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WHISTLEBLOWING IN LIGHT OF THE WHISTLEBLOWER PROTECTION DIRECTIVE

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INTRODUCTION

Enabling whistleblowing is an element f building an ethical work environment. Whistleblowing is critical to preventing abuse in an organization. According to research by audit organizations, 40% of fraud investigations were initiated as a result of a whistleblower report. Whistleblowers in most cases report violations in the areas of finance, occupational safety and health, and data protection. Whistleblowing is an essential element of an organization's compliance risk management system.

Currently, whistleblowing regulations are already in place in over 40 countries around the world. Following the adoption of 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 ("Directive"), all European Union Member States will have until 17 December 2021 to implement national legislation in this area.

The draft national legislation implementing the Directive law was published on 18 October and was sent for consultations. The legal status of whistleblower protection in Poland is still ambiguous, but the Directive provides basic guidelines for national legislators.

WHISTLEBLOWER PROTECTION DIRECTIVE – WHAT DOES IT REGULATE AND WHO DOES IT APPLY TO?

The Directive applies to private and public entities with at least 50 employees. The Directive regulates the notification of actions that are incompliant with the EU law in selected areas of EU activity (e.g. in public procurement, consumer protection, public health, product safety or transport).

Generally, HR breaches are not covered by the Directive unless they pertain to privacy or personal data protection. However, employers may choose to also accept reports pertaining to other irregularities, such as suspected violations of all common laws, internal policies, regulations, or standards of conduct and ethics. Expanding the scope of regulation is desirable for efficiency of the whistleblowing system.

It should not be the employee's role to determine what type of violation we are dealing with and what regulations have been violated. Enabling reporting of all irregularities is intended to improve risk management in the organization by making the abuse reporting channel as "streamlined" as possible, including in terms of subject matter.

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The Directive applies to whistleblowers working in the private or public sector who have obtained information about violations in a "work-related context." A whistleblower can be: an employee or former employee, a job candidate, a collaborator (B2B), a person providing work under a civil-law relationship, a contractor, a partner/shareholder, a member of a body, an intern or even a volunteer. The condition for a person reporting a breach to be considered a whistleblower, with all the consequences thereof (the obligation to provide them with the protection afforded by the Directive), is good faith.

Good faith should be understood as a reasonable belief that the reported information is true and that it constitutes information on a breach of law.

According to the bill, the whistleblower protection regulations will not apply to whistleblowers who report a breach that affects only their rights, or when the report is made only in the individual interest of the whistleblower. Reporting is conditional on the requirement that there be a "public interest" or benefit other than that drawn individually by the whistleblower. This may be a challenge for employers at the report classification stage in complex and ambiguous cases.

The Directive imposes, among other things, the following obligations on employers:

- establishing whistleblowing channels adopting compliance procedures in the area of whistleblowing (procedure for receiving and classification of reports and following up on reports)
- keeping a record of reports
- clarifying the information contained in the report within a reasonable time, which in practice may require carrying out an internal investigation procedure
- providing whistleblowers with protection from retaliation for their report
- regular monitoring of the up-to-dateness of procedures (compliance-check).

The bill implementing the Directive provides only a 14-day vacatio legis. Employers with 250 or more employees need to hurry – the whistleblower protection system and follow-up rules must be in place in their organizations as soon as the law takes effect. It is also important that internal regulations must be consulted with the company's trade union organization or employee representatives, which in practice lengthens the process of adopting the policies. Employers with 50 to 249 employees in the private sector have until December 2023 to implement the new requirements.

WHAT TYPES OF REPORTS ARE THERE? SHOULD AN ANONYMOUS REPORT BE CONSIDERED?

The Directive and the bill of the national law distinguish between internal reporting, external reporting and public disclosures. Internal reporting is done, as the name implies, within the organization – to a designated person or designated body.

External reporting should be understood as a notification of competent – from the perspective of the subject matter of the report – public authorities, such as the Police, the Prosecutor's Office, the State Labour Inspection Service, the Polish Financial Supervision Authority or the Office of Competition and Consumer Protection. Reports can also be made to the Civil Rights Ombudsman, who has been designated in the bill as the central authority whose role is to provide information and support to whistleblowers, as well as to perform preliminary verification of reports and forward them to appropriate authorities.

An employer cannot require a whistleblower to make an internal report in the first place and prohibit the whistleblower from notifying the appropriate public authority. However, an employer may encourage such action by adopting an understandable internal procedure and conducting appropriate staff training. An element of “building trust" in the whistleblowing policy may involve allowing anonymous reporting.

The Directive left it up to Member States to decide whether reports from anonymous whistleblowers should be considered. The Polish legislator has not introduced such an obligation, but only a possibility (unless acceptance of anonymous reports results from separate regulations – e.g. reports in the area of counteracting money laundering and terrorist financing).

The last type of reporting listed in the Directive and the bill of the national legislation is public disclosure. It means publishing information about a breach, e.g. in the press or on the Internet. The granting of protection to a whistleblower making a public disclosure is subject to additional conditions.

It includes the making of at least an external report and the lack of feedback/follow up by the public authority, within the timeframe set by the authority's internal procedure. The external reporting requirement does not need to be satisfied if:

- the breach may pose a direct or obvious threat to the public interest, in particular, there is a risk of irreversible harm;
- making an external report will expose the whistleblower to retaliation;
- there is little likelihood that the authority will clarify the matter (e.g. where there is collusion between the public authority and the perpetrator of the breach or where the public authority participated in the breach).

FOLLOW UP

Following up on a report is one of the employer's primary responsibilities. The employer is required to receive, classify and investigate reports of suspected irregularities. It has 7 days to provide feedback to the whistleblower on the receipt of the report. The investigation, in turn,

should last no longer than 3 months. The legislator does not provide for an extension of time for the internal investigation procedure.

While the 3-month time limit will be sufficient for trivial and uncomplicated cases, it can be challenging in cases of serious violations that require an "evidentiary hearing" e.g. securing company equipment and reviewing documents, emails, or engaging investigators and security and IT specialists.

Neither the Directive nor the bill implementing it provide a detailed procedure for conducting investigations, nor do they detail specific activities that the employer should conduct to demonstrate that it has taken adequate follow up actions. However, it is a requirement that this is carried out by an independent entity. Implementation of this obligation will depend to a large extent on the specific situation – who is the subject of the report and what forces and resources the organization has at its disposal.

WHISTLEBLOWER PROTECTION MEASURES

The Directive and the bill of the national law provide for an open catalogue of whistleblower protection measures. In practice, this protection amounts to a prohibition on retaliation for a whistleblower's report. The protection includes, among other things, the prohibition of:

- termination or termination without notice of employment
- suspension, involuntary unpaid leave or equivalent measures
- demotion or withholding of promotion
- delegation of duties, change of the work location, reduction in pay, change in work hours
- suspension of training
- coercion, intimidation, mobbing or exclusion in the workplace
- discrimination, unfavourable or unfair treatment.

The protections are available not only to a whistleblower who is an employee but also to other persons who cooperate with the organization. In such a situation, it prohibited to apply unfavourable treatment by, for example, terminating, terminating without notice or refusing to enter into the legal relationship under which the whistleblower's work is or is to be performed.

If an organization terminates an employment/cooperation agreement, it will have to demonstrate that it was motivated by objective reasons and that its action is unrelated to the report.

CRIMINAL LIABILITY

The bill provides for criminal liability for the employer as well as the whistleblower. An employer may be liable for such actions as: obstructing reporting, failing to adopt internal procedures, retaliating, or violating its duty to keep a whistleblower's information confidential. A whistleblower, in turn, may be liable for making a report in bad faith (reporting false information).

The aforementioned types of criminal acts are punishable by a fine, restriction of freedom or imprisonment for up to three years.

SUMMARY

The adoption of the Directive should be viewed positively. It is a big step towards building a compliance culture in organizations. This is the first time when whistleblowing obligations are imposed on such a wide range of entities – until now, these regulations were implemented only in individual sectors (e.g. in the area of finance).

Member States have little time left to implement the Directive in their national laws. In Poland, the biggest challenges await employers with at least 250 employees, who – according to the bill – cannot count on a transition period to adjust to the requirements of the Directive.

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