



## The Problem of External Whistleblowing from the Perspective of a Country without Specific Legislation – Poland

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### **Abstract**

The article discusses the specific issue of the lack of legislation regulating external reporting of irregularities by employees in Poland. Limited freedom of expression is maximized by disciplining employees who report irregularities with disciplinary dismissals justified by violating the employee's fundamental obligation specified in the Polish Labour Code in article 100 § 2 p. 4<sup>1</sup>, which is „to care for the best interest of the employer's establishment”. The normative perspective for the protection of this particular category of workers remains unchanged at present so their protection is subject only to the provisions of the Polish Labour Code, which does not foresee the concept of whistleblowing. Also, possible procedural protection is perceived by labour courts from the perspective of the provisions on claims of employees whose employment contracts were terminated without notice. A remedy for this may be the new European Union Directive on the protection of whistleblowers, aimed at protecting whistleblowers in court proceedings related to information disclosure. This article concerns the current problem of external whistleblowing in Poland, being a post-communist country. The author analyses the current legal status concerning the protection of whistleblower<sup>2</sup> employees in Polish labour law, with specific emphasis on the legislation of the European Union. Therefore, this article aims to establish to what extent the Directive will help to protect external whistleblowers and the freedom of expression against retaliation by the employer. In this article, the term whistleblower<sup>3</sup> will be used to indicate an employee who discloses irregularities, although such term is not defined in the Polish Labour Code.

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<sup>1</sup> Labour Code of 26 June 1974 (Journal of Laws of, 1974, No. 24 item 141).

<sup>2</sup> In Polish, the most precise translations into English is „signaller”. However, the terms “whistleblower” or „whistleblowing” are commonly used in foreign doctrine and EU legislation.

<sup>3</sup> Even the terms „whistleblowing” or „whistleblower” do not exist in Polish language.

**Keywords:** Poland, whistleblower, whistleblowing, employee, employer, freedom of speech, external whistleblowing

## 1. Introduction

The debate on whistleblowing is not gaining impulse in Poland, even though there is little time to implement the provisions of the Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons reporting breaches of Union law. The pandemic situation, which in Poland has become the cause of many cases of abuse against employees reporting irregularities, is not conducive to this situation, either<sup>4</sup>.

Polish labour law protects whistleblowers to a certain extent without specific treatment of whistleblowing – even if it may seem paradoxical – and this is often the case in a country where disciplinary dismissal is a form of retaliation against employees who report irregularities. As a rule, a disciplinary dismissal requires that the employee be informed of the reasons for their employment contract termination. Most often, the employer cites Art. 52. § 1 (Polish Labour Code): “The employer may terminate the employment contract without notice due to the employee’s fault in the event of a serious breach by the employee of basic employee duties”. In such a situation, the employee may prove to the labour court that the reason for terminating the employment relationship was untrue or indicate that the employer violated the conditions for formal termination of the employment contract without notice, regarding the provisions of Art. 52 § 1 of the Polish Labour Code cited above, such as: failure to notify the trade union about the intention to terminate the employment contract with the employee or dismissal of the employee more than one month after the date when the employer became aware of the offense by the employee. These and other circumstances are irrelevant to the effective protection of the employee-whistleblower because the whistleblower’s protection remains a side effect of the main case. In a country where no provisions protecting whistleblowers exist, the Directive offers minimum protection against unjustified dismissal. For a post-communist country, some solutions adopted in the Directive will constitute a breakthrough in whistleblower protection and the related protection of the freedom of speech<sup>5</sup>. The functionality of whistleblower protection depends on the socio-organizational culture in which the Directive will be embedded. Apart from the fact that there is even a rudimentary regulation of employee protection dismissed from discipline, concluding civil law contracts in place of an employment contract is very attractive in the Polish legal system. The

<sup>4</sup> An example will be presented later in the article.

<sup>5</sup> See also: Vigjilencja ABAZI: The European Union Whistleblower Directive: A „Game Changer” for Whistleblowing Protection? *Industrial Law Journal*, 2020. 3.; See more from this author: Vigjilencja ABAZI: Whistleblowing in Europe: A New Era of Legal Protections. In: Philip CZECH – Lisa HESCHL – Karin LUKAS – Manfred NOWAK – Gerd OBERLEITNER (eds.): *European Yearbook on Human Rights*. Cambridge, Intersentia, 2019.

Polish Labor Court will face difficulties in defining the concept of “the employee’s obligation to care for the best interest of the workplace” De lege lata such employees are left unprotected<sup>6</sup>. One should agree with V. Abazi that effective protection of whistleblowers consists of at least two main components: what happens to the whistleblowers after they report irregularities and what measures are taken to remove the irregularities reported by the whistleblower. Nevertheless, considering the lack of regulations protecting whistleblowers in Poland after they report an irregularity, the first component mentioned by the quoted author is the most important. The reason for such a state of affairs is the dual perception of the limits of freedom of expression through the obligations to care for the best interest of the workplace, the scope of which is wide, and at least the potential threat of causing damage to the employer<sup>7</sup>.

## 2. A “remedy” for the problem of whistleblowers in Poland – dismissal

Whistleblowing is an accepted practice in Anglo-Saxon countries<sup>8</sup>, but to a certain extent it is a phenomenon in Poland. It means the disclosure by a member of an organization (former or current) of illegal, immoral or unlawful practices carried out with the knowledge of the employer, by informing individuals or organizations that are able to take effective action to stop these practices<sup>9</sup>. As a result of the actions taken, the public interest is protected, but often also the interests of the employers themselves<sup>10</sup>. Whistleblowing reports irregularities and is a form of objection, which has four features. Firstly, it is about making information public individually. Secondly, the information is disclosed to those outside the organization who make it public. Thirdly, the information disclosed relates to a serious irregularity found in the structures of the organization. Finally, the person reporting the irregularity is, in principle, a member of the organization. The perspective presented is narrow and

<sup>6</sup> In some countries, whistleblower laws are broader, e.g. in Norway, protection covers employees who disclose irregularities in a general act that applies to all employee matters and covers both the public and the private sector; Act of 17 July 2005, No. 62, as amended by the Act of 19 July 2009, No. 83, Acting to working environment, working hours and employment (Working Environment Act). The text of the Act is available at: <http://www.arbeidstilsynctno/binfil/download2.php?Tid=92156> (date last accessed 1 December 2020).

<sup>7</sup> The judgment of the Supreme Court of 6 December 2018, II PK 233/17; The judgment of the Supreme Court of 23 September 1997, I PKN 274/97; The judgment of the Supreme Court of 16 November 2006, II PK 76/06, The judgment of the Supreme Court of July 2009, II PK 46/09; The judgment of the Supreme Court of 6 July 2011, II PK 13/11; The judgment of the Supreme Court of 24 February 2012, II PK 143/11.

<sup>8</sup> For Instance: UK and US; See more: Richard J. OPARIL: The Coming Impact of the Amended False Claims Act. *Akron Law Review*, Vol. 22., Iss. 4. (1989) 527.; Richard MOBERLY: Sarbanes-Oxley’s Structural Model to Encourage Corporate Whistleblowers. *BYU Law Review*, 2006. 1107., 1117.; Richard MOBERLY: Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win. *William & Mary Law Review*, Vol. 49. (2007) 4–75.; Kelly BOULOUY: The Public Interest Disclosure Act 1998: Nothing more than a “Cardboard Shield”. [https://hummedia.manchester.ac.uk/schools/law/main/research/MSLR\\_Voll\\_1\(Bouloy\).pdf](https://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Voll_1(Bouloy).pdf); (date last accessed 1 July 2021).

<sup>9</sup> Daniele SANTORO – MAHONAR KUMAR: *Speaking Truth to Power – A Theory of Whistleblowing*. Cham, Springer, 2018.; Robert A. LAMER: WHISTLEBLOWING AND EMPLOYEE LOYALTY. *Journal of Business Ethics*, Vol. 11., No. 2. (1992) 125–128.; Emanuela CEVA – Michele BOCCHIOLA: THEORIES OF WHISTLEBLOWING. *Philosophy Compass*, 2019.

<sup>10</sup> Łucja KOBROŃ-GĄSIOROWSKA: Poland on the Path towards Whistleblower Protection. *Comparative Labor Law & Policy Journal*, <https://cllpj.law.illinois.edu/dispatches> (date last accessed 1 December 2020). See also: Terry Morehead DWORKIN – Janet P. NEAR: A Better Statutory Approach to Whistle-Blowing. *Business Ethics Quarterly*, Vol. 7., Iss. 1. (1997) 3.

does not cover all elements of the basic definitions of whistleblowing, e.g. that the reporting person may be a former member of the organization<sup>11</sup>.

In Poland, the concept of whistleblowing or only informing about irregularities is perceived with some reserve and this concept is very often associated with espionage, lack of loyalty to the employer, and informing. It is a relic of the PRL era, when almost every report addressed to the authorities could be considered disloyal<sup>12</sup>. In the Polish legal space, the issue of reporting irregularities is signaled a problem that needs to be addressed because there are no appropriate legal safeguards for whistleblowers, who can be anyone, i.e. employees, interns, apprentices, former employees, but also persons who do not have a typical employment relationship with the target organization<sup>13</sup>. This is not to say that countries with a long history of whistleblowing remain free from the problems of protecting ethical whistleblowers. However, Poland, as a post-communist country, must do a double job because during the COVID-19 pandemic the employee protection system with disciplinary dismissal from work for external disclosure of irregularities has brutally exposed the truth not only about the organizational aspect but above all the legal one, which somehow “allowed” retaliatory actions by employers towards employees. The latter were left to fend for themselves to defend themselves against their employer’s revenge<sup>14</sup>. Due to historical events, the definition of whistleblower in Poland is marked by very negative associations<sup>15</sup>. One of the key aspects of whistleblower protection is the court stage, i.e. an essential stage for the whistleblower who revealed the irregularities. As indicated by the Batory Foundation<sup>16</sup>, apart from historical reasons, it is postulated in Poland to introduce certain minimum standards related to the violation of legal and ethical standards in the workplace. A new law would help improve the image of whistleblowers in society and overcome their fear of stigmatization. The protection of whistleblowers is also presented by trade unions, which are rather in favour of strengthening the existing institutionalized forms of protection of workers’ rights, including leaders representing groups of workers and social labour inspectors. In their opinion, trade union leaders have statutory rights granted by groups of employees to defend their interests and counteract the violations of their rights<sup>17</sup>.

<sup>11</sup> R. Johnson, *Whistle-blowing: when it works – and why* (Boulder, CO, 2003) 3.

<sup>12</sup> Łucja KOBROŃ: Whistleblower: strażnik wartości czy donosiciel. *Palestra*, 2013/11–12. 298.; and see also: Marcin WUJCZYK: Podstawy whistleblowingu w polskim prawie pracy. *Przegląd Sądowy*, Vol. 23., Iss. 6. (2014) 114.; M. DERLACZ-WAWROWSKA: Whistleblowing a ochrona informacji poufnych pracodawcy. In: Gertruda Uścińska (ed.): *Prawo pracy. Refleksje i poszukiwania. Księga jubileuszowa Profesora Jerzego Wrątnego*. Warszawa, IPISS, 2013. 390.

<sup>13</sup> Łucja KOBROŃ-GĄSIOROWSKA: Whistleblower w prawie europejskim. Ochrona whistleblowera czy informacji. *Roczniki Administracji i Prawa*, No. XVIII/2. (2018) 132.; and also Helena SZEWCZYK: Whistleblowing w zakładzie pracy w świetle nowej dyrektywy 2019/1937 Parlamentu Europejskiego i Rady (UE) w sprawie ochrony osób zgłaszających przypadki naruszenia prawa Unii. *Praca i Zabezpieczenie Społeczne*, No. 2. (2020) 3.

<sup>14</sup> The 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).

<sup>15</sup> KOBROŃ-GĄSIOROWSKA (2018) op. cit. 132.; and also SZEWCZYK op. cit. 3.

<sup>16</sup> G. Makowski, M. Waszak, *Ustawa o ochronie sygnalistów w Polsce – o potrzebie i perspektywach jej wprowadzenia*, [https://www.batory.org.pl/wp-content/uploads/2020/09/Ustawa-o-ochronie-sygnalistow-w-Polsce\\_PP.pdf](https://www.batory.org.pl/wp-content/uploads/2020/09/Ustawa-o-ochronie-sygnalistow-w-Polsce_PP.pdf) (date last accessed 1 July 2021).

<sup>17</sup> Ibidem.

### 3. Not the “current” tendency

Currently in Poland there is a tendency to reveal irregularities outside the organization, most often by informing the media about a particular situation. The most famous case of censorship is the case of a midwife from a hospital in Nowy Targ<sup>18</sup>. The employee posted a photo on Facebook wearing a protective mask with a description. This included an account that her hospital did not have basic protection against the coronavirus. The employer gave the midwife a statement of termination of the employment contract without notice on the grounds that she allegedly violated the good name of the hospital and her basic employee duties i.e. care for the best interest of the workplace<sup>19</sup>. One of the obvious reasons for doing so may be that a leak to the media is viewed as safer for the individual than other forms of disclosure. Not surprisingly, there is a tendency to treat such leaks as illegal, while whistleblowing in accordance with certain rules may be viewed more positively. The second case was the subject of proceedings before the ECHR of 18 October 2011 in the case of a doctor who used the so-called internal ways of reporting irregularities existing at that time. Barbara Sosinowska was a specialist in lung diseases at a hospital in Ruda Śląska. She criticised the decisions of her superior regarding the diagnosis and treatment of patients. On this matter, she wrote a letter to the regional medical consultant in the field of lung diseases. Disciplinary proceedings were initiated against the doctor, accusing her of violating the principles of professional ethics by openly criticising the supervisor’s diagnostic and therapeutic decisions in the presence of other colleagues from the hospital – this was the opinion of medical courts, which sentenced B. Sosinowska to a reprimand. The doctor lodged a complaint against this decision with the ECHR. The Court found that there had been a violation of the doctor’s freedom of expression. In the opinion of the Tribunal, her criticism was substantive and the action was aimed at drawing the attention of the competent authorities to a serious, in her opinion, dysfunction in the work of her supervisor<sup>20</sup>.

Thus, in both cases, the reporting led to negative consequences for female employees, in the form of measures under labour law. The employees’ superiors, referring to their breach of basic employee duties, retaliated against them. In the case of the midwife, the reprisals were the hardest. Both internal and external reporting of irregularities is perceived as a sign of disloyalty to the employer and thus a violation of basic employee duties. Any perceived protection is based on labour law provisions that cannot be fully utilized in the aspect of whistleblower protection in Poland<sup>21</sup>. It must be indicated that Polish labour law does not currently provide whistleblower protection. As one may clearly notice, in both of the cases mentioned above, irregularities were revealed, which was met with immediate

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<sup>18</sup> March 2020.

<sup>19</sup> Available in Polish at: [https://serwisy.gazetaprawna.pl/zdrowie/artykuly/1463864,koronawirus-w-polsce-uciszanie-lekarzy.html?fbclid=IwAR0TugvIMeeqzlpb5vX7Rk\\_xqbGY8-8SmWbaB8bKujPfiVWYeZVFI76aHtE](https://serwisy.gazetaprawna.pl/zdrowie/artykuly/1463864,koronawirus-w-polsce-uciszanie-lekarzy.html?fbclid=IwAR0TugvIMeeqzlpb5vX7Rk_xqbGY8-8SmWbaB8bKujPfiVWYeZVFI76aHtE) (date last accessed 1 July 2021).

<sup>20</sup> <https://hudoc.echr.coe.int/eng?i=001-107053> (date last accessed 1 July 2021).

<sup>21</sup> Kobroń, Whistleblwer: strażnik wartości czy donosiciel, (298).

dismissal under a disciplinary procedure, based on the violation of primary employee duties<sup>22</sup>. It may be interesting that in the first case (concerning irregularities during the COVID-19 pandemic), the emphasis was placed on the protection of the employer's interests, in particular loyalty to the employer, which is supposed to sell off bad practices at the employer. In the case of Barbara Sosinowska, the Court restored the doctor to work, but she was reinstated due to the employer's formal errors during the disciplinary dismissal procedure. In Poland, in general opinion and contrary to the opinion of the labour court, the reinstatement of the doctor did not mean that it was not justified<sup>23</sup>. B. Sosinowska was charged with unethical behaviour towards her colleague. Medical courts of both instances found her guilty of violating the code of professional ethics, which consisted in openly criticizing her superior's diagnostic and therapeutic decisions in other colleagues' presence from the hospital<sup>24</sup>. The reinstatement of B. Sosinowska was justified by procedural reasons of terminating the employment contract without notice due to breach of employee obligations<sup>25</sup>.

#### 4. Unjustified dismissal under Polish Labour Law – Selected Problems

A Polish whistleblower, regardless of the form of reporting irregularities used, can only seemingly count on the extensive protection provided by the Polish Labour Code. Polish Labour Code states that the employer may terminate an employment contract without notice due to the fault of the employee in the following cases: 1) serious breach by the employee of the basic employee obligations<sup>26</sup>. Termination of an employment relationship without notice is an extraordinary way of terminating an employment contract with an employee. An act makes the solution of the nature of a unilateral legal act, which results in the immediate termination of the employment relationship when the statement of termination reaches the addressee, enabling them to become acquainted with it<sup>27</sup>. In the opinion of the Supreme Court, mentioned in art. 52 § 1 point 1 of the Labour Code, the serious breach must relate to the employee's basic duty. The assessment of whether the breach of the obligation is serious should take into account the degree of fault and the threat or violation of the employer's interests. There are three elements in the term "serious breach of basic employee duties" used in the above provision. These are

<sup>22</sup> Art. 52. § 1. p.1 Polish Labor Code.

<sup>23</sup> Case of Sosinowska v. Poland, no. 10247/09, p. 33.

<sup>24</sup> Compare: Frankowicz v. Poland, no. 53025/99, § 49, 16 December 2008.

<sup>25</sup> See more cases of the ECtHR on protection of whistleblowers are Marchenko v Ukraine, no 4063/04, 19 February 2009; ECtHR, Kudeshkina v Russia, no 29492/05, 26 February 2009; ECtHR, Heinisch v Germany, no 28274/08, 21 July 2011; ECtHR, Bucur and Toma v Romania, no 40238/02, 8 January 2013, ECtHR, Matúz v Hungary, no 73571/10, 21 October 2014; ECtHR, Pasko v Russia, no 69519/01, 22 October 2009.

<sup>26</sup> Art. 52 § 1 of Polish Labor Code.

<sup>27</sup> BARAN op. cit. 397.

1. unlawful behaviour of the employee (violation of the basic employee obligation); 2. infringement or threat to the employer's interests; 3. a fault that includes both wilful and gross negligence<sup>28</sup>.

A Polish whistleblower, regardless of the form of reporting irregularities used, can only seemingly count on the extensive protection provided by the Polish Labour Code. The starting point for considering the protection of informants must be Art. 100 of the Labour Code. Art. 100 § 2 point 4 of the Labour Code regulates the employee's duty to take care of the best interests of the workplace and the obligations to protect its property and keep secret information, the disclosure of which could expose the employer to damages. The first premise set out in Art. 52 § 1 of the Labour Code constitutes a serious breach of basic employee obligations. The legislator used a general clause, which may be interpreted very broadly<sup>29</sup>. The first required element is a violation of the basic employee duties, while the second one is the severity of the violation<sup>30</sup>. In the event of termination of an employment contract without observing the notice period due to the fault of the employee (Article 52 § 1 point 1 of the Labour Code), it is possible to indicate several reasons which the employer qualifies as a severe breach of basic obligations, and for the legality of such a statement of will, it is sufficient if at least one of them is proven by the employer<sup>31</sup>. The case-law of the Polish Supreme Court is extensive as regards the premises included in the notion of "serious breach of basic employee duties". From the point of view of the issue of interest to us, one should refer to the disciplinary dismissals commented on in this article, assessing the unjustified dismissal. In the case of B. Sosinowska, the employer terminating the employment contract with the doctor, in addition to the main accusation, which was unjustified criticism of another doctor, provided an unjustified reason for dismissal, being "failure to comply with the employer's instructions"<sup>32</sup>. On the other hand, in the case of a midwife working in conditions where the employer did not provide clothing to protect her against COVID-19, the reason was that "such behaviour was unacceptable". The general obligation to take care of the employer's best interest and property is due to the employee's duty of special loyalty<sup>33</sup>. This obligation applies to the employer's property and its intangible interests, such as reputation. For this reason, the aforementioned disclosure of the conditions in the hospital during the COVID-19 pandemic by a midwife in Nowy Targ was considered a breach of the obligation to look after the employer's interests. In the opinion of the Supreme Court, criticizing the employer and informing about possible irregularities of the employer is not a flagrant

<sup>28</sup> The judgment of the Supreme Court of December 6, 2018, II PK 233/17; See also: Walerian SANETRA: Rozwiązanie umowy o pracę bez wypowiedzenia w znowelizowanym kodeksie pracy. *Praca i Zabezpieczenie Społeczne*, 1996/6. 24–25.

<sup>29</sup> A. Dral, p. 25.

<sup>30</sup> A. Dral, p. 25.

<sup>31</sup> The judgment of the Supreme Court of 28 October 2018, II PK 188/17.

<sup>32</sup> The limit of the obligation to follow the employer's instructions is compliance with the law and the employment contract. If these limits are exceeded, the employee is not bound by the employer's instructions. The judgment of the Supreme Court of 5 August 2008, I PK 37/08.

<sup>33</sup> Zbigniew GÓRAL: Comment on art. 100. In: Krzysztof Wojciech BARAN (eds.): *Kodeks pracy. Komentarz*. Warszawa, 2016. 719–720.

breach of employee duties, even if the allegations indicated prove to be groundless<sup>34</sup>. This judgment only indirectly points to the existence of a potential whistleblowing institution. In the jurisprudence of the Supreme Court, there is a view that exceeding the limits of acceptable criticism may constitute grounds for drawing consequences against an employee, including termination of a contract without notice, may be. Criticism is considered admissible in the doctrine if it is compliant with the legal order (including the principles of social coexistence and morality), is formulated in an appropriate form and place, and is substantively justified<sup>35</sup>. It is assumed that acceptable and constructive criticism of superiors not only does not constitute a breach of duties but it may even prove that the employer's interests are taken care of. They are the highest indications that, for example, giving an interview in the mass media or making entries on internet forums and social networks should be considered as public criticism. The employee may, of course, critically evaluate the employer's performance; however, any public criticism should take an appropriate form and, in particular, must not be aimed at harming the employer.<sup>36</sup>

Thus, in the context of the facts cited in this study, disciplinary dismissal due to gross violation of employee obligations, i.e. under Art. 52 § 1 point 1 of the Labour Code, may be treated by the employer as the most convenient form of retaliation against an employee, as it causes immediate termination of the employment relationship. As the Supreme Court ruled, the very threat to the employer's interests is contained in the phrase "gross violation of basic employee duties"<sup>37</sup>. In 2013, the Supreme Court emphasized the need to introduce the institution of reporting irregularities and the need to protect the employee. According to the Supreme Court, an employee has the right to express admissible public criticism of his superior (the right to report irregularities in the functioning of their workplace consisting in various types of unfairness, dishonesty involving the employer or its representatives), if this does not lead to a breach of his employee duties, in particular the obligation to care for the best interest of the workplace and to keep secret privileged information, the disclosure of which could expose the employer to damage (duty of loyalty; not violating the interests of the employer - Article 100 § 1 point 4 of the Labour Code), as well as to comply with corporate rules of social coexistence (Article 100 § 2 point 6 of the Labour Code), the employee may not rashly justify in a subjective manner, or formulate negative opinions towards the employer or its representatives<sup>38</sup>. The application of immediate termination of employment by default of the employee, under Art. 52 § 1 p.1 of the Labour Code, requires the simultaneous fulfillment of two conditions. Apart from the breach of the basic employee obligation, the breach must be of a serious nature. In Polish jurisprudence, when referring to the concept of a serious infringement, it is indicated that it includes intentional fault

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<sup>34</sup> The judgment of the Supreme Court of 7 December 2006, I PK 123/06.

<sup>35</sup> The judgment of the Supreme Court of August 21, 2012, II PK 19/12.

<sup>36</sup> The judgment of the Supreme Court of November 16, 2006, II PK 76/06.

<sup>37</sup> The judgment of the Supreme Court of November 29, 2012, II PK 116/2012.

<sup>38</sup> The judgment of the Supreme Court of 28 August 2013, I PK 48/13.

and gross negligence. Intentional fault involves both direct intention (when the employee is aware that their behavior is unlawful and wants to cause a specific, unlawful effect) and possible (when the employee, being aware of the unlawfulness, agrees to cause a specific effect). Gross negligence occurs when the employee does not foresee that their behavior may violate the applicable regulations, although they could and should have foreseen it<sup>39</sup>. The noticeable discrepancy in the positions of the Supreme Court deserves attention. A thesis can be made – it is correct that the provisions of Art. 52 § 1 point 1 bound the Supreme Court, which does not use the definition of whistleblowing. It is also worth noting that the Polish legal system knows no precedents, so the jurisprudence of the Supreme Court cannot be treated in this way.

## 5. What is the role of trade unions in whistleblower protection in Poland?

In principle, trade unions should play a crucial role in influencing the implementation of the Whistleblower Protection Directive, which should not be negated. The mere implementation of the basic provisions on the protection of whistleblowers does not mean that trade unions can play a significant role in the effective protection of whistleblowers, as the trade union density in Poland is low and amounts to around 10%<sup>40</sup>. The fundamental question that should be raised here is whether employers will be willing to cooperate with whistleblowers. After all, it cannot be ruled out that the employer will not be interested in cooperation with the trade union, especially with the whistleblower, and perhaps for legitimate reasons. Therefore, the discretion in the scope of the EU directive should be assessed positively. Moreover, it is left to the Member States to define the role of trade unions in whistleblower protection. This discretion is positive in itself, if only from the point of view of the level of unionization in individual member states<sup>41</sup>. As organizations, trade unions should be strong enough to stand up to employers and support whistleblowers who fear retaliation for their actions<sup>42</sup>. Although one should not consider the above reasoning to be wrong, from the perspective of Polish trade unions' role in the whistleblower protection process, this thesis seems useless for several reasons. First of all, the unfortunate view that Poland's trade unions constitute a severe force in the struggle with employers may lead to a misconception about union membership in Poland. The claim about trade unions' strength might be correct because Polish trade unions operate mainly in the public sector

<sup>39</sup> The judgment of the Supreme Court of 20 December 2013, II PK 81/13, The judgment of the Supreme Court of 20 January 2016, II PK 311/14.

<sup>40</sup> (CBOS) Public opinion research center, [https://www.cbos.pl/SPISKOM.POL/2019/K\\_138\\_19.PDF](https://www.cbos.pl/SPISKOM.POL/2019/K_138_19.PDF).

<sup>41</sup> Preamble para. 54, EU Whistleblower Directive.

<sup>42</sup> See Grzegorz MAKOWSKI – Marcin WASZAK: *Whistleblowers in Poland as Seen by Employers and Trade Unions*. Warszawa, Fundacja im. Stefana Batorego, 2016.

(10%)<sup>43</sup>. Secondly, at present, trade union members may also be employees employed under civil law employment relationships and self-employed persons who may not always be interested in disclosing irregularities because they are not tied to the employer with such a strong relationship and dependent employees in the meaning of the Labour Code.

## **6. Expectation for protection under the Directive on the protection of persons reporting on breaches of Union law<sup>44</sup> – selected issues**

This subsection of the article aims to analyze the content of the provisions of the Directive relating to the so-called external information, taking into account the absence of this topic in the existing legal literature as well as the situation of Polish employees who have decided to report externally and the resulting retaliation of the employer in the form of disciplinary dismissal.

The entry into force of the Whistleblower Protection Directive was preceded by a series of consultations<sup>45</sup>. Since 2017, the European Commission has organized many consultations with various circles that were interested in the solutions provided in the newly created Directive. The conclusions highlighted the need to strengthen the protection of whistleblowers as a means of effective enforcement of national and EU law, mainly in cases of fraud and corruption, and the protection of workers' rights and freedoms. The consultations raised the issue of implementing the multi-level use of internal channels<sup>46</sup>.

As shown by the latest data from 21 out of 27 countries,<sup>47</sup> the European Union has started the process of implementing the Directive; however, it has already encountered resistance in some countries, including Germany. Poland still has not taken any actions in this regard, which will not positively affect the implementation of even the minimum protection standards set out in the Directive. According to Transparency International, the EU agrees: "We have 18 months to ensure that the necessary whistleblower legal protection, which we have worked so hard for at the EU level, really works in practice at the Member State level. These are the same months that Europe will ease restrictions on COVID-19. More whistleblowers will tell us where and how existing weaknesses in our systems need to be remedied in order to move the necessary public funding away from those who need it most. The EU whistleblower rate will help us request the change we need across Europe to protect whistle-blowers

<sup>43</sup> <https://www.pulshr.pl/związki-zawodowe/gus-podal-liczebnośc-organizacji-pracodawców-i-związków-zawodowych-w-2018-r,66709> (date last accessed 1 December 2020)

<sup>44</sup> Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305/17.

<sup>45</sup> Available at [https://ec.europa.eu/info/publications/annexes-proposal-directive-protection-persons-reporting-breaches-union-law\\_en](https://ec.europa.eu/info/publications/annexes-proposal-directive-protection-persons-reporting-breaches-union-law_en) (date last accessed 1 December 2020)

<sup>46</sup> Annexes on the Proposal, p. 69.

<sup>47</sup> See <https://euwhistleblowingmeter.polimeter.org/#promises> (excluding Poland) (date last accessed 16 December 2021)

who help us protect the public interest<sup>48</sup>. The European Commission itself showed the gaps in the European Union law system in the field of unequal whistleblower protection, which may pose a threat to the interests of the entire EU, which are necessary for the internal market's proper and functioning. Failure to effectively protect whistleblowers will result in threats that transcend national borders, and this means that whistleblowers will be suffering the consequences for wanting to protect the public interest<sup>49</sup>.

On November 26, 2019, the Directive (EU) 2019/1937 of the European Parliament and the Council on protecting persons reporting breaches of EU law, commonly known as the Whistleblower Directive, was published in the Official Journal of the European Union. Starting from December 17 2019, Member States have two years to introduce whistleblower protection provisions into their national legal systems. The EU Directive is a major achievement in the legal protection of whistleblowers and it provides for minimum harmonization standards that the Member States have committed themselves to implement in their legal systems. The Directive provides for the implementation of internal (internal channels)<sup>50</sup> and external (external channels) reporting processes that will enable employees and external persons such as job applicants and even volunteers to report EU law breaches and ensure that reports are monitored<sup>51</sup>. The obligation to implement information reporting processes will apply to the private sector of enterprises employing over 50 employees, as well as all companies from the financial sector, regardless of their size. The scope of the Directive covers public procurement, financial services, money laundering, product and transport safety, nuclear safety, public health, consumer protection, protection of privacy and personal data, protection of the financial interests of the Union, breaches of the internal market rules, including competition and aid rules, states or issues related to tax avoidance<sup>52</sup>. Notwithstanding, it is worth noting that the Member States are encouraged to consider extending its scope during transposition<sup>53</sup>. Therefore, instead of a horizontal initiative that can protect whistleblowers in every sector, as recommended by the European Parliament, the Commission chose a sectoral approach rather than a horizontal approach limited to cross-border protection of the EU market. It may take longer to adapt the national laws due to the COVID-19 pandemic. Member States are heterogeneous in this regard, as some have more experience in whistleblower protection<sup>54</sup>, while others have not even started to set a rule. In my opinion, the implementation of the Directive on whistleblower protection in the Member States of the European Union is only a starting point for

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<sup>48</sup> <https://whistleblowingnetwork.org/Our-Work/Spotlight/Stories/FINAL-WIN-EU-Whistleblowing-Meter-Press-Release-22.aspx> (date last accessed 1 December 2020)

<sup>49</sup> European Commission SWD(2018) 116 final, "Impact assessment", p. 3.

<sup>50</sup> Art. 12.

<sup>51</sup> Art. 4.

<sup>52</sup> Art. 2.

<sup>53</sup> See: <https://transparency.eu/wp-content/uploads/2018/08/Transparency-International-Position-paper-EU-Whistleblower-Directive-003.pdf> (date last accessed 1 July 2021).

<sup>54</sup> For instance: Slovakia or Hungary- a post-communist country.

creating a universal framework for whistleblower protection by the EU Member States. From the point of view of the presented issue, the significant meaning of the so-called external information presented in the Directive includes reporting irregularities to the media. The Directive adopted a means for grading the methods of reporting irregularities, as indicated by the authors of Art. 15: A person who makes a public disclosure shall qualify for protection under this Directive if any of the following conditions is fulfilled:

- (1) the person first reported internally and externally, or directly externally in accordance with Chapters II and III, but no appropriate action was taken in response to the report within the timeframe referred to in point (f) of Article 9(1) or point (d) of Article 11(2); or
  - (2) the person has reasonable grounds to believe that:
    - (a) the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or
    - (b) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.
2. This Article shall not apply to cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information.

There is no doubt that the controversy surrounding the Directive concerned the procedure of external reporting of irregularities, bypassing the institution's internal channels<sup>55</sup>. The adopted text of the Directive recognizes that employed persons are not required to notify their employer or superiors in advance to obtain legal protection. In the consultations carried out in 2017, there was quite strong resistance to the possibility of reporting irregularities to external bodies, bypassing internal reporting channels. It was stressed that EU actions should not encourage external reporting channels, but instead strengthen the internal reporting channels that should be easily accessible. One crucial argument was identified, which cannot be denied in all situations, namely that the employer may be able to deal with the problem before any external disclosure. This argument is remarkable because sometimes the employer, perhaps for good reasons, will not be interested in working with the employee.

The Directive states that freedom of expression will be protected against retaliation. Persons providing information about actions or omissions within the workplace (internal reporting) or to an external body (external reporting), as well as persons disclosing such information to the public (e.g., via the media or by publishing information on social media), will be protected. The whistleblower may publicly report the irregularity to the media but they must demonstrate that they have attempted to communicate the irregularity internally and externally first. Furthermore, the information

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<sup>55</sup> See: Summary results of the public consultation on whistleblower protection, p. 14.

communicated must pose an immediate or obvious risk to the public interest. However, these additional conditions seem risky when interpreted differently as “public interest” or even “threat to the public interest”. The formula is so broad that it may constitute an experimental field for national courts. According to the Directive, Member States shall take the necessary measures to ensure the protection of reporting persons who meet the conditions set out in Art. 21, against retaliation. Such measures shall include, in particular, those referred to in paragraph 1 p. 2-8 of this provision. The reporting persons shall not be liable in connection with obtaining or access to information that is the subject of reporting or public disclosure, provided that such obtaining or access does not constitute a separate prohibited act. Where such obtaining or access constitutes a separate offense, criminal liability remains a matter for the applicable national law. Remedial measures that the whistleblower may be entitled to include, for example, reinstatement, promotion, re-conclusion of a terminated contract, compensation for actual and future financial losses (for lost earnings in the past, but also for future loss of income, costs related to changing the profession), reimbursement of court fees and costs of treatment, and compensation for non-pecuniary damage (pain and suffering). Poland is on the eve of implementing these regulations, so why was the midwife from Nowy Targ dismissed in March 2020? Without relevant provisions dedicated exclusively to whistleblowers, at least in Polish labour law, whistleblowers remain unprotected.

## 7. Conclusion

The practice of informing about irregularities in the workplace is new in the Polish legal space, but it has been gaining more and more interest in recent years. The current Polish labour law in the field of reporting irregularities is based on the provisions of the labour law, i.e., fragmented legislation, and on the other hand, on jurisprudence, which is a consequence of the lack of a general regulation on whistleblowing. Traditionally, Polish labour courts have been reluctant to provide whistleblowers with comprehensive protection, assuming that any whistleblowing generally qualifies as a breach of essential employee obligations or the principle of loyalty to the employer, which may result in disciplinary dismissal. The positive change in whistleblowers’ perception should be noted primarily in the impact of changes in European Union legislation, particularly in the 2019 Directive on whistleblower protection. Nevertheless, whistleblower protection remains embedded primarily in the provisions on the conditions of protection against dismissal, focusing on balancing the parties’ rights and interests to the employment contract. The Directive itself confirms the protection of whistleblowers who make external reports, while at the same time leaving the Member States the freedom to assess such broad notions as public interest or threat to the public interest. Hopefully, the implementation of these rules will highlight the spirit of whistleblowing.