law, as well as procedures and ethical standards. Pursuant to the aforementioned regulation, the issuer is obliged to have procedures for anonymous reporting by employees to the designated member of the management board, and in special cases — to the supervisory board, of breaches of law, in particular the provisions of the Act, as well as procedures and ethical standards. The aforementioned act only indicates the obligation to create procedures for reporting irregularities. However, it does not refer to the principles and scope of whistleblower protection at all.

When discussing the applicable legal acts, one should mention the Act of April 16, 1993 on Combating Unfair Competition, whose Art. 11(8) contains regulations stating that the disclosure, use or acquisition of information constituting a trade secret does not constitute an act of unfair competition, when it occurred in order to reveal irregularities. The indicated legal act mentions only the act of disclosing irregularities, which will not be treated as a breach of competition protection rules.

When analyzing the legal acts that are the subject of the legislative procedure, three projects should be identified. The first is a civic project prepared by the Batory Foundation, the Helsinki Foundation for Human Rights, the Forum of Trade Unions and the Institute of Public Affairs on the protection of whistleblowers, the second is the draft act on transparency in public life, and the third is the draft act on liability of collective entities for acts prohibited under penalty.

On the basis of the draft act on the transparency of public life, the status of a whistleblower has been defined quite broadly (Art. 61(4)). This category includes, among others, an employee, officer, soldier or a person employed on a basis other than employment contract, provided that the information relates to his employer, supervisor, another employee employed by the same employer or another officer, or a natural person who performs the profession on his own behalf and on his own account, or conducts business as part of the performance of such a profession related to a contractual relationship with an entity or entrepreneur related to a legal relationship. An important condition for extending protection over a whistleblower is the requirement of good faith, which differs from the established international standards. This means that only a person who reports reliable

information about the commission of specific crimes will be protected. This solution is controversial as whistleblowers do not know, in the first place, how their performance will be assessed and whether it will be considered credible. In addition, the draft act does not define any criteria for assessing the credibility of a report. In fact, it goes a step further back and provides for the possibility of depriving a whistleblower of protection where the information provided thereby occurs not sufficient to initiate preparatory proceedings. Such a solution seems risky and may in practice lead to a reduction in the number of reported irregularities for fear of not getting protection.

The objective scope of the project in question refers to specific, exhaustively listed corruption, accounting and financial crimes. This seems much too narrow. At the same time, pointing to the scope of whistleblower protection, the discussed draft provides only two areas of whistleblower protection — the reimbursement of the costs of the process and the prohibition of terminating the contract, or changing its terms to less favorable ones. The proposed solution also seems to be too narrow as it does not protect the whistleblower against, for example, discrimination or unfair treatment in connection with the irregularity disclosed. On the basis of the draft in question, the status of a whistleblower is granted by the prosecutor as a consequence of irregularities being reporting to law enforcement authorities. However, there is no guarantee that you will receive the status of a whistleblower, nor can you appeal against the prosecutor's decision. The adoption of such a solution is quite likely to negatively affect the development of the whistleblower institution, rather than make it gain more trust among both employees and employers. In addition, the prosecutor is obliged to inform the employer about granting the whistleblower status, which of course reveals the person's identity. The consequences of such regulation will create a very uncertain and unfavorable situation for whistleblowers where the prosecutor fails to make decision on initiating the proceedings, and so the whistleblower protection is lifted (Szewioła, 2017; Zieliński, 2018).

The draft act on the liability of collective entities defines, in Article 12, a whistleblower as an employee, member of a body, person acting on behalf or in the interest of a collective entity on the basis of a legal act or contract. Against the background of the proposals analyzed, the proposed definition is broad and covers an extensive range of people. This should be assessed positively, because narrowing the whistleblower category only to the group of "employees" is not enough. The substantive scope of the matters specified in the draft act under discussion is much wider than in the draft on transparency in public life, and refers to those specified in Art. 12 — reports of failure to exercise due diligence and irregularities in relation to all prohibited acts, failure to fulfill obligations or abuse of powers by the bodies of a collective entity. Such a solution may in practice turn out to be a tool to combat personal prejudices, because the notions of "due diligence" or "irregularity" are characterized by rather blurred definition and cause many problems of an interpretation nature. Protecting everyone, without applying the requirement of "good faith", will disturb the balance between a real whistleblower and persons trying to settle their private scores using statutory possibilities. As regards the protection of whistleblowers, the draft of this law seems to be prone to abuse. Pursuant to Article 14, the whistleblower may demand reinstatement, payment of compensation or cash benefits. Such a solution may result in false applications for protection or financial gratification. In this project, the channels for reporting irregularities cover only the internal path — transfer of information to the body of a collective entity or persons exercising internal supervision (Art. 12). Unfortunately, this draft does not deal with the confidentiality of whistleblowing reports.

The civic project, i.e. the draft act on whistleblowers, in its Article 2 defines the whistleblower as a person who, in connection with the duties performed, work or a contract performed, reports irregularities or provides assistance in reporting irregularities by another person.

A whistleblower may be any natural person, regardless of the type of employment and the nature of the legal relationship between him/her and the employer, during and after its termination. Such a solution deserves recognition, because the broader the subjective scope, the more effective the system of informing about irregularities. The approach in which every employee is entitled to whistleblower status, regardless of the basis of employment, should be split. Citizen's Bill on whistleblowers in its Article 3 defines as irregularities any activities threatening the public interest, any violation of generally applicable law, internal company regulations, including codes of ethics. The scope of breaches defined in this draft is extensive and it seems that it would result in protection being provided in response to a wide range of reports. The essential premise for whistleblower protection is acting in good faith. Before making an external report, the whistleblower is obliged to apply internal procedures, where established, or to report irregularities to the competent authorities. Whistleblower protection measures include, in particular: protection of their personal data, prohibition of taking or threatening retaliation (e.g. termination of employment, transfer to another position, change of responsibilities, unequal, discriminatory treatment).

One important aspect of creating any regulations regarding the protection of whistleblowers is the issue of the whistleblower's obligation to maintain professional secrecy. In connection with the sectoral protection of whistleblowers in Poland, the limits of freedom of speech, in the scope of irregularities reported, extend general guarantees of freedom of expression. It should be remembered, however, that freedom of speech is not absolute and is subject to certain restrictions applying in certain cases. This mainly refers to Art. 31 sec. 3 of the Polish Constitution and Art. 10(2) of the European Convention on Human Rights and Fundamental Freedoms. One should also take into account the regulation of Art. 100 § 2 point 4 of the Labor Code, which provides for the obligation to care for the good name of the employer and to keep secret information, the disclosure of which could expose the employer to damage. The limits of the freedom of

speech of whistleblowers are also determined by the Civil Code, Art. 23 and 24, containing regulations on the protection of personal rights and protection against their unlawful infringement. In addition, there are a number of regulations contained in the acts of regulated professions that guarantee legally protected secrets, e.g. medical secrets, advocacy or business secrets. Whistleblowers-employees have a special obligation to care for the good name of the employer, the factor that whistleblowers must take into account when deciding on disclosing any information regarding their employer. However, this obligation is not absolute (Kobylińska, Folta, 2019).

As noted by the Supreme Court in one of its judgments: "An employee has the right to allowable public criticism of the supervisor (the right to whistleblowing, i.e. disclosure of irregularities in the functioning of his workplace, consisting in various types of acts of dishonesty involving the employer or its representatives), where this does not lead to a breach of his/her employee duties, in particular, consisting in taking care of the welfare of the workplace and keeping secret information, the disclosure of which could expose the employer to damage, as well as compliance with the corporate rules of social coexistence. The employee must not rashly, in a manner justified only by subjective reasons, formulate negative opinions towards the employer or its representatives. "Allowable criticism" must be factual, reliable, appropriate to specific factual circumstances, and expressed in an appropriate form. The basic premise for criticism to be allowable is the employee's "good faith", i.e. that person's subjective conviction that the criticism is based on truthful facts while exercising due diligence in checking them and acts in the legitimate interest of the employer (Supreme Court judgment of 28 August 2013). The jurisprudence of the European Court of Human Rights specifies the duty of loyalty to the employer, differentiating it in relation to the profession performed. The highest degree of loyalty is required from officers of uniformed services. However, this does not completely deprive the officers of the right to criticize, and in certain situations they also should obtain protection from negative consequences of reporting irregularities. Moreover, a high degree of loyalty is required of officials, in particular of the civil service (ECtHR judgment of 2 February 2008). It should also be emphasized that the essence of the whistleblower's actions is informing the employer (and not the external environment) about any suspected irregularities. In order to maintain professional secrecy, internal procedures for informing about irregularities should be created, taking into account the specificity of the workplace in the context of information protected by law (Kamiński, 2010).

Conclusions

The purpose of this article was to determine the status of whistleblowers in the Polish legal order. The analysis shows that the current legal status of the protection of whistleblowers is insufficient. The solutions adopted so far have a sectoral dimension, are fragmented and dispersed.

Analysis of legal proposals also leads to similar conclusions. Firstly, the legislative process is very slow. Secondly, the solutions adopted in drafts often deviate from accepted international standards. For example, the criterion of "good faith" versus "credibility" can be cited as a very important prerequisite for the protection of a person reporting irregularities. The whistleblower is not able to assess whether his notification will be considered credible and thus protected. Future legal regulations should take the premise of good faith, not credibility.

International standards extend protection over disclosure of any activities detrimental to the public interest, whereas the Polish proposals only refer to reporting of selected crimes, which definitely seems too narrow an approach. Moreover, the assumption that a whistleblower cannot use channels other than external ones to report irregularities is not only inconsistent with international standards, but also significantly weakens the position of the whistleblower and likely to result in fewer reports. The lack of guarantee of confidentiality of whistleblowers' data is another reason why a whistleblower will have to well consider whether to report an abuse where this involves putting his professional position at stake. It seems that a whistleblower's data should be known only to the person accepting the report.

The most complete protection for whistleblowers is granted by the citizens' project. It also corresponds most closely to international standards and to the provisions of the Directive. Instead, both the bill on the responsibility of collective entities and the bill on the openness of public life deviate from the requirements set out in the Directive and should not be passed in this form.

Many countries already have effective whistleblower rights protection mechanisms in place favoring safe reporting of irregularities and preventing retaliation by employers. Poland lacks comprehensive protection of whistleblowers, and the current pace of legislative work is very slow. It is difficult to assess the prospects for the development of the whistleblower institution in Poland, but assuming the most pessimistic scenario, Polish regulations regarding the protection of persons reporting violations, under Directive 2019/1937 must be established by December 17, 2023 at the latest.

Przypisy/Notes

[1] Associating whistleblowing with informing seems determined by our country's history when collaborating with (foreign) employer or state was perceived as betrayal.

[2] Whistleblower protection in southeast Europe, Regional Anti-Corruption Initiative, 2015, http://idmalbania.org/wp-content/uploads/2015/07/Whistleblower-Protection-in-SE-Europe. pdf (14.02.2020).

[3] "The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union by means of measures taken in accordance with this Article which shall act as a deterrent and be such as to afford effective protection in the Member States and in all Union institutions, bodies, offices and agencies. (2) Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests. Treaty on the Functioning of the European Union of 30.04.2004, OJ 2004.90.864/2.

[4] "The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

[5] "Speak up" is a policy of speaking out loud about irregularities. The postulate is currently applied in many international corporations as one of the elements of the organizational culture.

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