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## EFFECTS OF EXTERNAL WHISTLEBLOWING IN POLAND

### Abstract

In Poland, reporting of irregularities by employees has been largely ignored. This topic is not part of the professional-ethical or normative discourse. External disclosure involves reporting the irregularity to an external entity that can react or take follow-up action. The issue of external reporting is a highly controversial problem of labor law in Poland, which is limited by the primary obligation of an employee specified in the Labor Code in Art. 100 § 2 points 4. Under such conditions, employees who report irregularities to repair the organization are treated as persons violating their loyalty to the employer, even though they demonstrated the will to rectify the offense and the accompanying readiness to act. An attempt to go beyond this dilemma is to be the new Directive of the European Union on the protection of whistleblowers and the presented draft Polish act on the protection of whistleblowers submitted on October 18, 2021. The transposition of the Directive provisions turned out to be a failure on December 17, 2021. For employees who decide to report irregularities externally, reporting irregularities is a complex dilemma that may break the ties of trust and dismissal by employer-relevant regulations. The Polish Labor Code requires the conceptualization of the rationality of notifications, despite the lack of appropriate regulations in this regard.

**Słowa kluczowe:** Polska, sygnalista, dylemat etyczny, zgłoszenie zewnętrzne, sygnalizowanie nieprawidłowości, dyrektywa o ochronie sygnalistów

**Keywords:** Poland, whistleblower, ethical dilemma, external reporting, whistleblowing, Whistleblower Protection Directive

**ASJC:** 3308, **JEL:** K31

### Introductory remarks

The dilemma about whistleblowing in Poland is exacerbated by the failure to transpose the provisions of the Whistleblower Protection Directive (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, OJ L 2019/305, pp. 17–56, hereinafter referred to as: “Whistleblower Protection Directive”; Regulation (EU) 2020/1503 of the

European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 (Text with EEA relevance), OJ L 2020/347, pp. 1–49) envisaged on December 17, 2021. This situation is also not favored by Poland’s economic and social problems caused by the COVID-19 pandemic. On October 18, 2021, the Government Legislation Center published a draft act on the protection of persons reporting violations of European Union law (UC101 list, which was to become the beginning of ending the dilemma, among others external reporting of employees—a problem especially during the pandemic, which affected not only employees in Poland. For instance as indicated by the Occupational Safety and Health Administration (OSHA) in the United States, since February 2021, more than 4,600 whistleblower complaints have been filed every day. On the other hand, the International Whistleblowing Network is also reporting a growing number of complaints made when healthcare professionals advocate maintaining working conditions during the COVID-19 pandemic. It was emphasized that some countries, such as China, India, and Poland, do not have any whistleblower protection laws. And although the United States implemented the Whistleblower Protection Act in 1989, the International Whistleblowing Network continues to report increasing instances of retaliation in the country. Nursing staff across the country have been fired or threatened with dismissal after fighting for safe working conditions (Handzel 2021). Medical professionals are particularly vulnerable to the most severe methods of retaliation, including mobbing and dismissal. Whistleblowers in the public sector in Poland often face the unique problem that their disclosure may lead to disciplinary dismissal. This can create an ethical dilemma when the ongoing violations are serious, and there is no reasonable prospect of taking any corrective action.

Ronald Duska points out that the obligation to report irregularities interferes with the duty of loyalty, i.e. included in the Polish Labour Code (Act of 26 June 1974, Dz.U. 2020, item 1320 consolidated text, as amended, hereinafter referred to as: “the Labour Code”) as the employee’s duty to care for the welfare of the workplace, protection of the employer’s property and the obligation to keep secret information, the disclosure of which could expose the employer to damage (Art. 100 § 2 point 4 of the Labour Code). In such a configuration, Ronald Duska indicates that we are dealing with the contradictory needs of the organization (Duska 1990, pp. 142–147). This article shows that the proposals of the Polish Labour Code regarding the employee’s obligations towards the employer are contradictory if we reconsider the concept of the employee’s obligations set out in Art. 100 § 2 points 4 of the Labor Code to meet the current characteristics of today’s organization. Going beyond this contradiction is hampered by the lack of transposition of the Directive provisions in the many EU Member States, including Poland. On the one hand, the need to go beyond the current contradiction in terms of the reconceptualization of whistleblowing and the strict obligations of employees in terms of employer loyalty is urgent. The contradiction in Polish law is that reporting irregularities, especially external ones, is mostly treated as a breach of the employer’s trust towards the employee, which in the best case may lead to the imposition of a disciplinary penalty on the employee (Art. 108 of the Labor Code) or even to disciplinary dismissal

under Art. 52 § 1 point 1 of the Labor Code: “The employer may terminate an employment contract without notice due to the employee’s fault in the event of a gross breach by the employee of basic employee duties.” The lack of reconceptualization of primary employee duties, regardless of whether and when Poland transposes the provisions of the Directive, will not lead to a breakthrough in the protection of whistleblowers and the related protection of at least some of the EU’s interests (Abazi 2020, p. 3; more by this author: Abazi, 2019). I am not saying, however, that the reconceptualization of primary employee duties must be total. On the contrary, a potential whistleblower should assess the status of the information before disclosing it outside. The second issue is whether the potential whistleblower has a specific legal or ethical obligation to disclose information. Regardless of the process of transposing the Directive’s provisions, there is a need to ensure that there is no contradiction between signaling and the scope of the employee obligation specified in Art. 100 § 2 points 4 of the Labor Code (judgment of the Supreme Court of 6 December 2018, II PK 233/17; judgment of the Supreme Court of 23 September 1997, I PKN 274/97; judgment of the Supreme Court of 16 November 2006, II PK 76/06, judgment of the Supreme Court of 9 July 2009, II PK 46/09). The currently existing contradiction results from the lack of rationality in the concept of employee duties confirm that the employee is required to have almost absolute and total tolerance of irregularities in the workplace (judgment of the Supreme Court of 6 July 2011, II PK 13/11; judgment of the Supreme Court of 24 February 2012, II PK 143/11). As shown by the coronavirus pandemic, the effect of external disclosures has led to considerations in this regard to a state of urgent change.

## How to report irregularities in Poland?

Whistleblowing is a practice accepted in Anglo-Saxon countries (UK and US, e.g.), although it is not without controversy. Whistleblowing is one of the types of ethical activity for reporting irregularities noticed, for example, in the workplace by employees. Offenses, such as illegal or unethical acts and improper behavior, occur in various sectors of the economy around the world, and the entities having direct contact with them are most often employees (Dworkin, Near 1997, p. 3; Dral 2011; Kobroń 2013, p. 296; 2015, pp. 81–92; Kobroń-Gąsiorowska 2018, pp. 129–142; 2020). Whistleblowing reports irregularities and is a form of objection, which may make the information public individually (Johnson 2003, p. 3). The act of informing about irregularities may be internal or external (Near, Miceli 1985, pp. 1–16). An internal act of whistleblowing means diverting the disclosure inside the organization where the misconduct was observed. The external whistleblowing act targets parties outside the organization where malfeasance has been observed (Near, Miceli 1985), such as authorities or entities capable of reacting and acting.

In Poland, the concept of reporting is a problem associated with espionage and a lack of loyalty to the employer. It is a relic of the Polish People’s Republic era, when almost every report submitted to the authorities could be considered disloyal (Derlacz-Wawrowska 2013, p. 390; Wujczyk 2014, p. 114). In the Polish legal space, the issue of reporting irregularities

is associated with a strong perception of the employee's belonging to the employer in the sense of the value and employee obligations that the employee should fulfill towards the employer. In Polish legal culture, the issue of whistleblowing is still very controversial, and it is criticized for the lack of adequate legal safeguards for a whistleblower who can be anyone, i.e., an employee, intern, apprentice, former employee, but also a person who does not have a typical employment relationship with the target organization (Kobroń-Gąsiorowska 2018, p. 132; Szewczyk 2020, p. 3).

Justifying reporting irregularities is not an easy dilemma, especially in a post-communist country, which is familiar with the negative experiences of "informing." Other difficulties may include: institutional secrecy, disproportion between private and public interest, or even restriction of rights and freedoms. In addition, there may be a problem related to the treatment of whistleblowing in a political context, which may be important not only for democracy and state security but also for individuals' fundamental rights and freedoms. An important aspect in the whistleblowing process is the controversy surrounding the issue of disclosing state secrets and employers' secrets, which the whistleblower breaches during the whistleblowing process.

In 2013, the Polish Supreme Court emphasized the need to introduce an institution for reporting irregularities and the need to protect employees in the context of employee reports. In the opinion of the Supreme Court, an employee has the right to express acceptable public criticism towards an employer (the right to report irregularities in the functioning of their workplace consisting in various types of dishonesty, dishonesty involving the employer or their representatives), if it does not lead to a breach of employee obligations, in particular the responsibility to care for the welfare of the workplace and to keep confidential information secret, the disclosure of which could expose the employer to damage (duty of loyalty; not violating the interests of the employer; Art. 100 § 1 point 4 of the Labor Code), as well as compliance with the company rules of social coexistence (Art. 100 § 2 point 6 of the Labor Code), an employee may not rashly subjectively justify themselves or formulate negative opinions towards the employer or its representatives (judgment of the Supreme Court of 28 August 2013, I PK 48/13). Thus, in the context of the facts cited in this study, disciplinary dismissal due to gross violation of employee duties, i.e. according to Art. 52 § 1 point 1 of the Labor Code may be treated by the employer as the most convenient form of revenge against the employee, as it results in the 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" (judgment of the Supreme Court of 29 November 2012, II PK 116/12).

Although the disciplinary dismissal requires Art. 52 § 1 point 1 of the Labor Code, the simultaneous fulfillment of two conditions does not leave the slightest illusions about the validity of this solution. Apart from the breach of the primary employee obligation, the breach must be of a serious nature. In Polish jurisprudence, referring to the concept of a serious breach, it is indicated that it includes intentional guilt and gross negligence (judgment of the Supreme Court of 20 December 2013, II PK 81/13; judgment of the Supreme Court of 20 January 2016, II PK 311/14; Sanetra 1996, pp. 24–25, Dral 2011, p. 25).

A gross breach of essential obligations from reporting irregularities is a breach of the principle of loyalty to the employer or workplace. The jurisprudence of the Supreme Court concerning the premises contained in the concept of “serious breach of basic employee duties” is very extensive (judgment of the Supreme Court of 28 October 2018, II PK 188/17). From the point of view of the issue of interest to us, it should be recognized that the general obligation to look after the good and property of the employer results from the duty of special loyalty of the employee, but at the same time whistleblowing does not have to completely exclude commitment, with the fact that we will not get rid of the dilemma of loyalty in employment relationships without its reconceptualization.

### **Expectation for external whistleblowing protection under the Directive (EU) 2019/1937 on the protection of persons reporting on breaches of Union law**

This subsection of this paper 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>1</sup> Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, described the directive as a “game changer.” According to Vigjilencia Abazi, the Commissioner exaggerated the importance of the new rules; however, they do draw from the best practice in many ways, because they contain a broad definition of who can be a whistleblower, covering a wide range of policy areas, including the public and private sectors. All forms of retaliation against whistleblowers are prohibited, and in the event of alleged retaliation, the burden of proof that there has been no retaliation lies with the employer. Frans Timmermans confirmed this with the words:

Many recent scandals might never have come to light if insiders did not dare to speak up. If we protect whistleblowers better, we can better detect and prevent harm to the public interest, such as fraud, corruption, corporate tax avoidance, or injury to human health and the environment. There should be no penalties for doing the right thing. In addition, today’s proposals also protect those who provide information to investigative journalists, helping to ensure the protection of freedom of expression and media freedom in Europe.<sup>2</sup>

<sup>1</sup> Annexes on the Proposal for a Directive on the protection of persons reporting on breaches of Union law, [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) (access: 1 December 2021).

<sup>2</sup> European Commission, Whistleblower Protection: Commission Sets New, EU-wide Rules, Press Release, 23 April 2018, [ec.europa.eu/commission/presscorner/detail/en/ip\\_18\\_3441](https://ec.europa.eu/commission/presscorner/detail/en/ip_18_3441) (access: 1 December 2021).

An essential aspect of relevance for prospective whistleblowers is the rejection of Art. 153 TFEU as a legal basis (Consolidated version of the Treaty on the Functioning of the European Union, OJ C 2012/326, pp. 47–390, hereinafter referred to as: “TFEU”). It was indicated that such an initiative would regulate aspects of whistleblower protection with regard to the improvement of the working environment to protect workers’ health and safety and working conditions, and would also provide protection to workers reporting breaches of both national and EU law. The personal scope of such an initiative would be minimal. This would only include workers and leave other potential whistleblowers unprotected, such as contractors, contractors or suppliers. Also, Art. 153 TFEU would not be an appropriate legal basis to harmonize the laws of the Member States governing what constitutes legal reporting of irregularities. Finally, an initiative based on Art. 153 TFEU could result in a burden on employers that would not be justified by the additional benefits of improved enforcement of EU law. A focus on protecting the health and well-being of workers and their working conditions could mislead workers and lead to a significant increase in the number of reports of individual work-related complaints (and thus higher costs for the employer in investigating such information), but would not translate into this means a higher rate of detection of infringements of EU law. Overall, a legislative initiative based on Art. 153, extending protection also to situations where there is no cross-border dimension or other spillover effects, where it is not related to EU law or the EU’s financial interests, would be far-reaching—and consequently also quite costly and appear to fall short of proportionality.<sup>3</sup>

Given the above and the high international standards of whistleblower protections, the Commission has opted for a broad approach, thus rejecting the horizontal approach. Chapter IV, which includes Art. 15 can be considered as one of the elements of the central part of the Whistleblower Protection Directive because it contains the conditions for the protection of the so-called external whistleblowers, i.e., people who disclose outside the organization. Only a person who has reasonable grounds to believe that: the breach may constitute a direct or apparent threat to the public interest, e.g., in the event of an emergency or a risk of irreparable damage; or if an external report is submitted, it will be at risk of retaliation or the breach is unlikely to be effectively addressed due to the specific circumstances of the case, such as the

<sup>3</sup> Annex to the Communication from the Commission, EU law: Better Results Through Better Application, {C(2016) 8600 final}, OJ C 2017/18, pp. 10–20, [https://ec.europa.eu/info/publications/communication-commission-eu-law-better-results-through-better-application\\_en](https://ec.europa.eu/info/publications/communication-commission-eu-law-better-results-through-better-application_en) (access: 1 December 2021), p. 10. See indicated there: Political guidelines for the next term of the European Commission of 15 July 2014 and letters describing the tasks of 1 November 2014 sent by the President to the Vice-Presidents and Commissioners; Commission Communication, Better monitoring of the application of Community law, 16 May 2003, {COM(2002)725 final}, [https://ec.europa.eu/governance/docs/comm\\_infraction\\_en.pdf](https://ec.europa.eu/governance/docs/comm_infraction_en.pdf) (access: 1 December 2021); Communication from the Commission, A Europe of Effectiveness—Applying Community Law, 5 September 2007, {COM(2007) 502 final}, [https://eur-lex.europa.eu/resource.html?uri=cellar:6fc1ad14-7018-485f-bceb-ab767b5c5927.0003.02/DOC\\_3&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:6fc1ad14-7018-485f-bceb-ab767b5c5927.0003.02/DOC_3&format=PDF) (access: 1 December 2021); Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the rule of law, 1 March 2014, {COM(2014) 158 final}, <https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:52014DC0158&from=NL> (access: 1 December 2021).



possibility of concealing or destroying evidence or the possibility of cooperation between the authority and the perpetrator or the authority's participation in the breach.

It is up to the Member States to ensure that the conditions of protection are respected and implement a set of measures to ensure an effective level of protection and provide legal, financial, and interim remedial measures. Therefore, Art. 15 and 16 indicate which measures are appropriate to implement to guarantee high protection standards, including ensuring citizens the right to access free information on protection measures and assistance from competent national authorities. The provision also guarantees security to persons reporting irregularities via external channels, including confidentiality, legal aid, and financial aid.

In accordance with the principle of attribution of competences and pursuant to Art. 2 of the Whistleblower Protection Directive, only "violations of EU law" in particular such violations that fall within the scope of the legislative acts defined in the Directive: public procurement; financial services, products and markets; prevention of money laundering and terrorist financing; product safety; transport safety; environmental Protection; radiation and nuclear safety; food and nutrition safety; animal health and welfare; public health; consumer protection; protection of privacy and personal data; and the security of network and information systems. Infringements affecting the Union's financial interests and violations of the internal market are equally covered. Moreover, the broad material scope of the Directive is not exhaustive, as long as it provides for the possibility of "extending protection under national law to areas or acts that do not fall within the material scope".

The intense controversy surrounding the Directive has focused on external reporting of irregularities, disregarding internal channels of the institution. In the consultations carried out in 2017, there was quite a strong resistance to the possibility of reporting irregularities to external authorities bypassing internal reporting channels. It was stressed that EU action should not encourage external reporting channels but strengthen internal reporting channels that should be easily accessible. One key argument was highlighted: an employer can deal with a problem before disclosing it to the outside world by creating an organizational culture based on transparency. This argument is noteworthy because sometimes the employer, perhaps for good reasons, will not be interested in working with the employee.<sup>4</sup>

The Directive states that freedom of expression will be protected against retaliation. Persons providing information about actions or omissions in the workplace (internal reporting) or an external body (external reporting), as well as persons disclosing such data to the public (e.g., via the media or by publishing information on social media) will be protected. Whistleblowers may publicly report the irregularity to the media but must first demonstrate that they tried to communicate it internally and externally. Furthermore, the information transmitted must present 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 draft reporting procedure was one of the main points of

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<sup>4</sup> Summary results of the public consultation on whistleblower protection, [https://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=54254](https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54254) ec.europa.eu/newsroom/just/item-detail.cfm?item\_id=54254 (access: 1 December 2021), p. 3.

contention in the negotiations between the Council and Parliament. For example, Virginie Rozière MEP—rapporteur for the directive—opted for a more flexible approach, allowing whistleblowers to report via any of these three channels from the outset.<sup>5</sup> The Directive's text finally adopted opt for a procedure that allows: whistleblowers to report via internal reporting channels or external agencies in first instance. Public disclosure is indicated in the Directive as one of the possibilities of disclosure only when both internal and external channels have failed to bring the expected effect and in the case of a direct and obvious threat to the public's interest, if there is a risk of retaliation or a low probability of successful settlement of the case. Report through the agency's internal or external reporting procedures. Poland not only did not transpose the provisions of the Directive into its legislation as of December 17, 2021, but at the same time, there are currently no studies on the conceptualization of the employee's attitude to duty. There may be much more controversy about disciplinary dismissal for those who wish to make an external report. Without relevant provisions dedicated exclusively to whistleblowers and the reconceptualization of employee obligations towards the employer, at least in Polish labor law, whistleblowers remain without protection.

## Conclusion

Despite these risks, there are strong reasons to let reports externally and justify it. Perhaps the difficulties with the transposition of whistleblowing result from the lack of terminological and conceptual order in employee duties, particularly the principles of loyalty and caring for the welfare of the workplace. The failure of the transposition of the Directive in Poland requires some reflection in reporting irregularities. The Directive itself was to make a positive change in the perception of whistleblowers in Poland. Nevertheless, the protection of whistleblowers remains embedded primarily in the provisions on the conditions of protection against dismissal, focusing on balancing the rights and interests of the parties to the employment contract. The Directive confirms the protection of whistleblowers making external reports while leaving the Member States the freedom to assess broad concepts such as public interest or a threat to the public interest. Unfortunately, the Directive excludes the so-called declarations related to work performance, although the Member States have the option to extend the material scope.

The labor law in force in Poland in the field of reporting irregularities is based on the provisions of the labor law, i.e., fragmented legislation and conceptually unadapted to reporting irregularities outside the organization, and on the other hand, on the jurisprudence, which is a consequence of the lack of a general regulation on whistleblowing. Polish labor courts are also not helpful in being reluctant to provide whistleblowers with comprehensive protection, notwithstanding the perceivable need to protect whistleblowers who report irregularities, assuming that each report qualifies as a breach of essential employee obligations or the

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<sup>5</sup> <https://whistleblowerprotection.eu/blog/roziere-positions-whistleblower-protection-law-as-response-to-public-concerns/> (access: 1 December 2021).



principle of loyalty to the employer. I see another controversy here, as there is currently no analysis of the loyalty limits problem, if one exists in the context of reporting irregularities, i.e., loyalty exists as long as I am subordinate as part of a group of employees. In short, the discussion on the employee's duty to care for the welfare of the workplace and loyalty will be the subject of further analysis.

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