



Dear Reader,

On October 7, 2019, the Council of the European Union adopted a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law. Poland will be given 2 years to adapt its national legislation to the new requirements. In our latest PRO HR, we describe compliance issues that will arise following the directive's entry into force and, above all things, the system for protecting whistleblowers who report suspicions of abuse in good faith.

In addition, we describe a new legal obligation in the area of AML, consisting in reporting beneficial owners to the register established under the act on anti-money laundering and combating the financing of terrorism. Importantly, the obligation to notify beneficial owners does not only apply to entities obliged within the meaning of the Act, but to all companies operating in Poland (except professional partnerships and public companies). Failure to comply with the notification obligation may result in a financial penalty of up to 1,000,000 PLN.

We also discuss the latest judicial practice concerning the offense of abuse of trust. The presented view of the Supreme Court confirms that not only the members of the management board may be responsible for abusing trust and causing significant material damage to the company.

I hope you'll find the read insightful,
Janusz Tomczak

Obligations of entrepreneurs arising from the adoption of the Directive

The implementation of the directive on the protection of whistleblowers will entail additional obligations for businesses and public entities. The Directive imposes the following obligations:

- establishing internal and external channels for reporting irregularities and adopting a procedure for receiving and following-up reports;
- registering notifications;
- looking into a notification within a reasonable period of time (the Directive stipulates that the period to provide feedback on the follow-up to the reporting person must not exceed three months from the date of the notification);
- regularly reviewing the procedures for receiving and following-up notifications;
- ensuring the confidentiality of the whistleblower's identity and protecting them against retaliation.

The protection of whistleblowers is to consist in counteracting the negative effects of their notification - the prohibition on termination of the employment agreement as a result of notification in good faith as well as other forms of repression on the part of the employer or co-workers. Protection against retaliation includes a prohibition on actions including suspension in duties, forced unpaid leave, demotion or suspension of promotion, transfer of duties, change of workplace, reduction of remuneration, suspension of training, intimidation, mobbing or exclusion in the workplace. The EU has left it up to the Member States to provide for proportionate and dissuasive sanctions. The Polish legislator will, therefore, be free to determine sanctions for natural and legal persons who hinder reporting, retaliate against whistleblowers or disclose their identity.

Companies must enter their beneficial owners in the Register

The Central Register of Beneficial Owners became operational on October 13. **The Register contains information about the beneficial owners of all commercial companies - except for professional partnerships and public companies.**



Advocate Damian
Tokarczyk

The register was established under the act on anti-money laundering and combating the financing of terrorism. The obligation to report its beneficiaries applies not only to entities that have been obliged by the law to implement specific anti-money laundering measures but to all companies.

Beneficial owners are natural persons who, by virtue of their ownership rights, can exercise a decisive influence on the decisions made by the company. These may be, primarily, partners in partnerships representing the company and managing its affairs, or partners in capital companies with at least 25% of votes in company board meetings (either directly or through entities controlled by them).

Beneficial owners are registered by persons authorised to represent the company, in accordance with the rules of representation. The registration is conducted electronically, using the form available on the website <https://crbr.podatki.gov.pl/adcrbr/#/>. The registration must be conducted using a qualified electronic signature or a signature confirmed by an ePUAP trusted profile. The registration form must be completed with the beneficiary's personal data (first name, surname, citizenship, country of residence, civil registration number PESEL/ date of birth) and a description of their status in the company, which gives them rights confirming that they are a beneficial owner. Companies are also obliged to report any changes in the data concerning beneficial owners. This obligation also applies if a former beneficiary loses their rights and a new real beneficiary acquires them.

The obligation of registering beneficial owners must be fulfilled by April 20, 2020. Failure to comply with this obligation may result in a financial penalty of up to 1,000,000 PLN. The penalty is imposed, by way of decision, by the General Inspector of Financial Information, the President of the National Bank of Poland or the President of the Polish Financial Supervision Authority.

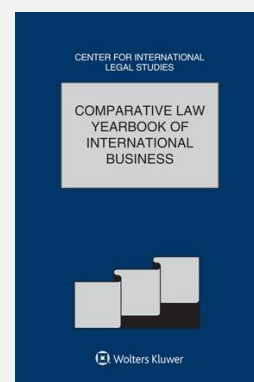
PUBLICATIONS

The Comparative Law Yearbook of International Business Volume 41

The 41st issue of the Comparative Law Yearbook of International Business spans an arc from nuanced discussion of the notion of "creativity" under various copyright regimes and product designations over corporate organization, acquisition and criminal conduct, regulation of payment services and tax evasion, to dealing with disruptive behavior in international arbitration.

The authors, practitioners and academics, from Japan, Poland, Romania, Greece, Turkey, Iran, Spain and England bring a medley of perspectives.

More information [here](#).



Not only board members are subject to penalties for the offense of abuse of trust.

The offense of abuse of trust consists in inflicting material damage to the company in the amount of at least 200,000 PLN as a result of abuse of rights or failure to fulfil an obligation. Liable for this crime are only those individuals who, on account of their entitlements, "handle the company's assets or its business activity". (Art. 296 of the Penal Code). Depending on the amount of damage and whether the perpetrator acted intentionally or unintentionally, the penalty may be as severe as up to 10 years imprisonment.

The judicial practice typically assumed that the perpetrator of the offence can only be a person who independently makes decisions on behalf of the company. They were usually board members and proxies. Depending on the circumstances of a specific event, proxies or senior executives could also be liable. In its judgement of July 3, 2019, (V KK 256/18), the Supreme Court pointed out, however, that decision-making independence must be assessed from the point of view of a given company's organisational structure, as it is often the case that the final decision (which led to damage to the company) comprises many actions and partial decisions taken by persons in lower positions. In practice, such partial decisions are not verified at a later stage and constitute the basis for concluding a contract or undertaking an investment or other business activities.

According to the Supreme Court, a manager's independence is determined not only by whether they make an "external" decision but also by whether they review the grounds for such a decision before making it. As the Court states, "Sometimes the decision-making autonomy will be connected with duties, which - if analysed separately from the mentioned organisational structure - may take the form of activities that only prepare a formal decision. This is the case in organisational structures here, due to legal or factual conditions, the entity formally authorised to make asset-related decisions does not formulate their content independently nor does it control them".

The Supreme Court's judgement is of great importance for the proper shaping of the responsibilities of persons at particular levels of the organisational structure. Furthermore, this verdict should be an impetus for verifying the structure of each organisation along with its decision-making processes.

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24 months to implement EU legislation on the protection of whistleblowers

On October 7, 2019, the Council of the European Union adopted a Directive on the protection of whistleblowers reporting cases where the Union laws are violated. EU member states will be given two years to implement the solutions stipulated in the directive. The Polish legislator will have to introduce a special regime for the protection of whistleblowers as well as handling of information provided by them.



Trainee Advocate
Ewelina Rutkowska

The directive stipulates the rules of reporting activities contrary to the EU law (e.g. in the sectors of public procurement, consumer protection, public health, product safety, and transport) and applies to whistleblowers working in the private or public sector who have obtained information about violations in a work-related context. A whistleblower may be an employee, a co-worker, members of company bodies or even candidates who report violations in good faith. The "work-related context", according to the Directive, means "current or future public or private sector work activities where, regardless of their nature, individuals can obtain information about violations and may experience retaliation when reporting them".

The directive on whistleblower protection and the national law

As far as the Polish legal system is concerned, there is no legal act comprehensively regulating the whistleblower's situation. The last attempt made by the legislator is the draft act on the liability of collective entities, which was submitted to the Sejm in January this year. It corresponds to the assumptions of the directive in so far as it obliges entrepreneurs to implement the procedure of reporting abuses and orders them to protect whistleblowers. Although, according to the principle of discounting parliamentary rights, it is not currently undergoing any proceedings, it nevertheless constitutes an important point of reference.

The whistleblower protection directive	Act on the liability of collective entities
Prohibition on, in particular: <ul style="list-style-type: none"> ✓ termination of the employment agreement based on a notification made in good faith ✓ suspension, compulsory unpaid leave, dismissal or equivalent measures ✓ demotion or suspension of promotion ✓ transfer of duties, change of workplace, decreased remuneration, change of working hours ✓ suspension of training ✓ negative evaluation of performance or negative opinion about the employee ✓ imposition of a disciplinary penalty, reprimand or any other penalty, including a financial penalty 	<ul style="list-style-type: none"> ✓ Obligation to implement a procedure for reporting violations and relevant proceedings ✓ Ensuring anonymity at the whistleblower's request ✓ Protection of the whistleblower's personal data ✓ Protection against retaliation and discrimination ✓ Prohibition of termination of the employment agreement due to a notification made in good faith (in cases of unjustified termination, the whistleblower may be entitled to compensation for the entire period of unemployment or reinstatement)



The whistleblower protection directive	Act on the liability of collective entities
<ul style="list-style-type: none">✓ coercion, intimidation, harassment or exclusion in the workplace✓ discrimination, disadvantageous or unfair treatment <p>failure to convert a fixed-term agreement into a permanent agreement</p> <ul style="list-style-type: none">✓ Obligation to implement a procedure for reporting violations and relevant proceedings✓ Ensuring anonymity at the whistleblower's request✓ Protection of the whistleblower's personal data	

It is also worth pointing out that the draft act on the liability of collective entities changed the regime of collective entities' criminal liability. The assumption consisted in the possibility to convict companies for any crime committed directly in connection with their activity, without waiting for the conviction of the perpetrator or even if they were not detected. This means that the company - employer - could also be held liable for crimes against employee rights, which was previously impossible. The draft provided for severe penalties - the dissolution of the company or imposition of a financial penalty - ranging from 30,000 to 30,000,000 PLN. The prosecutor's office had the right to control whether the company conducted an internal investigation after suspicion of a crime was reported. If no such investigation was conducted, the fine could increase up to 60,000,000 PLN.