

Law

Towards a Better Protection of Workplace Whistleblowers in the Visegrad Countries, France and Slovenia

edited by Dagmara Skupień



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UNIWERSYTETU
ŁÓDZKIEGO

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UNIwersytetu
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Łódź–Warszawa 2021

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About the International Visegrad Fund

The Fund is an international donor organization, established in 2000 by the governments of the Visegrad Group countries — Czechia, Hungary, Poland, and Slovakia to promote regional cooperation in the Visegrad region (V4), as well as between the V4 region and other countries, especially in the Western Balkans and Eastern Partnership regions. The Fund does so by awarding €8 million through grants, scholarships, and artist residencies provided annually by equal contributions of all the V4 countries. Other donor countries (Canada, Germany, the Netherlands, South Korea, Sweden, Switzerland, the United States) have provided another €10 million through various grant schemes run by the Fund since 2012.

More about the International Visegrad Fund: <https://www.visegradfund.org/>

About the Visegrad Grant “Workplace Whistleblower Protection in the V4 Countries, France and Slovenia” (WhistlePro)

The project focuses on the protection of workers who reveal irregularities or breaches of law in their organisations, both in the public and private sectors (whistleblowing).

With the support of the Slovenian and French legislative experiences, it aims to contribute to the improvement of the legal framework in the Visegrad (V4) countries concerning the protection of whistleblowers and indirectly to the change of attitude of workers towards whistleblowing.

The main goal of the project is to develop a model for the effective protection of whistleblowers in all the V4 countries, especially taking into consideration the obligation of all the EU Member States to implement the 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 by 17 December 2021.

The WhistlePro Grant is coordinated by the University of Lodz, Faculty of Law and Administration in cooperation with Charles University in Prague, Károli Gáspár University of the Reformed Church in Hungary, Trnava University in Trnava, the University of Maribor and the University of Tours.

The project is co-financed by the Governments of Czechia, Hungary, Poland, and Slovakia through Visegrad Grants from the International Visegrad Fund. The mission of the Fund is to advance ideas for sustainable regional cooperation in Central Europe.

More information: <https://wpia.uni.lodz.pl/en/research/whistlepro>

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This publication was made possible through Visegrad Grant
(No. 21930021) Workplace Whistleblower Protection in the V4 Countries, France and Slovenia
(WhistlePro) from the International Visegrad Fund

#WHISTLEPRO



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<https://doi.org/10.18778/8220-639-5>

Published by Lodz University Press

First edition. W.10406.21.0.K

Publisher's sheets 16,5; printing sheets 15,625

ISBN WUŁ 978-83-8220-639-5

e-ISBN WUŁ 978-83-8220-640-1

ISBN PWN 978-83-01-21964-2

Lodz University Press

90-131 Lodz, 8 Lindleya St.

www.wydawnictwo.uni.lodz.pl

e-mail: ksiegarnia@uni.lodz.pl

tel. 42 665 58 63

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Introduction

Dagmara Skupień¹

<https://doi.org/10.18778/8220-639-5.01>

The contributions in this monograph are the result of research completed within the Visegrad Grant (No. 21930021) “Workplace Whistleblower Protection in the V4 Countries, France and Slovenia” – WhistlePro (2020–2021) financed from the International Visegrad Fund.² The project aims to contribute to the improvement of the legal framework in the V4 countries concerning the protection of workplace whistleblowers and indirectly to the change of workers’ attitude towards whistleblowing.

The research within this project consisted in the comparative analysis of national legislations, caselaw and practice in the countries of organisations participating in the project, namely Visegrad Group countries (Czechia, Hungary, Slovakia, Poland), France and Slovenia concerning the protection of workplace whistleblowers, detection of legislative shortcomings and loopholes in each of the countries and – in the final step – preparation of proposals for the improvement of the legislation in the Visegrad countries and possibly also in France and Slovenia, taking into consideration European and international law.³

The chance to contribute to the amelioration of the legislation concerning whistleblower protection appeared as all the EU Member States became obliged to implement the 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 by 17 December 2021 (EU Whistleblower Protection Directive).⁴

The idea to consolidate the efforts of researchers from the V4 countries in the area of workplace whistleblower protection was bound with the historical and present situation of the region. All the Visegrad countries have experienced loss of national sovereignty to foreign powers in different periods of time as well as totalitarian

1 Dr hab., Professor at the University of Lodz.

2 The project is co-financed by the Governments of Czechia, Hungary, Poland and Slovakia through Visegrad Grants from the International Visegrad Fund. The mission of the Fund is to advance ideas for sustainable regional cooperation in Central Europe. For more details about the WhistlePro project see <https://www.wpia.uni.lodz.pl/en/research/whistlepro>, accessed 01/09/2021.

3 This publication reflects the law as at 1 September 2021 (unless otherwise indicated by Authors).

4 With transitional period guaranteed for medium-sized enterprises (50–249 workers). In this regard, Member States shall bring into force laws, regulations and administrative provisions necessary to comply with the obligation to establish internal reporting channels under Article 8(3) of the EU Whistleblower Protection Directive by 17 December 2023.

dictatorships and despised informant systems.⁵ These facts of the history left a trace in society, namely a certain reluctance towards denunciators, “snitches” or collaborators. The Corruption Perception Index is still less favourable for these countries in comparison with the most developed countries.⁶ The legal researchers’ cooperation and benchmarking practices in the region have a long-lasting tradition. Therefore, a research project was launched to elaborate common proposals for legislative changes concerning workplace whistleblower protection in the V4 countries.

Contributions from France and Slovenia are particularly precious for the WhistlePro Grant goals. Being a Central-European country with similar post-communist roots, Slovenia achieved an advanced level of legislation in the field of combatting corruption, namely it adopted the Integrity and Prevention of Corruption Act in 2010 (ZIntPK). France adopted a legal act concerning the transparency and prevention of corruption⁷ (Loi Sapin II), a part of which is dedicated to the guarantee of measures for the protection of whistleblowers. Moreover, the system of guidance of persons disclosing irregularities in France is guaranteed by the Defender of Rights.

The monograph begins with Marcin Górski’s contribution referring to Article 10 (Freedom of Expression) of the European Convention of Human Rights, which lies at the very heart of every act of whistleblowing. The author analyses the caselaw of the European Court of Human Rights concerning complaints related to breach of the freedom of expression by the Member States in cases of whistleblowing and draws conclusions with regard to the conditions to obtain protection based on Article 10 against any acts of retaliation. In the second part of his analysis, the author makes an interesting comparison between the ECoHR’s test for the legality of public whistleblowing and the requirements laid down in Article 15 of the EU Whistleblower Protection Directive.

Zbigniew Hajn in his chapter analyses the personal scope of the EU Whistleblower Protection Directive, trying to answer not an easy question, namely who is protected against acts of reprisals and who should bear responsibility for them. The author draws attention to the fact that the EU Whistleblower Directive uses not the term of “whistleblower”, but of “reporting person”. The author presents the personal scope of protection against retaliation, which covers not only reporting persons who fulfil the conditions to be found in various provisions of the Directive, but also other persons who are vulnerable to retaliation because of their relationship with the whistleblower. The notion of “work-related context” is explained. In addition, the chapter discusses controversial issues, namely the appropriateness of providing protection measures to legal persons, anonymous reporting persons and persons who intended or attempted to make a whistleblowing report or even who

5 See also A. Kun in this monograph.

6 Compare Corruption Perception Index for 2020, <https://www.transparency.org/en/cpi/2020/index/>, accessed 01/09/2021.

7 La loi No. 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et la modernisation de la vie économique.

are believed or suspected to be whistleblowers. In the final part of the text, the list of entities obliged to perform the protection duty under the Directive is analysed.

The publication follows with the chapter of Gwenola Bargain. The author examines the legal situation of whistleblowers in France under Loi Sapin 2 and other legal acts concerning whistleblowers. The assessment of the effectiveness of the French instruments by the author is not idolatrous. Shortcomings such as especially too restrictive conditions for the whistleblower status to be granted to a given person (seriousness of the disclosed breach of law, disinterested character of the disclosure) are detected. Moreover, the author argues that the protection or even the status of a whistleblower should be granted not only to natural persons, but also to legal persons, which would result in protecting the individual against retaliation. The author also explains the competencies of the French Defender of Rights, expressing a view that the assistance given so far by this institution to whistleblowers has not been fully effective and that there is a need for a specialized inspectorate concerning whistleblowers which could be included in the structure of the Defender of Rights.

Darja Senčur-Peček presents in her chapter an in-depth analysis of the Slovenian legislation guaranteeing instruments of whistleblower protection in the light of international and EU law. Anti-corruption legislation, labour law instruments and anti-discrimination law are discussed in this contribution. Even though the Slovenian legal framework concerning whistleblowing is internationally perceived as advanced, there is still much room for improvement, especially in the sphere of whistleblower protection against retaliations.

As the analysis showed, the protection of whistleblowers is insufficient in all V4 countries. In the Czech Republic and in Poland, workplace whistleblowers may seek protection on the basis of various different legal acts, but despite legislative proposals put forward by both the government and non-governmental organizations, there is no legal act which would regulate the protection of whistleblowers in a complex, comprehensive way. The protection is granted in an insufficient way on the basis of different dispersed legal acts. In Slovakia and Hungary, separate legal acts concerning the protection of whistleblowers are in force, but their effectiveness is criticized.

The chapter by Jakub Morávek and Jan Pichrt presents legislative efforts made so far in the Czech Republic to regulate whistleblower protection in one single act and indicates possible reasons for the failures to achieve this aim. Then, the authors undertake a critical assessment of the Czech bill aiming at the transposition of the EU Whistleblower Directive. Particular criticism concerns the wide scope of disclosures giving rise to protection, covering also insignificant irregularities as well as imposing high administrative and financial burdens on companies. Furthermore, the chapter covers proposals for such incentives as private action in public interest. As it concerns protection of whistleblowers, interestingly enough, the authors break up with the traditional approach, according to which the continuity of the whistleblower's employment seems to be the highest value for the employer. They propose to guarantee the right of the workplace whistleblower to terminate the employment contract with the right to compensation.

The contribution of Attila Kun focuses on the whistleblowing system guaranteed on the basis of Act CLXV of 2013 on Complaints and Public Interest Disclosures. The author shows the strong sides of this system (electronic reporting channel monitored by the Hungarian Commissioner for Fundamental Rights, personal data protection mechanisms) as well as its weaknesses, namely the narrow personal scope or the insufficient system of the protection of whistleblowers under labour law provisions. The chapter culminates with proposals for changes of the Hungarian legislation on the occasion of the transposition of the EU Whistleblower Protection Directive.

Dagmara Skupień in her chapter concerning Poland writes about various dispersed sources of law under which the whistleblower may seek protection, namely general principles of labour law and the caselaw of the Supreme Court in labour disputes as well as numerous sectoral acts. The main disadvantage of the legal situation of whistleblowers in Poland is that they usually have to defend themselves in the course of labour disputes in cases concerning dismissal, but neither protection nor measures of support are granted *ex ante*. Moreover, atypical workers or civil law workers are not protected effectively against retaliations.

Protection of personal data is crucial for the safety of the whistleblower. Possible ways to improve the situation in this realm are analysed by Edyta Bielak-Jomaa. The author examines both internal (in the private and the public sector) and external channels, seeking solutions that would reinforce the guarantee of confidentiality of the whistleblower's personal data as well as the data of the alleged wrongdoer. The importance of creating an appropriate structure of internal channels taking into consideration different factors, such as the employer's size, organizational structure, industry or sector of operation, available financial resources or the level of risk of potential fraud, is underlined. Proposals *de lege ferenda* are put forward, especially for the Polish legislature, but they have a more universal character.

Peter Varga and Veronika Zoričakova in their chapter take into close scrutiny the Slovak legislation concerning the protection of persons who disclose anti-social activities. They present essential elements of whistleblower protection guaranteed by this law. Moreover, they draw attention to the measures of protection granted on the basis of anti-discrimination law. The Slovak legal framework, even though seemingly advanced, leaves much room for improvement, which may be carried out on the occasion of the transposition of the EU Whistleblower Protection Directive. Especially, the authors underline the main disadvantage of the present system, namely different levels of protection granted to persons disclosing irregularities depending on the qualification of these irregularities as anti-social activities or not. It seems that much hope is pinned on making the new Whistleblower Protection Office fully operational.

In the closing chapter, Zbigniew Hajn and Dagmara Skupień present the summary of the proposals for changes in the legislative framework of the V4 countries and possibly also France and Slovenia as well as other EU Member States. The authors cover such issues as the method of transposition of the EU Whistleblower Protection Act into national laws, relationship of general acts with sectoral provisions, material

scope of whistleblowing acts, personal scope of whistleblowers and duty-bearers, the appropriate construction of internal and external reporting channels, problems related to anonymity and confidentiality, protection against retaliations, measures of support, financial incentives, as well as sanctions for preventing or deterring whistleblowing or for the misuse of the right to blow the whistle.

In conclusion, this monograph was prepared with the expectation that it would put forward useful solutions which could be employed in the complicated task of implementing the EU Whistleblower Protection Directive in the Visegrad countries as well as France and Slovenia. A clear legal framework of protection consolidated in one single act of general application (with references to sectoral provisions) would certainly provide more legal certainty and encourage persons who consider reporting breaches of law noticed in their work environment. It would contribute to the improvement of the public perception of whistleblowing and as a consequence to the reduction of the occurrence of such harmful phenomena as corruption, illegal environmental pollution and waste, economic crimes or breaches of labour law. On the other hand, the future legislation should not protect false denunciators whose intention is to take revenge on their employers or simply cause harm to the organization due to private reasons or in the interest of competitors.

Part 1

Workplace Whistleblower Protection in the European and Comparative Perspective

Interactions between the Interpretation of Article 10 ECHR and the EU Directive on the Protection of Whistleblowers

Marcin Górski¹

<https://doi.org/10.18778/8220-639-5.02>

Introduction

Directive 2019/1937² provides for measures concerning whistleblowers reporting breaches of EU law which protect them when they report internally within a given organization (Article 7) or externally (Article 10) or made a public disclosure (Article 15).

Pursuant to Article 15 of the Directive 2019/1937, a person who makes a public disclosure shall qualify for protection under this Directive if any of the following conditions is fulfilled:

- (a) 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
- (b) the person has reasonable grounds to believe that:
 - (i) 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
 - (ii) 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.

¹ Dr hab., Professor at the University of Lodz.

² 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 305, 26.11.2019, pp. 17–56.

Recital 31 of the Directive reads that “Persons who report information about threats or harm to the public interest obtained in the context of their work-related activities make use of their right to freedom of expression. The right to freedom of expression and information, enshrined in Article 11 of the Charter and in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, encompasses the right to receive and impart information as well as the freedom and pluralism of the media. Accordingly, this Directive draws upon the case law of the European Court of Human Rights (ECHR) on the right to freedom of expression, and the principles developed on this basis by the Council of Europe in its Recommendation on the Protection of Whistleblowers adopted by its Committee of Ministers on 30 April 2014”.

Obviously, it is not the very reference to Article 10 ECHR in the recitals of the Directive, but above all Article 6(1) TEU read jointly with Article 52(3) ChFR that result in that the standard of safeguarding the whistleblowers’ freedom of expression provided for in the Directive must be construed as at least equivalent to that stemming from Article 10 ECHR. The aim of the present chapter is to establish whether the Directive allows for observing the Convention standard, or whether it provides for stronger protection reaching beyond the standard of the Convention. One should underline at the outset that the topical problem has been already discussed by legal scholars.³

1. The standard of whistleblower protection under Article 10 ECHR

The interpretation of Article 10 ECHR in the context of the protection of whistleblowers reaches back to the Moldovan case *Guja*. Since the delivery of that judgment in 2008, the Strasbourg standard has been consolidated and somewhat universalised.⁴ The present subchapter presents this evolution.

3 See e.g. D. Kaferanis and R. Brockhaus, *Time to reconsider Strasbourg’s whistleblower case law*, <https://europeanlawblog.eu/2020/09/21/time-to-reconsider-strasbourgs-whistleblower-case-law/>, accessed 01/09/2021, and V. Abazi and F. Kusari, *Comparing the Proposed EU Directive on Protection of Whistleblowers with the Principles of the European Court of Human Rights*, <https://strasbourgobservers.com/2018/10/22/comparing-the-proposed-eu-directive-on-protection-of-whistleblowers-with-the-principles-of-the-european-court-of-human-rights/>, accessed 01/09/2021.

4 In the Polish legal scholarship, the evolution of the ECtHR case-law on whistleblowers has been presented by A. Płoszka – see *Ochrona demaskatorów (whistleblowers) w orzecznictwie ETPCz (Protection of whistleblowers in the case-law of the ECtHR)*, EPS 2014, No. 4, pp. 12–18, and M. Krzyżanowska-Mierzewska and A. Rutkowska – see *Zagadnienia prawne związane z ochroną whistleblowerów w warunkach zatrudnienia w ujęciu orzecznictwa ETPCz (Legal issues relating to the protection of whistleblowers in the context of employment, as interpreted by the ECtHR)*, PS 2015, No. 4, pp. 106–122. Also, more generally on the status quo under international and

1.1. The emergence of the Convention standard of protecting whistleblowers. *Guja v. Moldova*

In *Guja v. Moldova*,⁵ the applicant alleged a breach of Article 10 ECHR consisting in his dismissal from the Prosecutor General's Office for divulging two documents which he viewed as disclosing rather grave interference in pending criminal proceedings by a high-ranking politician. None of these documents were classified as confidential. After they were sent to a newspaper, an article was published criticising the political pressure in public prosecution. The applicant was nevertheless dismissed from his office. The reasons for his dismissal were the confidentiality of both documents and the applicant's failure to consult their disclosure with the heads of some departments at the Prosecutor General's Office. The Court held that the interference was permitted by law and served the legitimate aim of protecting the authority of the administration of justice as well as preventing crimes and protecting the reputation of others. Therefore, the Court had to consider whether the interference was "necessary in a democratic society".

The Court held that although "Article 10 applies also to the workplace, and [...] civil servants, such as the applicant, enjoy the right to freedom of expression", nonetheless "employees have a duty of loyalty, reserve and discretion to their employer. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion". Nevertheless, the Court expressed the view that "a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest" and "the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large". The Court added that "in the light of the duty of discretion [...], disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public".

Further, the Court developed a six-element test applicable in the assessment of interferences regarding the whistleblowers' freedom of expression:

domestic (Polish) law on whistleblowers, including the case-law of the ECtHR: H. Szewczyk, *Ochrona prawna pracowników-sygnalistów (uwagi de lege lata i de lege ferenda)* [Legal protection of whistleblowers (remarks de lege lata and de lege ferenda)], PS 2020, No. 1, pp. 7–22.

5 Judgment of ECtHR (GC) of 12 February 2008, *Guja v. Moldova*, appl. No. 14227/04. See the comments on that judgment in K. Badźmirowska-Mastowska, *The Protection of Whistle-blowers within the Latest Initiatives of the Council of Europe*, Adam Mickiewicz University Law Review 2019, vol. 9, pp. 151–165.

First, it must be established whether the applicant had any effective alternative channels to use in order to prevent or combat breaches of law which he intended to disclose.

Second, while reviewing the proportionality of interference regarding the freedom of expression of a civil servant in such a case, regard must be had to a number of other factors, including, in the first place, to the public interest involved in the disclosed information, because “the interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence”.

Third, the authenticity of the disclosed information is of relevance – any person deciding to disclose such information must “carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable”.

Fourth, one “must weigh the damage, if any, suffered by the public authority as a result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed” (since “the subject matter of the disclosure and the nature of the administrative authority concerned may be relevant”).

Fifth, the “motive behind the actions of the reporting employee is another determinant factor in deciding whether a particular disclosure should be protected or not. For instance an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection [...]. It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet, means of remedying the wrongdoing was available to him or her”.

Sixth, the review of the challenged interference must concern also the severity (proportionality) of the sanction applied in respect of the whistleblower.

The Court held against these criterions in *Guja* that the applicant had not had at his disposal another, alternative measure likely to counteract the irregularities which he reported, that he had acted in order to protect a legitimate public interest, that he had divulged (which was not disputed in the case) authentic information, that the interests of preventing political interferences with the functioning of public prosecution outweighed the possible detriment to the general public’s confidence in the administration of justice, that he had acted in good faith and that the sanction applied in respect of him – termination of the work contract – had been particularly severe. In view of these circumstances, the Court found a violation of Article 10 ECHR.

A structurally similar case was *Bucur and Toma v. Romania*⁶ concerning secret service officers convicted for publicly disclosing, during a press conference, state secrets concerning illegal surveillance regarding journalists, politicians and businesspersons.

6 Judgment of ECtHR of 8 January 2013, *Bucur and Toma v. Romania*, appl. No. 40238/02.

1.2. Generalization of the *Guja* standard. *Heinisch v. Germany*

The *Guja* ruling concerned explicitly a public servant reporting irregularities, and the Court in its reasoning on several occasions underlined the particular circumstances regarding the employment of a public officer. However, the Court generalized the application of the *Guja* doctrine in the *Heinisch v. Germany*⁷ ruling, which concerned a geriatric nurse employed in a state-owned company providing medical services. The applicant was fired without notice after she informed the prosecution of a suspected crime allegedly committed by her employer, while accusing the company, among others, of “serious shortcomings in the daily care provided there, caused by a shortage of staff”.

The Court noted that (point 71) “the information disclosed by the applicant was undeniably of public interest. In societies with an ever growing part of their elderly population being subject to institutional care, and taking into account the particular vulnerability of the patients concerned, who often may not be in a position to draw attention to shortcomings in the provision of care on their own initiative, the dissemination of information about the quality or deficiencies of such care is of vital importance with a view to preventing abuse. This is even more evident when institutional care is provided by a State-owned company, where the confidence of the public in an adequate provision of vital care services by the State is at stake”. As for the authenticity of the disclosed information, the Court remarked that the applicant had previously reported irregularities to her principals and that “allegations made by the applicant were [...] not devoid of factual background and there is nothing to establish that she had knowingly or frivolously reported incorrect information”. Like in *Guja*, also in this case the Court found a violation of Article 10 ECHR.

Structurally similar cases were *Marchenko v. Ukraine*,⁸ in which the applicant, both a teacher and a trade union activist, was sentenced for defamation of the school’s headmaster, whom they had accused of financial irregularities, and *Matúz v. Hungary*,⁹ which involved a journalist of a public television dismissed for publicly disclosing allegations on censorship practices entertained by the employer. An interesting and at the same time again structurally similar case was *Rubins v. Latvia*,¹⁰ where the Court found a violation of Article 10 ECHR on account of terminating the work contract with an academic teacher who criticized, in an internal exchange of correspondence addressed to the president of the university, certain organizational changes introduced at the applicant’s faculty. One should probably mark this judgment as a particularly protective for whistleblowers if one takes into consideration that the letter addressed to the university’s president could hardly be treated as

7 Judgment of ECtHR of 21 July 2011, *Heinisch v. Germany*, appl. No. 28274/08.

8 Judgment of ECtHR of 19 February 2011, *Marchenko v. Ukraine*, appl. No. 4063/04.

9 Judgment of ECtHR of 21 October 2014, *Matúz v. Hungary*, appl. No. 73571/10.

10 Judgment of ECtHR of 13 January 2015, *Rubins v. Latvia*, appl. No. 79040/12.

anything else than a form of a rather poorly camouflaged blackmail.¹¹ The Court nevertheless held that the applicant had defended the public interest and had not been inspired by any personal motives, that he had not impaired the reputation of the interested persons (or, at least, it had not been convincingly established by national authorities), and that the sanction imposed on him had been significantly severe.

Finally, one should also mention the *Aurelian Oprea v. Romania*¹² case, where the Court held that there had been a violation of Article 10 ECHR, yet at the same time that – contrary to the observations made by the applicant, who had publicly accused the academic community of corruption and scientific dishonesties – the case was not about whistleblowing.

1.3. Instances of refusal to find breaches of Article 10 ECHR in respect of applicants labelling themselves whistleblowers

We can also find examples of the Court's case-law showing that the Court sometimes refuses to grant protection under Article 10 ECHR to (applicants alleging to be) whistleblowers.

In *Soares v. Portugal*,¹³ the Court found no violation of Article 10 ECHR. The applicant, an officer of *Guardia Nacional Republicana*, had been sentenced to a fine of EUR 720 and a disciplinary sanction of suspension in duties for six days (conditionally suspended as a probative measure) for insulting his principal through accusing him, in a letter addressed to the internal auditing services of the *Guardia*, of a certain embezzlement. The Court emphasised that the applicant had been aware from the very beginning that his allegations were based on rumours but he had taken no effort to verify them. Furthermore, as the Court held, the applicant had not made use of any alternative channels of communicating the alleged irregularities and he failed to explain it. What the Court took into account as well was a relatively low level of severity of the sanction applied in respect of the applicant.

The Court found no violation either in the *Gawlik v. Liechtenstein*¹⁴ case, where the applicant, a doctor of medicine, had been dismissed without notice for notifying public prosecution of a suspicion of the crime of illegal euthanasia, yet without having previously verified those allegations in any way except for simply noting that four patients had died after being given doses of morphine. The Court highlighted that national courts had applied the *Guja* test and that their assessment did not raise the concerns of the ECtHR.

11 Let us quote a passage from the applicant's piece of epistolographic art: "If we are unable to reach agreement by signing a settlement agreement I will make all my current information public in the form of an open letter so that the members of the constituent assembly of the University also have at least one day before the meeting to think about their vote".

12 Judgment of ECtHR of 19 January 2016, *Aurelian Oprea v. Romania*, appl. No. 12138/08.

13 Judgment of ECtHR of 21 June 2016, *Soares v. Portugal*, appl. No. 79972/12.

14 Judgment of ECtHR of 16 February 2021, *Gawlik v. Liechtenstein*, appl. No. 23922/19.

Similarly, in *Medžlis Islamske zajednice Brčko and others v. Bosnia and Herzegovina*¹⁵ (one should note that the judgment was adopted with a majority of eleven votes in favour against six votes against, with three dissenting opinions criticizing the majority's findings), the Court held that there had been no violation of Article 10 ECHR on account of applying criminal sanctions for defamation committed by the applicants in respect of a candidate for the post of the head of a local radio station. They had accused the candidate of lacking professional and moral qualifications for the position she was applying for. The defamation had occurred in a letter addressed to international authorities supervising *Brčko*, which had been also published in the media in a form of an open letter. The defamation had been committed pending the recruitment procedures for the position of the head of the local radio broadcaster. The Court found it decisive that the applicant had failed to verify their allegations prior to announcing them publicly.

2. The mechanism of Article 15 of the EU Directive 2019/1937

The instrument of Article 15 of the Directive 2019/1937, being the *ultima ratio* of whistleblowing action,¹⁶ permits making a public disclosure where:

- a) the whistleblower made an internal report (Article 7 of the Directive) or an external one (Article 10) but no appropriate action was taken in response to the report within the time limit of 3 months (in case of internal reporting) or 6 months (in case of external reporting), or,
- b) the whistleblower has *reasonable* grounds to *believe* that the breach may constitute an imminent or manifest danger to the public interest, or 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.

One ought to remark at the outset that some semantic divergences appear between the Polish and the French and the English official versions of the Directive 2019/1937. Firstly, the term “reasonable” (*raisonnables*) employed in the initial sentence of

15 Judgment of ECtHR [GC] of 27 June 2017, *Medžlis Islamske zajednice Brčko and others v. Bosnia and Herzegovina*, appl. No. 17224/11.

16 See – accurately – Ł. Łaguna, *Ochrona interesu publicznego a dyferencjacja roli sygnalisty (Protection of the public interest and the differentiation of the role of the whistleblower)*, [in:] B. Baran, M. Ożóg (eds.), *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości (Whistleblower protection. Regulations concerning persons reporting irregularities)*, Wolters Kluwer, Warsaw 2021, in subchapter 3 of the chapter *Status prawny sygnalisty na gruncie dyrektywy 2019/1937*.

Article 15(1)(b) of the Directive has been translated to Polish as *uzasadnione* (legitimate), which – in Polish – refers to a situation where one is in possession of evidence or at least has legitimate arguments that an irregularity occurred, whereas the term “reasonable” (*raisonnables*) employed in the compared language versions can be attributed, at least to a larger extent, to the subjective assessment of a whistleblower who presents an appraisal of circumstances in accordance with an abstract concept of a “reasonable person” while basing that appraisal on the sources available to him or her. The concept of a “reasonable person” is actually well known to the European scholarship and case-law.¹⁷ Secondly, the Polish word *sądzić* (to appraise, to assess) is employed in the same provision as the equivalent to “to believe” in the English version and *croire* in the French official version of the Directive. Here again, one can trace a certain shift of accents at the semantic level since “appraisal” requires stronger evidence than a “belief”. Sadly, this type of translation errors is likely to adversely affect and contaminate both the future legislative transposition and the practical application of national provisions (implementation *largo sensu*). On the other hand, these semantic doubts perhaps fade away when viewed against the background of much more dramatic interpretational shortcomings, such as the one in Article 5(4) of the Directive. This provision reads in English that “internal reporting means the oral or written communication of information on breaches within a *legal* entity in the private or public sector” (and identically in French: “«signalement interne»: la communication orale ou écrite d’informations sur des violations au sein d’une entité *juridique* du secteur privé ou public”), whereas in the Polish version one can be surprised that the same passage is worded as follows: “zgłoszenie wewnętrzne oznacza ustne lub pisemne przekazanie informacji na temat naruszeń w obrębie podmiotu prywatnego w sektorze prywatnym lub publicznym” (literally: within a *private* entity in the private or public sector, au sein d’une entité *privé* du secteur privé ou public). Nonetheless, also the malfunctions in the Polish wording of Article 15 of the Directive represent a sufficient potential of “confusing the enemy”, i.e. the whistleblower or the national authority responsible for affording him or her protection pursuant to the Directive.

3. The compatibility of Article 15 of the Directive with the *Guja* standard

One can make the following remarks when analysing the conformity of Article 15 of the Directive with the Strasbourg case-law.

Firstly, and most obviously, under the Directive, the motivation behind a public disclosure (and more generally – behind any whistleblower’s action protected by

¹⁷ See e.g. H. Howells, Ch. Twigg-Flesner, T. Wilhelmsson (eds.), *Rethinking EU Consumer Law*, Routledge, London–New York, 2018, p. 7 – see in particular the case-law referred to in footnote 22.

the Directive) is irrelevant. It has been explicitly clarified in recital 32 (*in fine*) of the Directive that “the motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection” (Fr. *les motifs amenant les auteurs de signalement à effectuer un signalement devraient être sans importance pour décider s'ils doivent recevoir une protection*). This finding is sufficient to support the assumption that the Directive improves the standard of protection in this respect in comparison to that afforded by the *Guja* standard of interpretation of Article 10 ECHR, which is harmonious with the second sentence of Article 52(3) of the Charter of Fundamental Rights. The editorial and topical framework of this chapter does not allow for more than a brief mention of the problem of the interpretation of Article 52(3) ChFR in the context of cases where raising the level of protection (in the EU measure) of one of the rights or freedoms guaranteed simultaneously under the ECHR and the ChFR (here: freedom of expression) inevitably implies as a corollary that the intensity of protection of another right or freedom protected by both instruments is reduced (here, at least potentially: the right to peaceful enjoyment of possession protected by Article 1 of Protocol 1 to the ECHR or the reputation safeguarded by Article 8 ECHR). The issue noted here deserves a more in-depth conceptual analysis.

Secondly, uncertainties arise in respect of the delineation of circumstances justifying public disclosure defined in Article 15 of the Directive, if viewed from the perspective of the first element of the *Guja* standard. Let us rephrase that according to the first element of the test, the whistleblower's freedom of expression is protected (Article 10 ECHR) when he or she made a public disclosure in the absence of any other effective means of counteracting irregularities that he or she intended to disclose. At the same time, the Directive reads in Article 15 that the whistleblower can either report internally (or immediately externally) and then wait (somewhat in vain) until the applicable timeframes for reaction of the addressees of his/her reporting expire ineffectively, or divulge information publicly only where reasonable reasons exist to believe that there is an imminent hazard to public interest or that there is a risk of retaliatory measures or ineffectiveness of milder whistleblowing actions.

In other words, an immediate public disclosure is exclusively permissible (i.e. protected by Article 15 of the Directive) in cases of imminent or manifest danger to the public interest (let us call it, for the sake of this analysis, the “prerequisite of imminence”) or where more discrete whistleblowing action implies the risk of retaliation or ineffectiveness (which we can jointly refer to as the “prerequisite of ineffectiveness”, assuming that it includes likewise retaliatory revenge, as such retaliation results in reducing the effectiveness of whistleblowing because the latter is not intended to result in the whistleblower losing their job). At the same time, the first and fourth element of the *Guja* test, read jointly, appear to allow for the conclusion that the *way* in which the interest that the whistleblower intends to protect is endangered, i.e. whether that interest is threatened directly and manifestly or not, does not seem to have significance for the protection afforded by the Convention. What is relevant, however, is whether the whistleblower employed alternative channels

of communication of his/her allegations (i.e. whether he/she made use of more discrete whistleblowing actions) and whether the balancing of interests potentially impaired by reporting or divulging and the interest protected by whistleblowing proved that the former were outweighed – as the significance of the endangered public interest can be so heavy that it results in absolving a whistleblower from employing internal ways of reporting. Hence, where the public interest in disclosure outweighs the possible detriment to the entity affected by such a disclosure, neither the aforementioned *way* of endangering the public interest nor the occurrence of the prerequisite of imminence (as defined above) should impact the scope of protection afforded by Article 10 ECHR.

Thirdly, certain minor doubt arises when one compares Article 15 of the Directive and the *Guja* test, namely in reference to the link between the “exculpating” prerequisite of public disclosure and the protection of the “public interest”. Let us clarify the point. Obviously, said link as such is appropriate since the Directive – as reflected in its Article 2(1) read jointly with Article 5(1) – applies solely to reporting or disclosing irregularities allegedly breaching the Union law, which is why its function (clearly differently than under Article 10 ECHR) is to protect the financial interests of the EU and not the freedom of expression as such (which is the consequence of the treaty-basis of the Directive rooted in, among others, Article 325 TFEU concerning the combating of fraud and any other illegal activities affecting the financial interests of the Union). Yet on the other hand, the wording of Article 15(1)(b)(i) is likely to cause interpretative uncertainties in cases where the reported or disclosed irregularity occurs in a private-sector entity and not in a public one. In such a case, the perpetrator of the irregularity ultimately impairs the interest of the private entity in which he/she commits the irregularity. The financial interest of the EU would be protected by the very whistleblower’s action and the private entity would be ultimately held responsible, with all the legal and financial consequences included. When construing the proviso of Article 15(1)(b) (i) of the Directive, one should be aware of the general function of the Directive and avoid interpretational shortcomings leading to the flawed conclusion that no public interest was endangered if a whistleblower reported or divulged irregularities in a private entity.

Conclusions

The scholarly analyses mentioned at the outset of this chapter¹⁸ present contradictory conclusions on the conformity of the Directive with the *Guja* standard

18 D. Kaferanis and R. Brockhaus, *Time to reconsider...*, op. cit., and V. Abazi and F. Kusari, *Comparing the Proposed EU Directive...*, op. cit., see footnote 2.

(and its aftermath). The work of V. Abazi and F. Kusari¹⁹ criticized the proposed EU provisions on the gradation of permissible methods of communicating irregularities (internal reporting – external reporting – public disclosure). Their criticism encompasses the alleged inconformity of that gradation with the *Guja* standard of interpretation of Article 10 ECHR. The article of D. Kaferanis and R. Brockhaus, to the contrary, is rather apologetic to the Directive and advocates the necessity of reconsidering the Strasbourg standard of whistleblower protection, which, in these authors' view, should be incompatible with the Directive. While we will not address here the somewhat novel and striking postulate of these authors concerning the need to adapt the case-law of the ECtHR to the Directive (let us quote: “from a normative perspective, the Strasbourg Court should reconsider its case law and align it with the Directive to ensure the same level of protection under Art. 10 ECHR in all CoE Member States”), as it perhaps provokes a more complex reconsideration from the normative perspective, one can state that generally, to the extent discussed in the present chapter, Article 15 of the Directive does not reveal major inconsistencies if compared to the *Guja* standard (and its aftermath).

Nevertheless, certain doubts can probably be raised regarding a clear tendency of the Union lawmakers to abstain from conditioning the intensity of protection afforded by the Directive upon the motivation of the whistleblower. On the other hand, however, the same position of the Union law can be defended as logical if one takes the primary EU law basis of the Directive into consideration. Unlike under Article 10 ECHR, the *ratio* of the EU norms on whistleblower protection is to protect not freedom of expression as such (which appears in a way a side-effect of the Directive) but the financial interests of the Union. Keeping that in mind, it is hard to identify reasons why a whistleblower should be less protected if he or she acted upon low motives such as e.g. the intention to enjoy personal revenge.

More serious and well-founded, although still not dismantling the generally positive perception of Article 15 of the Directive, doubts arise when it comes to the apparent interpretational tension, presented above, between the *Guja* standard and Article 15(1)(b)(i) of the Directive providing for the conditioning of the immediate public disclosure upon the type (*way*) of danger posed by the reported or disclosed irregularity to the public interest for the sake of which a whistleblower acts. It would seem more plausible and compatible with the *Guja* test if the provision of the Directive, instead of the way in which the public interest is endangered, referred to balancing the significance of the public interest which the irregularity impedes of endangers against the possible impairment to the legally protected interests affected by whistleblowing.

19 One should, however, mention, for the sake of accurateness, that V. Abazi and F. Kusari discussed in their work, cited above, the European Commission's proposal of the Directive presented in 2018 [see EUR-Lex – 52018PC0218 – EN – EUR-Lex (europa.eu)], which was quite significantly different from the ultimately adopted text of the Directive, especially in respect of the conditions applicable to public disclosure.

Abstract

This chapter presents the evolution of the Strasbourg case-law concerning the protection of whistleblowers, starting from the 2008 *Guja v. Moldova* judgment, and confronts the EU Directive's provisions on public disclosure with the ECtHR's relevant standard of interpretation of Article 10 of the Convention (the *Guja's* six-element test). The work concludes that there exist certain divergencies between the Convention standard and Article 15 of the Directive and that somewhat confusing wording of the latter provision is likely to cause future interpretative malfunctions if one employs only grammatic interpretation of that provision while forgetting about the general function and scheme of the Directive.

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Protection of Whistleblowers in the Workplace. Who Is Protected and Who Is Responsible under the Provisions of the EU Directive 2019/1937?

Zbigniew Hajn¹

<https://doi.org/10.18778/8220-639-5.03>

Introduction

When considering the personal scope of whistleblower protection, it is necessary to begin with a few remarks for the sake of order. First, 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,² as its title implies, concerns the protection of whistleblowers. However, this protection is secondary to its objective expressed in Article 1, which is to protect the public interest by improving the enforcement of Union law and policies in specific areas.³ Ensuring a high level of protection for persons who report breaches of Union law should serve this purpose.⁴ Therefore, it is reasonable to conclude that possible doubts as to the personal scope must be clarified bearing in mind the stated purpose of the Directive. Secondly, Article 1 indicates that only whistleblowers are protected, whereas that protection extends also to the other entities mentioned in Article 4(4), namely entities associated with the whistleblower who may suffer retaliation for this reason. However, this is not an inconsistency or oversight by the legislature. Indeed, the protection of related persons is the protection of whistleblowers from indirect retaliation.⁵ Its justification is therefore the protection of whistleblowers. This is also the reason for its scope and conditions under which it is granted.

1 Professor, dr hab., University of Lodz.

2 Hereinafter: the Directive.

3 See wider: W. Vandekerckhove, *Is It Freedom? The Coming About of the EU Directive on Whistleblower Protection*, *Journal of Business Ethics*, <https://doi.org/10.1007/s10551-021-04771-x>, accessed 01/09/2021.

4 V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, *Industrial Law Journal*, Volume 49, Issue 4, December 2020, p. 645.

5 Recital 41.

For the above reasons, the protection of whistleblowers will be referred to in the following remarks as direct protection and the protection of related persons as indirect protection.

Effective protection of whistleblowers depends to an important extent on clearly defining the personal scope of the provisions that regulate it. Issues related to this subject will be presented in part II of this paper. Part III will be devoted to selected problems concerning the entities responsible for carrying out the obligations imposed by law in connection with this protection of whistleblowers.

1. Who is entitled to protection?

As already indicated above, in the light of Article 4 of the Directive, a clear distinction is drawn between whistleblowers and those who are protected because they are at risk of retaliation due to their relationship with the whistleblower. This distinction is important. The protection of whistleblowers is broader. This is because it is served by both the provisions ensuring that information can be disclosed through internal reporting, external reporting and public disclosures and the provisions on protection against retaliation contained in Chapter VI. By contrast, the protection of persons vulnerable to retaliation because of their connection with a whistleblower is generally limited to the right to benefit from measures against retaliation where appropriate.⁶

The persons covered by the Directive are protected irrespective of whether they are citizens of the Union or of a third country.⁷

To determine the scope of direct protection, the notion of whistleblower is of primary importance. The Directive does not use this term, although in its recitals the terms “reporting person” and “whistleblower” appear interchangeably. The reason for avoiding the term “whistleblower” in the articulated text of the Directive is, it seems, the difficulty in translating that English term into other languages. I will refer to such a person interchangeably as a “reporter” or a “whistleblower” in the following remarks.

In the broadest sense, a whistleblower is an informant who reveals wrongdoing in an organization in the hope that it can be stopped. However, the Directive adopts in Article 5(7) its own, narrower definition of this concept. According to it, “reporting person” means a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities. Anyone who meets these requirements by this definition is therefore a whistleblower.

⁶ Article 4(4) *in initio*.

⁷ Recital 37.

The Directive includes a wide range of persons as whistleblowers, thus fulfilling most of the wishes expressed prior to its issuance. The categories of entities that may be whistleblowers are set out in Article 4(1-3).

In the first place, the Directive includes among whistleblowers workers within the meaning of Article 45(1) TFEU, including civil servants, as persons having the closest links with the institutions in which wrongdoing may occur and, at the same time, because of the subordination and dependence on the employer characteristic of the employment relationship, particularly vulnerable to retaliation. Workers are in a special position. In particular, internal channels should be made available to them on a mandatory basis, whereas they are optional for other categories of whistleblowers.⁸

Among potential whistleblowers, the Directive also includes other persons who may have priority access to certain types of information sources and who, at the same time, may find themselves in a vulnerable situation in the context of their work-related activities.⁹ They include: persons working in the private or public sector, including at least : (-) self-employed workers within the meaning of Article 49 TFEU; (-) shareholders or members of the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and trainees, whether remunerated or not; (-) persons working under the supervision and direction of contractors, subcontractors and suppliers.

However, important doubts concern the definition of persons entitled to protection in Articles 4(2) and 4(3). These provisions recognise as whistleblowers persons who report breaches of which they become aware after the relationship they had with the legal entity has ended, as well as persons who report breaches concerning information they obtained in the course of recruitment or negotiations prior to the establishment of a legal relationship with the entity. The English version of the text of the Directive defines this relationship as a “work-based relationship”. In contrast, many other language versions, including the languages of the countries surveyed, use the term “employment relationship”. This difference is important because it leads to a significant differentiation between the circle of whistleblowers and the possibilities of reporting breaches. In our opinion, the relationship indicated above cannot be equated with an employment relationship. It refers to all relations connected with the broadly understood work of persons mentioned in Article 4(1) and other persons who reports or publicly discloses information on breaches acquired in the context of their work-related activities. Such a conclusion is justified by a systematic interpretation of Article 4(1) as a whole and by the purpose of that provision and of the Directive as a whole, which is to create the widest possible opportunities for reporting breaches in a work-related context.¹⁰

⁸ Article 8(2).

⁹ Recital 39 and 40.

¹⁰ The correctness of such an interpretation is also confirmed by the last sentence of recital 39, as well as by the Council of Europe’s position explaining the use of the same term. Council of Europe, 2014, p. 20.

It is irrelevant whether the work in the sense described is carried out in the private or public sector. However, the Directive does not cover EU officials, who are not subject to national legislation, but to the EU Staff Regulations. It should, however, apply to them in cases where officials and other servants of the Union report breaches that occur in a work context, but not in the context of their employment relationship with the institutions, bodies, offices or agencies of the Union.¹¹

The list of persons who may be considered whistleblowers contained in Article 4 is open-ended. It is illustrative and minimal. Transposition may extend the list but not close it. Protection should be afforded to all who are reporting persons within the meaning of the Directive and who fulfil the conditions laid down therein to benefit from protection. As indicated above, anyone who meets the definition of a reporting person in Article 5(7) is a whistleblower. It is therefore sufficient to be a natural person and to report or publicly disclose information on breaches obtained in the context of one's work. However, this does not mean that every such person will be protected. In order to benefit from protection, a whistleblower must fulfil further conditions. As follows from Article 6 of the Directive, he or she must have reasonable grounds to believe that the information was true at the time of reporting and falls within the scope of the Directive. Moreover, he/she may not be recognized or registered as a paid whistleblower. Finally, whistleblowers may be excluded from protected whistleblowing if they make complaints solely for their own private interest related to a conflict with another person.

The requirement that a whistleblower be a natural person is clear and does not raise interpretation issues. However, it excludes legal persons from the circle of whistleblowers. This limitation seems to be reasonable.¹² The purpose of the Directive is to protect the public interest in improving the observance of the law by protecting whistleblowers in the context of their work. The specific reporting procedures, support measures and measures for protection against retaliation provided for in the Directive are tailored to achieve this objective. This is in itself a sufficiently important, distinct and specific area for combating breaches of the law that threaten society. On the other hand, whistleblowing by legal entities, such as for example contractors of the wrongdoer or civil society organizations combating fraud and

11 See recital 23. Each EU institution, body and agency adopts its own rules on the basis of an internal administrative rule-making process; see Regulation No. 31 (EEC) 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ P045/1385. It is therefore alleged that EU workers are protected in a fragmented way, i.e. in a way that the Directive seeks to remedy at national level; see V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, *Industrial Law Journal*, Volume 49, Issue 4, December 2020, p. 647.

12 However, this is met with some criticism. In particular, it is argued that granting legal persons the ability to blow the whistle "would make it possible to give the report a collective character and thus break the loneliness in which the whistleblower often finds himself, while reducing his or her exposure to the risk of retaliation"; see Opinion of the Defender of Rights n° 20-12 quoted by Bargain 2021 in footnote 4.

corruption, would, if the existing provisions are considered insufficient, require separate legislation. Another issue is the possibility of protecting organizations such as trade unions or other civil society organizations that provide assistance to whistleblowers. This issue is related to the protection of whistleblower's facilitators and will be discussed in further comments.

Another characteristic of a whistleblower, which according to Article 5(7) is the disclosure of information on breaches acquired in the context of his or her work-related activities, also requires comment.¹³ As explained in Article 5(9), "work-related context" means current or past work activities in the public or private sector through which, irrespective of the nature of those activities, persons acquire information on breaches and within which those persons could suffer retaliation if they reported such information. It seems to mean simply that the person obtains the information in circumstances connected with his or her work, by means of which he or she comes into contact with the institution for which he or she is carrying out that work and by means of which he or she obtains the information which he or she wishes to disclose. The inclusion of this term in the glossary of the Directive is important. Namely, the term should be understood uniformly throughout the Directive. Thus, if the Directive defines, for example, the facilitator as "person who assists a reporting person in a work-related context", this means that he/she assists the whistleblower in circumstances related to the whistleblower's work and not in circumstances related to his/her work. Moreover, it follows from the wording of the term in question that the obtaining of information, the disclosure of which is protected by the Directive, should be linked to the circumstances of the whistleblower's work, whereas such a link does not have to characterise the information itself.

There is another significant condition for the recognition of a whistleblower as a subject of protection. This is the requirement that the whistleblower must have reasonable grounds to believe that the information was true at the time of reporting and falls within the scope of the Directive. By contrast, the Directive does not require that a breach has occurred. It is rightly emphasized that whistleblowing may cause negative consequences if whistleblowers disclose information that is false. This may be the result of a deliberate act, but it may also be due to the fact that the whistleblower had reason to believe that there was a serious problem but was not in a position to know the full situation and was consequently wrong.¹⁴ The most common way to protect a whistleblower in such a situation while taking into account the rights of the entity to which the whistleblower attributed the breach is to make the protection conditional on the whistleblower acting in good faith.¹⁵

13 A similar phrase ("context of their work-based relationship") is found in the definition of the whistleblower proposed in Council of Europe, 2014, p. 6.

14 Cf. Council of Europe, 2014, p. 39.

15 See for example Article 33 of the United Nations Convention against Corruption (UNCAC), adopted by the General Assembly by resolution No. 58/4 of 31 October 2003, and the OECD definition of signalling (OECD 2016, p. 18. In turn, the ECHR held in *Guya v Moldova*, No. 1085/10 (No 77) that protection is extended to individuals "acting in good faith and in the belief that it

He/she must therefore be convinced that the conduct which is the subject of the disclosure is wrong and constitutes a breach of the law. However, this way of regulating this issue is criticized. Amongst others, it is claimed that good faith cannot be used as a condition for protecting whistleblowers because it diverts attention from the message to the motives of the messenger.¹⁶ It is also argued that such shaping of the terms of protection makes it easier for persons affected by a report based on inaccurate information to question the whistleblower's motives, on which a finding of good faith depends.¹⁷ It should also be added that, in light of the practice of the UK courts, whistleblowers have had considerable difficulty in demonstrating that they are acting in good faith, resulting in the rejection of the good faith test in the Public Interest Disclosure Act 1998 in 2013 and its replacement by a reasonable belief test.¹⁸ These arguments are convincing. It is therefore welcomed that the Directive abandons the concept of good faith, replacing it with the construct of "reasonable grounds to believe".¹⁹ According to Article 6(1)(a), reporting persons are eligible for protection provided that they had reasonable grounds to believe that the reported information on the breaches was accurate at the time of reporting and that such information was within the scope of the Directive. To be sure, recital 32 clarifies that the motives of the persons making the report should not be relevant in deciding whether they should be granted protection. Furthermore, the whistleblower can report even if he or she has only suspicions that a wrongdoing occurs.²⁰ In this light, the term "reasonable grounds to believe" does not refer to the whistleblower's belief in the veracity of the information, but to the judgment that a reasonable and objective observer in the whistleblower's situation, i.e. for example, one occupying a comparable position and possessing comparable knowledge and experience²¹, would make. At the same time, the whistleblower's motives are not entirely indifferent, since persons who at the time of reporting intentionally and knowingly provided false or misleading information do not enjoy protection.²² Moreover, they should be

was in the public interest to disclose it and that no other, more discrete, means of remedying the wrongdoing was available to him or her".

16 D. Lewis, *The EU Directive on the Protection of Whistleblowers: A Missed Opportunity to Establish International Best Practices?*, E-Journal of International and Comparative Labour Studies, Vol. 9, No. 1, January 2020, p. 18.

17 A. Savage, *Whistleblowers for Change: The Social And Economic Costs and Benefits of Leaking and Whistleblowing*, Open Society Foundations, <https://www.opensocietyfoundations.org/uploads/3f0ed83b-1ec2-450f-884b-5ed71d5a4769/20181120-whistleblowers-for-change-report.pdf>, accessed 01/09/2021.

18 W. Vandekerckhove, *Is It Freedom? The Coming About of the EU Directive on Whistleblower Protection*, *Journal of Business Ethics*, <https://doi.org/10.1007/s10551-021-04771-x>, accessed 01/09/2021.

19 Such a legal solution was also recommended by the Committee of Ministers of the Council of Europe, Council of Europe, 2014, p. 9, 39.

20 Article 5(2).

21 See also Transparency International, 2019, p. 3; D. Levis, *The EU Directive on the...*, 2020, p. 7.

22 Recital 32.

subject to effective, proportionate and dissuasive sanctions and be liable for damages caused by such conduct.²³ A separate point should be made when a whistleblower makes a report without properly knowing whether there are reasonable grounds for reporting and whether the reported breach is covered by the Directive and, for example, reports information that is already publicly known or is unsubstantiated rumour or hearsay (recital 44). It seems that in such a case the protection should not apply if an error of judgement could have been avoided and the error is due to gross negligence of the whistleblower.²⁴

It should be stressed that also the assessment whether a whistleblower reported information falling within the scope of the Directive depends on whether, at the time of reporting, he or she had reasonable grounds to believe so. Therefore, this assessment, too, depends on the judgment that a reasonable and objective observer in his position would have made.

In the light of recital 30, the Directive should not apply to persons who, having given their informed consent, have been identified as informants or registered as such in databases managed by authorities appointed at national level, such as customs authorities, and report breaches to enforcement authorities in return for reward or compensation. In support of this position, it was pointed out that such reports are made pursuant to specific procedures that aim to guarantee the anonymity of such persons in order to protect their physical integrity and that are distinct from the reporting channels provided for under the Directive. At the same time, in accordance with recital 62, the Directive should also grant protection where Union or national law requires the reporting persons to report to the competent national authorities, for instance as part of their job duties and responsibilities or because the breach is a criminal offence. It must be considered that these indications are consistent with the Directive as a whole and express the formal position of the legislature. For these reasons, although the recitals are not subject to transposition,²⁵ it should be recommended that they be taken into account in the implementation of the Directive into national legislation.

In the light of the above, it also seems reasonable to conclude that the obligation to inform the employer of irregularities in the workplace, sometimes inferred from the duty of loyalty of the employee towards the employer, from the official's duty of care for the public good or the duty of the employee to have regard for the welfare of the workplace,²⁶ does not exclude whistleblower protection under the

23 Article 23(2) and recital 102.

24 F. Kein, *Whistleblowing and labour law: The Whistleblower Directive – development, content and obstacles*, Italian Labour Law e-Journal, Volume 13, Issue 2, <https://illej.unibo.it/article/view/11720>, accessed 01/09/2021.

25 R. Baratta, *Complexity of EU Law in the domestic Implementing Process. The Theory and Practice of Legislation*, Volume 2, Issue 3; December 2014, https://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf, accessed 01/09/2021.

26 L. Mitrus, Z. Hajn, *Labour Law in Poland*, Kluwer Law International BV, Alphen aan den Rijn, 2019, pp. 104–105.

Directive. A contrary view would lead to a serious conflict between the Directive and national law.

It also follows from the recitals that it is permissible to exclude from the circle of whistleblowers protected by the Directive persons who report complaints solely in their private interest related to a conflict with another person. This issue raises the important question whether acting in the public interest is a condition for the protection of a whistleblower. According to the classic understanding, whistleblowing means reporting in the public or social or general interest or in the general public interest, as in Article 5(b) of the EU Trade Secrets Directive.²⁷ It is accepted in the case law of the ECHR, the Council of Europe and a number of national legislations.²⁸ The Directive generally moves away from considering the public interest as part of the concept and condition for the protection of the whistleblower. Only the admissibility of public disclosure has been made conditional on the public interest in certain situations. This is not the case, however, for internal or external reporting. Although the Directive refers to the public interest in a number of recitals, stresses the importance of whistleblowing for the protection of the interests of the Union and of the Member States, and even links whistleblowing to the protection of the public interest,²⁹ it does not make the protection of whistleblowers dependent on acting in that interest. At the same time, the Directive indicates how signalling systems can be relieved of reporting which is clearly not related to the protection of the public interest. Namely, in accordance with recital 22, reports concerning grievances about interpersonal conflicts between the reporting person and another worker can be channelled to other procedures. However, this indication does not imply the possibility of excluding or limiting the protection of whistleblowers motivated by an expectation of personal or financial gain.³⁰ It is worth noting that the application of this model regulation frees the whistleblower and the entities assessing the notification from considerations of the notion of public interest and doubts as to whether the notification takes the public interest into account. At the same time, this approach makes it possible to sift out reports that are clearly not intended to protect the public interest³¹ and to provide protection to a wider range of whistleblowers than would be the case if the public interest concept were adopted. It is a simple instrument; it is easy to understand by the addressees of the law and

27 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15.6.2016, p. 1–18.

28 Judgment of ECtHR (GC) of 12 February 2008, *Guja v. Moldova*, appl. No. 14277/0, paras 72, 74, 76; Council of Europe, Protection of whistleblowers, Recommendation CM/Rec(2014)7 and explanatory memorandum, p. 7, <https://rm.coe.int/16807096c7>, accessed 01/09/2021.

29 E.g. recitals 1 and 31.

30 Otherwise ECtHR in *Guja v Moldova*, para. 77.

31 A similar solution was adopted under Section 5(3)(b) of the Irish Protected Disclosures Act 2014, www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html, accessed 1/09/2021, see also Transparency International, 2018, p. 10.

easy to evaluate by the authorities applying the law. At the same time, it has the good effect of not protecting notifications in the protection of an obviously private interest. If the solution suggested in recital 22 as described above is not adopted, notifications in the purely private interest will enjoy protection under the Directive.

The abandonment of the recognition of an action in the public interest as a condition for the protection of a whistleblower should, it seems, be relevant in legal proceedings concerning, for example, defamation and other cases indicated in Article 21(7). It is worth noting that the ECHR, in weighing the rights of the parties to the dispute giving rise to the complaint, e.g. the right to freedom of expression under Article 10 ECHR of that Convention, examines whether the public interest in disclosure supports granting protection to the whistleblower.³² Under the Directive, on the other hand, the prerequisite for protection (discontinuance of proceedings) is a finding that he or she had reasonable grounds to believe that the notification or public disclosure was necessary to bring the breach to light in accordance with the Directive. However, it cannot be ruled out that future case law will nevertheless take the public interest into account for such an assessment.

It follows from the above that, although the purpose of the Directive is to protect the public interest by protecting whistleblowers who report breaches of Union law, except in the case of public disclosure set out in Article 15.1(b)(i), a positive finding of an action in the public interest is not a criterion on which whistleblower protection depends. These conclusions should also apply to whistleblowers who, within the scope of the Directive, disclose business secrets obtained in a work-related context. In such a case, the defendant whistleblower will not have to prove that he or she acted in defence of the general public interest, as required by Article 5(b) of the EU Trade Secrets Directive.³³

Persons who have made anonymous reports of infringements are only covered by direct protection if the Member State obliges legal entities and competent authorities to receive and follow up such reports. In such a case, if a person makes a report or a public disclosure complying with the requirements of the Directive and is subsequently identified and suffers from retaliation, he or she shall be protected under the Directive.³⁴ This means that an anonymous person who has made a public disclosure under the conditions indicated in Article 15.1(b)(i) and has been identified is protected regardless of whether the Member State provides for the acceptance of anonymous reports through internal and external channels. The Directive also provides that where anonymous reporting is permitted under national law, it should

32 See for example *Soares de Melo v. Portugal* (application No.72850/14).

33 See Article 21(7) and recital 98 of the Directive. See also the critical assessment of Article 5(b) of the EU Trade Secrets Directive in V. Abazi, *Trade secrets and whistleblower protection in the European Union*, *European Papers – European Forum*, Volume 1, Issue 3, October 2016, p. 1069 <https://www.europeanpapers.eu/fr/europeanforum/trade-secrets-and-whistleblower-protection-in-the-eu>, accessed 01/09/2021. The Author asks inter alia: “What is precisely the scope of general public interest?”

34 Article 6(3).

be followed up with due diligence.³⁵ It would seem worthwhile to supplement this vague provision with a clear imposition on operators of internal and external channels of the obligation to maintain confidentiality in the event that the identity of anonymous persons is disclosed, and where their identity is ascertainable.³⁶

As already indicated, indirect protection covers entities that have not made a report. Thus, they are not whistleblowers, but because of their connection to the whistleblower, they may be vulnerable to retaliation by the person who is the subject of the report or by another entity responding to the report in this way. As aptly pointed out, this increases protection for whistleblowers beyond the existing standard in most countries. At the same time, this is not an expression of legal generosity, but rather an adaptation to the experiences of whistleblowers and a recognition that not only they, but also others around them are vulnerable to pressure and other negative consequences.³⁷ However, it is in fact a protection of the whistleblower himself or herself against indirect retaliation,³⁸ although the protection granted in the Directive to third parties is obviously also in their interest. This protection is also justified on the grounds that its absence might discourage potential whistleblowers from reporting infringements. The personal scope of indirect protection has been defined by indicating three groups of entities described below. This list, unlike direct protection, is not open-ended. A comparison of the way in which the personal scopes of direct protection and indirect protection are defined in Article 4(1) and in Article 4(4), respectively, indicates the intention of the legislature to limit the entities covered by indirect protection to the indicated three groups of entities. The possibility of extending this protection to other entities would have to be based on an expansive interpretation of Article 25(1), which empowers Member States to adopt provisions that are more favourable to the rights of persons making a notification. Literalistically, extending the personal scope of indirect protection is not tantamount to the adoption of provisions more favourable “to the rights” of whistleblowers. It is, however, a measure more favourable to whistleblowers, as Article 25(1) has been interpreted in recital 104. Indeed, as indicated above, indirect protection is in essence the protection of whistleblowers against indirect retaliation.

Among the persons covered by indirect protection, the Directive places facilitators in the first place. A facilitator is a natural person who assists the whistleblower

35 Article 9.1(e).

36 Such an order is provided for by Article 53.2(5) of the Polish Act of 1 March 2018 on the prevention of money laundering and terrorist financing, Journal of Laws (2018) item 723, implementing Directive 2015/849/EU of 20 May 2015 on the prevention of the use of the financial system for money laundering or terrorist financing.

37 V. Abazi, *The European Union Whistleblower Directive: A ‘Game Changer’ for Whistleblowing Protection?*, Industrial Law Journal, Volume 49, Issue 4, December 2020, p. 648.

38 Recital 41.

in the reporting process in a work-related context. This should be understood as assistance related to the whistleblower's work, whereby the whistleblower obtains information about violations.³⁹ Assistance may consist, for example, in facilitating access to sources of information, giving advice on procedures, assisting in writing a report, etc. The facilitator should be protected from disclosure of the fact that assistance has been provided.⁴⁰ As explained in recital 41, facilitators who provide advice and support to the whistleblower can also be trade union representatives or other employees' representatives. They are then subject to protection both granted under the Directive and afforded to them under other EU and national rules on the status of employees' representatives. On the other hand, trade unions as such, i.e. as legal persons, do not fall within the role of facilitators as defined in the Directive. For the same reason, other civil society organizations do not fall within it, either, despite requests made.⁴¹

It seems that support and protection for such organizations is needed. However, it should be, if national law does not provide it, introduced by a specific regulation other than a directive explicitly aimed at the protection of individuals. In turn, workers and activists of such organizations remain outside the personal scope of the Directive, as they do not act in a work-related context. Extending the protection against retaliation to them as natural persons seems justified. However, this would have to entail extending the notion of facilitator also to other natural persons operating outside a work context. Indeed, they may, due to their lack of organizational support, be more vulnerable to retaliation than civil society activists.

In the light of the Directive, the protection of facilitators is limited to persons assisting in the process of making a report, omitting persons assisting the whistleblower after the report has been made, e.g. protecting the whistleblower from being exposed or opposing unfavourable actions taken against him or her. Therefore, it seems justified to extend the protection of facilitators also to this group.

A person who discloses information that supplements information on breaches previously disclosed by another person should be distinguished from a facilitator. Such a person should be regarded as a separate whistleblower.⁴²

The indirect protection under the Directive extends also to third parties such as colleagues or relatives of the reporting person who are also in a work-related connection with the reporting person's employer or customer or recipient of services.⁴³

39 Article 4.4(a) and Article 5(8).

40 Article 5(8).

41 Transparency International sees a need to protect such organizations in their role as facilitators, pointing out that defining a facilitator in the Directive as an individual excludes civil society organizations that provide advice and support to whistleblowers. This exposes these organizations to retaliation and pressure to reveal the identity of the whistleblower, which jeopardizes their essential work done to protect whistleblowers and help them uncover wrongdoings that need to be addressed to safeguard the public interest; See: Transparency International (2019), pp. 5–6.

42 Otherwise, it seems, Transparency International (2018), p. 11.

43 Article 4.4(b); recital 41.

The personal scope of the protective provisions of the Directive is completed by the reference to legal entities that are owned by the reporting person, for which he/she works or with which he/she is otherwise connected in a work-related context. The group of these entities thus extends beyond natural persons. As indicated in recital 41, the aim is to counter such indirect retaliatory behaviour as, for example, refusal to provide services, blacklisting or boycotting a business. Article 4.4(c) also does not appear to justify the inclusion of trade unions as protected entities. It is true that, literally, a trade union representing the interests of a whistleblower could be considered to be associated with the whistleblower in a work-related context, but it is difficult to imagine against what kind of retaliation it would be protected as a legal person. The protection of trade union officials or other employee representatives as facilitators of the whistleblower and the protection of unions and their activists arising from freedom of association would seem sufficient.

Finally, some calls in subject literature for an extension of legal protection beyond the personal scope adopted in the Directive require attention. This applies in particular to persons who only intend or attempt to disclose information and to persons who do not disclose or do not even intend to report but are suspected of having done so or may do so. Examples include situations when an employee asks questions related to a breach, discloses his or her knowledge of a breach without even realizing that he or she is talking about a breach, or advises co-workers or superiors about a perceived breach. It is pointed out that, for these reasons, these individuals may experience prejudicial treatment aimed at discouraging them from disclosing the information or be subject to “pre-emptive action”, such as transfer to another position or dismissal to circumvent legal protection. In other words, in certain circumstances the perception (typification) of someone as a whistleblower may result in retaliation. The protection as whistleblowers of persons who try to expose irregularities or are perceived as whistleblowers has been advocated among others by Transparency International.⁴⁴ Moreover, the Committee of Ministers of the Council of Europe recommends that the prohibition on retaliation should cover situations where an employer recommends, threatens or attempts to retaliate against a potential whistleblower, pointing out that such actions may have a chilling effect on the whistleblower, who as a result may be deterred from properly reporting the problem.⁴⁵

There is no doubt that these persons deserve protection if the described circumstances are the cause of repression. Indeed, the exertion of pressure on them, in the form of adverse actions, may be regarded by legal entities (employers) as a means of preventing disclosure of breaches. The protection of these persons is currently limited to requiring Member States to impose a prohibition on obstructing or attempting to obstruct reporting under the pain of sanctions.⁴⁶ Such protection does

44 See Transparency International 2019, Transparency International 2018.

45 Council of Europe, 2014, p. 38.

46 Article 23 (1)(a).

not appear to be sufficient, however, as punishing the offender does not remedy the harm suffered through retaliation. Such protection should be afforded, for example, by expressly providing in national legislation for the general rule that a person suspected of whistleblowing and intending or attempting to carry out whistleblowing may not suffer retaliation for doing so in a work-related context. While even without such an explicit provision in the law, the disclosure of such circumstances in court proceedings should result in the court granting protection by, for example, declaring the termination of the employment contract or another act of the employer to be defective, this could prove ineffective, for example, in a case for damages for the termination of a civil contract, where the reason for termination is often irrelevant. Stronger protection would be provided by an appropriate application of Chapter VI of the Directive to the above-mentioned groups of persons.

2. Who is obliged to carry out the obligations imposed by law in relation to the protection of whistleblowers and responsible for doing that?

In the light of the Directive, a number of entities can be distinguished as being obliged and responsible for failure to comply with primary and derived protection obligations. These obligations relate in particular to: the establishment and operation of channels for receiving reports and taking follow-up action, the supervision, coordination and provision of support measures to whistleblowers and other protected persons, and the prohibition of retaliation. These entities include, in particular, the legal entity, the competent authority, persons acting on their behalf or in their stead, the entity or entities providing support measures, and entities implementing retaliatory measures.

The description and characterization of all these subjects and their duties and responsibilities would require a separate and extensive study, especially as the decision as to the very definition of their group and their responsibilities depends to a large extent on the Member States and on those operating the notification channels and those providing support to protected persons.

For these reasons, I will limit further comments to two issues, one general and one specific. The first (general) refers to liability for non-performance or improper performance of duties.

The Directive does not generally regulate or even give guidance on this issue. The only provisions dealing explicitly with the liability under consideration are Articles 21(8) and 23(1). The former deals with compensation for the harm suffered by the whistleblower through remedies such as restitution or damages. The latter obliges Member States to establish effective, proportionate and dissuasive penalties

applicable to natural or legal persons who obstruct or attempt to obstruct a report, retaliate or instigate nuisance proceedings against protected persons or violate the obligation to keep the identity of reporters confidential. This regulation highlights the wide range of persons who may be subject to sanctions. Indeed, they may be not only the so-called legal entities (as legal or natural persons) operating the internal channels and the so-called “competent authorities” as entities designated to operate the external channels, but also their employees carrying out certain duties in this respect, third parties entrusted with the operation of the internal channel or with the follow-up, or even staff members of the competent authority not authorized to receive notifications received in error.

However, beyond the scope of Articles 21(8) and 23(1), there remains a complex of issues that need to be addressed in national legislation in order to ensure the operability and effectiveness of the whistleblowing system. This concerns in particular issues such as sanctions for lack of follow-up, breach of deadlines for the provision of feedback, failure to provide the required information, failure to comply with the obligations imposed on competent authorities by Articles 11 to 13 of the Directive, and failure to fulfil or inadequate fulfilment of duties in relation to the provision of support measures. Of course, not all rules of liability for the violations indicated as examples must be explicitly regulated in the provisions implementing the Directive. In many cases, they may result from the general rules of labour, civil, administrative or criminal liability. However, what seems to be needed is a clear indication of the principle of liability of the obliged entities, the establishment of specific sanctions in cases where the general principles of legal liability are not sufficient, as well as a clear definition in national law of the scope of duties of individual entities. This could be done in statutory provisions or, for example, in by-laws and other internal acts of legal entities and competent authorities that set out the rules and procedures for the operation of internal and external channels. It would be desirable to give these internal rules the force of law as sources of rights and obligations. Where appropriate, it would also be useful to regulate the means of intervention available to whistleblowers, e.g. in the case of untimely handling of reports, failure to provide confirmation of reporting, etc. The persons concerned should be clearly and precisely informed about the above issues.

Of the specific issues, it seems most important to clarify the concept of the legal entity, i.e. the entity obliged to set up and ensure the functioning of the internal channels. These channels are of fundamental importance for the purposes of the Directive. Their establishment and smooth functioning, trusted by whistleblowers, is also in the direct interest of the institutions in which they should be set up, because of not only the chance to clean up irregularities in the organization, but also the chance to deal with the matter “on the spot”, without it becoming known to external bodies or receiving publicity.

In the Directive, these entities are usually referred to as “legal entities” or “organizations”. Occasionally, the terms “employer”⁴⁷ or “undertaking”⁴⁸ are used. The occasional use of the latter two terms is understandable, since the entity obliged to establish an internal channel need not be an employer or an undertaking, although it is most often both. The terms “employer” and “undertaking” therefore fall within the meaning of “legal entity” or “organization”. At the same time, the terms “legal entity” and “organization” reflect the subjective and objective faces of the same concept.⁴⁹ It follows from the provisions and recitals of the Directive that it is an organization where the breaches have occurred or are likely to occur and where the reporting person works or has worked, or another organization, with which the reporting person is or was in contact through his or her work.⁵⁰ It is also the entity within which the breaches which are the subject of an internal notification take place⁵¹ and which has the capacity to deal effectively with the report.⁵² It is also worth noting that these legal entities are most often “persons concerned”, i.e. persons who are referred to in the report or are organs or employees of the entity.

The use of the inclusive term “legal entity” and not the terms “natural person” and “legal person” justifies the thesis that the basis of legal capacity is not a defining criterion for a “legal entity”.⁵³ The role of “legal entity” and the semantic contexts in which the term, with one exception,⁵⁴ appears in the Directive support the conclusion that it can cover both natural and legal persons, as well as associations of persons or organizational entities having legal capacity, despite the lack of legal personality, such as general partnerships and partnerships under some national laws. It is essential that it is a unit in which, by virtue of its separation and having its own set of workers and collaborators and tasks, there may be breaches for which an internal channel is needed and that it is equipped with the legal powers to respond appropriately to breaches in accordance with the procedures for the operation of such a channel. It is desirable, however, that that entity should be able to take legal responsibility. It is, in fact, as has been pointed out, most often the person who is the “person concerned” by the report or who is the object of the report, whether it concerns an organ or an employee. Therefore, the Directive defines the “person concerned” as a natural or legal person who is referred to in the report or public

47 Recital 47.

48 E.g. Article 4(1)(c).

49 In the Directive, the term “legal entity” is most often used in personal meaning, while “organization” in the objective one. But this is not a rule without exceptions, e.g. Article 5(4) mentions “information on breaches within a legal entity”.

50 Article 5(2), recital 1, 33, 45.

51 Article 5(4).

52 Recital 47.

53 Similarly for example, in recital 8 and Article 2(c) of the Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

54 See Article 4(4)(c).

disclosure as a person to whom the breach is attributed or with whom that person (i.e. person to whom the breach is attributed) is associated. The person identified as the infringer therefore ought to be a natural or legal person, as this guarantees the capacity to bear legal liability, in particular civil liability for damages. As seems appropriate, entities having under national law legal capacity equivalent to legal personality, such as certain companies without legal personality, should be put on an equal footing. However, the lack of such capacity should not disqualify an entity from being a legal person within the meaning of the Directive. In such a case, the law should ensure that legal liability is borne by the natural or legal persons who “stand behind” such an entity, such as a company behind its branch.⁵⁵

The specificity of the concept of “legal entity” in the Directive is further revealed in relation to groups of undertakings. Internal reporting procedures should enable legal entities in the private sector to receive and investigate in full confidentiality reports by the workers of the entity and of its subsidiaries or affiliates (“the group”), but also, to any extent possible, by any of the group’s agents and suppliers and by any persons who acquire information through their work-related activities with the entity and the group.⁵⁶ The establishment of an internal channel at group level does not prevent it from also being set up at the level of the individual companies in the group. Moreover, it is compulsory for entities with at least 50 employees.

It should be added that a whistleblower may make reports through several internal channels administered by legal entities with which he or she has a working relationship.

Conclusions

Protection of whistleblowers is subsidiary to the objective of the Directive, which is to protect the public interest by improving the enforcement of laws and policies of the Union. As a result, doubts as to the personal scope of protection of whistleblowers must be clarified, taking into account the above mentioned objective of the Directive. This protection has a wide personal scope. In addition to whistleblowers, it also covers persons associated with the whistleblower who may suffer retaliation for that reason. The rationale for extending protection to related persons is to protect whistleblowers from indirect retaliation. This is how its scope and conditions should be explained. Therefore, on the basis of the Directive, it is justified to

55 This problem may concern countries such as Poland, where the status of employer is also granted to entities without legal personality, if they have the so-called capacity to hire employees. This applies in particular to governmental organizational units, local government units and separate internal units of private sector companies.

56 Recital 55.

distinguish between direct (whistleblowers) and indirect (persons associated with the whistleblower) protection.

A whistleblower under the Directive is a “reporting person”, i.e. a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities. The list of persons who can be considered whistleblowers contained in Article 4 is minimal. Any reporting person in the sense given above should be considered a whistleblower. The relationship that such persons have with the organisation to which the whistleblowing relates is referred to in the Directive as a “work-based relationship”. This concept cannot be equated with an employment relationship.

The status of a whistleblower (“reporting person”) does not in itself ensure legal protection. To benefit from it, a whistleblower must fulfil further conditions. In particular, he/she must have reasonable grounds to believe that the disclosed information was true at the time of reporting and falls within the scope of the Directive. The term “reasonable grounds to believe” does not refer to good faith, i.e. the whistleblower’s belief in the veracity of the information, but to the assessment that a reasonable and objective observer in his/her situation would make. However, persons who, at the time of reporting, have intentionally and knowingly provided false or misleading information do not enjoy protection. Moreover, obtaining protection generally does not depend on a positive finding that the whistleblower acted in the public interest. However, whistleblowers who report complaints solely in their private interest related to a conflict with another person should be excluded from the circle of protected whistleblowers. Similarly, a person recognized or registered as paid whistleblower does not enjoy protection, either.

Indirect protection covers the whistleblower’s facilitators, third parties associated with the whistleblower and legal entities owned by the whistleblower or otherwise associated with him or her. It would be advisable to extend the group of entities covered by that protection to include persons assisting the whistleblower after the report has been made as well as persons intending or attempting to disclose information and persons suspected of being whistleblowers if the aforementioned persons suffer retaliation for those reasons.

Under the Directive, a number of entities can be distinguished as obliged and responsible for failure to comply with obligations relating to direct or indirect protection. These obligations relate in particular to the establishment and functioning of channels for receiving and following up on reports, the supervision, coordination and provision of support measures to whistleblowers, and the prohibition of retaliation. In principle, apart from Articles 21(8) and 23(1), the Directive does not regulate, or even give guidance on, the liability of obliged entities for non-performance or poor performance of obligations. For this reason, it seems necessary to clearly establish the principle of liability of the obliged entities for non-performance or improper performance of signalling obligations, to provide for specific sanctions in the event that the general principles of legal liability are not sufficient, and to clarify in national law the scope of the obligations of the

various entities. It would also be appropriate to regulate the means of protection and intervention available to whistleblowers, e.g. in the case of untimely handling of reports, etc. The persons concerned should be clearly and precisely informed about the above-mentioned issues.

Abstract

The aim of this chapter is to present selected problems related to the transposition into national law of the provisions of the Directive (EU) 2019/1937 which define the personal scope of its application. The author focuses on the prerequisites for recognising a given person as a whistleblower (reporting person) and including them in the circle of protected persons. Among other things, he considers issues related to the Directive's departure from the recognition of acting in good faith and in the public interest as conditions for the protection of a whistleblower, as well as the relevance for the protection of a whistleblower of the obligation to report breaches existing in some national laws. He also argues that the relationship that whistleblowers enter into with the organisation affected by the whistleblowing, referred to in the English version as a "work-based relationship", cannot be equated, as other language versions do, with an employment relationship. The author also proposes, following earlier postulates, to extend the personal scope of protection of facilitators. He also attempts to clarify the notion of "legal entity" as the main entity responsible for the creation and functioning of internal channels. He further postulates more complete regulation in national legislation of the rules of liability of entities responsible for fulfilling the obligations imposed by the Directive.

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Shortcomings in the Workplace Whistleblower Protection in France: What to Expect from the Transposition of Directive 2019/1937?

Gwenola Bargain¹

<https://doi.org/10.18778/8220-639-5.04>

Introduction

At first glance, the French legal framework for whistleblower protection may appear to be particularly well developed. Indeed, since the so-called *Sapin II Law*,² it has offered general criteria to qualify a person as a whistleblower and set procedural and substantive guarantees against possible retaliatory measures. Although advanced, the system is not complete. Its shortcomings are repeatedly mentioned³ to the extent that the transposition of the European Directive (EU) 2019/1937 of 23 October 2019⁴ is an opportunity to correct the limitations of the current system.⁵

Article 6 of the *Sapin II Law* does not exactly define whistleblowing or whistleblowers, but it does provide a legal qualification, which implies protection of the whistleblower. It is a matter of revealing or reporting, “in a disinterested manner and in good faith, a crime or misdemeanour, a serious and manifest violation of an international commitment regularly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, of the law

1 Associate Professor at the University of Tours.

2 Loi No. 2016-1691 du 9 décembre 2016 *relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*. Michel Sapin was the Minister of Economy and Finance at the time.

3 See, for example, the communiqués of the Defender of Rights on this subject, <https://www.defenseurdesdroits.fr/fr/communique-de-presse/2020/12/la-defenseure-des-droits-appelle-a-renforcer-la-protection-des-lanceurs>, accessed 01/09/2021.

4 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.

5 See Opinion of the Defender of Rights No. 20-12: “The Defender of Rights has, in fact, noted numerous gaps and uncertainties in the whistleblower protection system resulting from the Sapin II Law, which the transposition of the directive should make it possible to correct”, 16 December 2020, p. 10.

or of regulations, or a serious threat or prejudice to the general interest” (Article 6). The person who issued the alert must also have personal knowledge of the facts in question. This is not exactly a definition and the list of the objects of this alert is deliberately vague, with the essential criterion being the seriousness of the breach or the threat. However, the progress made is noteworthy since the French legislator is attempting to encompass situations of great variety through a single legal category.

The assimilation of this new legal category is still too recent for the litigation to be significant and, at this stage, the legal term ‘whistleblower’ remains relatively rare within the jurisprudence.⁶ It should also be noted that a recent and famous case concerns not an employee but a labour inspector, who claimed whistleblower status in the context of the ‘Tefal case.’⁷ The French concept of the whistleblower status still appears to be in its infancy. The Defender of Rights, an organization in charge of the orientation and protection of whistleblowers, underlined a relatively low number of alerts reported since the adoption of the law.⁸ In order to understand the difficulties faced by persons wishing to launch an alert, it is necessary first of all to question the aims pursued by the legislator in the construction of the whistleblower protection system in France.

It should be remembered that the decision to institute a general framework for the protection of whistleblowers in France was not made suddenly.⁹ The understanding of the content of whistleblowing and its purpose has evolved with the work and reports carried out on the subject. Originally conceived as referring primarily to the person who reveals or denounces a risk to health or the environment, the whistleblower has gradually emancipated from this sole dimension to become part of the public policy issue of transparency. Now, a whistleblower is the person who reveals violations of the law, thus becoming part of the compliance scheme.¹⁰ Indeed, the protection of whistleblowers has been integrated into the *Sapin II Law* with a view to fighting corruption and financial offences.

6 See J. Alibert, J.-P. Foegle, *Première victoire d'un lanceur d'alerte en référé sous l'empire de la loi «Sapin II»*, La Revue des droits de l'homme [En ligne], Actualités Droits-Libertés, <https://journals.openedition.org/revdh/6313>, accessed 01/09/2021.

7 In this case, a labour inspector had disclosed e-mails to trade unions that she had obtained from an employee of the company. These e-mails had been sent and received in 2013 by the management of a factory and demonstrated collusion between the factory manager and the labour inspector's supervisor regarding the inspections that the inspector was to carry out.

8 In 2018, the Defender of Rights, Jacques Toubon, reported 195 referrals between 2016 and 2018. See J. Toubon, *Le régime général de protection des lanceurs d'alerte est-il l'expression d'un droit fondamental?*, Semaine Sociale Lamy, 20 May 2019, No. 1862.

9 See O. Leclerc, *Protéger les lanceurs d'alerte : la démocratie technique à l'épreuve de la loi*, LGDJ, Paris 2017. Voir également, J. Schwartz Miralles, *Le lancement d'alertes en droits français et américain*, Doctorat, Université Aix-Marseille, 2019.

10 M.-A. Frison-Roche, *L'impossible unicité juridique de la catégorie des lanceurs d'alerte*, [in:] Chacornac J., *Lanceurs d'alerte, regards comparatistes*, Collection Centre Français de Droit Comparé, Vol. 21, 2019, pp. 13–31.

As several authors have pointed out, this evolution is double-edged since by no longer characterising themselves as merely announcing a risk but also as denouncing a breach, whistleblowers become an instrument at the service of institutions to guarantee proper application of the law.¹¹ This issue of effectiveness of the law appears clearly in the framework of the European directive, which refers to the interest of “effective detection, investigation and prosecution of breaches of Union law, thereby enhancing transparency and accountability” (Recital 3). This dimension coexists with the objective of “detecting and preventing, reducing or eliminating risks to public health and to consumer protection resulting from breaches of Union rules” (Recital 13). There are several figures of the whistleblower but the contemporary legal approach does not make any distinction among them.

In the context of this approach, the European directive only envisages whistleblowing in the professional context, since it is in this context that breach of the law is likely to be observed. The particularity of the French legislative framework with respect to the provisions of the directive is primarily due to a broadened scope of application that is not limited to a professional context. While the company or the workplace may appear at first glance to be the setting in which the alert takes place and needs to be protected, the French legislator has set criteria guaranteeing this protection that go beyond the sole professional context. This legislation is therefore bound to coexist with the alerts that French labour law has protected for several decades. The Labour Code effectively enshrines the so-called ‘collective’ right to alert insofar as this right is recognized for employee representatives.¹² Four subjects of alert are defined: in case of infringement of personal rights (Article L. 2312-59 of the Labour Code), in case of serious and imminent danger (L. 2312-60), in economic matters (Article L. 2312-63) and in social matters (Article L. 2312-70 of the Labour Code). Started in 1982, the construction of this right to signal (which later became a right to alert) recognized to the staff representative bodies was progressive. It is first and foremost part of a desire to guarantee “the exercise of prerogatives of expression.”¹³ This collective alert coexists with the so-called individual alert within the company, which has a different purpose.¹⁴ The Labour Code provides that any worker must immediately alert the employer of any work situation which he or she has reasonable cause to believe presents a serious and imminent danger to his or her life or health, as well as of any defect that he or she observes in the protective systems.¹⁵ Also, following the law of 16 April 2013 n° 2013-316, a specific alert is provided if the worker believes in good faith that the products or manufacturing processes used or implemented by the establishment pose a serious risk to public

11 *Ibidem*.

12 Art. L2312-59 to L2312-71, Labour Code.

13 O. Leclerc, *Protéger les lanceurs d’alerte: la démocratie technique à l’épreuve de la loi*, op. cit., p. 23.

14 See J. Icard, *L’alerte individuelle en droit du travail*, Droit social, 2017, p. 54.

15 Article L. 4131-1.

health or the environment.¹⁶ In the context of these alerts, the employer is the recipient of the report and the procedure is much less restrictive than that resulting from the general framework set out in the *Sapin II Law*. The coexistence of these different types of individual alerts poses some difficulties in the intelligibility of the French legal framework. It is difficult to grasp a unitary approach of French law with respect to the alert launched by the worker.

Regarding the legal basis for this protection, the French approach is now in line with the protection of freedom of expression. It is in this sense that the Defender of Rights conceives the protection of whistleblower: “the alert is first and foremost the manifestation of a fundamental individual freedom, the freedom of expression enshrined at the international, European and national levels.”¹⁷ It is also in this sense that the Court of Cassation conceived it. Indeed, well before the adoption of the *Sapin II Law*, the Social Chamber of the Court of Cassation had affirmed this protection for employees denouncing acts deemed irregular in its decision of 30 June 2016.¹⁸ The judges had explained that “the fact for an employee to bring to the attention of the public prosecutor facts concerning the company which appear irregular to him, whether or not they are liable to penal qualification, does not in itself constitute a fault.” Likewise, “because of the infringement of freedom of expression, in particular the right of employees to report unlawful conduct or acts observed by them in the workplace, the dismissal of an employee for having reported or testified in good faith about facts of which he became aware in the performance of his duties and which, if established, would be of such a nature as to constitute criminal offences, is null and void.”¹⁹ The approach here is extensive and marks a desire to place the protection of employees who report acts that they consider unlawful in the wake of the protection of fundamental rights.²⁰ However, the legal framework resulting from the *Sapin II Law* remains quite restrictive with regard to this concept.

It is difficult to assess the impact of this legislation given its early date. The adoption of the European directive and the recent private Member’s bills (*Proposition de loi*) submitted in the assembly²¹ nevertheless make it possible to highlight its

16 Article L. 4133-1.

17 J. Toubon, *Le régime général de protection des lanceurs d’alerte est-il l’expression d’un droit fondamental?*, Semaine Sociale Lamy, 20 May 2019, No. 1862.

18 Cass. Soc., 30 June 2016, No. 15-10557.

19 See the explanatory note of the Court of Cassation, which states that “the decision is in line with the decisions of the European Court of Human Rights, which consider that sanctions taken against employees who have criticized the functioning of a service or disclosed unlawful conduct or acts observed in the workplace constitute a violation of their right to expression”, https://www.courdecassation.fr/jurisprudence_2/notes_explicatives_7002/protection_lanceurs_alerte_30.06.16_34751.html, accessed 01/09/2021.

20 See P. Adam, *A propos de la protection générale des lanceurs d’alerte dans l’entreprise privée (Commentaire de la loi dite «Sapin II» du 9 décembre 2016)*, Revue de jurisprudence sociale, 2017.

21 See *Proposition de loi visant à la protection effective des lanceuses et des lanceurs d’alerte*, 21 January 2020, https://www.assemblee-nationale.fr/dyn/15/textes/l15b2600_proposition-loi#, accessed 01/09/2021.

limitations and to consider the prospects for its development.²² The European Directive (EU) 2019/1937 would not bring significant progress for employees' rights since it limits its scope to the reporting of violations occurring in certain areas, which do not include those concerning the protection of workers' rights or failures in the application of European social legislation. If the purpose of the directive is above all to build a common framework for reporting violations of European Union law, it is surprising to note that European legislation applicable to health and safety at work, for example, is not included.²³ However, it must be recognized that by targeting alerts launched in a professional context, workers are the first to be concerned by the European system thus designed.

The shortcomings of the current French legal framework are based on three issues. First, the scope of this protection must be defined more broadly (I) and the overly restrictive procedural framework must be corrected (II). The protections provided must also be strengthened (III). The question remains, however, whether it is possible to develop a unitary concept of the whistleblower when whistleblowing can pursue different purposes.

1. A necessary revision of the scope of whistleblower protection in France

a) Limited protection due to the multiplicity of legal criteria for whistleblower qualification

Breaches. The qualification criteria of the whistleblower were largely designed by the Sapin II Law. Article 6 of the Sapin II Law does not exactly define the alert but gives a legal qualification to the object of the signal implying the protection of the author.²⁴ The object of the alert is understood here rather broadly since it may concern a "breach" of the law or a "threat". The French approach towards whistleblowing combines both the dimension of guaranteeing the effectiveness of the law (the whistleblower reacts

22 See A. Pitras, *Le lanceur d'alerte: Etude comparée entre droit français et droit de l'Union européenne*, Revue trimestrielle de droit européen, 2020, p. 181.

23 See. L. Robert, *Vers un statut harmonisé du lanceur d'alerte – analyse critique de la directive sur la protection des personnes qui signalent des violations du droit de l'Union*, [in:] Chacornac J., *Lanceurs d'alerte, regards comparatistes*, op. cit., p. 174.

24 Article 6 of the Sapin II Law: "A whistleblower is a natural person who discloses or reports, in a disinterested manner and in good faith, a crime or misdemeanour, a serious and manifest breach of an international commitment duly ratified or approved by France, of a unilateral act of an international organization taken on the basis of such a commitment, of the law or of the regulations, or a serious threat or prejudice to the general interest, of which he or she has had personal knowledge."

to a breach of the law) and that of informing others about a risk (the whistleblower signals a threat). The alert is understood here as a revelation of information on illegal practices but also as information on the existence of a risk incurred.

However, the emphasis here is on the seriousness of the breach. The report must refer to a “serious breach” or “serious harm” or “serious threat”. This severity is not specified. It will be assessed in the light of the general interest in the last two cases. For other violations, the seriousness of the breach will be assessed in the light of the legal requirements, except in the case of a crime or misdemeanour. In these two cases, the penal qualification of the offence is sufficient to lead to the protection of the person who reveals it. It must therefore be emphasized that, except in the case of a crime or misdemeanour, it is the person who makes the alert who must assess the seriousness of the breach he or she wishes to report. This is precisely the difficulty with this requirement, which could be a deterrent as it places the burden of assessing the seriousness of the breach on the person reporting it.²⁵ In the hypothesis of a violation of a safety rule that would not be considered sufficiently important, this would imply that the person could not benefit from this qualification.

This dimension seems restrictive today but it was originally intended to open up the protected warning more widely to cases that do not fall within the scope of the criminal offence that was originally the only one targeted. Article L. 1132-3-3 of the French Labour Code, as drafted by Law 2013–1117 of 6 December 2013, only referred to employees who reported “facts constituting an offence or a crime of which they had knowledge in the performance of their duties.” In a recent case, the Court of Cassation ruled out the qualification of whistleblower for a person who had broadcast a recording of an informal meeting with his employer during which the latter had mentioned the surveillance of correspondence to which trade unionists were subjected in the company. Under the law applicable in 2013, the Court found that it had not been established that the employee had reported or testified to facts that could constitute an offence or a crime.²⁶

In this respect, the directive offers a distinct approach by targeting the violations concerned not with regard to their degree of seriousness but with regard to the areas in which they occur (Article 2). Breach is defined broadly in terms of the unlawfulness of the act or omission that contravenes the rules in the listed areas. It could be as well an act or omission that defeat the object or the purpose of the rules in the Union acts (Article 5). By offering a restrictive list of the areas concerned as well as the legal acts listed in the annex, the directive offers a more restrictive approach than the alert conceived in French law.²⁷ However, for the areas concerned, the qualification will be broader than that provided for under French law, since this qualification

25 P. Adam, *A propos de la protection générale des lanceurs d’alerte dans l’entreprise privée (Commentaire de la loi dite «Sapin II» du 9 décembre 2016)*, Revue de jurisprudence sociale, 2017.

26 Cass. Soc., 4 November 2020, No. 18-15669.

27 See L. Robert, *vers un statut harmonisé du lanceur d’alerte – analyse critique de la directive sur la protection des personnes qui signalent des violations du droit de l’Union*, op. cit., p. 175.

is not conditional on any seriousness. It may seem simpler in this case to identify the area of the protected alert based on a more objective approach. However, the assessment of unlawfulness may be just as unclear and difficult to characterise for the person reporting the violation. Recital 42 of the Directive emphasizes the need for “the concept of violation to include abusive practices, namely acts or omissions which do not appear to be unlawful in formal terms but which run counter to the object or purpose of the law.”

Context of the alert. The system resulting from the *Sapin II Law* offers protection with the personal scope of application that is both precise and broadly circumscribed. Article 6 is aimed only at natural persons, and Article L1132-3-3 of the French Labour Code, which is a variation of this Article, is aimed not only at employees but also at candidates undergoing recruitment or a training period. As Article 6 is of a general nature, there is no exclusion in principle of self-employed workers or temporary workers from the scope of its application. Moreover, it is not necessary for the person to be acting in a professional context but to have personal knowledge of the facts he or she is reporting. The scope of application of the whistleblower status therefore excludes legal persons who cannot meet the criteria set to benefit from this protection. This limitation, in the context of labour, excludes in particular the role of trade unions as beneficiaries of this protection.

The European approach is more restrictive than the French framework, since it concerns persons who intervene in a professional context, with Article 4 providing a list of persons concerned. The concept is admittedly broad, since persons “working” in the private or public sector are included, in addition to employees. This interpretation is reinforced by Recital 39 of the Directive, which specifies that natural persons who are not employees in the legal sense of the term but who intervene in a “professional” context (such as suppliers, for example) may be concerned. The French legal framework is in line with this requirement since the approach is not limited to employees but to any natural person, without any reference to the professional context. The procedure provided for by the *Sapin II Law* suggests that the classic framework for whistleblowing is the professional framework because of the procedure it establishes for reporting such whistleblowing. However, this is not in itself a requirement for qualification, as the legislator has preferred to impose a “personal knowledge of the facts,” which then appears to set an additional condition with regard to European law. This requirement of personal knowledge of the facts is understood as aiming to prevent the propagation of rumours.

Reasons for the alert. The question of the motivation of the whistleblower could appear essential since the classic representation is that of a virtuous and honest person denouncing a violation of the law for general interest.²⁸ The approach chosen by the

28 See M.-A. Frison-Roche, *L'impossible unicité juridique de la catégorie des « lanceurs d'alerte »*, op. cit., p. 14.

legislator is the classic one in French law of a person acting in good faith, coupled with the condition of acting as a “disinterested” person. While this condition of “good faith” is specified in the regulatory texts with respect to public employees,²⁹ nothing is said in the Labour Code. The judges of the Social Chamber of the Court of Cassation have had the occasion to specify that the bad faith of the whistleblower, when he denounces acts of harassment, should be understood as resulting from “the employee’s knowledge of the falsity of the facts denounced and not from the sole circumstance that the facts denounced are not established.”³⁰

This requirement of good faith is therefore not to be understood as a requirement of truthfulness with regard to the whistleblower but of ignorance of the possible falsity of the facts reported. Regardless of the motives of the whistleblower’s action, in order to assess this good faith the information available to the whistleblower on the day of the denunciation must be taken into account and not his or her possible intention. The judges of the court may for instance characterise this good faith by noting that “it does not result from any of the elements of the file that (the employee) denounced facts that he knew to be false. It can be deduced from this that (the employee) was acting in good faith when he brought to light his suspicions about possible misappropriation of public funds by the employer.”³¹ However, this condition is not always strictly assessed by the judges. In order to exclude the qualification of whistleblower, it has been judged that “good faith does not require that the facts denounced be subsequently established, but that they have been reported with honesty and loyalty and without any malicious intent.”³² In this approach, good faith is likened with the search for the absence of defamation or malicious intent. Outside of employment litigation, this characterisation of good faith will be essential in the context of a possible defamation or slander action against the whistleblower. In this case, the judges will be even more demanding and other criteria will be taken into account to qualify good faith.³³

This approach to good faith might seem far from the Anglo-Saxon approach taken by the European directive, which is primarily concerned with the whistleblower’s “reasonable grounds” for believing that the information reported was true (Article 6.1). It is not a question of assessing the motivation of the whistleblower, since Recital 32 specifies that the motives of the author of the report should be irrelevant in

29 See Circulaire du 19 juillet 2018 relative à la procédure de signalement des alertes émises par les agents publics dans le cadre des articles 6 à 15 de la loi No.2016–1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, et aux garanties et protections qui leur sont accordées dans la fonction publique. The circular specifies that “the author must have a reasonably established belief in the truthfulness of the facts and acts that he intends to report with regard to the information to which he has access, and be devoid of any intention to harm.”

30 Cass. Soc. 8 juillet 2020, No. 18-13593.

31 Cour d’Appel d’Agen, 26 January 2021, No. 19/00666.

32 Cour d’Appel d’Amiens, 9 January 2020, No. 18/00584.

33 Y. Pagnerre, *Harcèlement, alerte et diffamation: enfin l’harmonie?*, Dalloz, Paris 2016, p. 2447.

determining whether protection should be granted to them. Rather, the approach would be to assess whether the whistleblower could validly believe in the truth of what he or she was reporting, in the light of the knowledge available at the time of reporting.

This could be similar to the French approach but French law adds the condition of a disinterested action to the condition of good faith. This condition is not always uniformly understood. It may imply the absence of material or financial interest behind the action. It can be more broadly understood as implying the absence of any personal involvement in the facts reported. The latter interpretation is not satisfactory in so far as it leads to a considerable reduction in the scope of the protection granted. In the Tefal case, the labour inspector who was in conflict with her superior was reproached by the judges for this personal involvement in the alert triggered. It was found that “she was denouncing an infringement of the principle of independence of labour inspectors, but she was the direct victim of the disturbance she intended to denounce. She did not denounce other facts, distinct from those concerning her personally, likely to constitute a threat or a serious prejudice for the general interest.”³⁴ This other condition combined with the requirement of good faith leads judges to scrutinize the motives of the whistleblower. For example, the Amiens Court of Appeal considers that the purpose of the letter sent by the whistleblower “is a negotiated departure, for which the employee uses the means of blackmail, claiming the existence of fraudulent facts, not to denounce them in the interest of the collective good or of the company, but to achieve his own ends. This approach, which is opposed by nature to the launching of an alert, assuming the disinterested nature of the act, constitutes a major breach of the obligation of loyalty, making it immediately impossible to maintain the employment contract.”³⁵ The conditions set out in French law concerning the motivation of the whistleblower seem much more restrictive than those set out in the Directive. The importance given to this condition appears to be highly questionable.

b) The necessary extension of the personal scope of whistleblower qualification

Legal entities. In the context of the future transposition of Directive (EU) 2019/1937, the opinions rendered are almost unanimous in deploring the restriction of the personal scope of application of whistleblowers to natural persons only and in defending the extension of the qualification of whistleblower to legal persons.³⁶

34 Cour d’Appel de Lyon, 24 October 2019, No. 19/00554; A. Casado, *Lanceur d’alerte: maturation ou estouffade*, Bulletin Joly Travail, 2020, p. 44.

35 Cour d’Appel d’Amiens, 9 janvier 2020, No. 18/00584.

36 CNCDH, *Avis sur la transposition de la directive relative à la protection des lanceurs d’alerte*, 24 September 2020, https://www.cncdh.fr/sites/default/files/avis_2020_-_11_-_avis_transposition_directive_lanceurs_dalerte.pdf, accessed 01/09/2021.

They all recall that before the *Sapin II Law*, within the framework of the law of 16 April 2013, the right was established for “any natural or legal person” to make public or to disseminate in good faith information concerning a fact, data or an action, as soon as the ignorance of this fact, these data or this action seems to pose a serious risk for public health or on the environment (Article 1). This provision was repealed by the *Sapin II Law*, which now only targets natural persons.

Several arguments are used to defend this extension of the protection linked to the status of whistleblower. The first argument aims above all at underlining the role that certain legal entities such as NGOs or trade unions can play. The Defender of Rights affirms that this “would make it possible to give a collective character to the alert and thus to break the solitude in which the whistleblower often finds himself while limiting his exposure to the risks of reprisals.”³⁷ Indeed, trade unions are often called upon in the context of whistleblowing in a professional context. This was the case, for example, of the labour inspector who had sent the information she had gathered to report the alert directly to several union organizations outside the company. The question of reprisals that may be incurred by legal entities obviously arises differently than for natural persons, acting in particular in a professional context. Here, it is not a question of protecting them against possible exclusion from a recruitment process, for example. The idea is rather to extend the protection against abusive procedures or ‘gagging’ procedures that could be introduced against them.

However, trade unions have a somewhat different status, since for several decades French law has recognized a collective right to alert the employer of certain facts within the framework of the exercise of their functions. In this respect, they are protected by their function.

Facilitators. In the French legal context, it is not necessary for the person to act in a professional context (see the difference with the directive) but he or she must have personal knowledge of the facts that he or she reports. This condition is essential since it implies that the person has access to information which, if known, will enable a rapid reaction. However, its disadvantage is that it does not allow for the protection of third parties, i.e. the people who provide assistance to the whistleblower.

In this point, the Directive does take into account the role of third parties, i.e. the ‘facilitators’. Recital 41 specifically envisages the protection of trade union representatives and workers’ representatives under the protection provided by the Directive and envisages their intervention with the whistleblower in this respect by providing advice and assistance. Similarly, it is the “legal entity” to which the whistleblower belongs that is mentioned as a possible target of indirect reprisals. Article 4(c) of the Directive refers to “legal entities belonging to the whistleblowers or for which they work, or with which they are linked in a professional context.” In an opinion issued in 2020, the Commission nationale consultative des droits de l’Homme considered “that the status of facilitator should be extended to any legal entity, in particular

37 Opinion of the Defender of Rights No. 20–12, 2020, p. 5.

trade unions, non-profit associations and foundations.”³⁸ Similarly, the Defender of Rights believes that “in the event that a representative of the legal entity is likely to be considered as a facilitator and benefit from the same protection regime as the author of the alert, the legal entity could not claim to benefit for itself from protection measures in the event of reprisals against it (removal of facilities for carrying out its activity, removal of subsidies...)”.³⁹ In particular, it encourages efforts “to clarify the role of legal persons in the process of launching alerts (NGOs, trade unions).” This element is also at the heart of the bill tabled in 2020.⁴⁰ On this point, the transposition could therefore allow French law to apprehend the role of third parties more precisely in the framework of the protection granted to whistleblowers.

The scope of whistleblower protection in French law differs from that of the European Directive. The results of the application of these very restrictive conditions underline the need to reconsider these criteria. Similarly, the procedure put in place to guarantee the protection of whistleblowers appears too complex.

2. The need to strengthen the guarantees regarding the modalities of the treatment of the alert

a) A hierarchical conception of alert processing

Internal reporting. As conceived by the *Sapin II Law*, the whistleblower must follow a three-step procedure. The choice has been made to favour an internal reporting procedure, within the whistleblower’s professional framework. Article 8 of the law provides that the whistleblower must bring the facts to the attention of the employer’s direct or indirect superior or of a person designated by the latter. It is the responsibility of this person to verify the admissibility of the alert. On this basis, a decree dated 19 April 2017 specifies the procedures for collecting reports issued by whistleblowers within legal entities under public or private law or State administrations.⁴¹ More specifically, legal entities employing at least fifty employees are targeted in particular. In this context, they must establish an internal procedure

38 CNCDH, *Avis sur la transposition de la directive relative à la protection des lanceurs d’alerte*, 24 September 2020, https://www.cncdh.fr/sites/default/files/avis_2020_-_11_-_avis_transposition_directive_lanceurs_dalerte.pdf, accessed 01/09/2021

39 Opinion of the Defender of Rights No. 20–12, 2020, p. 5.

40 *Proposition de loi visant à la protection effective des lanceuses et des lanceurs d’alerte*, 21 January 2020, https://www.assemblee-nationale.fr/dyn/15/textes/l15b2600_proposition-loi#, accessed 01/09/2021.

41 Décret No. 2017-564 du 19 avril 2017 relatif aux procédures de recueil des signalements émis par les lanceurs d’alerte au sein des personnes morales de droit public ou de droit privé ou des administrations de l’Etat.

for collecting reports and appoint a contact person with the competence, authority and resources required to carry out his/her duties. Alerts must be processed within a reasonable time. Article 5 of the decree states that the procedure for collecting alerts specifies the methods by which the author of the alert sends his or her report to the direct or indirect superior, the employer or the referent. However, no special procedure is specified in small structures, companies with less than 50 employees.

This first stage is therefore characterised by the legislator's desire to give priority to the internal handling of the alert, within a hierarchical framework, and not with regard to any particular capacity of expertise held by the recipient of the alert. It has been underlined in this sense that "the collection of alerts is embedded in a hierarchical network."⁴² Originally, it was the same body, the national commission of ethics and alerts in matters of public health and the environment, which ensured the transmission of alerts. The difficulties concerning the investigative powers of the commission led to a change in the institutional organization of this handling of alerts, entrusting it to the Defender of Rights in the framework of the Sapin II Law. Article 8 accepts that any person may send his or her report to the Defender of Rights, who may refer the whistleblower to the appropriate body.

This recourse to the Defender of Rights is only an alternative. Article 8 of the *Sapin II Law* favours a gradation in the reporting channels offered to whistleblowers. Only if the whistleblower's case is not dealt with internally can it be sent to the judicial or administrative authorities or to professional associations. If, after a period of three months, the alert has not been processed, the author of the alert is authorized to make it public. This hierarchy within the alert channels can only be bypassed in case of "serious and imminent danger or in the presence of a risk of irreversible damage." The observance of this procedure is a precondition for the benefit of the whistleblower's protection and in particular the absence of criminal responsibility. In this respect, the labour inspector in the 'Tefal case' was prosecuted for receiving stolen goods. The inspector in question, in conflict with her superior, had disclosed facts by forwarding e-mails she received to a higher authority and to the unions. In a referral ruling, the Court considered that the fact that she had not addressed the report to her hierarchy beforehand but to a third party, even though she was in conflict with one of the members of her hierarchy, resulted in the failure to comply with the reporting procedure, so that she could not hope for no criminal liability. According to the judges, she could have notified her regional or national director.⁴³

The whole constraint of such a graduated system rests on this assessment of the treatment of the alert within a reasonable time. It seems very uncertain for the whistleblower to determine whether the time elapsed can be considered to constitute a reasonable time, especially since he or she may be in a particularly vulnerable situation due to the disclosure.

42 O. Leclerc, *Protéger les lanceurs d'alerte: la démocratie technique à l'épreuve de la loi*, op. cit., p. 65.

43 Cour d'Appel de Lyon, 24 October 2019, No. 19/00554.

In this respect, the French legal framework differs from the European concept of reporting channels. Contrary to the wishes of the European Commission, the Directive, in its Article 7, provides for this purpose that member states “encourage” the use of internal reporting channels, while indicating that this should happen on condition that the author of the report believes that there is no risk of reprisals. It is therefore left to the whistleblower to assess which channel is the most appropriate one for the alert in view of the professional risk involved. Article 10 also states that the alert may be made internally or “directly through external reporting channels.” It is also provided that these channels can be managed internally or by a service provided externally by a third party. Outsourcing of the collection of the alert is therefore conceivable.

Public disclosure. In this respect, French law appears to be far too restrictive in relation to the framework set by the European Directive. Indeed, the only exceptions allowing a public alert to assume either that it intervenes as a last resort or that the author of the alert is confronted with a serious and imminent danger or in the presence of a risk of irreversible damage (Article 8 of the Sapin II Law). The exceptions provided for in the Directive are more important since it also provides for this possibility, in the case of external reporting, if there is a risk of retaliation or if there is little chance that the violation will actually be remedied, due to the particular circumstances of the case, such as when evidence may be concealed or destroyed or when an authority may be in collusion with the perpetrator of the violation or implicated in the violation (Article 15). However, even if the public reporting route is more widely open, this option must be combined with the requirement of a professional context for the alert, so that it still seems rather risky for the person who discovers a violation in a professional context to report it publicly.

b) The limits of the administrative treatment of the alert

Recipient. In view of the difficulties posed by the gradation of reports in the French legal framework, it seems necessary to develop institutional support for whistleblowers. The many uncertainties created by the time required to follow up on the treatment imply that other means of recourse should be offered to the person who wishes to reveal a violation of the law. In this context, it seems even easier for the person who has made a report without respecting the procedure and who is subject to a disciplinary measure to argue that the freedom of expression has been infringed. The first recipient of the whistleblowing in the French approach is mainly the employer (informed through the referent or a hierarchical superior) but the situation of the whistleblower in the company may constitute a major obstacle to internal reporting. The Directive provides more precise elements concerning the follow-up of these alerts than the Sapin II Law does. It is stated that these channels must be “independent and autonomous” (Article 12).

Beyond these procedural limits, the issue at stake is the handling of the alert by the Defender of Rights. The latter has the particularity of having a constitutional status. He intervenes to guide and inform the whistleblower. However, the problem is that of the means available to the Defender of Rights. A proposal has been made to create a general inspectorate for the protection of whistleblowers.⁴⁴ The idea is to attach an inspectorate to the Defender of Rights that would be responsible for monitoring the treatment of whistleblowers. The missions of this inspectorate would focus on the reception and processing of whistleblowers. Information would also be provided by this inspectorate, which could also carry out an audit. The interest of such an inspectorate would lie in its composition: several commissions would compose this inspectorate and would be divided according to the fields of expertise.

Data protection. The issue of handling whistleblowing today essentially revolves around the protection of the confidentiality of the person who reports these violations. In French law, anonymity is not allowed,⁴⁵ but confidentiality must be guaranteed: “The procedures implemented to collect alerts, under the conditions mentioned in Article 8, guarantee strict confidentiality of the identity of the authors of the alert, of the persons targeted by the alert and of the information collected by all of the recipients of the alert” (Article 9 of the Sapin II Law). This confidentiality is protected since disclosing the identity of the person and the information concerned is an offence. The law provides that this offence is punishable by two years of imprisonment and a fine of EUR 30,000. The procedure must therefore guarantee “strict confidentiality of the identity of the author” of the report. Despite this protection, the identity of the whistleblower will, by definition, be known by the recipient of the alert, which may constitute a significant obstacle to this approach. In this respect, the French National Commission for Information Technology and Civil Liberties (CNIL) published a reference framework “relating to professional alert systems (DAP)” in December 2019. In this framework, it reiterates the recommendation not to “encourage people who are intended to use the system to do so anonymously, it being understood that an anonymous alert is an alert whose author is neither identified nor identifiable.”⁴⁶ The Commission notes, however, that “by exception, an alert from a person who wishes to remain anonymous should be treated under the following conditions: the seriousness of the facts mentioned is established and the factual elements are sufficiently detailed;

44 Proposition de loi organique visant à la création de l’inspection générale de la protection des lanceuses et lanceurs d’alerte, 15 January 2020.

45 There are however particular cases where anonymity will be allowed. See Article L. 634-1 of the Monetary and Financial Code, which authorizes anonymous reporting of breaches to certain persons.

46 See CNIL, *Reference framework on the processing of personal data intended for the implementation of a professional alert system*, 18 July 2019, p. 6.

the treatment of this alert must be surrounded by particular precautions, such as a prior examination, by the first addressee, of the appropriateness of its dissemination within the framework of the system.”⁴⁷

3. Whistleblower protection to be completed

a) Limited measures of protection

Against retaliations. The general purpose of the legal framework relating to whistleblowers in France is, above all, to guarantee protection against possible reprisals. The confidentiality of the report and the lack of criminal responsibility in the event of violation of a secret protected by law are at the core of this protection. This protection is based on two pillars: a labour law component and a criminal law component. In this respect, the Directive cannot modify this state of the law since the European Union does not have the competence to impose criminal legislation concerning whistleblowers.⁴⁸ In this regard, the Directive reserves the competence of the Member States with regard to criminal liability (Article 21 §3). Apart from the hypothesis that a criminal offence is recognized, the author of the alert does not incur any liability (§2).

In France, the protection of whistleblowers was conceived in the context of the fight against discrimination.⁴⁹ Under the influence of European law and the transposition of the European Directives on equality, the rules aimed at protecting the author of a whistleblowing report against retaliatory measures have been designed according to the model of non-discrimination law. This is reflected first of all in the adaptation of the evidentiary rules. These have been adapted to facilitate the exercise of the warning, since Article L. 1132-3-3 of the Labour Code provides that “when the person presents factual elements that allow for the presumption that he or she has reported or testified in good faith about facts constituting an offence or a crime, or that he or she has reported an alert in compliance with Articles 6 to 8 of the aforementioned Act No. 2016–1691 of 9 December 2016, it is incumbent upon the defendant, in view of the elements, to prove that his or her decision is justified by objective elements unrelated to the statement or testimony of the person concerned. The judge shall form his or her opinion after ordering, if necessary, any investigative measures that he or she deems useful.” In this context, the author of the measure must establish the elements on which his or her decision is based.

⁴⁷ *Ibidem*.

⁴⁸ J. Leblois-Happe, *La protection pénale du lanceur d’alerte – réflexions théoriques et approche comparatiste*, [in:] Chacornac J., *Lanceurs d’alerte, regards comparatistes*, op. cit., pp. 129–152.

⁴⁹ O. Leclerc, *Protéger les lanceurs d’alerte: la démocratie technique à l’épreuve de la loi*, op. cit., p. 73.

It is under the prohibition of discrimination that retaliatory measures are null and void. The same Article provides that no person may be subject to a discriminatory measure “for having reported or testified, in good faith, to facts constituting a misdemeanour or a crime of which he or she may have become aware in the performance of his or her duties” as well as “for having reported an alert in compliance with Articles 6 to 8 of Law 2016–1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of economic life.” This intertwining of the alert and discrimination implies that the person will only be protected if his or her situation falls within the cases listed by the legislator. This rises difficulties insofar as “the alert is useful precisely because it draws attention to events or risks that were not envisaged.”⁵⁰

Article 19 of the Directive, which lists the prohibited measures of retaliation in a restrictive manner, does not bring about any major change in this respect, since the approach adopted is also to target essentially retaliatory measures that may occur in a professional context. In this respect, Recital 44 of the Directive stresses the need for “a broad definition of the term retaliation, encompassing any act or omission in a professional context which causes prejudice to the whistleblowers.” However, the list provided in Article 19 could lead to changes in the French legal framework since it refers broadly to “harm, including damage to the reputation of the person, in particular on social networks, or financial loss, including loss of business and loss of income.”

As far as criminal law is concerned, the protection designed appears to be fragmentary. A specific system of protection has certainly been adopted within the framework of the *Sapin II Law* in view of the inadequacies of ordinary law.⁵¹ The whistleblower benefits from a special exemption from criminal liability if his or her report violates a secret protected by law. Article 122-9 of the Criminal Code, however, sets the condition of a “necessary and proportionate disclosure to safeguard the interests at stake.” In addition to this, there is the condition of respecting the reporting procedures defined by the law. This is precisely the point at issue in the dispute between the labour inspector, who is being prosecuted for receiving stolen goods, and the Tefal company. The inspector, in conflict with her superior, disclosed the facts by forwarding e-mails she received to a higher authority and to the unions. In a referral ruling, the Court of Appeal considered that the fact that she had not addressed the report to her hierarchy beforehand but to a third party, even though she was in conflict with one of the members of her hierarchy, resulted in the failure to comply with the reporting procedure, so that she could not rely on criminal irresponsibility.⁵² According to the judges, she could have notified her regional director or her national director. This first procedural constraint appears very restrictive. In addition, it must be established that the report violates a protected secret, which is more restrictive than the confidentiality

⁵⁰ *Ibidem*.

⁵¹ J. Leblois-Happe, *La protection pénale du lanceur d’alerte – réflexions théoriques et approche comparatiste*, op. cit. p. 129.

⁵² Cour d’Appel de Lyon, 24 October 2019, No. 19/00554; A. Casado, *Lanceur d’alerte: maturation ou estouffade*, Bulletin Joly Travail, 2020, p. 44.

of information that would be broken. Any disclosure of information is not protected. Above all, as this criminal disclaimer is limited to the situation of a breach of secrecy, other criminal actions (defamation, theft...) against the whistleblower fall outside its scope.

It is true that actions aimed at hindering the launching of the alert, whether it is an obstacle to reporting or abusive legal action, are now more generally targeted. Article 13 of the Sapin II Law provides for a penalty of one year of imprisonment and a fine of EUR 15,000, but also a fine of EUR 30,000 for abusive or dilatory defamation claims. The approach is again very limited since this sanction is only aimed at one particular action, so that actions for receiving stolen goods, theft, are not included.

In this respect, the European Directive opens up an “immunity from liability” (Recital 92) which is intended to be very broad, taking into account the conditions under which the information was obtained. Article 21 §7 provides that “In legal proceedings, including those for defamation, infringement of copyright, breach of secrecy, infringement of data protection rules or disclosure of business secrets, or in respect of claims for compensation under private law, public law or collective labour law, the persons referred to in Article 4 shall not incur any liability as a result of alerts or public disclosures made pursuant to this Directive.”

Specially protected secrets. Article 1 of the Sapin II Law provides that facts, information or documents, regardless of their form or medium, covered by national defence secrecy, medical secrecy or the secrecy of relations between a lawyer and his or her client are excluded from the whistleblower regime. There is also a specific regime for trade secrets. Trade secret is defined in Article L. 151-1 of the French Commercial Code. It covers any information meeting three criteria: it is not, in itself or in the exact configuration and assembly of its elements, generally known or easily accessible to persons familiar with this type of information because of their sector of activity; it has a commercial value, actual or potential, because of its secret nature; it is the object of reasonable protection measures, taking into account the circumstances, on the part of its legitimate holder, in order to preserve its secret character. An exception is provided for the disclosure of such a secret in the context of an alert, since it cannot be invoked if such disclosure occurs in the context of the exercise of the right to freedom of expression or to reveal, in order to protect the general interest and in good faith, an illegal activity, a fault or reprehensible behaviour, including when exercising the right to alert as defined in Article 6 of Law No. 2016-1691 of 9 December 2016 relating to transparency, the fight against corruption and the modernization of economic life.

b) The need for material support

Institutional support. In the current state of positive law, the most deficient part of whistleblower protection lies in the absence of real support measures provided for by the law. Support for whistleblowers is primarily conceived in terms of one

institution, the Defender of Rights. Beyond this institution, there are few elements designed by the legislator to develop support measures for whistleblowers. The French approach is very different from the American one, since no financial reward is provided for.⁵³ In the French conception, the whistleblower should be “disinterested” and a certain ethics would imply that he/she should not receive any financial compensation for this alert. This approach seems coherent, but as soon as the whistleblower is conceived in terms of a certain idea of compliance, ethics becomes less important than effective action.⁵⁴

The possibility of financial support granted by the Defender of Rights was, however, originally foreseen by the legislator. The provision was censured by the Constitutional Council because of the competence of the Defender of Rights and not on the principle of the measure itself. It was thus ruled that “the mission entrusted by the aforementioned constitutional provisions to the Defender of Rights to ensure respect for rights and freedoms does not include the task of providing financial assistance, which might prove necessary, to persons who may refer cases to him. Consequently, the organic legislator could not, without disregarding the limits of the competence conferred on the Defender of Rights by the Constitution, provide that this authority could grant financial aid or financial assistance to the persons concerned.”⁵⁵

In the context of an opinion on the transposition of the European Directive, the Defender of Rights noted that “the Sapin II Law did not provide a sufficient framework for the conditions of handling and follow-up of alerts, which is a major obstacle to their development.”⁵⁶ She proposes to consider compensation for whistleblowers through “financial aid to compensate for the loss of income”⁵⁷ and the creation of a specific support fund intended to support whistleblowers facing difficulties or even legal aid without conditions given the qualification of whistleblower. In this respect, the measures envisaged in Article 4 of the Directive appear to be particularly important, since these support measures include “financial assistance and support measures, in particular psychological support, for whistleblowers in the context of legal proceedings,” and these measures could be provided by an information centre or a single, clearly identified independent administrative authority. Above all, it is a matter of guaranteeing “effective assistance from the competent authorities before any relevant authority associated with their protection against reprisals.”

Compensation. The other central aspect of support for whistleblowers that is also highlighted in the Directive concerns the question of compensation granted

53 See J. Schwartz Miralles, *Le lancement d'alertes en droits français et américain*, Doctorat, Université Aix-Marseille, 2019.

54 See M.-A. Frison-Roche, *L'impossible unicité juridique de la catégorie des « lanceurs d'alerte »*, op. cit., p. 13

55 Conseil constitutionnel, décision No. 2016-740 DC, 8 December 2016, cons. 5.

56 Opinion of the Defender of Rights No. 20-12, 2020, p. 9.

57 *Ibidem*.

to persons who are victims of measures taken against them as a result of reporting. In this sense, Recital 95 of the Directive emphasizes the need to “ensure real and effective compensation or reparation, in a way that is dissuasive and proportionate to the harm suffered.” The Directive provides that the Member States must take “the necessary measures to ensure that remedies and full reparation are available for the damage suffered by the persons referred to in Article 4 in accordance with national law” (Article 21).

Under French labour law, a dismissal based on unlawful grounds may be null and void and the employee is entitled to reinstatement or to compensation. Nevertheless, since the adoption of an ordinance dated 22 September 2017, Article L1235-3-1 of the French Labour Code lists the grounds for nullity of dismissal, namely the violation of a fundamental freedom, acts of moral or sexual harassment under the conditions mentioned in Articles L. 1152-3 and L. 1153-4, discriminatory dismissal under the conditions mentioned in Articles L. 1132-4 and L. 1134-4, dismissal following legal action concerning professional equality between women and men under the conditions mentioned in Article L. 1144-3, or denunciation of crimes and offences. Provisions concerning retaliatory measures taken against a whistleblower are contained in Article L. 1132-3-3 which is not included in the causes listed in Article L. 1235-3-1.

However, violation of a fundamental freedom is a ground for nullity of the dismissal. It may be considered that the dismissal of a person who has made a whistleblowing report under the conditions provided for in Article 6 of the Sapin II Law would infringe the freedom of expression. In this respect, it may be possible to rely on the decision of the Labour Division of the Court of Cassation, which based the nullity of the dismissal pronounced “for having reported or testified, in good faith, to facts of which he had knowledge in the performance of his duties and which, if they were established, would be of such a nature as to characterise criminal offences”⁵⁸ on the infringement of the freedom of expression.⁵⁹ Very often, reprisals against the person who made the alert can also take the form of moral harassment and in this case dismissal will be declared null and void. This issue is important because if the dismissal is found to be without real and serious cause instead of being null and void, the employee will be subject to a scale of compensation and will therefore not be able to obtain full compensation. It should be noted that this issue is also addressed in Recital 95 of the Directive, which states that “the remedies introduced at national level should not discourage potential whistleblowers. For example, the granting of compensation as an alternative to reinstatement in the event of dismissal could lead to a systematic practice, particularly on the part of large organizations, which would have a dissuasive effect on future whistleblowers.”

⁵⁸ Soc. 30 June 2016, No. 15–10.557.

⁵⁹ See P. Adam, *Libertés fondamentales et barémisation: la grande évasion*, *Revue de droit du travail*, 2017, p. 643.

Conclusions

At the end of these four years of application of the law of 9 December 2016, the effectiveness of the protection designed for whistleblowers appears more than limited. The multiplicity of criteria to be met in order to benefit from this qualification is certainly one of the causes. The French legislator, while wanting to guarantee a specific mechanism for persons reporting a serious violation or a risk, has sought to limit inappropriate denunciations. By taking care to define the legal framework very precisely, it has at the same time made it too complex. In this respect, informing people about their rights and the steps to take is a real challenge in order to guarantee real protection for them. Beyond the qualification criteria, the procedure to be followed, by giving priority to the hierarchical framework, does not offer sufficient guarantees for the persons concerned. It is too uncertain and leads to increased vulnerability for those who undertake to disclose a violation.

In view of these various problems, the transposition of the European Directive offers the opportunity to remedy these shortcomings. On the one hand, by simplifying the criteria for qualifying as a whistleblower, it will make it possible to broaden the scope of application of the protection of individuals while making the legal framework more accessible. On the other hand, by opening up an alternative regarding the procedures to be implemented, it will make it possible to return to the gradation of channels that has been favoured by the French legislator.

It may be possible, however, to question the purpose of the legal framework that seeks to provide the same legislation for the steps taken by people who denounce violations of the law or who warn about health or environmental risks. By conceiving the whistleblower as a person who guarantees the correct application of the law and by seeking to establish a uniform framework of protection regardless of the subject of the alert, the French and European legislators have given the whistleblower a unique role. They are part of a compliance process and no longer a function of anticipating the damage that may result from any risk whatsoever.

The protection of whistleblowers was born, however, in the face of the many lawsuits brought against people to silence them. It is with regard to the extensive litigation of which they are victims that this protection must be conceived above all. As one author has underlined, “it should be remembered that the protection of whistleblowers appeared as a necessity in view of the trials they were subjected to.”⁶⁰

Abstract

At first glance, the French legal framework for whistleblower protection may appear to be particularly well developed. Indeed, since the so-called Sapin II Law, it has offered general

60 O. Leclerc, *Protéger les lanceurs d'alerte: la démocratie technique à l'épreuve de la loi*, op. cit., p. 89.

criteria to qualify a person as a whistleblower and set procedural and substantive guarantees against possible retaliatory measures. Although advanced, the system is not complete. Its shortcomings are repeatedly mentioned, to the extent that the transposition of European Directive (EU) 2019/1937 of 23 October 2019 is an opportunity to correct the limitations of the current system. No matter if the criteria may be too restrictive, the procedure too constraining or the protective measures insufficient, there are many elements that need to be modified. However, a question may arise as to whether a unitary treatment of the alert is possible when it does not always serve the same purpose.

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How to Improve the Protection of Employees-Whistleblowers in Slovenia by Implementing the EU Whistleblower Protection Directive

Darja Senčur Peček¹

<https://doi.org/10.18778/8220-639-5.05>

Introduction

Workers and public employees often become aware of decisions and practices that are unlawful or corrupt or have a negative impact on the environment, on public finances, and the like when performing their work or in relation to their work. Some keep such information to themselves, while others decide to disclose it in order to suspend or eliminate such conduct. As a result, they become the so-called whistleblowers. The employee's decision on whether or not to inform the competent authority, a state authority or another institution or the public of these irregularities is influenced by several factors,² among which the extent and effectiveness of legal protection against retaliatory measures granted to the whistleblower by the employer are especially important.³

Taking into account the importance of whistleblowers for the disclosure of violations (of EU law) and the fact that whistleblower protection is fragmented across the Member States and uneven across policy areas,⁴ the 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 was adopted (hereinafter: the Directive).⁵

1 Prof. Dr. Darja Senčur Peček, University of Maribor, Faculty of Law.

2 For example, the value system of such person or of the society in which he or she lives. See D. Banisar, *Whistleblowing: International Standards and Developments*, [in:] Sandoval I. (ed.), *Corruption and transparency: Debating the frontiers between state, market and society*, World Bank-Institute for social research, UNAM, Washington D.C., 2011, p. 12, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180, accessed 01/09/2021; see also Council of Europe, 2014, p. 14.

3 See Transparency International, 2016, pp. 23, 24.

4 See recital 4 of the Directive. For more on the situation in individual countries, see also Transparency International, 2013.

5 OJ L 305/17, 26 November 2019, pp. 17–56.

It aims to improve the implementation of Union law and policies by ensuring a high level of protection of persons reporting violations.⁶ In this regard, the Directive derives from the case law of the European Court of Human Rights and the Council of Europe recommendation concerning the protection of whistleblowers,⁷ whereas the phrasing of particular solutions adopted under the Directive is a result of coordination between the Parliament (which argued for stronger protection) and the Council (which defended a more restrictive position).⁸ The effectiveness of the Directive – which otherwise broadly defines the circle of protected persons, covers reports of violations in several areas, imposes the obligation to establish internal and external channels of reporting, prohibits all retaliatory measures, and provides a variety of protective measures – in enhancing the protection of whistleblowers will largely depend on how successfully it will be transposed into national legal systems by the Member States. The Directive stipulates only the minimum common standards of protection, while the Member States, which must not reduce the existing level of protection at the national level as a consequence of the Directive, have the option to implement provisions that are more favourable to whistleblowers than those set out in the Directive.⁹

The chapter considers the protection of whistleblowers in the Republic of Slovenia under applicable legislation and case law. Based on the analysis of particular aspects of this legislation, it addresses some dilemmas concerning the implementation of specific provisions of the Directive and offers perspectives directed to the preservation or improvement of the existing (mainly labour-law) protection of whistleblowers.¹⁰

1. Legal sources

There is no special legal act in Slovenia that would provide comprehensive protection for whistleblowers. Instead, provisions relating directly or indirectly to whistleblowers are found in several acts. Some of them implement obligations arising from international documents binding on Slovenia.

The Republic of Slovenia (RS) ratified the Civil Law Convention on Corruption of the Council of Europe¹¹ and the United Nations Convention against Corruption¹² and adopted the Integrity and Prevention of Corruption Act (*Zakon o integriteti in*

6 See Article 1 of the Directive.

7 Council Of Europe, 2014.

8 See M. Šepec et al., *The European whistleblowing directive: a legislative barrier between journalists and their sources?*, Media, Culture & Society 7–8/2020, pp. 1530–1533.

9 See Article 25 of the Directive.

10 At the time this contribution was submitted, no proposal for the act that would implement the Directive in Slovenia has yet been drafted, or at least it has not yet been presented to the public.

11 Official Gazette of the Republic of Slovenia – MP, No. 8/2003 of 11 April 2003.

12 Official Gazette of the Republic of Slovenia – MP, No. 5/2008 of 4 March 2008.

preprečevanju korupcije, ZIntPK) in 2010.¹³ The latter act governs the reporting of corruption and the protection of the person reporting corruption (Article 23), the reporting of unethical or illegal conduct (Article 24), and measures to protect the person filing a report (Article 25).

The reporting of unethical and illegal conduct or influence is also governed by the Slovenian Sovereign Holding Act (*Zakon o slovenskem državnem holdingu, ZSDH-1*),¹⁴ whereas the protection of persons reporting corruption and other unethical or illegal practices is subject to the provisions of the ZIntPK.

As an EU Member State, Slovenia is also bound by regulations and directives in the field of banking (credit institutions), insurance, stock market, etc., which impose upon the Member States the responsibility to regulate the obligations of legal entities and their supervisory authorities regarding the establishment of internal channels for reporting irregularities and ensuring the protection of reporting persons. Slovenia fulfilled the requirements referred to in these EU acts by adopting the Banking Act (*Zakon o bančništvu, ZBan-2*),¹⁵ the Insurance Act (*Zakon o zavarovalništvu, ZZavar-1*),¹⁶ the Market in Financial Instruments Act (*Zakon o trgu finančnih instrumentov, ZTFI-1*),¹⁷ and the Investment Funds and Management Companies Act (*Zakon o investicijskih skladih in družbah za upravljanje, ZISDU-3*).¹⁸

The Prevention of Money Laundering and Terrorist Financing Act (*Zakon o preprečevanju pranja denarja in financiranja terorizma, ZPPDFT-1*),¹⁹ which governs the internal notification system and the system of notifying supervisory authorities of violations and provides for limited protection of the reporting person (the protection of reporting person's identity), likewise complies with the EU directives in this field.

The same applies to the Trade Secrets Act (*Zakon o poslovni skrivnosti, ZPosS*),²⁰ implementing the Directive (EU) 2016/943, which grants protection against civil sanctions to a person disclosing business secrets in order to protect the public interest.

Slovenian labour legislation provides no special protection for whistleblowers from retaliatory measures by their employers. However, the Employment Relationships Act (*Zakon o delovnih razmerjih, ZDR-1*),²¹ which complies with binding international acts of the ILO, the EU, and the Council of Europe, provides all workers (as well as public employees) with protection against unlawful practices

13 Official Gazette of the Republic of Slovenia, No. 45/2010, 26/11 and 43/11.

14 Official Gazette of the Republic of Slovenia, No. 25/14.

15 Official Gazette of the Republic of Slovenia, No. 25/15, 44/16 – ZRPPB, 77/16 – ZCKR, 41/17, 77/18 – ZTFI-1, 22/19 – ZIUJSOL and 44/19 – odl. US).

16 Official Gazette of the Republic of Slovenia, No. 93/15, 9/19 and 102/20.

17 Official Gazette of the Republic of Slovenia, No. 77/18, 17/19 – popr. and 66/19.

18 Official Gazette of the Republic of Slovenia, No. 31/15, 81/15, 77/16 and 77/18.

19 Official Gazette of the Republic of Slovenia, No. 68/16, 81/19 and 91/20.

20 Official Gazette of the Republic of Slovenia, No. 22/2019.

21 Official Gazette of the Republic of Slovenia, No. 21/2013. Special regulation of certain issues is provided for public employees under the Public Employees Act (*Zakon o javnih uslužbencih, ZJU*; Official Gazette of the Republic of Slovenia, No. 63/2007 UPB-1, 65/2008).

by employers (such as harassment and mobbing) and the unfounded termination of the employment contract. It is worth mentioning that Slovenia has ratified the ILO Convention No. 158 on the termination of employment at the initiative of the employer (1983), Article 5 of which includes, among other reasons that may not be considered a serious reason for the termination of the employment relationship, point c), which reads: “the filing of a complaint or the participation in proceedings against an employer involving the alleged violation of laws or regulations or recourse to competent administrative authorities”.

Indirectly, the protection of whistleblowers is also addressed by the Mass Media Act (*Zakon o medijih*, Zmed),²² which guarantees the journalists the right not to disclose their sources; the Inspection Act (*Zakon o inšpekcijskem nadzoru*, ZIN),²³ which imposes a duty on inspectors to protect the source of the report or the source of other information, as well as the Witness Protection Act (*Zakon o zaščiti prič, ZZPrič*)²⁴ and the Criminal Code (*Kazenski zakonik*, KZ-1).²⁵

Even though the system of collective bargaining in Slovenia is highly developed, and collective agreements are an important source of labour law,²⁶ sectoral collective agreements and professional service collective agreements do not govern the protection of whistleblowers, nor is this issue generally covered by collective agreements at the level of the employer or by general acts governing the rights and obligations of employees.²⁷

The definition of unlawful, unfair, or unethical practices, the methods of reporting, and the protection of reporting persons at the level of employers are governed by the so-called codes of conduct, ethical codes, or corporate integrity policies of larger companies. A considerable part of these companies are state-owned;²⁸ most of them are also signatories to the 2014 Slovenian corporate integrity guidelines.²⁹

22 Official Gazette of the Republic of Slovenia, No. 110/06 – official consolidated text, 36/08 – ZPomK-1, 77/10 – ZSFCJA, 90/10 – odl. US, 87/11 – ZAvMS, 47/12, 47/15 – ZZSDT, 22/16, 39/16, 45/19 – odl. US and 67/19 – odl. US.

23 Official Gazette of the Republic of Slovenia, No. 43/07 – official consolidated text and 40/14.

24 Official Gazette of the Republic of Slovenia, No. 81/06 – official consolidated text, 117/06 – ZDoh-2, 110/07 and 30/18.

25 Official Gazette of the Republic of Slovenia, No. 50/12 – official consolidated text, 6/16 – popr., 54/15, 38/16, 27/17, 23/20 and 91/20.

26 See K. Kresal Šoltes, *Vsebina kolektivne pogodbe (Content of the collective agreement)*, GV Založba, Ljubljana 2011.

27 Although these collective agreements and general acts (as opposed to the sectoral collective agreements and professional service collective agreements that have been published in the Official Gazette) are not publicly available, this can be inferred based on the information obtained from practice.

28 For example, Petrol, Telekom, Luka Koper, Elektro, also Talum. However, such codes are also found in larger privately owned companies.

29 The guidelines were prepared by the Chamber of Commerce and Industry of Slovenia (GZS), the Managers' Association of Slovenia (ZM), and the Slovenian Directors' Association (ZNS) upon the initiative of the Faculty of Economics, University of Ljubljana, and were signed by 28 major

Given the fragmentation and partial nature of the existing regulation of whistleblower protection, the Directive should be implemented by adopting a special act, as proposed by the Ministry of Justice to the government of the RS.³⁰ Such proposals were also made by legal theorists, both before and especially after the adoption of the Directive.³¹ For the new law to upgrade the existing protection instead of reducing it, the special act on whistleblower protection will have to refer to other legal acts (for example, the ZDR-1), as well as the amendments and additions to the applicable legislation (where this is necessary to ensure compliance with the minimum level of protection granted by the Directive or to enhance the protection of whistleblowers).

2. Personal scope of protection

The ZIntPK stipulates that anyone can report corrupt conduct to the competent authority. Any person reporting in good faith³² is entitled to protection with regard to their identity (which may not be established or disclosed), provided that the conditions are met, and to protection under the ZZPrič. Specific measures for the protection of a person reporting corruption against retaliation by the employer apply to both workers and public employees, whereas the right to be transferred to another post is only guaranteed to public employees (Article 25 of the ZIntPK).

The ZBan-2, ZZavar-1, ZTFI-1, and ZISDU-3 impose on banks, insurance companies, financial sector entities, management companies, and their supervisory authorities the obligation to establish a notification system for violations for the employees (workers). They, too, protect only workers from retaliation.

Only the ZPDFT-1 imposes the obligation on persons responsible for establishing a notification system for violations for employees (workers) and persons having a comparable status to that of a worker. The prohibition of disclosure of identity applies to both categories, as well.

companies. The guidelines are based on the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance.

30 See the Government of the RS, Response to the parliamentary question, No. 00104-4/2020/6 of 6 February 2020.

31 See I. Vuksanović, *Poziv za specialno zakonsko ureditev zaščite »žvižgačev«* (Call for special regulation of "whistleblowers"), *Pravna praksa* 45/2010, A. Sedlar, *Zgodovinska prelomnica pri zaščiti žvižgačev v EU (A historic turning point for whistleblower protection in the EU)*, *Pravna praksa*, št. 13, 2019.

32 The Commission for the Prevention of Corruption takes into account the good faith of the reporting person, and thus only protects the identity of the reporting person who has filed a report in good faith or has reasonably concluded that his or her information regarding the report is true. Furthermore, only a reporting person who has acted in good faith enjoys protection against his or her employer, while malicious filing of a report is also considered an offence punishable under provisions of the ZIntPK, or can even result in criminal charges if the elements of a criminal offence have been established.

Labour legislation provides protection against unlawful conduct by employers and against unlawful termination of employment contract mainly to workers (and public employees). The provisions of the ZDR-1 relating to the prohibition of harassment and discrimination apply also in the case of voluntary internship and temporary and occasional work of students (Article 212(7) of the ZDR-1), whereas in the case of economically dependent persons, provisions referring to the prohibition of the termination of a contract for unjustified reasons (Article 214 of the ZDR-1) apply in addition to these ZDR-1 provisions.

Codes of conduct adopted by companies generally apply only to persons employed by those companies (irrespective of the nature of the employment contract) in terms of the reporting of violations and the protection of reporting persons.

As a general rule, all these acts extend the protection against retaliation only to whistleblowers, but not to their family members or persons assisting the whistleblower. The exception is the ZInPK, which stipulates that in cases when the reporting person and their family members are at risk due to having filed a report of corruption, they may be included in the programme for the protection of witnesses and other persons who are endangered on account of their co-operation in criminal procedures if the conditions under the ZZZPrič are met, and they have given their consent.³³

A broader scope of protection, namely concerning the prohibition of harassment, is also provided by the ZDR-1. An employee who is a victim of harassment, as well as persons who offer their assistance to the victim, must not be exposed to unfavourable consequences because of actions aimed at asserting the prohibition of harassment.³⁴

Moreover, the new law on the protection of whistleblowers will have to define a wide range of protected persons. Only thus will it follow the Directive, which provides protection against retaliatory measures by the employer to a wide range of persons who are economically vulnerable in relation to their employer due to their work.³⁵ The protection will have to be granted to all whistleblowers who, on various legal grounds, directly or indirectly, in return for payment or free of charge, perform work for employers in the public or private sector or are associated with them (such as employees, public employees, self-employed, employed by a third party, shareholders, members of the company's bodies, volunteers, unpaid interns, as well as former employees and candidates for employment), as well as to persons associated with the person reporting violations (family members, workers' representatives, etc.).³⁶ Even though the protection will depend in part on the nature of the relationship,³⁷ it is essential to grant labour-law protection not only to whistleblowers who have

33 Article 23(6–7) of the ZIntPK.

34 See Article 6(7) of the ZDR-1 in connection with Article 7(2) of the ZDR-1.

35 Recital 36 of the Directive.

36 See Article 4 of the Directive, as well as recitals 36 to 41 of the Directive.

37 For example, shareholders will not need labour-law protection, but will instead require protection in relation to claims for compensation and other procedures.

concluded a contract of employment with the employer, but to all who, like workers, are in need of protection.³⁸ This is indicated by a broad definition of the concept of worker in the Directive (the concept of worker as defined by the CJEU case law).³⁹ Similar solutions can already be found in the ZDR-1 (extension of a particular type of protection to economically dependent persons, voluntary interns, etc.).

Laying down the conditions for the protection of whistleblowers will be necessary, as well. It is worth pointing out that in this regard, the Directive follows the Council of Europe's recommendation and provides protection to all those who "had reasonable grounds to believe that the information reported was true at the time of reporting",⁴⁰ regardless of their motive for the report. Therefore, the Directive does not provide for the condition of good faith, while the Member States are also explicitly discouraged from including it by Transparency International.⁴¹ There is no reason for this (or similar) condition to be included in the new Slovenian law.⁴²

3. Material scope of protection

Legal acts governing the reporting of violations and the protection of persons reporting such violations in particular areas specify, among other things, the violations themselves.

The ZIntPK protects persons reporting corrupt practices. Consideration Article 4(1) of the ZIntPK, corruption is any violation of due conduct of the official and responsible persons in the public or private sector, as well as the conduct of persons who were the initiators of the violation or of persons who may benefit from the violation due to a directly or indirectly promised, offered or given, or required, accepted or expected benefit for themselves or another person.

38 This will also protect disguised employees. For more on this problem, see D. Senčur Peček, *The self-employed, economically dependent persons or employees?*, [in:] I. Florczak, Z. Góral (eds.), *Developments in labour law from a comparative perspective*, Lodz University Press, Lodz, 2015, pp. 223–248.

39 See Article 4 and recital 38 of the Directive. For more on the concept of worker in EU law, see the article D. Senčur Peček, *Novejša sodna praksa Sodišča EU in njen vpliv na uveljavljanje in obseg delovnopravnega varstva (Recent case law of the Court of Justice of the EU and its impact on the enforcement and scope of labor law protection)*, *Delavci in delodajalci*, 2–3/2020, pp. 169–203.

40 Article 6(1)(a) of the Directive.

41 Transparency International, 2019, page 3.

42 Although the ZIntPK provides for the protection of the reporting person's identity when the conditions of reasonable grounds to believe that the information reported was true and good faith are fulfilled (derived from the unclear Article 23), the KPK has only considered five malicious reports between 2011 and 2018 (out of 10,170 reports submitted). See A. Nabernik, *Preden prijavim goljufijo, želim vedeti, kakšno zaščito bom dobil (Before I report fraud, I want to know what protection I will get)*, *Pravna praksa*, No. 33, 2019, pp 23–24.

The ZBan-2, ZZavar-1, ZTFI-1, ZISDU-3, and ZPDDFT-1 determine violations whose reporting is subject to protection by referring to breaches of the provisions of the relevant act⁴³ or to breaches of the provisions of other legal acts. As a general rule, this means the violations of the provisions of national law and the internal acts of legal entities (banks, management companies),⁴⁴ but also violations of the provisions of regulations and other EU legal acts.⁴⁵

Codes of conduct adopted by individual companies define the violations that should be reported by the employees (who are protected in doing so) more generally, so as to cover corrupt practices, unlawful conduct, or conduct in violation of legislation and internal acts, as well as unethical conduct, conduct contrary to good business practices and unprofessional conduct.

Labour legislation protects workers (and, to a limited extent, other persons) against unlawful measures taken by the employer regardless of the cause for these measures (reporting corruption, unlawful or unethical conduct, etc.).

A shortcoming of the current Slovenian regulation lies in the fact that it grants special protection only to persons reporting certain irregularities or irregularities in a particular area, meaning that the protection is partial instead of comprehensive. Even the Directive, which otherwise determines a whole range of areas (more precisely, twelve) – EU policies covered by protection, retained the sectoral approach. However, if a horizontal approach was not possible at the EU level due to the lack of competence,⁴⁶ comprehensive protection of whistleblowers is possible at a national level.⁴⁷ The European Commission is encouraging the Member States to do so.⁴⁸ Therefore, the protection provided by the new law should include all persons reporting the breaches of law, violations of human rights, or any other actions contrary to the public interest, regardless whether they represent a breach of EU law or national law, and regardless of the field to which the violation relates (public health, environmental protection, the use of public funding, etc.).⁴⁹ Providing protection only for reports of specific types of violations or violations in certain areas would,

43 See, for example, Article 280a. of ZZavar; the first paragraph of Article 159 of ZPDDFT-1.

44 See the first paragraph of Article 140 of ZBan-2; the first paragraph of Article 73č. of ZISDU-3.

45 See, for example, the first paragraph of Article 239 of ZBan-2 in connection with the second paragraph of Article 9 of ZBan-2; Article 432 of ZTFI-1.

46 M. Šepec et al., *The European whistleblowing directive: a legislative barrier between journalists and their sources?*, Media, Culture & Society 7–8/2020, p. 1537, V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, Industrial Law Journal, Volume 49, Issue 4, December 2020, pp. 653–654.

47 The possibility for Member States to extend protection beyond the areas listed in the Directive is already noted in the second paragraph of Article 2 of the Directive.

48 See European Commission (2018). It seems that this is also the position of the Slovenian Ministry of Justice, which supposedly “proposed to the government the adoption of a comprehensive new law that will include a complete protection of whistleblowers, therefore, not only of persons reporting breaches of the EU law, which are covered by the Directive”. See Government of the RS (2020).

49 Except where specific areas would be explicitly excluded.

on the one hand, deter the reporting of those violations that would not be included and, on the other hand, present a risk to whistleblowers, who, as non-professionals, might not be able to assess the nature of the violation properly and could be left without protection upon reporting it.⁵⁰

4. Internal reporting

Labour legislation does not determine a general obligation of employers to establish internal systems for reporting violations detected by employees or other persons.

The ZIntPK likewise fails to impose on employers the obligation to establish internal channels for reporting corrupt practices, but only regulates the procedure of reporting to the Commission for the Prevention of Corruption (KPK).

However, the obligation to establish internal channels for reporting violations is imposed on certain legal entities (banks, asset management companies, financial sector entities, entities liable under the ZPPDFT-1) by the ZBan-2, ZTFI-1, ZISDU-3, and ZPPDFT-1. The regulation under all these acts is almost identical. Employers are required to set up a notification system for violations which allows the employees to report infringements internally through “independent and autonomous”⁵¹ or “independent and anonymous”⁵² reporting channels. A notification system must provide for a simple and easily accessible method for the transmission of employees’ reports, and the procedures for the acceptance and processing of reports must be clearly determined and must include reporting on the findings in respect of the received reports and activities performed. The ZBan-2, ZTFI-1, and ZISDU-3 also provide employers with a legal basis (for the purposes of processing reports and reporting on findings and activities resulting from this report) for processing the personal data of the reporting person.⁵³ The employer must ensure that any data regarding the reporting person is treated as confidential and may not disclose any such information without the reporting person’s consent (except where the disclosure of the reporting person’s identity is considered necessary for the purposes of criminal proceedings under the law). The ZPPDFT-1, which otherwise requires the employers to establish anonymous reporting channels, also requires an employer who discovered the reporting person’s identity to treat the reporting person’s personal data in a confidential manner and prohibits them from disclosing the reporting person’s identity without his or her consent.

Generally, the codes or policies of employers specify in more details the procedure for reporting violations, which may be done verbally (personally or by telephone) to

50 See also Transparency International, 2019, p. 4.

51 See Article 140 of the ZBan-2, Article 432 of the ZTF-1, and Article 73č. of the ZISDU-3.

52 See Article 159 of the ZPPDFT-1.

53 In doing so, the employer must comply with the Personal Data Protection Act (*Zakon o varstvu osebnih podatkov*, ZVOP-1), Official Gazette of the Republic of Slovenia, No. 94/07 – UPB1.

the compliance officer (the corporate integrity officer or another authorized person) or in writing (by regular mail or by e-mail). An anonymous report can also be made through a special web portal, a special free telephone number, or even by submitting a written report into a special box. Moreover, they regulate the procedure for processing the report, while some of them also stipulate the deadlines for responding to the report (for example, seven working days). Furthermore, they govern actions to be taken after the violation is established (for example, a recommendation concerning the elimination of the violation, a proposal for the improvement of the situation, a notification of the violation to the authorities), as well as the obligation of the employer's competent department to notify the reporting person. The obligation to treat the reporting person's personal data in a confidential manner and the prohibition of disclosing his or her identity is also determined in general terms.

The Directive provides for the obligation to establish internal channels for certain employers in both the public and the private sector. However, the particularities of the employers' obligation are within the discretion of the Member States.⁵⁴ When regulating internal reporting channels, the Slovenian legislature should consider the experience of employers who have already established such channels, based on either legislation regulating the banking and financial sector or their own codes. Nevertheless, in addition to the framework regulation of procedures for internal reporting, further actions, and the employer's obligation regarding the preservation of the confidentiality of the whistleblower's identity,⁵⁵ it is also necessary to establish the employer's obligation regarding the protection of whistleblowers against retaliatory measures⁵⁶ as well as effective and dissuasive sanctions (for the employer and responsible persons) for the cases of non-compliance with these obligations.⁵⁷ In the case of internal reporting, whistleblowers are very vulnerable in relation to management if their identity is disclosed.

Detailed regulation of these procedures should be left to employers (in cooperation with the workers' representatives),⁵⁸ while the manner of participation of workers' representatives should be further specified by law.⁵⁹ Appropriate communication with workers' representatives and their participation in establishing internal channels could significantly contribute to their practical application.⁶⁰

Internal channels are often the first choice for whistleblowers;⁶¹ however, employers are also interested in resolving violations internally. The prerequisite for

54 See Articles 7–9 of the Directive.

55 Both can also be derived from the Directive – see Articles 8 and 16 of the Directive.

56 See also Transparency International, 2019, pp. 9–10.

57 While legal acts in the fields of banking and finance determine those regulations (in more or less general terms), they fail to define their infringements as offences or to impose sanctions.

58 The same follows from Article 8(1) of the Directive.

59 For more on this topic, see the subchapter on workers' representatives.

60 See also V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, *Industrial Law Journal*, Volume 49, Issue 4, December 2020, p. 655.

61 Transparency International, 2019, p. 9.

a whistleblower's decision to submit an internal report is mainly his or her confidence in the established internal reporting system. The choice of the person or persons responsible for receiving reports is just as crucial as establishing procedures and the obligation to preserve the whistleblower's identity. This has already been demonstrated in Slovenian practice in relation to the reporting of workplace mobbing.⁶² In practice, it is difficult to expect the employer's workers to be completely independent of management. As a result, independent external consultants, external platform providers, or workers' representatives seem to be a better solution.⁶³

From the perspective of the risk of retaliatory measures, the most reliable option for a whistleblower is the possibility to submit an anonymous report. The obligation to establish anonymous channels and consider anonymous reports, which is already established in the Slovenian banking and financial sector, as well as in certain codes should also be stipulated in the new act.⁶⁴ It should be emphasized that with the new technology, it is possible to obtain additional information from an anonymous whistleblower later and to keep him or her informed even in the case of anonymous reporting (for example, via online platforms).⁶⁵

Nevertheless, it should be kept in mind that, despite a functioning internal reporting system, the decision regarding the choice of the reporting channel must be left to the whistleblower. Legal protection of the whistleblower should not depend on whether he or she first submitted an internal report or instead immediately approached an external institution.⁶⁶

5. External reporting

Individual acts also regulate the procedure for reporting violations to external institutions for their respective areas or impose on those institutions the obligation to establish a system for accepting reports. These external institutions are the KPK (ZintPK), the Bank of Slovenia (ZBan-2), the Insurance Supervision Agency (ZZavar-1), the

62 Employers have a duty under labour law to regulate the procedure and to designate a person responsible for receiving and handling reports of mobbing. The labour inspection finds that, despite the existence of internal procedures, workers often do not wish to exercise their rights related to mobbing before the employer, but prefer to turn directly to the inspection. See Inšpektorat RS za delo, 2019, pp. 71–72.

63 See point recital 54 of the Directive. Some major Slovenian employers have also hired external consultants for the position of confidential person in relation to mobbing reports, who are also geographically separated from the employer's place of business.

64 The Directive leaves the decision on whether anonymous reports will be considered to the Member States (see Article 6(2) of the Directive).

65 Transparency International, 2019, p. 8; A. Nabernik, *Preden prijavim goljufijo, želim vedeti, kakšno zaščito bom dobil (Before I report fraud, I want to know what protection I will get)*, Pravna praksa, No. 33, 2019, p. 25.

66 Article 7(2) and Article 10(1) of the Directive can also be understood in this context.

Securities Market Agency – ATVP (ZTFI-1, ZISDU-3), and supervisory authorities under Article 139 of ZPPDFT-1.

Article 23(1) of the ZIntPK provides that any person may report corrupt practices to the KPK or to another competent authority. The KPK and other competent authorities have to inform the reporting person of their actions or procedures at his or her request. Nonetheless, this provision does not interfere with the reporting person's right to inform the public of corrupt practices.⁶⁷

The identity of the reporting person may not be established (if the report was anonymous) or disclosed, but only if the commission considers that the reporting person made the report in good faith or was justified in believing that the information regarding the report is accurate.⁶⁸ Only the court may decide that the information or identity of the reporting person should be disclosed if this is strictly necessary to protect the public interest or the rights of others.⁶⁹ Otherwise, establishing or disclosing the reporting person's identity is defined as a misdemeanour, which is punishable by a fine (Article 77(1)(3), Article 77(2) and Article 77(6) of the ZIntPK).⁷⁰

In addition to the identity of the protected reporting person, which remains protected after the end of the procedure, all documentary materials relating to the procedure for reporting corruption are protected, as well. Pending the completion of the procedure before the commission or before another competent authority, such materials (documents, files, records, and others) are not considered public information. This applies even if the material is delegated to another authority.

Other special acts (ZBan-2, ZZavar-1, ZTFI-1, ZISDU-3, and ZPPDFT-1) determine the obligation of supervisory institutions to put in place an effective and reliable notification system for violations for persons employed by legal entities controlled by these supervisory institutions (banks, insurance companies, management companies, and others). In this respect, the acts impose on the supervisory institutions the obligation to ensure a simple and secure method for transmitting reports of violations, to determine internal procedures for accepting and examining the reports, including reporting on the findings in respect of the received reports and activities performed, to ensure adequate protection of personal data of the reporting persons, to not disclose such information without the reporting person's consent (except where it is considered necessary for the purposes of criminal proceedings under the law), and to seek to prevent the disclosure of the reporting person's identity. The most detailed is the regulation under the ZTFI-1, which also imposes on the ATVP the obligation to determine the appropriate number of employees who

67 This is explicitly stated in Article 23(1) of the ZIntPK.

68 See Article 23(4) of the ZIntPK. When assessing the good or bad faith of the reporting person, the commission takes into account especially the nature and gravity of the reported conduct, the damage caused by the reported conduct or impending damage, possible breach of the reporting person's duty of protecting certain data, as well as the status of the authority or of the person to whom the issue was reported.

69 Article 23(8) of the ZIntPK.

70 Article 77(1)(3), Article 77(2) and Article 77(6) of the ZIntPK.

are trained to provide interested persons with information on the procedure of informing the ATVP of violations, employees who are trained to accept reports, and employees who are trained to maintain contact with the reporting person. It explicitly provides for the obligation of the ATVP to publish on its website information about the communication channels for accepting reports, the procedure for the examination of reports, the appropriate way to protect the confidentiality of the reporting person and the procedures for the protection of the reporting person, as well as a disclaimer that the reporting person shall not be liable for damages or subject to criminal charges for disclosing information to the ATVP.⁷¹ The Act explicitly directs the ATVP regarding the establishment of the reporting procedure,⁷² which should allow for the acceptance of anonymous reports, reports submitted by telephone,⁷³ by e-mail, or by regular mail,⁷⁴ and in the course of a personal meeting of the reporting person with an ATVP employee.⁷⁵ Moreover, it needs to establish the type, content and timeline for feedback on the outcome of the report, whereas the communication channel for accepting reports should be separated from other communication channels of the ATVP. The rules on the protection of confidentiality of the reporting person's data are laid down in detail, too.

In Slovenia, the identity of whistleblowers is also protected in the case of reporting a violation to inspections and certain other authorities. Article 16(2) of the Inspection Act (*Zakon o inšpekcijskem nadzoru*, ZIN), which binds the inspectorates in all areas, imposes on the inspectors a duty to protect the source of reporting and the source of other information.⁷⁶ The Police Tasks And Powers Act (*Zakon o nalogah in pooblastilih policije*, ZNPPol)⁷⁷ stipulates in Article 118(4) that in the case where the police already ensure the anonymity of the reporting person or where the reporting person so requires, his or her personal information may not be disclosed (and may be disclosed only upon an order issued by the court). Such provisions on the protection of the source are likewise contained in some other legal acts.⁷⁸ Even if someone wishes to obtain the information on the source of reporting under the Public Information Access Act (*Zakon o dostopu do informacij javnega značaja*,

71 The ATVP must send all this information to the reporting person no later than upon receipt of the report.

72 See Article 431(6) of the ZTFI-1.

73 It is explicitly stipulated that the reporting person should be notified of any recordings being made at the beginning of the interview and that (in the event that he or she has revealed his or her identity) he or she should be informed of the possibility to authorize the written record of the interview.

74 The e-mail address must be secure and preserve confidentiality.

75 If the reporting person has disclosed his or her identity, he or she should be allowed to examine, correct and agree with the record of the interview by signing it.

76 In this respect, see the judgment of the Administrative Court of the RS U 313/2004.

77 Official Gazette of the Republic of Slovenia, No. 15/13, 23/15 – popr., 10/17, 46/19 – odl. US and 47/19.

78 For example in the Financial Administration Act, the Prevention of Restriction of Competition Act etc.

ZDIJZ),⁷⁹ the Information Commissioner will deny access to this information in such cases on the basis of Article 51(3) of this Act.⁸⁰

We can conclude that external channels for reporting certain types of violations are already in place in Slovenian sectoral legislation and practice and that the protection of the reporting person's identity is widely established, as well. When implementing the Directive, which imposed upon the Member States the obligation to establish independent and neutral external reporting channels, to regulate procedures for actions to be taken in response to these reports, and to protect the reporting person's identity, the starting point should be the well-established solutions, which should be (where necessary) completed or upgraded in accordance with the Directive.⁸¹ The ZIntPK⁸² is especially noteworthy in this regard, as it allows for anonymous reporting,⁸³ provides an appropriate legal basis for the protection of the reporting person's identity,⁸⁴ which is implemented by the KPK (concerning reports of corruption),⁸⁵ and determines sanctions for the cases of determining or disclosing the identity of the reporting person (as well as for the cases of retaliatory measures against the reporting person). All these solutions should be incorporated into the new regulation.

6. Public whistleblowing

The concept of public whistleblowing became the subject of a public discussion in Slovenia when an employee of the Agency of the Republic of Slovenia for Commodity Reserves revealed irregularities in the procurement of safety equipment in

79 Official Gazette of the Republic of Slovenia, No. 51/06 – official consolidated text, 117/06 – ZDavP-2, 23/14, 50/14, 19/15 – odl. US, 102/15 and 7/18).

80 In this regard, see UPRS judgement II U 456/2016-13, UPRS judgement II U 433/2016-13.

81 See provisions of Articles 10–14 and 16 of the Directive.

82 Slovenia falls within the group of countries with the most suitable legal protection granted to persons reporting corruption. See Transparency International, 2013, p. 8.

83 As is the case with internal reporting, I believe that it is also necessary to legally determine the obligation to accept anonymous reports and act upon such reports when reporting through an independent institution. In this regard, see also Transparency International, 2019, p. 8; V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, *Industrial Law Journal*, Volume 49, Issue 4, December 2020, p. 652.

84 Of course, when granting protection to whistleblowers, only the condition of reasonable grounds to believe that the information reported was true should be taken into account, without the requirement of good faith, as derived from the ZIntPK.

85 *Inter alia*, the reporting person can request special protection – they become a so-called disguised reporting person, who is designated a pseudonym or a code name when first contacting a KPK official, which is then used throughout the entire process. In this way, the identity of the reporting person is known only to the person responsible for the case. Between 2011 and 2018, the KPK designated 51 code names. See A. Nabernik, *Preden prijavim goljufijo, želim vedeti, kakšno zaščito bom dobil (Before I report fraud, I want to know what protection I will get)*, *Pravna praksa*, No. 33, 2019, p. 25.

a television show.⁸⁶ The term is generally understood as a public disclosure (typically through the media) of unlawful practices or other irregularities detected by the whistleblower in their working environment and disclosed in the public interest.⁸⁷

Slovenian legislation offers very limited answers concerning the question whether a whistleblower should first use internal or external channels to communicate these violations before publicly disclosing them. Only Article 23(1) of the ZIntPK, which refers to the possibility of reporting corrupt practices to the KPK or other competent authorities, expressly provides that this provision has no impact on the reporting person's right to inform the public of corrupt practices. The ZBan-2, ZZavar-1, ZTFI-1, ZISDU-3, and ZPDFT-1, which govern internal and external reporting channels do not regulate the relationship between these communication channels and possible public disclosure. In other areas, such reporting channels are not foreseen, so the conditions for the admissibility of public disclosure are not regulated, either.

A whistleblower publicly disclosing violations is protected in this respect by constitutionally guaranteed freedom of expression,⁸⁸ which, like other fundamental human rights, is not unlimited. The disclosure of various facts and data could harm the reputation, honour, good repute, and privacy of individuals, or could interfere with the material and non-material sphere of legal persons, i.e. with other constitutionally protected rights.⁸⁹ In the event of a collision of fundamental rights, the court has to decide in a particular case, based on all the relevant circumstances, "which right should be given protection and which right should yield to this right in order to activate the necessary, constitutionally protected content thereof"⁹⁰ or assess the (dis)proportionality of the infringement of one right to protect another.

The weighting of two fundamental rights might be needed where an individual (for example, a manager) files a claim for damages against the whistleblower or for publication of the judgment in the case of defamation or proliferation of false

86 See <https://www.delo.si/novice/slovenija/v-tarci-razkrili-dokumente-o-vmesavanju-politike-v-dobave-zascitne-opreme-302856.html>, accessed 01/09/2021, <https://www.delo.si/novice/slovenija/zaposleni-na-zavodu-za-blagovne-rezerve-pozivajo-k-zasciti-ivana-galeta-306797.html>, accessed 01/09/2021, <https://www.ostro.si/si/razkrinkavanje/objave/zvizgastvo-ni-javno-tozarjenje>, accessed 01/09/2021.

87 The notion is also defined in this sense in the few professional and scientific contributions on the topic of whistleblowing. See I. Vuksanović, *Poziv za specialno zakonsko ureditev zaščite »žvižgačev«* (Call for special regulation of "whistleblowers"), *Pravna praksa* 45/2010; D. Senčur Peček, *Delovnopravno varstvo žvižgačev* (Labour law protection for whistleblowers), *Delavci in delodajalci*, 2-3/2015.

88 See Article 39 of the Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121, 140, 143, 47/13 – UZ148, 47/13 – UZ90, 97, 99 and 75/16 – UZ70a.

89 See Articles 34, 35 and 38 of the Constitution of the RS, as well as Article 67 of the Constitution of the RS.

90 See judgement VS RS II Ips 61/2017, point 31. In the present case, the court weighted the rights set out in Articles 35 and 39 of the Constitution of the RS.

claims⁹¹ under the provisions of the Obligations Code (*Obligacijski zakonik, OZ*),⁹² or where the employer requests compensation for the damage from the whistleblower (worker) in accordance with the ZDR-1 (by applying, *mutatis mutandis*, the provisions of the OZ).⁹³ Article 37 of the ZDR-1 prohibits the employee from acting in a way that could cause material or moral damage to the employer's interests, whereas Article 177 governs the liability for damages of the employee who causes damage to the employer deliberately or out of gross negligence, at work or in connection with work.⁹⁴ The weighting between the employee's right to the freedom of expression and the right to respect for the reputation and business interests of the employer also constitutes grounds for decisions issued by labour courts on the legality of the termination of a whistleblower's employment contract due to a breach of the prohibition of causing harm under Article 37 of the ZDR-1. In several similar cases, the labour courts regarded the termination of the employment contract as a disproportionate interference with the freedom of expression,⁹⁵ following the criteria laid down in the decisions of the European Court of Human Rights in cases concerning Article 10 of ECHR (*Guja v. Moldova, Heinisch v. Germany, Rubins v. Latvia, Kharlamov v. Russa, Sanches v. Spain, and Langner v. Germany*).⁹⁶

Also the provisions of the Directive (regarding the question of the whistleblower's freedom of expression) are based on the case law of the ECHR and on the principles deriving from the Council of Europe Recommendation (2014).⁹⁷ It follows from both the ECHR's judgments and the Recommendation that the decision – whether freedom of expression was (un)lawfully restricted – depends on, *inter alia*, whether the whistleblower had (and used) other options for disclosure before making the public disclosure.⁹⁸ The Directive protects the whistleblower only if public disclosure⁹⁹

91 See Articles 177 to 179.

92 Official Gazette of the Republic of Slovenia, No. 97/07 – UPB1.

93 In the first case, the decision is issued by a regular court, while in the second case, it is issued by the labour court.

94 Taking into account Article 132 of the OZ and the case law, this damage includes both pecuniary and non-pecuniary losses, even in the event of damage caused to the reputation of a legal person (see Article 183 of the OZ).

95 See, for example, VDSS judgement Pdp 486/2011 of 26 October 2011 and VDSS (judgement and decree) Pdp 505/2012 of 14 June 2012.

96 Among the most important is the judgment and decree VIII Ips 109/2015 of 8 December 2015, issued in a case where a public employee was dismissed for the infringement of Article 37 of the ZDR-1 that he had supposedly committed by submitting a proposal for the dismissal of a manager (in which the manager was accused of several irregularities, including those related to the use of budget resources), which was previously sent to the president of the council of the defendant, to be published in a newspaper.

97 See recital 31 of the Directive.

98 See Council of Europe, 2017; see also Council of Europe (2014), pp. 10 and 40.

99 Public disclosure includes also disclosure to the media. Thus, this kind of solution, which discourages whistleblowers from direct disclosure to journalists, is considered as undermining the supervisory role of the media (M. Šepec et al., *The European whistleblowing directive*:

is used as a last resort, in the event of either inaction by the competent authorities (based on an internal or external report) or an imminent threat to the public interest or risk of retaliation (or inaction by the competent institution) in the case of external reporting.¹⁰⁰ The actual protection of the whistleblower in the event of public disclosure will thus depend on the CJEU's wide or restrictive interpretation of the concepts of imminent and obvious danger to the public interest, the risk of retaliation, and the risk of failure to address the infringements. It is possible to agree with the argument that the CJEU should follow the case law of the ECHR when assessing these issues.¹⁰¹ However, even in this case, whistleblowers will continue to be exposed to considerable uncertainty regarding the granting of protection in the event of public disclosure. The question is whether this uncertainty could be reduced by more concrete national arrangements, perhaps also by providing temporary safeguards in any case of public disclosure, in order to prevent any immediate action by the employer before the circumstances are clarified.¹⁰²

7. Protection against reprisal measures

7.1. The current legal framework of protection (*de lege lata*)

Legal acts governing the reporting of violations in various areas contain a general provision on the protection of whistleblowers against retaliation (without specifying retaliatory measures in more detail), and some (especially the ZIntPK and the ZTFI-1) additionally regulate the protection against particular retaliatory measures.

According to provisions of the ZintPK, employees or public employees who have reported corrupt practices are protected against retaliatory measures of the employer.¹⁰³ Since the Act does not specify retaliatory measures, all practices and conduct of the employer can be considered as such, including termination of the employment contract. If an employee or a public employee has been subjected to retaliatory measures by their employer and such measures have resulted in damage, the ZIntPK provides the basis for the employee's right to claim compensation for

a legislative barrier between journalists and their sources?, Media, Culture & Society 7–8/2020, p. 1542). However, the Directive is without prejudice to any specific national protection regime in the event of direct disclosure to the media. See Article 15(2).

100 See Article 15 of the Directive.

101 Abazi, 2020, p. 651.

102 The danger of abusing the rule of primary use of other channels for disclosure (in order to justify the dismissal of the worker) is also pointed out by the Council of Europe, 2014, p. 40.

103 Article 25 of the ZIntPK.

the damage caused unlawfully by the employer.¹⁰⁴ Especially significant is the role of the KPK when establishing a causal link between the report and the retaliatory measures (disciplinary measures, termination of the employment contract) and the authority of the KPK to demand immediate discontinuation of such conduct.¹⁰⁵ Another important provision stipulates that in the event of a dispute (due to mobbing or unlawful termination of the employment contract), the burden of proof rests with the employer. The employer will thus have to prove that his or her conduct was not a retaliatory measure resulting from the report. In addition, public employees have the option of being transferred to another equivalent work post, which is often the most efficient measure.

The ZBan-2, ZZavar-1, ZTFI-1, and ZISDU-3 contain almost identical provisions obliging employers (banks, insurance companies, financial sector entities, and management companies) to establish measures to prevent any retaliation, discrimination, or other inappropriate treatment of employees who have filed a report, as well as measures to remedy the consequences of retaliation if the inappropriate treatment has already occurred.

Furthermore, the ZTFI-1 explicitly protects the reporting person against the termination of the employment contract and liability for damages. Namely, it stipulates that the reporting of the employer or a person in a contractual relationship with the employer does not constitute a breach of the employment contract or statutory obligations of the employees. Such report is considered an unfounded reason for the termination of the employment contract. Moreover, the reporting person is not liable for any damage caused by the report to the employer or a third party, unless the damage is caused intentionally or through gross negligence.¹⁰⁶

In all the other cases (when they report other wrongdoings), employees and public employees are protected under general provisions of labour legislation. Protection concerning harassment and mobbing and termination of employment contracts is particularly crucial for whistleblowers.

The ZDR-1 regulates the prohibition of sexual and other harassment and workplace mobbing.¹⁰⁷ These provisions also stipulate that the burden of proof rests with the employer, who has to prove that he or she has not violated his or her duty to provide a work environment free of harassment and mobbing. In the case of harassment

104 The employer and the responsible person acting on behalf of the employer who cause damage to the reporting person or subjects him or her to retaliatory measures are also punishable by a fine for offence.

105 If they should fail to comply, the ZIntPK imposes on the responsible person acting on behalf of the employer and on the employer a fine for the offence.

106 See Article 431(14) and (15) of the ZTFI-1.

107 Harassment is defined as any undesired behaviour associated with any personal circumstance with the effect of adversely affecting the dignity of a person or creating intimidating, hateful, degrading, shaming or insulting environment or with the intent to achieve such effect. Workplace mobbing is any repeated or systematic, wrong or clearly negative and offensive treatment or behaviour directed at individual employees at the workplace or in connection with work.

or mobbing, an employee (public employee) is entitled to compensation¹⁰⁸ or may also extraordinarily terminate the employment contract.¹⁰⁹ Additionally, a fine for the offence can be imposed on an employer who fails to provide protection against harassment or mobbing under the law.

Moreover, the protection of whistleblowers against unlawful termination of an employment contract falls under the scope of general provisions of labour legislation. The ZDR-1 and ZJU both stipulate that the employer may only terminate an employee's or a public employee's employment contract if there is a substantiated reason provided in these acts, and only in accordance with provisions of these acts (relating to the employee's possibility of defence, to the role of employee representatives, the form and content of termination and the service of notice of termination). The burden of proof rests with the employer. These acts, moreover, determine the circumstances or the conduct that may not be considered a justified reason for termination, for instance, trade union membership, participation in a strike, participation in trade union activities, as well as filing an action or participating in proceedings against the employer due to allegations of their violations of contractual or other obligations arising from the employment relationship before arbitration, court or administrative authorities, and others (Article 90 of the ZDR-1).

If an employee believes that the termination of the employment contract was unlawful (either because reasons were not justified or for procedural grounds), he or she may request before the competent labour court to establish the illegality of termination within 30 days of the day of the service. If the employer fails to prove the existence of reasons for termination or if there are procedural reasons, the court establishes that the termination of the employment contract was unlawful and determines that the employee shall return to work, or under certain conditions, grants the employee adequate compensation instead of reintegration.¹¹⁰ The court determines the amount of monetary compensation according to the criteria laid down by law,¹¹¹ but it should not exceed the amount of 18 monthly wages of the employee.¹¹²

108 Where the awarded damages must be sufficiently high to be effective and to discourage the employer from committing further violations. See Article 8 of the ZDR-1.

109 In that case, the employer pays to the employee severance pay (in the same amount that would be granted to the employee in the case of ordinary termination of the employment contract for business reasons by the employer) and compensation amounting to no less than the amount of lost remuneration during the notice period.

110 The proposal can be made by either the employee or the employer, and the court may grant compensation instead of reintegration, if it has been established that with regard to all the circumstances and interests of both contracting parties, the continuation of the employment relationship would no longer be possible. See Article 118 of the ZDR-1.

111 The criteria or circumstances that the court takes into account when determining the amount are the duration of the employee's employment, the employee's options with regard to finding new employment, the circumstances that led to the unlawfulness of the termination of the employment contract and the rights invoked by the employee in the period up to the termination of the employment relationship.

112 See Article 118(1) and (2) of the ZDR-1.

A public employee may file an appeal against the termination of their employment contract with the appellate commission, whereas a judicial review is only allowed if the public employee has exhausted the right to appeal. A public employee may request a judicial review within 30 days of being served the decision of the appellate commission or of the expiration of the deadline for issuing the decision by the appellate commission. If the unlawfulness of the termination of the employment contract is established, the public employee shall also be ordered to return to work or granted compensation instead under the same conditions as the employee.

The continuation of work in his or her current work environment can very often become difficult for the reporting person; therefore, the most efficient protective measure is a change of the work post. The ZIntPK only provides this possibility in the case where the person reporting corruption is a public employee.¹¹³ They can request to be transferred to another equivalent work post.¹¹⁴ Such request may be made if they continue to be the focus of retaliation despite the KPK's demand that such conduct is discontinued, making it impossible for them to continue working in their current work post. A public employee requests to be transferred away from the employer and informs the KPK of this request. The employer has an obligation to ensure that the public employee's demand is met within 90 days at the latest and to inform the KPK of this fact. If the employer fails to transfer the public employee without providing justified reasons, the ZIntPK imposes on the employer and the responsible person acting on behalf of the employer a fine for the offence.

7.2. The proposed new legal framework of protection (*de lege ferenda*)

In accordance with the Directive, which obliges Member States to prohibit any form of retaliation measures against whistleblowers,¹¹⁵ the new Slovenian legislation should also contain a properly worded general ban on any retaliation against whistleblowers¹¹⁶ and at the same time exemplificatory list of the most important possible retaliatory measures.¹¹⁷

Subject to Article 21 of the Directive, Member States must take the necessary measures to protect whistleblowers from retaliation measures. Given that the Slovenian sectoral legislation contains some very good solutions regarding the protection

113 Article 25(4) and (6) of the ZIntPK.

114 Even though this is not explicitly stipulated by the law, transfers to another body will mainly be suitable (for example, from one ministry to another).

115 See also Council of Europe, 2014, p. 9 (principle 22).

116 The term "whistleblowers" covers also persons associated with whistleblowers who are provided with protection.

117 The examples listed in the Directive include contract termination, discrimination, harassment etc. See Article 19.

of reporting persons, it would be advisable to provide these protective measures to all whistleblowers under the new law. It would also be advisable to supplement labour/employment legislation (which already guarantees the right to adequate judicial protection and reintegration of unlawfully dismissed workers) with a more concrete whistleblower protection regime and to extend the validity of labour law provisions relating to these safeguards to all workers in the broadest sense. The measures that could be enacted are (*inter alia*) the following: the presumption that a measure against a whistleblower (dismissal, transfer, degrading treatment, infliction of damage, etc.) is a retaliatory measure, with shifting of the burden of proof – that the measure is not related to the report of the infringement – onto the employer;¹¹⁸ if necessary, providing the whistleblower with the assistance of the competent authority¹¹⁹ in establishing a causal link between the retaliation and the report of the infringement;¹²⁰ providing the competent authority with the legal possibility to withhold retaliation measures (e.g. dismissal);¹²¹ explicitly classifying the reporting of infringements as an unfounded reason for termination;¹²² or the classification of the whistleblower as a specifically protected category with a general non-regression clause,¹²³ the possibility of transfer within the employer or to another body in the case of the public sector,¹²⁴ and the whistleblower's right to adequate compensation that fully covers the suffered damage and will act as a deterrent.¹²⁵

Even when enforcing measures explicitly provided for in the Directive (for example, eliminating contractual liability in relation to disclosure of information and eliminating liability in certain proceedings), which sets special conditions for their application,¹²⁶ it would be advisable to take into account already established legal

118 See Article 21(5) of the Directive; see also Transparency International, 2019, p. 7.

119 The authority responsible for receiving applications (such as the Commission for the Prevention of Corruption) or the labour inspectorate could be responsible.

120 Similar to Article 25(2) of the ZIntPK. Among the rare cases of implementation of this provision was the case when the Commission for the Prevention of Corruption prepared an expert opinion on the existence of a causal link in the procedure of termination of an employment contract as a consequence of a report of corruption. See Nabernik, *Preden prijavitim goljufijo, želim vedeti, kakšno zaščito bom dobil (Before I report fraud, I want to know what protection I will get)*, Pravna praksa, No. 33, 2019, p. 25.

121 The ZDR-1 provides the labour inspector with the general possibility of withholding the effect of a dismissal (if necessary to prevent arbitrary conduct and prevent irreparable damage). The latter is possible until the lapse of the time limit for judicial protection or until a decision of the court on a proposal for the issuing of an interim order in the event that the worker requires an interim order in judicial proceedings (see Article 215 of the ZDR-1).

122 As already provided by the ZTFI-1.

123 Similarly, the ZDR-1 provides for workers' representatives' (see Article 207 of the ZDR-1).

124 As stipulated in Article 25(4) of the ZintPK.

125 In the sense of Article 8 of the ZDR-1.

126 Article 21(2), (7) and (5). A special condition is the well-founded belief that "the notification or disclosure was necessary to disclose an infringement under this Directive".

solutions¹²⁷ and grant such protection to whistleblowers subject only to the fulfilment of the general conditions for protection.¹²⁸

8. Whistleblowing and anti-discrimination measures

Article 6 of the ZDR-1 governs the prohibition of discrimination and retaliation. The employer must ensure equal treatment of the candidate for employment and the employee in respect of entering into an employment relationship, during the employment relationship, and upon termination of the employment contract, regardless of various (non-exhaustively listed) personal circumstances (nationality, race, ethnic origin, gender, skin colour, health condition, disability, religion, age, sexual orientation, family status, membership in a trade union, or financial situation). They do not include whistleblowing.

Given that the circle of possible personal circumstances on the basis of which discrimination is prohibited is not listed exhaustively, whistleblowing could also be considered among these circumstances. While Slovenian legislation fails to define the notion of “personal circumstances”, Slovenian legal doctrine provides a broad definition, referring to “the circumstances or characteristics that significantly co-create the individual’s identity or represent an essential integral part of the identity”.¹²⁹

The ZDR-1 prohibits both direct and indirect discrimination on the grounds of personal circumstances as well as retaliatory measures related to invoking the prohibition of discrimination, stipulates that the burden of proof lies with the employer, and defines a deterring and effective compensation.

The burden of proof is distributed so that in the event of a dispute, the employee (or the candidate for employment) has to indicate the facts that justify the presumption that they were a victim of discrimination, whereas the employer must then prove that there was no discrimination and that, therefore, he or she has not violated the principle of equal treatment.¹³⁰

As follows from Article 8 of the ZDR-1, in the case of violation of the prohibition of discrimination, the employer is liable to pay compensation to the employee or the candidate under general rules of civil law. Non-pecuniary damage includes mental pain suffered as a result of the unequal treatment of the employee or discriminatory conduct

127 For example, Article 431 of the ZTFI-1 regarding relief from civil liability; provisions of the KZ-1 relating to exemption from criminal liability in connection with the criminal offences of insult, defamation, as well as the criminal offence of leaking classified information and illegal disclosure of professional secrets.

128 Stronger whistleblower protection in civil and criminal proceedings is also proposed by Transparency International, 2019, p. 6.

129 B. Kresal, [in:] I. Bečan et al., *Zakon o delovnih razmerjih s komentarjem*, Lexpera GV založba, Ljubljana, 2019, p. 51.

130 See Article 6(6) of the ZDR-1.

by the employer. When determining the amount of compensation for non-pecuniary damage, the court should ensure that the compensation is effective and proportionate to the damage suffered by the candidate or employee and that it will discourage the employer from further violations.

The employee's claim for damages is subject to a limitation period under Article 352 of the OZ. The claim for damages expires within three years of the time the injured party (employee) became aware of the damage and the person who caused it. In any case, the statute of limitations for this claim expires within five years of the damage occurring.

In the case of an unsuccessful candidate, the ZDR-1 provides a shorter period for filing a claim for damages. If the unsuccessful candidate considers that the choice was accompanied by an infringement of the prohibition of discrimination, they may, within 30 days of being served with the employer's notification, request judicial protection before the competent labour court.¹³¹ They may claim compensation under Article 8 of the ZDR-1.

Under the Directive, discrimination against the whistleblower is one of the forms of prohibited retaliation.¹³² A way to ensure that whistleblowers are protected from less favourable treatment could also be to explicitly classify "whistleblowing" as one of the personal circumstances on the basis of which less favourable treatment is prohibited.¹³³ Consequently, all the protection mechanisms in relation to non-discrimination would apply to whistleblowers.

9. Whistleblowing and workplace representative bodies

In Slovenia, there are two types of workers' representations representing the workers' interests before their employer: the trade union and the directly elected works council (or the worker representative). The matters about which the employer has to inform workers' representatives, consult them or even obtain their consent, are governed by the ZDR-1 (for trade unions and partly also for works councils) and the Worker Participation in Management Act – ZSDU¹³⁴ (for works councils). These are issues that are important for the position of workers (such as collective redundancies, restructuring of the employer, working time, inclusion of atypical forms of work, the field of safety and health at work etc.).¹³⁵

131 They may claim compensation under Article 8 of the ZDR-1.

132 Article 19(h).

133 Such solutions can be found, for example, in Slovak and French law.

134 Official Gazette of the Republic of Slovenia, No. 42/07 – UPB1.

135 See K. Šoltés, [in:] Bečan et al. (eds.), *Zakon o delovnih razmerjih s komentarjem (Labour Relations Act with Commentary)*, Lexpera GV založba, Ljubljana, 2019, p. 1096, also p. 1107; and also V. Franca, *Sodelovanje zaposlenih pri poslovnem odločanju (Employee participation in business decision making)*, Planet GV, Ljubljana, 2009.

Neither the ZDR-1 nor the ZSDU contain provisions on protecting whistleblowers or the role of workers' representations in their protection. Given the fact that under Article 10(1) of the ZDR-1, the employer is required to obtain the opinion of trade unions of the employer on any proposals of general acts regulating the organization of work or specifying the workers' obligations,¹³⁶ the employer will have to fulfil the same obligation in the case of a general act setting out internal reporting rules (if such trade union of the employer exists).

Given the importance of the rules concerning internal reporting channels and the protection of whistleblowers for the rights of workers, it would be appropriate (in this connection) to introduce an obligation to consult the directly elected workers' representatives (works councils). Such an obligation is determined (in the ZSDU), for example, regarding the adoption of acts in the field of safety and health at work.¹³⁷ It would also be possible to leave the regulation of these issues to the parties to collective agreements (at the industry/branch/sector or company level), as this is not just a question about work obligations and organizational issues, but also about interfering with workers' rights, which could already fall into the field of collective bargaining.¹³⁸

10. Institutional framework

There is no special institution dealing with the protection of whistleblowers in Slovenia.

Considering sectoral legislation, the most important institution which (among other things) protects whistleblowers who report corrupt practices is the Commission for the Prevention of Corruption (KPK). It is an autonomous and independent state body aiming to curb corruption, strengthen the rule of law, and promote integrity and transparency in society.¹³⁹

While the Securities Market Agency has no direct authority in terms of ensuring the protection of whistleblowers who report violations in the field of financial instruments, it plays an important role in providing information to reporting persons. The ZTFI-1 requires the Agency to publish on its website information about the procedures for the protection of reporting persons and provide the reporting person

136 A trade union of the employer is any representative trade union whose members are the employer's workers that elects a trade union representative. See Article 10(7) of the ZDR-1.

137 This is an area that covers also the protection of workers from harassment and other psychosocial risks.

138 On the relationship between the employer's general acts and collective agreements, see K. Šoltes and S. Peček, [in:] Bečan et al., *Zakon o delovnih razmerjih s komentarjem (Labour Relations Act with Commentary)*, Lexpera GV založba, Ljubljana, 2019, pp. 91–97.

139 See Article 5 of the ZIntPK.

at their request with comprehensive information and advice on legal remedies and procedures available to them for the protection of their rights.¹⁴⁰

According to the Directive, Member States must designate authorities competent for receiving reports of irregularities and adopting follow-up measures¹⁴¹ as well as an information centre or an independent administrative body to provide whistleblowers with support measures (information and advice, assistance in proceedings etc.).¹⁴² This can be a newly established body or an already existing one. According to the powers exercised by the KPK in relation to the protection of whistleblowers (acceptance of reports of corrupt practices, protection of the identity of the whistleblower, protection of the whistleblower against retaliation, as well as forwarding reports to other competent bodies when alleged infringements fall within their jurisdiction),¹⁴³ it can be expected that the KPK will be designated as the body for receiving applications and forwarding them to the competent authorities, as well as for providing support measures. Even if a new body is established, it will be able to use the KPK's experience in carrying out certain tasks.¹⁴⁴

NGOs also play an important role in raising public awareness as well as in advising potential whistleblowers.¹⁴⁵ Such an organization is Transparency International Slovenia (TI Slovenia).¹⁴⁶ It is a non-governmental and non-profit organization with a status in the public interest of the Ministry of Public Administration. The TI established the Center Spregovoril!, which receives reports of suspected irregularities, especially corruption and unethical practices, for the purpose of advising individuals who detected suspected irregularities in the public interest. TI Slovenia is also very active in the field of whistleblower protection. Among other things, it is actively involved in discussions regarding the implementation of the new Directive.¹⁴⁷

Recently, a Whistleblower Help Centre was established in Slovenia.¹⁴⁸ It will address the issue of remedying the consequences of retaliatory measures that often afflict whistleblowers. The Centre will use donations to create a fund which will provide assistance in the form of monetary compensation for loss of income, coverage of legal representation or professional advice in the field of psychosocial support, IT security, possible communication with the media, possible physical

140 See Article 431(3) and (17) of the ZTFI-1.

141 Among possible bodies, recital 63 of the Directive lists, *inter alia*, the anti-corruption body.

142 See Article 20 of the Directive.

143 See the KPK, 2019, p. 44 and the following.

144 In this sense also A. Nabernik, *Preden prijavitim goljufijo, želim vedeti, kakšno zaščito bom dobil* (Before I report fraud, I want to know what protection I will get), *Pravna praksa*, No. 33, 2019, p. 27.

145 See recital 89 of the Directive.

146 See <https://www.transparency.si/>, accessed 1/09/2021.

147 See <https://www.transparency.si/novica/zaskrbljujouce-pomanjkanje-napredka-pri-zasciti-zvizgacev/>, accessed 01/09/2021.

148 It was founded by Ivan Gale, a former employee of the Agency of the Republic of Slovenia for Commodity Reserves (who publicly revealed irregularities and later lost his job), and the European Institute for Compliance and Business Ethics from Ljubljana.

protection, etc. The whistleblowers' requests for protection will be examined by a committee made up of three eminent individuals. According to the Centre's website, it will also be active in raising awareness, establishing a positive attitude towards whistleblowing, advocating in the form of dialogue with the competent institutions and preparing initiatives and proposals for individual and systemic (including legislative) solutions.¹⁴⁹

Conclusion

The current protection of whistleblowers in Slovenia is limited in terms of content and scope, as individual sectoral laws only regulate the protection of whistleblowers who disclose certain types of irregularities (e.g. corruption practices) or in certain areas (violations of laws regarding financial institutions, securities markets etc.). The labour law legislative framework is appropriate. Nonetheless, it is general (it does not explicitly protect whistleblowers) and therefore less effective in protecting whistleblowers. The obligation to implement the Directive is an opportunity to enact a new law to comprehensively regulate the protection of whistleblowers, which will cover a wide range of protected persons in relation to the disclosure of all irregularities and will extend to the fields of labour, civil and criminal law. In doing so, it would be advisable to use many already established sectoral solutions and extend the application of some provisions of the amended labour legislation. However, in order to improve the protection of whistleblowers – in addition to proper regulation of employers' obligations and punitive sanctions for their breach – effective supervision is essential.

Abstract

Workers and public employees reporting unlawful or harmful conduct in Slovenia are granted special protection only by specific acts, whereas they also enjoy general labour-law protection as employees. The paper addresses the state of their protection as provided by the applicable sectoral legislation relating to the prevention of corruption and to reporting of irregularities in banking and financial sectors, as well as by general labour legislation. Based on the analysis of the material and personal scope of the existing protection, the regulation of reporting channels, the possibility of public disclosure, the legally defined protective measures, and the institutional framework, the author adopts a position on the possibility to update this protection by proper implementation of the EU Directive 2019/1937.

149 See <https://center-zvizgaci.si/>, accessed 01/09/2021.

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Part 2

Current Regulations in the Visegrad Countries and Proposed Changes

Protection of Whistleblowers under Czech Law within the Context of the Directive on the Protection of Persons Who Report Breaches of Union law (2019/1937)

Jakub Morávek¹, Jan Pichrt²

<https://doi.org/10.18778/8220-639-5.06>

Introduction

Since the turn of 2009, the issue of whistleblowing has been the subject of intense scrutiny in the Czech Republic. During that period, several companies involved in multinational group structures approached the Office for Personal Data Protection with regard to fulfilling their notification duty pursuant to Sec. 16 (now repealed) of Act No. 101/2000 Coll., On personal data protection. In so doing, their aim and intention was to register their internal whistleblowing systems in response to the US Federal Sarbanes-Oxley Act of 2002.

In response to these notifications, *inter alia*, the professional public began to deal and contend with the issue and, as a result, the first few articles on the topic were subsequently published.³ These articles were published *de facto* in tandem

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- 1 Doc. JUDr. Jakub Morávek, Ph.D. The author works at the Department of Labour Law and Social Security Law within the Faculty of Law, Charles University, as a reader and secretary. He is also the Vice-Chairman of the Czech Society for Labour Law and Social Security Law and is a practicing attorney in Prague.
 - 2 Prof. JUDr. Jan Pichrt, Ph.D. The author is the head of the Department of Labour Law and Social Security Law within the Faculty of Law, Charles University, and is chairman of the Czech Society for Labour Law and Social Security Law and is a practicing attorney in Prague. This chapter takes into account the situation as of 28 February 2021 and was created thanks to the support provided under the research project entitled 'Private Law and Challenges Today', ID. No. PROGRES Q03, and the UNCE project (research centre) – Dependent work in the 21st century – questions and challenges.
 - 3 See e.g. J. Pichrt, J. Morávek, *Whistleblowing*, Law for Business and Employment, St. No. 7–8, 2009, pp. 19–25, J. Pichrt et al., *Whistleblowing and related aspects – international conference*, Wolters Kluwer, Prague 2013.

with the first reports and materials that had been issued by the non-profit sector.⁴ Additionally, various professional conferences and discussion forums eventually followed.⁵

Relatively shortly thereafter, the topic of whistleblowing was also ‘discovered’ by political leaders, who sensed its political potential, especially in connection with the fight against corruption. Such a discovery was then followed by a number of unsuccessful attempts by the legislature to adopt whistleblowing legislation.

The presented chapter briefly summarizes the current legislative efforts and outlines the existing institutions of whistleblower protection under Czech law, and discusses the current form of the bill on whistleblower protection, intended to transpose Directive (EU) 2019/1937 of the European Parliament and Council of 23 October 2019 on the protection of persons who report breaches of Union law.

1. Existing legislative proposals for whistleblowing legislation

Presently, two independent bills for the legal protection of whistleblowers are being heard for discussion by the Chamber of Deputies of the Parliament of the Czech Republic, and through which Directive No. 2019/1937 is intended to be transposed. The first one is a bill that was submitted by MPs from the opposition Pirate Party on 22 July 2020. Additionally, a government bill on the protection of whistleblowers and a companion amendment bill were submitted on 9 February 2021.⁶

Although the bill put forth for consideration by the Pirate Party can be regarded as being more promising⁷ from a number of perspectives, further attention will be paid in detail to the government bill only. However, there is no reason (unfortunately) to believe that the opposition piece would gain any political support.

Nevertheless, the current political climate, especially the pandemic situation, as well as the minority government and the upcoming autumn elections for the Chamber of Deputies of the Parliament of the Czech Republic, are all extenuating circumstances which may potentially derail the success of the government bill.

4 See e.g. *Whistleblowing and whistleblower protection in the Czech Republic*. Transparency International. Prague 2009.

5 *Whistleblowing and related aspects – international conference*, Faculty of Law, Charles University, Prague, 2013, *Challenge for the Czech Republic: Whistleblowing as a protection of the financial interests of EU citizens*, organized by the non-profit organization Oživení, Prague 2015.

6 See Parliament of the Czech Republic, Chamber of Deputies, 8th term. Print No. 1150/0 and No. 1151/0.

7 The bill more clearly reflects the existing body of case-law of the ECtHR on the protection of whistleblowers, which is in line with the principles of a liberal democratic rule of law, and limits the scope of negotiations that may be the subject of notifications, etc.

As such, it cannot be ruled out that even this effort will go down in history as another unsuccessful attempt to regulate whistleblowing, which would already be the seventh failure in a row to do so. Should this be case, then the Czech Republic would not be able to meet the deadline for transposition.⁸

For a more comprehensive overview, we briefly refer below to earlier attempts to adopt legislation on whistleblower protection.

Government Bill (2012)

In November 2012, the Government of the Czech Republic approved the first draft legislation for whistleblower protection, wherein the aim was to fulfil the government's programme statement, calling for fight against corruption.

However, the proposed legislation was fragmentary as it only dealt with notifying the law enforcement authorities and failed to consistently address the protection of whistleblowers or the disclosed party, nor did it contain any internal regulation, and furthermore whistleblowers were granted protection very 'simply', merely by virtue of incorporating the proposed piece into an existing regulation, i.e. the Anti-Discrimination Act.

The bill was subjected to considerable criticism and scrutiny from the professional public. In 2013, the government suffered a crisis and no further attention was paid to the bill, i.e. it was 'dead in the water', so to speak.

Senate Bill (2013)

In 2013, a second legislative attempt was initiated by a group of senators. Intriguing, *inter alia*, was the fact that the submitters were led by Libor Michálek, who, prior to winning a seat in the Senate, had become a media-famous whistleblower after being fired from his position as a result of exposing high-level corruption.

The bill that was submitted by the senators followed the path of a separate law. However, it was intended to apply only to certain employees (especially in the public sector) and only to some acts (very specifically defined, e.g., the amount of anticipated harm and/or damage, etc.). Furthermore, the bill was insufficiently elaborated in terms of the legislation. As such, the Senate subsequently returned it to the legislators to be worked through. However, there was never any further discussion about it.

⁸ That would be nothing new. For example, the adaptation legislation (Act No. 110/2019 Coll. and Act No. 111/2019 Coll., respectively) for the GDPR, which entered into force on 25 May 2018, was not adopted until 24 April 2019. For almost a year, it was therefore not possible to apply the general regulation adequately and to control and penalize any violations thereof.

Parliamentary Bill (2016)

In 2016, a bill on the protection of whistleblowers was submitted by Andrej Babiš, the current Prime Minister and then Minister of Finance and Member of Parliament. It was an attempt at introducing a comprehensive statutory regulation that was significantly inspired by the then effective Slovak law on the protection of whistleblowers.

According to the bill, a wide range of persons were intended to have the right to make disclosures concerning exhaustively defined criminal offences and misdemeanours. Moreover, the bill required the prior consent of the Labour Office of the Czech Republic to engage in legal proceedings (within the framework of employment relations) against a person who was to have the status of a protected whistleblower.

Needless to say, the bill did not even manage to pass its introductory reading in the legislature. Rather, the end of the debate coincided together with the end of the term of office of the Chamber of Deputies. The reasons for this fate were many. Casting the factual reservations aside, it was primarily a matter of the fact that the bill was submitted by Babiš as a parliamentary bill without any governmental and, by extension, political support. In fact, it essentially served as a medium for a political struggle insofar as the intention to present the law was in fact announced at the same time as the bill within the meaning of the following point.

Government Bill No. 2 (2017)

The government bill from 2017, which had already been introduced in its basic form in 2016, seems to symbolically close the circle of hitherto futile attempts to regulate the protection of whistleblowers in the Czech Republic. In an effort to find a simple solution to an inherently complex problem, it very closely resembled the first government bill. This time, however, the government did not seek to expand the list of discriminatory grounds.

Whereas the fourth attempt sought to ensure the protection of whistleblowers by adding a single paragraph to Sec. 133a of Act No. 99/1963 Coll., the Code of Civil Procedure, which would extend the already existing regulation of the 'reverse' burden of proof in civil proceedings to whistleblowers as well.

Thus, for example, the burden of proof would newly be shared (transferred) even where it concerns labour law disputes between whistleblowers who would state in court that the reason for their being 'sanctioned' by the employer was due to their whistleblower activity. *Ergo* once again, it was a very simplistic and straightforward bill.

Similar to the Babiš bill, in this case it was in fact only a political gesture, since the bill was submitted to the Chamber of Deputies immediately before the end of the term of office, and therefore had no hope of moving to the next stage of negotiations in the legislative process.

At the moment, Government Regulation No. 145/2015 Coll., On measures related to the reporting of suspected misconduct whilst in the service of an office, can be considered as the only partial forthright legislation vis-à-vis the protection of whistleblowers (with both eyes shut). The Regulation was issued in order to implement Act No. 234/2014 Coll., On the civil service. However, the Regulation only applies to civil servants and contains only an organizational procedure for investigating disclosures, whereas no measures with respect to protecting whistleblowers are contained therein. Moreover, its constitutional conformity is problematic since, save for the provisions of the Civil Service Act, which states that a government decree is to be adopted, the Civil Service Act does not in fact provide anything more detailed about its content. The legal authority to issue an implementing regulation for the content in question is therefore not sufficient.

And so, the question thus arises: What is the cause for the repeated failures in formulating the statutory legislation of whistleblower protection in the Czech Republic?

If we were to leave out the political stage, the failures experienced to date are likely due to the necessary cross-section of the future legislation on whistleblower protection, along with the endemic complexity of regulations on individual areas upon which it should fall (e.g., employment relationships, service-supply relationships, etc.), their varying natures (i.e. employment relationships are public, whereas labour and service-supply relationships are of a private nature), and the fact that the vast majority of them have their own institutes as well as mandatory rules for preventing unjustified interference with the rights of persons who are in a weaker position.

For example, an employment relationship may be terminated unilaterally by the employer by way of giving notice or upon immediate termination, however, only if a statutory causal reason can be demonstrated and fulfilled, while the same applies to transferring to another job. Moreover, there must also be a legitimate reason for reducing an employee's remuneration, etc. With regard to the system of court proceedings, as a rule, the duty and burden of proof lie primarily with the employer, even in a dispute that has been initiated by an employee. The aforementioned similarly applies to service-supply relationships.

At the same time, legislation is in place on the protection of personal data, providing consistent protection for both whistleblowers and disclosed parties alike.

One must bear in mind that anti-discrimination legislation and the associated possibilities of private and public sanctions cannot be neglected, either.

The legislation concerning the criminal liability of legal entities as well as misdemeanour legislation, or more specifically the formulation of the grounds required to be released from liability for committing misdemeanours and crimes, also have an indispensable significance. Simply put, a person must prove that they have done all that was fair and just to be required of them in order to prevent the breach of their legal obligation from occurring. This construct is conducive to many opting to create internal notification systems, adopt *compliance* programmes, etc.

Although no special law exists at this time, a relatively wide-array of possibilities for the protection of whistleblowers can thus be inferred from the legal system as a whole.⁹ Under these circumstances, it is difficult to formulate further rules and institutes for the protection of whistleblowers.

The reason behind the insufficiency and inadequacy of whistleblower protection seems to lie elsewhere: it is cumbersome, too slow, complicated and costly to enforce the law, especially through the courts. However, ensuring the explicit legal protection of whistleblowers will hardly solve this broad issue.

2. Bill on the Protection of Whistleblowers¹⁰

Directive 2019/1937 provides a clear framework for transposing the legislation. Reflecting on this fact, only selected aspects of the proposed legislation will thus be mentioned, wherein there is a deviation from the basic task ensuing from the Directive. At the same time, one must bear in mind that the proposed legislation can be supplemented or amended in any way whatsoever during its journey through Parliament.

2.1. Definition of scope – disclosure and the protected whistleblower

The cornerstone of the whistleblower protection legislation is the delineation of the concept of ‘protected disclosure’ and, along with it, the protected whistleblower. In summary, both concepts *de facto* determine the scope of the legislation.

The proposed regulation significantly exceeds the ambit of the areas designated by the Directive which are to be affected by the whistleblower protection legislation.

A notification is to be understood as a disclosure which is made by a natural person containing information regarding:

- a possible violation having the elements of a criminal offence in general, not just in the areas within the meaning of Article 2 of Directive No. 2019/1937, or
- possible unlawful conduct committed in violation of the legislation of the Czech Republic or the European Union in the areas pursuant to Sec. 1 (2) of the bill, which *de facto* duplicates Article 2 of Directive No. 2019/1937,

9 Incentive measures in relation to whistleblowers *de facto* exclude the experience of local society from the times of non-freedom, whether during Communism, the Nazi occupation, or even further back in time in the Austro-Hungarian Empire.

10 See Parliament of the Czech Republic, Chamber of Deputies, 8th term. Print No. 1150/0 and No. 1151/0, <https://www.psp.cz/sqw/historie.sqw?o=8&T=1150>, accessed 01/9/2021.

where the whistleblower became cognizant of the perpetration thereof in connection with performing their work or other similar activity.¹¹

Thus, for illustrative purposes a protected disclosure could be, e.g., the reporting of damage caused to a symbol protected by law other than the state seal of the Czech Republic (Sec. 3 of Act No. 251/2016 Coll.); burning leaves or grass on a day other than that specified by a municipal ordinance (Sec. 4 of Act No. 251/2016 Sb.); a restaurant using more than its agreed allocation of municipal land for outdoor seating purposes; dumping coal in the municipal area in front of a building without a permit (§ 5 of Act No. 251/2016 Coll.); failure to pay child support (§ 196 of Act No. 40/2009 Coll.); failure to provide the appropriate materials or time conditions to a Data Protection Officer (Sec. 62 of Act No. 110/2019 Coll.); or failure to conclude an employment contract in writing (Sec. 25 of Act No. 251/2005 Coll.). The list goes on and on in a similar fashion.

The breadth of the definition of protected disclosure thus naturally contributes to considerations of proportionality and necessity, reflections on the ideas of a liberal democratic rule of law led by personal freedom, and reasonings of an engaged civil society as a prerequisite for a functioning democratic rule of law, while at the same time the motive for one's activity is their own interest in the common good as well as a public interest that is not fuelled by any special stimuli from the public authorities purposefully directing attention in a certain persuasion and direction. In this vein, it begs the question: What is the condition of the society or the state, as well as the entire Euro-Atlantic civilization as such if, in addition to the notification duty to report any suspicion of criminal activity, as follows from the factual nature of failure to report a crime (§ 368 of Act No. 40/2009 Sb., the Criminal Code),¹² and the basic preventive measures that are put in place to avert and prevent harm or injury and which are generally deemed to be sufficient mechanisms within a healthy and functioning democratic state that is governed by the rule of law, it is, however, considered (by some) necessary to create special legal figures who are responsible for regulating the reporting of all crimes and offences, and not only of these said crimes and offences, but also cases concerning other legal violations in relation to which neither the factual nature of the crime nor the offence is formulated.

The factual substance of criminal offences and misdemeanours refers to typical acts that are capable of endangering or damaging (to a significant extent) a socially recognized (sufficiently serious) interest or value. This is designated as socially harmful conduct. On the contrary, these are, in fact, the necessary prohibitions

11 The term 'work or other similar activity' is defined in the provisions of Sec. 2 para. 3 of the bill and it means: employment, service; self-employment; exercising of rights associated with participation in a legal entity; performing the function of an elected, appointed or otherwise called-upon member of a body of a legal entity; managing a trust fund; volunteering; professional experience; internship; or exercising rights and obligations under a contract for the provision of supplies, services, construction work or other similar performance, as well as for applying for a job or other similar activity.

12 Hereinafter referred to as the 'CC'.

designed to protect the interests and values in question, which restrict, but at the same time also effectively create the starting point for a liberal democratic state that is governed by the rule of law, that is freedom. The premise of freedom and autonomy of will as the primary principle is based on the construct according to which only some tortious acts must be compulsorily reported to the public authorities (provisions of Sec. 368 of the Civil Code). What role should an institute in this construct presuppose for the reporting and disclosure of non-criminal conduct? Should the primary aim be to educate society on proper and moral behaviour? Indeed, the law has a somewhat edifying and pedagogical function in this respect. However, there must be a sufficiently decent and compelling reason for its application in that the educational function should be consistently and primarily implemented vis-à-vis undesirable socially pathological phenomena (e.g., fraud, theft, sexual abuse, etc.).

Referentially, at the level of employment relationships, an external protected disclosure of a violation which has the characteristics of neither a criminal offence nor a misdemeanour does not sufficiently affect the public interest and should pose a negligible amount of social harm (this is an anti-social insignificant act). It cannot succeed due to the lack of general interest in terms of the principle of proportionality, or, as the case may be, loyalty stemming from the principle of *pacta sunt servanda*.¹³ The same also applies to non-work-related offences and criminal offences which are not subject to the notification obligation.

Besides a sufficiently strong public interest, the case-law of the European Court of Human Rights,¹⁴ as is generally well known, imposes (which is generally accepted) several other basic conditions for protected (especially external) disclosure, which should be reflected and adhered to also in respect of the application of the proposed whistleblower protection legislation.

Nevertheless, the bill only presupposes “*a reasonable belief in the veracity of the information*” for a protected disclosure; it does not mention the criteria (conditions) that were derived from other jurisprudence. Moreover, there is nothing in the text of the law to indicate that external disclosure should be of a subsidiary nature; the fact that it is necessary to proceed from the conditions inferred from the case-law is mentioned by the submitter only in the explanatory memorandum.

The principle of *ignorantia legis non excusat* (“ignorance of the law excuses not”) is one of the theoretical constructs underlying the concept of a democratic rule of law. It was never intended that the addressee would at all times have a comprehensive and complete knowledge of the legal system and, more specifically, their rights and obligations under the law. This principle is one of the manifestations of legal certainty. Its factual nature can be expressed roughly in such a way that each individual should be able to ascertain their rights and obligations. In essence, if legal certainty is to

¹³ Cf. the Constitutional Court of the Czech Republic in the case under file No. III. ÚS 298/12.

¹⁴ For example, Judgment of ECtHR (GC) of 12 February 2008, *Guja v. Moldova*, appl. No. 14227/04; Judgment of ECtHR of 21 July 2011, *Heinisch v. Germany*, appl. No. 28274/08.

be adequately fulfilled, the core of the rules for a given case affecting the addressee must be intuitive, that is to say the addressee must be able to sense them.

Yet, the construction that was used by the submitter goes: “*what is written in the law, must be read by the addressee together with the explanatory memorandum and the body of case-law of the EctHR (European Court of Human Rights),*” which, however, seems to be disproportionately distant and looks like a far cry from the indicated construct: an expert in the field will hardly have a chance of knowing the rules.

The status of a protected whistleblower and protection against retaliation for other persons who are associated with the whistleblower (Sec. 4 of the bill) arises from the law. As such, it is not subject to any formal decision. Even in this context, only the implicit presumption of satisfying the unspoken conditions is problematic within the context of legal certainty.

Knowingly making a false disclosure should be a misdemeanour (Sec. 24), for which a possible penalty of up to CZK 50,000 may be imposed.

2.2. Retaliatory measures

A retaliatory measure within the meaning of Sec. 2 para. 5 of the whistleblower protection bill is understood to be an action (or omission)¹⁵ taken in connection with the whistleblower’s work or other similar activity that was triggered by the whistleblower’s disclosure and which may cause harm (tangible or intangible). At the same time, the bill envisages an illustrative list of retaliatory measures, e.g., termination of employment, job dismissal, discrimination, ostracism, change of working time, hampering professional development, etc. In addition to standard claims depending on the nature of the retaliation (e.g., unequal remuneration, termination of employment, etc.), the bill (Sec. 5) grants the person personally affected by retaliation the right to receive adequate compensation for any non-pecuniary damage caused.

In connection with the term or concept of retaliation, what follows from the explanatory memorandum to the bill and what is crucial from the standpoint of application practices is that within the meaning of the law retaliation will only be deemed retaliation if retaliation is the sole reason for taking such action against the whistleblower. The retaliatory measure will therefore be a measure that is *triggered solely by the fact that the whistleblower made the disclosure*, but not a measure *also triggered by the disclosure itself*.¹⁶

Here is an illustrative example. An employer undergoes an organizational change, which is the underlying reason for the termination of employment (Sec. 52 letter c) of the Labour Code). As a result of the organizational change, five out of ten employees

¹⁵ See footnote 10 for the term.

¹⁶ As in the case of the case-law presumptions of protected disclosure, from the point of view of legal certainty it would certainly be more appropriate to state expressly that the notification must be the sole cause of retaliation.

who are in the same job position will be made redundant. The law does not regulate how the redundant employees are selected: rather, it is at the discretion of the employer to do so. Although the whistleblower may have better work performance results than other employees, he is selected as one of the five employees to be made redundant. This would not be construed as a retaliatory measure within the meaning of the Whistleblower Protection Act, insofar as the reason for the termination of employment is, first and foremost, linked to the fact that the employee's job position was cancelled and he was subsequently made redundant, this aside from the fact that he is the whistleblower.

In the provisions of Sec. 26, the whistleblower protection bill formulates a number of factual elements regarding misdemeanours. Among other things, according to the provisions of Sec. 26 para. 1 letter a) of the bill, an offence is committed by a person who does not prevent the whistleblower from being subjected to retaliation. In this context, a question arises as to the significance of the decision on the offence under the referenced provision for a civil dispute concerning a potential situation that is identified as retaliation. Pursuant to the provisions of Sec. 135 of the Civil Code, it is true that the court is bound by decisions on misdemeanours and criminal offences. In other words, will the decision on the offence actually anticipate, for example, a decision concerning the validity of the legal action or on the obligation to pay damages?

2.3. Notification system and competent person

As in other areas, in relation to the obligation to introduce an internal notification system, the whistleblower protection bill is somewhat stricter than Directive 2019/1937. The provisions of Sec. 8 of the bill, in response to the content of the Directive, envisage a number of persons who must implement an internal notification system. In terms of the private domain, namely Sec. 8 para. 1, letter b), which, unlike the Directive, imposes the obligation upon employers to conditionally introduce and implement an internal notification system based on having, on average, at least 25 employees¹⁷ over the previous calendar quarter.

An entity which is obliged to introduce and implement an internal notification system is, at the same time, obliged to appoint a competent person to investigate internal disclosures and perform other tasks provided for by law, including the submission of proposals for measures to either correct or prevent an illegal situation from occurring.

Such a competent person is presumed to be of age (18+ years old), and have full autonomy and integrity within the meaning of the bill. Although the qualifications for performing this function are not explicitly stated, the tasks of the person concerned and

¹⁷ Without distinguishing the scope of employment, or the form of the basic employment relationship, i.e., whether it is an employment relationship or employees working on the basis of agreements on work performed outside the employment relationship.

the content of the explanatory memorandum nevertheless state that such person should possess adequate legal awareness, necessary analytical and organizational skills, etc.

In the context of the above, the question again arises as to whether the proposed legislation can succeed in terms of the principle of proportionality. When considering implementation, the following must be taken into account: the costs of setting up an internal notification system, the appointment of a competent person and, on the other hand, the expected benefits and the level of protection of the public interest and legitimate interests of potentially affected persons.

At the same time, it is clear that in an insignificant number of cases of lack of public interest, the obligation to establish an internal notification system and the person concerned cannot succeed. One could typically consider seasonal work, where, for instance, a company that rents rowboats or pedal boats would employ 20 temporary workers in addition to its five regular employees for the busy season from May to October on the basis of agreements for work performed outside the employment relationship. An operator of an outdoor swimming pool or ski lift in a small mountain resort may be in the same situation. In fact, the possibilities are endless in this respect.

In these cases, the obligation clearly represents a pointless administrative burden as well as an unjustified encroachment of the liable person's proprietary domain.

Even with the possibility of sharing internal notification systems for employers with less than 250 employees, it can reasonably be assumed that the end result of the legislation would culminate in a business opportunity for internal notification service providers and competent persons other than the erroneously expected greater protection of whistleblowers.

It is indeed obvious that a small entrepreneur who, in particular, wants to properly fulfil their duties in this area and avoid liability for the offence in the sense that they have not fulfilled the obligations related to the appointment of a competent person, will find it difficult to find someone in their midst to perform such a function. Instead, the employer will have to ask around elsewhere, which would likely be cheaper in the end. However, this would still amount to an unnecessary expense.

The second option (which might be better or worse) would be to appoint an unprofessionally qualified employee as the competent person, while the fulfilment of the obligation in question would be only *pro forma*.

In short, one cannot get rid of the impression that essentially another 'Data Protection Officer' is being created, the only difference being that the non-fulfilment of obligations by the competent person can be qualified as a misdemeanour, carrying a possible sanction of up to CZK 100,000. In contrast, the personal data protection legislation does not recognize any offences in relation to the Data Protection Officer.

2.4. Incentive measures

The current whistleblower protection bill eschews the introduction of incentive measures in support of notifications, as has been the case with the most recent bill

before that. To a large extent, this tendency can be understood as a reflection of experiences from times of non-freedom.¹⁸ On the other hand, for truly functional and effective whistleblower legislation to exist, it does not seem reasonable to completely cast aside the incentive measure and other measures of similar nature.

The reason is that, at least from the perspective of the factual level of employment relationships, the prohibition of retaliation does not represent a comprehensive solution if there is a real will to seek revenge and retribution on someone.

If the retaliatory measure consists in transfer to another job, a reduction in wages or termination of employment, etc., the defence will require a legal dispute be initiated, or a notification sent to the relevant public authority (see below), competent in dealing with the public-law aspects of the matter. Nevertheless, no decision taken by a public authority, however positive for the whistleblower, can ensure that the workplace atmosphere or interpersonal relationships would in reality be such that the whistleblower would want to remain employed by such an employer, or, as the case may be, could remain there without mental suffering or other harm.

In this context, in case the whistleblower is treated negatively (which is either highly probable or already the case), it seems appropriate to offer the whistleblower the possibility of leaving employment against a reasonable amount of severance pay.¹⁹

Another, more knowledge-intensive institution that could have an incentive effect would be the introduction of a private lawsuit in public interest, where the plaintiff would have the right to a share in protected public funds.²⁰

Without any instruments of a similar nature, the effectiveness of the legislation can be justifiably questioned.

2.5. Further changes and monitoring the fulfilment of obligations

Together with the whistleblower protection bill, a companion amendment bill was submitted to the Chamber of Deputies of the Parliament of the Czech Republic, whereby related changes are to take place, especially with regard to civil service regulations. At the same time, the bill also intends to amend the Code of Civil Procedure, which governs civil court proceedings.

18 For more on this see J. Morávek, *On whistleblowing, its legitimacy and problems of international personal data transfers*, [in:] J. Pichrt (ed.), *Whistleblowing*, Wolters Kluwer ČR, Prague 2013, pp. 187–202.

19 The choice of measures of a similar nature for non-labor relationships and other relationships of work participation seems to be much more complicated, e.g. for relationships between entrepreneurs or shareholders of legal entities.

20 For the institution and its development, see, for example, A. Kristková, *The position of public action in the countries of continental Europe and in common law countries*, [in:] P. Zarivnij (ed.), *Public legal action and its perspectives*. Acta Universitatis Brunensis. Legal, Brno: Faculty of Law, Masaryk University, 2015. No. 538. p. 6, or also see T. Gřivna, *Private legal action in criminal proceedings*, Karolinum, Prague 2006.

Specifically, following the example of the second government bill from 2017, it proposes to supplement the provisions of Sec. 133a and to extend the already existing regulation of the 'reversed' burden of proof within civil court proceedings. In addition, it proposes to supplement the legislation on preliminary injunctions so that a whistleblower can request a temporary adjustment of their situation. Based on prior experience with the application of both institutions in other cases, one can conjecture that the significance of these changes will be rather limited.

The degree of effectiveness of the legislation and its enforcement in practice is largely determined by its monitoring and enforcement by the public authorities.

Originally, the whistleblower protection bill provided for the establishment of a Whistleblower Protection Agency within the Ministry of Justice. Additionally, the delegation of competences in this area to the Ombudsman and, to a large extent, the labour inspectorate, were also contemplated.

The resulting situation is such that the agenda will be entrusted to the Ministry of Justice, where, according to the explanatory memorandum to the whistleblower protection bill, ten civil servants are to be allocated to deal with such matters. However, they do not have to investigate individual cases themselves, rather they have to cooperate with labour inspection bodies in these matters, which are to be increasingly shifted to the role of 'investigators', although their previous monitoring activities have focused mainly on inspecting employment relationships and legal relationships in the field of employment. Also embarrassing is the fact that the labour inspectorate falls organizationally under another ministry, i.e. the Ministry of Labour and Social Affairs, while the experience with similar cross-competencies from the past has resulted in some vigilance.

Conclusions

In general, the objective of protecting the public interest through the protection of whistleblowers can be viewed in a positive light. In the context of the aforementioned reasons, however, it can be regarded that the transposition legislation in the Czech Republic will finally result in a rather general increase in terms of the administrative burden and financial burden on liable persons. There will be a positive effect in relation to the protection of the whistleblower whereas the fulfilment of the primary objectives of European legislation will be rather limited. The reasons are varied and plentiful, ranging from historical conditions to the structure and construction of the Czech law. The diversity of these aspects is, after all, one of the reasons why a directive rather than a regulation was chosen at the European level.

A more favourable outcome for effectuating the transposition legislation could be expected when reflecting on the local singularities, more specifically the fulfilment of the two conditions that follow from them. In the first place, it is a matter of omitting the tightening up against the basis which was laid down in the directive, in particular

as regards the definition of the concept of protected disclosure and the content of the obligation to establish an internal notification system. In addition, the measures mentioned in point 2.4 are being introduced. These measures, which would reduce the scope of legislation and transfer more responsibility to whistleblowers, would, *inter alia*, better correlate with the anticipated ineptitude of public administration supervision in this area, as is currently evident from the bill.

Insofar as the bill's journey through Parliament has only just begun, one can hope for a shift in terms of content in the direction indicated. However, experience has shown that it is sheer folly to pin exaggerated hopes on legislators believing that they are capable of making any significant contributions and positive change regarding the amelioration of legislation.

Abstract

The chapter is focused on the protection of whistleblowers under Czech law within the context of the Directive on the protection of whistleblowers for persons who report breaches of Union law (2019/1937). Specifically, the chapter deals with all seven previous and current proposals for legal regulation of whistleblower protection. The authors provide a detailed discussion of the current draft of law to transpose Directive 2019/1937. The authors deal with the definition of the scope of the bill, retaliation measures, breadth of the obligation to implement a notification system, status of the responsible/concerned person in the notification system, absence of motivational measures and problematic aspects of public control.

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Whistleblowing in Hungary

Attila Kun¹

<https://doi.org/10.18778/8220-639-5.07>

Introduction

At present, whistleblowers' legal status is regulated in Hungary by a single legal act, namely Act CLXV of 2013 on complaints and public interest disclosures (hereinafter referred to as: Act on Pkbt., in brief: Pkbt., following the Hungarian abbreviation), which entered into force on 1st January 2014.

At the time of the writing of this paper,² no official information is available if the implementation (or the related preparatory works) of the Whistleblower Directive ³/₄ 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 (hereinafter referred to as the Directive, or the Whistleblower Directive) has already started. The Member States are supposed to bring into force laws, regulations and administrative provisions necessary to comply with the Directive by 17 December 2021. As Abazi states, "the EU Whistleblower Directive is an important legal development but it is only in the early stages towards meaningful protection, rather than a 'game changer' for whistleblowers."³ It will be interesting to observe how post-socialist countries, including Hungary, will be able to meaningfully implement the standards of the Directive.

In this regard, the aim of this chapter is to take a general account of the past and current practices, experiences and challenges of whistleblowing legislation and whistleblower protection in Hungary. The emphasis will be put on the critical analysis of the currently effective regulatory environment of whistleblowing and whistleblower

1 Professor, Dr Attila Kun. Head of Department, Károli Gáspár University of the Reformed Church in Hungary (KRE), Faculty of Law, Department of Labour Law and Social Security; Professor, Hungarian National University of Public Service (NKE), Faculty of Public Governance and International Studies, Department of Human Resources. The study was conducted as part of the research of the MTA (Hungarian Academy of Sciences)-PTE Research Group of Comparative and European Employment Policy and Labour Law. This paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences. Supported by the ÚNKP-20-5-KRE-2 New National Excellence Program of the Ministry for Innovation and Technology from the source of the National Research, Development and Innovation Fund.

2 The manuscript was closed in March 2021.

3 V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, *Industrial Law Journal*, Volume 49, Issue 4, December 2020, pp. 640–656.

protection in Hungary, with specific regard to labour law aspects. Furthermore, the context, prospects and basic requirements of the future implementation of the Directive will also be highlighted. In this vein, Section 2 sketches the historical, societal and constitutional context. Section 3, as the central part of this study, examines in detail the currently effective legislative framework of whistleblowing in Hungary. Section 4 deals specifically with the labour law-related aspects of whistleblowing, while Section 5 takes a brief look into other related fields of law (including anti-discrimination, criminal law, and trade secrets). Section 6 considers recent and relevant critical opinions and motions for reform. Section 7 looks into the possible challenges and the main tentative tasks of the upcoming transposition of the Directive into Hungarian law. Finally, Section 8 draws some broad, general conclusions.

1. Background: the historical, societal and constitutional context

The first Hungarian whistleblower law was Act I of 1977 on public interest disclosures, recommendations, and complaints, which was in effect from 1977 until the country's accession to the EU in 2004. The main aim of this law was to uncover behaviours or facts which were illegal or contrary to "socialist morals" or the principles of socialist economy, or otherwise offended or endangered the interests of society. This act already provided for the protection of the discloser and also admitted anonymous reports. Between 2004 and 2009, only some basic, rather transitional rules concerning public interest disclosures were in force (NB: this is the Hungarian term for whistleblowing).

The next important milestone was Act CLXIII of 2009 on the protection of fair procedure and related amendments ("Fair Procedures Act"). In principle, it was a rather detailed and progressive piece of legislation covering also whistleblowing. It was modelled on certain experiences from the US. However, it provided for the establishment of a separate, dedicated Authority (in order to increase the efficiency of the fight against corruption), but this never came into being. As a result, this act remained *lex imperfecta* to a large extent.

As for the corporate practices of whistleblowing, according to a recent Hungarian survey, 94% of the responding companies had no "ethical infractions" in the last five years. Only 53.9% of the participating Hungarian corporations had a so-called code of ethics, while the international rate amounts to 81%. Just 28.5% have a dedicated channel (ethics hotline), while globally this index is at 60%. In sum, according to Ambrus, "the standards for combating corporate wrongdoing in Hungarian-owned companies do not correspond with international norms."⁴ Other experts are also

4 I. Ambrus, *Considerations for Assessing Corporate Wrongdoings – a Hungarian Approach to Whistleblowing*, *Elte Law Journal*, 2016/2, p. 9.

generally sceptical about the Hungarian practice of whistleblowing. For instance, Dénes notes that in Hungary, there is limited practical possibility for a person who reports abuse to report anonymously in such a way that irregularities are actually detected and remedied as a result of the report. The lack of this real possibility significantly reduces the efficiency of the Hungarian abuse-reporting system. Dénes concludes that the “whistleblowing system does not work well in Hungary.”⁵

It is a historical heritage that while in the Anglo-Saxon countries the attitude towards whistleblowers is normally positive, in continental Europe and thus in Hungary there is often a kind of scepticism, a cultural aversion towards them. In addition, in post-socialist countries like Hungary, people often associate whistleblowing with the informant-systems of the totalitarian dictatorships of the 20th century and treat the disclosers as informers and traitors.⁶

As regards the constitutional context, Article XXV of the Fundamental Law of Hungary (25 April 2011) stipulates that “Everyone shall have the right to submit – either individually or jointly with others – a written request, complaint or proposal to any organ exercising executive powers.”

2. The currently effective legislative framework of whistleblowing in Hungary: the Pkbt.⁷

2.1. Material scope of protection

The Pkbt. does not contain a list of breaches the disclosure of which justifies the whistleblower’s status. The material scope is rather broad and undefined. The Pkbt. [§ 1 (1)–(3)] provides that public bodies and local government bodies shall assess complaints and public interest disclosures pursuant to this act. The law makes a difference between complaints and public interest disclosures. A complaint is a request for putting an end to a violation of individual rights or interests the assessment of which does not fall under the scope of any other proceedings, including in particular judicial or administrative proceedings. A complaint may also contain a proposal. A public interest disclosure (i.e. whistleblowing) draws attention to a circumstance the remedying or discontinuation of which is in the interest of the community or

5 E. Dénes, *Whistleblowing: bejelentés vagy beárulás? (Whistleblowing: reporting or betrayal?)*, Munkajog (HVG-ORAC), 2020/4, pp. 37–44, p. 43.

6 E. Dénes, A. Kun, *A whistleblowerrek védelme – különös tekintettel a munkajogi aspektusokra (Protection of whistleblowers – in particular labour law aspects)*, Pécsi Munkajogi Közlemények, szeptember, IV. évf. II., 2011, pp. 113–145.

7 The official translation of the Pkbt. (which serves the basis for this Chapter, http://www.ajbh.hu/documents/14315/130159/Act_CLXV_of_2013_.pdf/faa3e557-8e16-473f-1fa9-539e7cdb0f22, accessed 01/09/2021.

the whole society. A public interest disclosure may also contain a proposal. Consequently, a public interest disclosure (i.e. whistleblowing) draws attention to any “*circumstance the remedying or discontinuation of which is in the interest of the community or the whole society.*”

As regards whistleblowing systems maintained by employers (i.e.: internal whistleblowing, see below) – according to §§ 13–14 Pkbt. – employers and their owners operating in the form of a company may define rules of conduct applicable to their employees in order to protect “*a public interest or overriding private interest,*” “*in order to provide their lawful and prudent operation.*” Again, the material scope is very broad and open-ended.

It must be noted that labour law infringements are not specifically covered. However, § 16 (4) Pkbt. stipulates that if the investigation reveals that the conduct reported by the whistleblower is not a crime but it constitutes a breach of the rules of conduct defined by the employer organization, the employer may impose employer sanctions on the employee concerned in accordance with the rules governing the employment relationship. Public interest disclosures may also play a role in relation to criminal law rules or, perhaps, another field of law (e.g. regulatory offences), as well as to civil law-related detriments such as negligence or violations of personal rights (e.g. those concerning reputation).

2.2. Personal scope of protection

According to § 1 (4) Pkbt., “*anyone*” may submit a complaint or a public interest disclosure to the body entitled to proceed in matters relating to the complaint and public interest disclosure. Thus, the logic of the Pkbt. is not employment-specific: “*anyone*” may submit a complaint or a public interest disclosure. Moreover, § 11 Pkbt. contains only a general clause on this matter (“*protection of whistleblowers*”): “*With the exception of the actions referred to in Section 3(4) [“bad faith”], any action taken as a result of a public interest disclosure which may cause disadvantage to the whistleblower shall be unlawful even if it would otherwise be lawful.*”

As regards whistleblowing systems maintained by employers (i.e.: internal whistleblowing) – according to § 14 (1) Pkbt. – whistleblower reports may be submitted by the employees of the employers, by other persons having a contractual relationship with the employer organizations, or by persons who have an acceptable legitimate interest in submitting the whistleblower report or the remedying or discontinuation of the activity subject to the whistleblower report. § 14 (6) Pkbt. provides the following in this regard: “*When making a whistleblower report, the whistleblower shall declare that the whistleblower report is made in good faith about circumstances that he or she is aware of or has a sufficient reason to believe that they are real. When making a whistleblower report, a whistleblower who is a legal person shall disclose its registered seat and the name of the legal representative of the person submitting the whistleblower report. Whistleblowers shall be reminded of the consequences of*

whistleblowing in bad faith, the rules governing the investigation of whistleblower reports, and the fact that the identity of the whistleblower – if he or she gives the data necessary to verify it – shall be treated confidentially in all stages of the investigation.” Thus, according to the general opinion, a personal qualification is necessary, but this personal qualification is rather broad.

No specific rules exist concerning the extension of protection beyond the duration of the (employment etc.) contract. Furthermore, for instance, the relatives of whistleblowers are not protected.

2.3. Internal reporting

The Pkbt. allows organizations to establish distinct rules and procedures for handling disclosures and also to enter into agency contracts with lawyers for the purpose of receiving disclosures (“discloser protection lawyer”). Thus, the *internal whistleblowing system is not obligatory*.⁸ The operation of a whistleblowing system is optional for the companies; however, if they elect to set up such a system, it must comply with some standards of the law. The whistleblowing rules are published on the website of the company in Hungarian. The whistleblowing system must be based on the employer’s publicly available code of ethics.

Alternatively, in line with §§ 17–18 Pkbt., a legal person that is not considered to be a public body or a local government body (“the principal”) may conclude an agency contract with a *lawyer for the protection of whistleblowers* to carry out activities relating to the reception and management of whistleblower reports concerning the activities of that legal person.⁹ For the purposes of the activities of the lawyer for the protection of whistleblowers, a whistleblower report covers all indications which draw the attention to a circumstance whose remedying or discontinuation is in the legal or lawful business interest of the principal or serve to put an end to an infringement that occurred in relation to the activities of the principal or to a threat to public security, public health or the environment. These “discloser protection

8 It must be noted that Government Decree 50/2013 (II. 25.) on the system of integrity management at public administration bodies and the procedural rules of receiving lobbyists prescribes that the head of the organization of public administration bodies shall be obliged to receive and investigate the reports on integrity and corruption risks with regard to the operation of the organization, in the framework of which they shall develop an internal regulation (§ 4 (1)). However, the notion of whistleblowing implies a broader understanding, going beyond these “reports on integrity and corruption risks”. Cf.: AJB-543/2021.

9 The lawyer engaged for the protection of whistleblowers is obliged to notify the regional bar association in writing about the conclusion of the agency contract within 15 days. The name, address, telephone number, e-mail address and website link of the lawyer for the protection of whistleblowers are published on the website of the regional bar association. For example, as for Budapest, currently only four lawyers (law firms) are registered as such (at the Budapest Bar Association), <http://www.bpugyvedikamara.hu/az-on-ugyvedje/bejelentovedelmi-ugyved/>, accessed 01/09/2021.

lawyers” are on the borderline between internal and external reporting¹⁰ (being independent, but, after all, still “on the payroll” of the company).

§§ 13–16 Pkbt. deal with “*whistleblowing systems maintained by employers*” (i.e.: internal whistleblowing) in further detail, providing for some basic procedural rules (including data protection).

According to § 14 Pkbt., in order to provide their lawful and prudent operation, employer organizations may set up whistleblowing systems for reporting violations of law as well as rules of conduct through which whistleblower reports may be submitted by the employees of the employers, by other persons having a contractual relationship with the employer organizations or by persons having acceptable legitimate interest in submitting the whistleblower report or the remedying or discontinuation of the activity subject to the whistleblower report. Employer organizations shall publish detailed information about the operation of their whistleblowing systems and their procedures relating to whistleblowing in Hungarian on their websites.

In the whistleblowing system, the employer organization may process the personal data, including also sensitive data and criminal personal data, of a) the whistleblower, and b) the person ba) whose activity or omission gave rise to the submission of the whistleblower report, or bb) who has relevant information concerning the substance of the whistleblower report [ba) and bb) hereinafter jointly referred to as “person concerned with the whistleblower report”] that is essential to the investigation of the whistleblower report only for the purposes of investigating the whistleblower report and remedying or discontinuing the reported conduct, and may transfer the data only to the lawyer for the protection of whistleblowers or to external organizations which participate in the investigation of the whistleblower report. Personal data processed within the whistleblowing system which does not fall under the above-mentioned rules has to be deleted immediately from the whistleblowing system.

When making a whistleblower report, the whistleblower has to declare that the whistleblower report is made in good faith about circumstances that he or she is aware of or with regard to which he or she has a sufficient reason to believe that they are real. When making a whistleblower report, a whistleblower who is a legal person has to disclose its registered seat and the name of the legal representative of the person submitting the whistleblower report. Whistleblowers have to be reminded of the consequences of whistleblowing in bad faith, the rules governing the investigation of whistleblower reports, and the fact that the identity of the whistleblower – if he or she gives the data necessary to verify it – will be treated confidentially in all stages of the investigation.

According to § 15 Pkbt., the data processed within the whistleblowing system is transferred to another state or international organization only if the addressee of the transfer undertakes a legal commitment with regard to the whistleblower report to

10 As Ambrus notes, this is a very “forward-thinking” solution of the Pkbt. I. Ambrus, *Considerations for Assessing Corporate Wrongdoings – a Hungarian Approach to Whistleblowing*, *Elte Law Journal*, 2016/2, p. 20.

comply with the provisions of the Pkbt. Whistleblowing systems have to be designed so as to ensure that a non-anonymous whistleblower can be identified by no one but those who investigate the whistleblower report. Until the investigation is closed or formal prosecution is initiated as a result of the investigation, those who investigate the whistleblower report have to keep confidential all information about the substance of the whistleblower report and the persons concerned with it and, with the exception of informing the person concerned with the whistleblower report, may not share such information with any other organizational unit or employee of the employer organization. When opening an investigation, the person concerned with the whistleblower report has to be informed in detail about the whistleblower report as well as his or her right to protection of his or her personal data and the rules governing the processing of his or her data. In accordance with the requirement of fair proceedings, the person concerned with the whistleblower report has to be given an opportunity to state his or her views on the whistleblower report also through his or her legal representative and to provide supporting evidence. In exceptional and justified cases, the person concerned with the whistleblower report may be informed later if the immediate information would jeopardize the investigation of the whistleblower report.

According to § 16 Pkbt., the employer organization investigates the whistleblower report in accordance with the procedures established by it and informs the whistleblower about the outcome of the investigation as well as the actions taken. A lawyer for the protection of whistleblowers may be entrusted to receive or investigate whistleblower reports under a contract, while a lawyer for the protection of whistleblowers or other external organizations may be entrusted to participate in investigating whistleblower reports.

The investigation of the whistleblower report may be omitted if:

- a) the whistleblower submitted it without revealing his or her identity,¹¹
- b) it is a repeated whistleblower report made by the same whistleblower and its substance is the same as that of the previous one,
- c) it was made by the whistleblower after six months of becoming aware of the activity or omission that he or she complains about;
- d) the prejudice to public interest or overriding private interest is not proportionate to the limitation of the rights of the person concerned with the whistleblower report resulting from the investigation of the whistleblower report.

Whistleblower reports have to be investigated as soon as possible under the given circumstances but not later than 30 days after their receipt, which time limit is subject to derogation only in cases where it is highly justified, except where the whistleblower report was made anonymously or by an unidentifiable whistleblower,

¹¹ Accordingly, anonymity is not fully supported.

provided that the whistleblower is simultaneously informed. The investigation may not last longer than three months.

If the investigation of the conduct reported by the whistleblower warrants the initiation of criminal proceedings, arrangements have to be taken to ensure that the case is reported to the police (this is the so-called *ex officio* principle).

If the investigation reveals that the conduct reported by the whistleblower is not a crime but constitutes a breach of the rules of conduct defined by the employer organization, the employer may impose employer sanctions on the employee concerned in accordance with the rules governing the employment relationship.

If the investigation reveals that the whistleblower report is unfounded or that no further action is necessary, the data relating to the whistleblower report has to be deleted within 60 days of the conclusion of the investigation.

If any action is taken on the basis of the investigation, including actions due to legal proceedings or disciplinary action launched against the whistleblower, the data relating to the whistleblower report may be processed in the employer's whistleblowing system until the final conclusion of the proceedings launched on the basis of the whistleblower report.

No further specific legal guarantees are prescribed by law for internal investigations (in practice, there is a high risk that reports are investigated by people/bodies that are the subjects of the reports).

2.4. External reporting

2.4.1. Complaints and public interest disclosures

The Pkbt. [§ 1 (1)–(3)] stipulates that *public bodies and local government bodies* assess complaints and public interest disclosures. Accordingly, the law makes a difference between complaints and public interest disclosures, as it has been presented above. Pursuant to § 1 (4) Pkbt., if a public interest disclosure is made orally, the body entitled to proceed puts it in writing and gives its copy to the whistleblower. § 1 (5) Pkbt. provides that if a complaint or a public interest disclosure is submitted to a body other than the body entitled to proceed, it are referred to the body entitled to proceed within eight days of its receipt. The complainant or the whistleblower have to be simultaneously notified about the referral. If a public interest disclosure contains a proposal for new legislation or for an amendment of an existing piece of legislation, it is also forwarded to the relevant person or body having legislative power.

According to § 2 Pkbt., as a main rule, complaints and public interest disclosures are assessed within thirty days of their receipt by the body entitled to proceed. If the investigation underlying the assessment is expected to last longer than thirty days, the complainant or the whistleblower have to be informed of the fact and of the expected date by which the complaint or the public interest disclosure will be assessed, as well as of the reasons for the prolonged investigation. If the substance

of the complaint or the public interest disclosure makes it necessary, the body entitled to proceed hears the complainant or the whistleblower. Upon assessment of complaints or public interest disclosures, the body entitled to proceed immediately informs the complainant or the whistleblower about its actions or inaction, with the exception of classified data or data constituting trade, economic or other secrets pursuant to the law, specifying the reasons for its actions or inaction. Such information is not required to be given in writing if the complainant or the whistleblower has already been informed orally about the assessment of the complaint or the public interest disclosure and the complainant or the whistleblower has acknowledged that information.

As for data protection, § 3 (3) Pkbt. stipulates that – except in cases of bad faith – the personal data of the complainant or the whistleblower may not be handed over to any recipient other than the body competent to carry out proceedings on the basis of the respective complaint or public interest disclosure, provided that such body is entitled to process such data pursuant to the law, or the complainant or the whistleblower has given explicit consent to the forwarding of his or her data. Without such explicit consent, the personal data of the complainant or the whistleblower may not be made public.

When whistleblowers turn directly to the body they consider to be competent to take action in the given case, some uncertainties may arise. It is not clearly regulated whose responsibility it is to investigate whistleblower reports within the given public organisation. There is no general best practice in this regard and the Pkbt. does not clarify the issue, either. However, it must be mentioned that as a result of the integrity control systems introduced by a government decree in 2013,¹² the so-called integrity framework gives a central role to internal integrity advisors in public authorities. All public institutions need to designate such an advisor.¹³ Thus, it is quite likely that whistleblower reports would end up being received by these integrity advisors (who are subordinate report directly to the leader of the organisation).

2.4.2. The protected electronic system for public interest disclosures: the role of the Commissioner for Fundamental Rights

§ 4 Pkbt. stipulates that public interest disclosures may be submitted also through a *specific, designated protected electronic system* for public interest disclosures. *The Commissioner for Fundamental Rights (CFR)*¹⁴ – the Ombudsman – provides for the operation of the electronic system serving for filing and registering public interest disclosures. In fact, this is the (main) – and most convenient and most secure

¹² 50/2013. (II. 25.) Government Decree.

¹³ At the National University for Public Service (NUPS/NKE) there is a targeted university programme for becoming an integrity advisor.

¹⁴ Further details: Act CXI of 2011 on the Commissioner for Fundamental Rights (Act on CFR, Hungarian acronym: Ajbt).

– external reporting channel in Hungary. Via the CFR, public interest disclosures can be made using the electronic system¹⁵ (on the interface established for this purpose on the homepage of the Office¹⁶) or in person at the customer service. According to § 7 Pkbt., public interest disclosures or their excerpts (in cases of anonymity, see below) received through the electronic system have to be forwarded to the body entitled to proceed (i.e. the Office has no capacity or competences to investigate all cases). During the investigations, it is possible to contact the whistleblower via the electronic system.

In practice, the primary task of the Ombudsman is to forward the reports to competent authorities. These reports are not automatically transmitted to law enforcement authorities, and an administrative investigation is carried out instead first by the competent authorities themselves, usually (but not inevitably) via the integrity advisor of the institution concerned. Integrity advisors report directly to their head of institution. Either upon request or ex officio, the Ombudsman may, however, examine whether those authorities have followed up appropriately on the reports. The public interest disclosures are investigated by the institutions concerned, and their answer containing the result of the investigation is uploaded to an electronic registry.¹⁷

More precisely, according to the Act on CFR (38/A.§), the CFR inquires into the practices of authorities in handling public interest disclosures made in accordance with the Pkbt. and, upon request, into the proper handling of certain public interest disclosures. According to the Act on CFR (38/C.§), a whistleblower may submit a petition requesting the CFR to remedy a perceived impropriety if a) a public interest disclosure is qualified as unfounded by the competent authority, b) the whistleblower does not agree with the conclusions of the investigation, and c) according to the whistleblower, the competent authority has failed to conduct a comprehensive inquiry into a public interest disclosure. The outcome of such an investigation can be a report that is not legally binding. However, the acting body must report back. The acting body may accept or reject the recommendations of the Commissioner.

In relation to the specific protected electronic system for public interest disclosures (operated by the CFR), the following rules of data protection apply. § 4 (2) Pkbt. provides that the personal data processed in the electronic system may be processed only for the purposes of investigating the relevant public interest disclosure and keeping contact with the whistleblower. The identification data stored in the electronic system includes the name and address of the whistleblower [§ 4 (4) Pkbt.]. § 5 Pkbt. contains further rules in this regard: the electronic system assigns a unique identification number to each public interest disclosure received if the data referred above is made available by the whistleblower. The Commissioner for

15 <http://www.ajbh.hu/kozerdeku-bejelentes-benyujtasa>, accessed 01/09/2021.

16 <http://www.ajbh.hu/kezdolap>, accessed 01/09/2021.

17 European Commission (2020): 2020 Rule of Law Report Country Chapter on the rule of law situation in Hungary, Brussels, 30.9.2020 SWD(2020) 316 final, 12.

Fundamental Rights discloses on the Internet a brief summary of the substance, excluding personal and specific institutional data, and the status of each public interest disclosure submitted through the electronic system, using their unique identification numbers.¹⁸ When a case has been closed, the name of the body involved in the public interest disclosure and, if different, the name of the body entitled to proceed are also made public. The electronic system has to be designed so as to enable contact with the whistleblower on the basis of the unique identification number and the password entered by the whistleblower. The electronic system has to be designed so as to enable the whistleblower to print and record in electronic form the entire content of the public interest disclosure.

In 2020, 316 submissions were received via this electronic system to the Office of the CFR, which corresponded to the average of the previous five years. Out of the 316 submissions, 232 (i.e. 84%) were genuine public interest disclosures. 80% of these reports were anonymous. More or less half of the public interest disclosures turned out to be well-founded. Most of the cases involved the following topics: illegal dumping, water pollution; transport, conditions of roads; education and health care-related grievances during the Covid-related emergency situation; consumer protection, building authority procedures; activities of the police in relation to minor offences, etc.¹⁹

In general, it seems that the system for public interest disclosures via the CFR has been well institutionalised. When it comes to anonymity, it has become the most important external channel for reporting and is used quite extensively. Consequently, the preservation (and the possible improvement) of this mechanism seems to be reasonable.

2.5. Anonymous disclosures

As a main rule [§ 2/A. (3)–(4) Pkbt.], the *competent authority* has to refrain from examining a complaint or a public interest disclosure made by an unidentifiable person (i.e. anonymity is not supported). However, the competent authority may not follow this rule and may still examine the complaint or public interest disclosure in those cases where the complaint or public interest disclosure is based on a serious violation of rights or interests. It must be noted that there are no specific judicial or extrajudicial procedures of appeal institutionalised against the decisions concerning anonymity. It is the competence of the *Commissioner for Fundamental*

18 The Database is available here (in Hungarian), <http://www.ajbh.hu/kozerdeku-bejelentes-publicus-kivonat>, accessed 01/09/2021.

19 Alapvető Jogok Biztosának Hivatala, *Beszámoló az Alapvető Jogok Biztosának és Helyetteseinek Tevékenységéről 2020* (Office of the Commissioner for Fundamental Rights: *Report on the Activities of the Commissioner for Fundamental Rights and his Deputies 2020*), B/15278, pp. 106–108.

Rights to inquire into the practices of competent authorities regarding anonymity. As a result of inquiring into their practice, the Commissioner may report to the National Authority for Data Protection and Freedom of Information.

In contrast to the main rule described above, according to § 6 Pkbt., whistleblowers making a public interest disclosure to the *Commissioner for Fundamental Rights* through the *specific protected electronic system* may request that their personal data are made available only to the Commissioner for Fundamental Rights and the Office of the Commissioner for Fundamental Rights. In this case, the Commissioner for Fundamental Rights prepares an excerpt about the public interest disclosure in order to ensure that it does not contain any data that may enable the identification of the whistleblower. In these cases, the investigation of the public interest disclosure (by the competent body) is not omitted on the grounds that the whistleblower cannot be identified by the body entitled to proceed.

As it was mentioned above, as regards *internal reporting*, the investigation of the whistleblower report may be omitted if the whistleblower submitted it without revealing his or her identity [§ 16. (1b) a) Pkbt.].

2.6. Public whistleblowing

No specific, targeted protection is guaranteed under Hungarian law (in the Pkbt. more specifically) for whistleblowers turning directly to the public (including the media).

On the general level, as regards *freedom of expression* of employees and its limits, § 8 (3) of the Labour Code (Act I of 2012, hereinafter referred to as the Labour Code) provides that “employees may not exercise the right to express their opinion in such a way that it may lead to causing serious harm or damage to the employer’s reputation or legitimate economic and organizational interests.”

2.7. Protection against reprisal according to the Pkbt.

Hungarian law (i.e. the Pkbt.) does not stipulate a prescribed list of possible unlawful retaliatory measures against the whistleblower. § 11 Pkbt. contains only a *general clause* on this matter (“*protection of whistleblowers*”): “With the exception of the actions referred to in Section 3(4) [“bad faith”], any action taken as a result of a public interest disclosure which may cause disadvantage to the whistleblower shall be unlawful even if it would otherwise be lawful.” This resembles a mere declaration without specific rules. § 3 (2) Pkbt. likewise stipulates that – except for the case of “bad faith” – complainants and whistleblowers shall not suffer any disadvantage for making a complaint or a public interest disclosure.

Furthermore, § 12 Pkbt. states that with the exception of the case referred to in Section 3(4) [“bad faith”], a *whistleblower qualifies to be at risk* if the disadvantages threatening him or her as a result of the public interest disclosure that he or she

made are likely to seriously endanger his or her life circumstance. A whistleblower who is a natural person is entitled to aids provided to ensure his or her protection, as defined in the relevant law, if he or she is likely to be at risk. The state has to provide the aids defined in Act LXXX of 2003 on legal aid to whistleblowers under the conditions defined in the same act. However, it is not clear from these rules who (which body) – and on what basis – is competent to qualify a whistleblower as being “at risk,” and in practice, this rule seems to be ineffective. In his Report No. AJB-1873/2017 (published on his website), the Commissioner stated that the relevant legal regulations are not clear and adequately detailed concerning the support measures either in the Act on Pkbt. or in the Act on Legal Aid. Furthermore, it is not clearly defined which authority shall establish that the whistleblower is at risk.

Concerning financial incentives, § 19 Pkbt. provides that the minister responsible for justice is authorized to determine by way of a decree the aids available to whistleblowers qualified as being at risk and the rules governing the disbursement of such aids. However, no such regulation is in force; it has never been adopted.

3. Whistleblowing and labour law

3.1. Aspects of individual labour law

Employees-whistleblowers are entitled to make a claim in the case of unlawful, wrongful termination of the employment relationship in line with the general rules of the Labour Code, i.e. there are no whistleblowing-specific rules in this regard. In other words: if the whistleblower’s employment is terminated as a result of his or her whistleblowing activity, the dismissal can be considered unlawful and the whistleblower may initiate a labour-rights dispute.

The new Labour Code (Act I of 2012) introduced a number of fundamental changes affecting employment contracts law and individual labour law. However, a conceptual change with the most far-reaching consequences certainly has affected the rules related to the legal protection against unlawful dismissal. In short, the new Labour Code reduces the legal protection against unlawful dismissal. By contrast, the “*old Labour Code*” stipulated that when a court found that an employer had unlawfully terminated an employee’s employment, the employee could request to continue being employed in his or her original position (“reinstatement”). According to these old rules, the court could in such circumstances and at the employer’s request release the employer from having to reinstate the employee in his or her original position, if the continued employment of the employee could not be expected of the employer. Should the employee not request to be reinstated in his or her original position or should the court release the employer from this obligation, the court was empowered, after weighing all applicable circumstances, to order

that the employer pay not less than two and not more than twelve months' average earnings to the employee (as a kind of punitive sanction). In such cases, the employment relationship was deemed to have terminated on the day the court handed down its ruling on the unlawfulness of the action. In the case of unlawful dismissal, the employee was to be – virtually automatically – reimbursed for lost wages (and other emoluments) and compensated for any damages arising from such loss. The portion of wages (and other emoluments) or damages recovered otherwise was to be neither reimbursed nor compensated.

Under the *new provisions* (§ 82–83 of the Labour Code), there are no more general obligations for re-instatement (i.e. re-instatement becomes a very exceptional possibility²⁰). In the old system, compensation of lost wages was quasi-automatic and without limits and it was due for the whole duration of the lawsuit (which, without doubt, was not fully fair for employers). Furthermore, legally speaking, the employee was not obliged to mitigate the costs. In the new system, the employer is obliged to provide financial compensation for all losses caused through the unlawful dismissal with a view to the rules on liability for damages (as a consequence, justification becomes more difficult and complex as the employee needs to show that he or she has suffered a real damage in relation to the unjust dismissal). Moreover, there is a statutory limit on the most typical share of damages: the damages – as lost earnings – thus paid may not exceed the total amount of the employee's twelve-month absence pay. Furthermore, the “punitive sanction” (2–12 months' salary in the former scheme) is completely ruled out under the new system. Accordingly, the gravity of the breach of law is irrelevant in the current system and the legal consequences of unjust dismissal (if any) are determined solely by the proven actual harm suffered by the employee (in line with the logic of liability for damages). In lieu of being able or eager to show the actual damage, the employee may demand a lump-sum payment equal to the sum of absentee pay due for the notice period when his or her employment is terminated by the employer (in practice, this lump sum payment is usually relatively low and offers not enough motivation to start a lawsuit).

Furthermore, the Curia (the highest judicial authority in Hungary) is of the opinion that no payment (“*sérelemdíj*” in Hungarian) for the violation of personality rights (which replaced non-pecuniary damages) can be claimed solely on the ground of unlawful dismissal, in the absence of any additional elements constituting a violation of personality rights.

All in all, sanctions for unlawful termination of the employment relationship are drastically limited in the new Code. The overall purpose of the reform was to reduce the large number of litigious proceedings (which is, in our opinion, a very debatable regulatory idea). As a result, the legal consequences of unlawful terminations are

20 Reinstatement is not specifically granted in relation to retaliatory dismissal in connection with whistleblowing. However, if the retaliatory measure (i.e. the termination) against the whistleblower also qualifies as discrimination, reinstatement might apply.

revised and moderated in order to avoid solutions which forced the employers to pay excessive, unproportionately high amounts. As Gyulavári and Kártyás describe it, “the new rules shifted the emphasis from punishing the employer and full reparation of damages to recovering only a very limited part of the damages incurred by the employee in [the] case of wrongful dismissal.” They continue by stating that it is questionable whether the employee receives appropriate reparation and whether the employer is efficiently restrained from introducing similar unlawful measures.²¹ All in all, a large number of unlawful terminations can remain without any sanction, as employees will not be motivated enough to file a case.²²

One cannot find too many decisions dealing specifically with whistleblowing in the Hungarian judicial practice.²³ In a classic, almost four decades’ old case, the court found that even a seemingly lawful dismissal was unlawful if the purpose of the dismissal was to remove the reporting employee, because the requirement that the grounds for termination must be reasonable was infringed, so that termination could not be lawful.²⁴ However, the existing case law is clear that the mere fact of a public interest disclosure (whistleblowing) does not provide full or absolute automatic protection for the employee against termination of employment.²⁵ In one more recent case, the court found that if the reason for dismissal or immediate termination met the general requirements of the law, the employer’s action would not be unlawful even if the employee had otherwise made a public interest disclosure. On this basis, it is for the court to determine whether the employer’s reasons are in fact aimed at seeking revenge on the employee or whether they are real, clear, reasonable and independent of the report. Thus, dismissal by the employer is not unlawful if the employee, in disregard of a substantial obligation, continues to act in a manner which is unfair to his or her employer and thereby breaches his or her obligation to cooperate.²⁶ Furthermore, the employer may also impose sanctions – under some conditions – on the employee, if the reason is the disclosure itself. Judicial practice admits this if it becomes clear that the whistleblower acted in bad faith on the basis of false information.²⁷

21 T. Gyulavári, G. Kártyás, *The Hungarian Flexicurity Pathway? New Labour Code after Twenty Years in the Market Economy*, Pázmány Press, Budapest 2015, p. 40.

22 For further details see: A. Kun, *International Research Project DIADSE* (Dialogue for Advancing Social Europe), Country Report – Hungary, 2017; (Project financed by the EU, European Commission DG Employment, Social Affairs and Inclusion, Social Dialogue, Industrial Relations; Agreement number. VS/2014/0530), Project Management: Universiteit van Amsterdam, Hugo S. Instituut), <http://hsi.uva.nl/en/diadse/reports/reports.html>, accessed 1/09/2021.

23 For an overview see: E. Dénes, *Whistleblowing: bejelentés vagy beárulás? (Whistleblowing: reporting or betrayal?)*, Munkajog (HVG-ORAC), 2020/4, p. 42.

24 BH 1979.39.

25 E. Dénes, *Whistleblowing: bejelentés vagy beárulás? (Whistleblowing: reporting or betrayal?)*, Munkajog (HVG-ORAC), 2020/4, p. 42.

26 BH 2009.255.

27 BH 2003.344.

It is noteworthy that in practice, some form of labour law-like protection can also derive from data protection law (in line with the GDPR²⁸). For instance, the National Authority for Data Protection and Freedom of Information (hereinafter referred to as the NAIH, according to the Hungarian abbreviation) in a seminal case imposed a fine of EUR 3,100 on a local government after an employee of an organization that it supervised reported a public interest complaint directly to it against his employer. After the organization learned of the complaint, it requested details in order to investigate, and the local government accidentally revealed the complainant's name. The NAIH considered it an aggravating factor that as a result of the data breach, the organization fired the person who made the report.²⁹ Furthermore, the NAIH published a guidance on the basic requirements for workplace-related data management in 2016. This document contains some targeted information on whistleblowing systems (in line with the Pkbt.).³⁰

It should be noted that in the public sector, the Code of Professional Ethics of the Faculty of Hungarian Government Officials (in Hungarian: A Magyar Kormánytisztviselői Kar – MKK – Hivatásetikai Kódexe) contains some specific (ethical) guidelines on reporting abuses (III./1.).³¹

3.2. Aspects of collective labour law

The role of workers' representatives (trade unions or works councils) in relation to whistleblowing is not clarified in Hungarian law. However, the general rules of the Labour Code (§ 264) provide that employers have to consult the works council prior to passing a decision in respect of any plans for actions and adopting regulations affecting a large number of employees, including, among others, a measure in relation to the protection of personal data of the employees. This rule might in principle apply to whistleblowing schemes (and related internal regulations), as well.

Concerning employees' representatives, the Labour Code sets very strict confidentiality obligations. § 234 (2)–(3) of the Labour Code provide that the representatives acting in the name and on behalf of works councils or trade unions are not authorised to disclose any facts, information, know-how or data which, in the legitimate economic interest of the employer or in the protection of its functioning, have expressly been provided to them in confidence or need to be treated as business

28 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

29 NAIH/2019/596/3, <https://www.naih.hu/files/NAIH-2019-596-hatarozat.pdf>, accessed 01/09/2021.

30 https://www.naih.hu/files/2016_11_15_Tajekoztato_munkahelyi_adatkezelesek.pdf, accessed 01/09/2021.

31 <http://mkk.org.hu/node/485>, accessed 01/09/2021.

secrets, in any way or form, and are not authorised to use them in any other way in connection with any activity in which this person is involved for reasons other than the objectives specified in the LC. Furthermore, any person acting in the name or on behalf of the works council or trade union is authorised to disclose any information or data acquired in the course of his or her activities solely in a manner which does not jeopardise the employer's legitimate economic interest and without violating rights relating to personality.

4. Whistleblowing and some other relevant fields of law

4.1. Whistleblowing and anti-discrimination

The legal framework for anti-discrimination is set out in Act CXXV of 2003 on equal treatment and the promotion of equal opportunities (hereinafter referred to as the Ebktv. following the Hungarian abbreviation). One of the most frequently arising issues is the question of how to interpret the concept of “other situation, characteristic or feature” in § 8 (t) of the Ebktv. The protected characteristics are the characteristics and features enumerated in the Ebktv. from point a) to t), including nineteen plus one characteristics. The law considers discrimination on the basis of these characteristics unlawful because it runs afoul of the principle of equal treatment. It is apparent that the Ebktv. tends to grant protection to characteristics that are typically innate and permanent and which either cannot be changed by the individual or are difficult to change for him or her. In line with international practice, the characteristics protected by the Ebktv. tend to be those that pertain to an essential feature of human personality; that may serve as the basis of group formation; that may be used as a basis of prejudice; and which are associated with some type of underprivileged situation. The enumeration of protected characteristics in the law is open-ended; the last (“plus”) one mentioned is “other situation, characteristic or feature” in Section 8 (t). This does not imply, however, that the law affords protection based on any characteristic or situation that might conceivably apply to an individual, for that would render the regulation meaningless. The range of characteristics and situations protected under this concept must be similar to the characteristics explicitly listed in the law. The concept of other situation must be construed narrowly (see also: the Advisory Board Position Paper No. 288/2/2010 (IV.9) on the definition of other situation³²). Generally, the concept of other situation does

³² See also: Curia – 4/2017 (XI.28.) KMK vélemény az egyenlő bánásmód követelményének megsértésével kapcsolatos munkaügyi perek egyes kérdéseiről (KMK opinion on the equal treatment requirement on certain aspects of labour lawsuits relating to breaches of the right to equal treatment).

not apply if the disadvantage suffered is associated with the petitioner's individual circumstances – if it is based on the employer's personal antipathy, for example, or on a difference in opinion or personal conflict between a manager and a subordinated employee. Whistleblowing is not specifically covered and there is a low probability that the court (or the relevant authority) would interpret whistleblowing as "other situation, characteristic or feature."

According to § 19 Ebktv., a reversed (shared) burden of proof applies in procedures initiated in connection with the alleged violation of the principle of equal treatment, which includes procedures conducted by relevant authority. However, this unique rule on the reversed (shared) burden of proof is not relevant in cases related to whistleblowing (see above).

4.2. Whistleblowing and some aspects of criminal law

As for external whistleblowing, according to § 3 (4) Pkbt., in cases where it has become clear that the complainant or the whistleblower communicated untrue information of crucial importance in *bad faith* and it gives rise to an indication that a crime or an infraction was committed, the personal data of the complainant or the whistleblower has to be handed over to the body or person entitled to carry out proceedings (similarly, if there is good reason to consider it likely that the complainant or the whistleblower caused unlawful damage or other harm to the rights of others, his or her personal data is handed over to the body or person entitled to initiate or carry out proceedings upon the body or person's request).

As for internal whistleblowing, § 16 (3) Pkbt. stipulates that if the investigation of the conduct reported by the whistleblower warrants the initiation of criminal proceedings, arrangements have to be taken to ensure that the case is reported to the police (this can be labelled the so-called *ex officio* principle).³³

It must be noted that § 257 of Act IV of 1978 (the previous criminal code) criminalized the initiation of any disadvantageous measures against a person making a public interest disclosure up until 31 January 2013 (the offence of persecution of a public interest discloser). Such an act is now classified as only a regulatory offence (as per § 206/A of Act II of 2012 on regulatory offences, regulatory offences procedure and the Regulatory Offence Registry System): any person who causes disadvantage to the whistleblower commits an offence. The police has competence in the procedure.

³³ According to Ambrus, the "ex officio" principle (i.e. the duty to make a criminal complaint) is highly debatable and problematic in practice (i.e. there is not always a pressing social interest to warrant the use of the state's punitive powers). I. Ambrus, *Considerations for Assessing Corporate Wrongdoings – a Hungarian Approach to Whistleblowing*, Elte Law Journal, 2016/2, p. 20.

4.3. Whistleblowing and protection of trade secrets

The Hungarian Parliament adopted a special act on the protection of trade secrets in 2018 (Act LIV of 2018 on the protection of business secrets). The Act starts with definitions related to the protection of trade secrets followed by clearly set procedural rules on exercising rights pertaining to the protection of trade secrets. The fundamental novelty of the Act is that it ensures the protection of trade secrets as a special way of protection similar to the concept and regulatory framework of intellectual property rights, whereas the previous concept under the Civil Code regarded trade secret as a part of privacy. According to § 1 (1) of the new law, *trade secret* “shall include any confidential fact, information and other data, or a compilation thereof, connected to economic activities, which are not publicly known in whole or in the complexity of their elements, or which are not easily accessible to other operators pursuing the same economic activities, where the proprietor of the secret has taken reasonable efforts that may be expected in the given circumstances to keep such information confidential.” It is important to underline that § 5 (3) (b) of this act provides that *the acquisition of the business secret shall not be construed an infringement* where the acquisition of a business secret and its disclosure to the proper authority was done for the purpose of protecting the *general public interest* in preventing or combating any illegal activity or any misconduct or wrongdoing violating the general requirements of *honest commercial practices*, to the extent justified by its purpose.

In this regard, § 8 (4) of the Labour Code stipulates that employees have to maintain confidentiality in relation to business secrets obtained in the course of their work. Moreover, employees may not disclose to unauthorised persons any data learned in connection with their activities that, if revealed, would result in detrimental consequences for the employer or other persons. The requirement of confidentiality does not apply to any information that under specific other legislation should be treated as information of public interest or public information and as such is rendered subject to disclosure requirement. It is noteworthy that the Pkbt. does not clearly set aside this strict labour-law based duty of confidentiality. In sum, the connection between the Labour Code’s strict confidentiality rule (as stated above) and whistleblowing is not specifically clarified in legislation (or in judicial practice).

5. Critical opinions and motions for reform

Some prominent non-governmental organisations dealing with whistleblower protection in Hungary are the following: K-Monitor,³⁴ Hungarian Civil Liberties

³⁴ <https://k-monitor.hu/fooldal>, accessed 01/09/2021.

Union (HCLU),³⁵ Transparency International Hungary³⁶ etc. These NGOs often express criticism and put forward proposals in relation to whistleblower protection (however, it must be noted that the whole topic of anti-corruption is inherently over-politicised, and sometimes it is difficult to perceive these debates and opinions objectively, without the political context). For instance, Transparency International Hungary addressed an open letter to the President of the Republic in order to try to stop the promulgation of Pkbt. in 2013. The open letter contained a call for more effective fight against corruption and more concrete protection for whistleblowers.³⁷ Furthermore, the Hungarian Civil Liberties Union and K-Monitor Watchdog for Public Funds prepared a submission for consideration by the UN Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression on the Hungarian legal framework and practices governing whistleblower protection in August 2015.³⁸ They fundamentally criticise the Pkbt. for providing poor protections to employees and citizens who report crime and corruption. The submission enumerates the main shortcomings of the law from the perspective of these NGOs. Among others, the following generally relevant concerns are mentioned about the Pkbt.:³⁹ lack of specific remedies for victimised whistleblowers to be reinstated or compensated; the law bans retaliation but lacks the specific means to protect whistleblowers from reprisals, criminal prosecution and civil actions; the law does not provide a full range of disclosure channels; it does not require results of investigations to be released to the public; it does not require workplace retaliation and harassment to be investigated and remedied; relatives of whistleblowers are not protected; anonymous reporting is not supported etc. They also note that the Ombudsman often forwards reports and complaints to the very same ministry or agency that is responsible for the misconduct. The law only provides a formal way of appeal, since the Ombudsman's Office has neither the empowerment nor the capacities to conduct substantive investigations. The NGOs also point out that although detrimental measures against the whistleblower can only be justified if their misconduct is proven, in the case of a suspicion of wrongdoing, proceedings aiming to reveal a possible crime are not considered detrimental measures. This means that

35 <https://hclu.hu/en>, accessed 01/09/2021.

36 <https://transparency.hu/en/>, accessed 01/09/2021.

37 <https://transparency.hu/kozszektor/kozerdeku-bejelentok-vedelme/allasfoglalasok-kutatasok/a-ti-nyilt-levele-dr-ader-janos-koztarsasagi-elnok-urhoz-a-kozerdeku-bejelentok-vedelme-erdekeben/>, accessed 01/09/2021.

38 K-Monitor, Hungarian Civil Liberties Union, Submission to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on the Hungarian legal framework and practices governing whistleblower protection, 2015, <https://www.ohchr.org/Documents/Issues/Opinion/Protection/HungarianCivilLibertiesUnion.docx>, accessed 01/09/2021.

39 See also: "A Change of Direction" project, August, 2015, K-Monitor, Hungarian Civil Liberties Union, <https://www.changeofdirection.eu/campaign-central/shortcomings-in-hungarys-whistleblower-law>, accessed 01/09/2021.

the protection guaranteed by the law does not prevail in practice. In conclusion, it is stated in the above-mentioned submission that “the current law does not provide sufficient protection to whistleblowers, and has to be reshaped fundamentally.”⁴⁰

A Report (2017) of the Commissioner for Fundamental Rights⁴¹ also included some critical remarks about the legislation concerning whistleblowing. For instance, it was mentioned that relevant legal regulations are not clear and adequately detailed concerning the support measures for whistleblowers. It is also not clearly defined which authority should establish that the whistleblower is “at risk” (the certification related to the fact that a person can benefit from protection is not regulated under national law). Furthermore, according to this Report, psychological support to whistleblowers should be provided by the government.

It should be noted that in 2015–2016, the government made plans for a new law in its draft anti-corruption programme, but finally, the issue completely disappeared.⁴² However, a fully worked-out bill on an entirely new whistleblowing act⁴³ was submitted to the Parliament in June 2015 (as an individual motion of a member of the Parliament⁴⁴). The Committee on Legal Affairs of the Parliament refused to put this bill on the legislative agenda of the Parliament (on 28th September 2015). It was noted in the bill that even the government’s anti-corruption strategy recognised shortcomings in the current rules of public interest whistleblower protection and the ineffectiveness of its current system, as it was also highlighted under the European Semester’s latest report on the Hungarian economic environment. Therefore, the bill was aimed at reforming the law in an extremely progressive spirit, to a large extent by incorporating the above-cited proposals of NGOs. Accordingly, the bill contained some elementary reform proposals, among which the most notable ones were the following (without intending to be exhaustive here): the creation of a separate, dedicated so-called Public-Interest Protection Office (as part of the envisaged anti-corruption prosecutor’s office); the reinforcement of the possibility of anonymous whistleblowing and whistleblowing via NGOs, trade unions, and journalists; the introduction of the reversal of the burden of proof; detailed rules on specific protections, remedies and support measures (including financial rewards) for whistleblowers; rules on public disclosures; protection for the relatives of the whistleblower; sanctions for reports made in bad faith etc.

40 K-Monitor, Hungarian Civil Liberties Union, 2015.

41 Report No. A/B-1873/2017 of the Commissioner, https://www.ajbh.hu/documents/10180/2602747/Jelent%C3%A9s+egy+k%C3%B6z%C3%A9rdek%C5%B1+bejelent%C5%91+vesz%C3%A9lyzetetts%C3%A9g%C3%A9r%C5%91+1873_2017/da2510cb-5353-cab8-b063-ee3dd38e03b?version=1.0 accessed 01/09/2021.

42 The National Anti-Corruption Programme (2015–2018) did not contain such a goal any more.

43 T/5373, <https://www.parlament.hu/irom40/05373/05373.pdf>, accessed 01/09/2021.

44 T. Szabó, at that time independent MEP.

6. Reflections and tentative regulatory options in light of the Whistleblower Directive – from a labour law perspective

As it was mentioned above, at the time of writing this paper, no official information is available on the Hungarian transposition (or related preparatory works) of the Whistleblower Directive. In any case, Member States are obliged to bring into force laws, regulations and administrative provisions necessary to comply with the Directive by 17 December 2021. Compared to the Pkbt., the regulation of the Directive is much more detailed and specific. Therefore, a medium-sized amendment to the law involving dozens of provisions is expected.⁴⁵ It is noteworthy that following the expiry of the previous anti-corruption programme in 2018, in June 2020, the government adopted a new Mid-term National Anti-corruption Strategy for 2020–2022 and an accompanying action plan. However, these documents contain no references to a reform of whistleblowing (even though whistleblowing is traditionally perceived as an element of anti-corruption in Hungary⁴⁶).

Now, the most obvious, most challenging elements of the Directive upon which the Hungarian legislature will certainly need to act will be mentioned. On the most general level, it is obvious that the Directive's unique "three-tiered model of reporting" (including mandatorily set up internal, stable external and – as last resorts – public channels)⁴⁷ will not be easily adaptable to Hungary. In Hungary, as the paper has presented above, internal channels of whistleblowing ("hotlines") are not yet obligatory, the external channels are institutionally existent but rather weak, while public disclosures are not specifically regulated. The analysis below is inherently tentative and exploratory (taking into account that no official draft or proposal is available yet) and by no means exhaustive (rather illustrative) and deliberately puts the emphasis on the labour law-related aspects of the Directive and the regulation (as the Directive will influence labour law in a significant way in general⁴⁸). In light of all these disclaimers, the following regulatory issues seem to be the most striking in view of the Directive.

First, it is not clearly stated in Hungarian law that in the event of a legal dispute, in a case of alleged retaliation against whistleblowers, the employer has to prove that

45 Based on the general practice of Hungarian legal harmonisation, it is very unlikely that any draft or concept on the issue would be completed or any social consultation or social dialogue (if any) would take place much before the deadline. Furthermore, the situation is further complicated by the COVID-related legislation as a priority which basically occupies the Ministry of Justice in 2020–21.

46 Cf. J. Hajdú, A. Lukács, *Whistleblowing és a közösségi média szerepe a korrupció elleni fellépésben (Whistleblowing and the role of social media in the fight against corruption)*, Nemzeti Közszolgálati Egyetem, Budapest 2018.

47 V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, *Industrial Law Journal*, Volume 49, Issue 4, December 2020, p. 650.

48 F. Kain, *Whistleblowing and labour law: The Whistleblower Directive – development, content and obstacles*, *Italian Labour Law E-Journal* 13(2), 2020, pp. 131–144.

his or her action is not related to the public interest disclosure or that the disclosure was made in bad faith. The Directive (Recital 93) provides that once the reporting person demonstrates prima facie that he or she reported breaches or made a public disclosure in accordance with this Directive and suffered a detriment, the burden of proof should shift to the person who took the detrimental action, who should then be required to demonstrate that the action taken was not linked in any way to the reporting or the public disclosure. In other words, the reversed burden of proof is an important rule of the Directive [Article 21(5)], which needs to be introduced explicitly into Hungarian (labour) law.

Second, probably the most concrete obligation – obligation to establish internal reporting channels – in the Directive is laid down in Article 8(1), according to which “Member States shall ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners⁴⁹ where provided for by national law.” As a main rule, the obligation applies to legal entities in the private sector with 50 or more workers. Reporting channels may be operated internally by a person or department designated for that purpose or provided externally by a third party. In sum, the Hungarian legislature will need to comply with this obligation and notify the Commission of any decision in this regard. Furthermore, the legislature, following an appropriate risk assessment taking into account the nature of the activities of the entities and the ensuing level of risk for, in particular, the environment and public health, may also require legal entities in the private sector with fewer than 50 workers to establish internal reporting channels and procedures.

Third, no specific protection is guaranteed for whistleblowers turning directly to the public (outside internal and external reporting channels) in Hungarian law (and more specifically in the Pkbt.). In light of the Directive (Article 15 on public disclosures), regulatory steps are certainly needed in this regard.

Fourth, the personal scope of the Directive (Article 4) is broader than that of the current Hungarian regulation. In brief, all persons who are in contact with the entity in the context of their “work-related activities” can report information on breaches. For instance, according to Article 4(2), the Directive applies also to reporting persons where they report or publicly disclose information on breaches acquired in a work-based relationship which has since ended (i.e. former employees). Furthermore, according to Article 4(3), the Directive applies to reporting persons whose work-based relationship is yet to begin in cases where information on breaches has been acquired

49 On the related potential roles of trade unions in general, see: EUROCADRES Best practice guide on whistleblowing for trade unions, <https://whistleblowerprotection.eu/blog/best-practice-guide-on-whistleblowing-for-trade-unions/>, accessed 01/09/2021. Furthermore, Abazi notes that “it is hoped that trade unions will play an active role in empowering whistleblowers’ voices and advancing protection, not only through law but also through organizational culture.” V. Abazi, *The European Union Whistleblower Directive: A ‘Game Changer’ for Whistleblowing Protection?*, *Industrial Law Journal*, Volume 49, Issue 4, December 2020, p. 656. In this regard, it is noteworthy that Hungarian trade unions are not active at all.

during the recruitment process or other pre-contractual negotiations. As mentioned before, according to § 14 (1) Pkbt., internal whistleblower reports may be submitted by the employees of the employers or other persons having a contractual relationship with the employer organizations or persons having acceptable legitimate interest for submitting the whistleblower report or the remedying or discontinuation of the activity subject to the whistleblower report. Although the latter phrasing (“persons having acceptable legitimate interest”) is broad enough, it is not especially precise.

Fifth, the Directive contains a very detailed regulation on protection measures (in Chapter VI), including prohibition of retaliation (Article 19),⁵⁰ measures of support (Article 20), measures for protection against retaliation (Article 21), and measures for the protection of persons concerned (Article 22). Furthermore, effective, proportionate and dissuasive penalties or sanctions need to be institutionalised (Article 23), and Member States have to ensure that the rights and remedies provided for under the Directive cannot be waived or limited by any agreement,⁵¹ policy, form or condition of employment (“no waiver of rights and remedies,” Article 24). The Hungarian regulatory framework surely needs more concretization on all of these points.

It ought to be noted that the material scope of the Directive (Article 2) does not cover labour law as such. The Directive lays down common minimum standards for the protection of persons reporting some pre-defined, listed breaches of Union law (falling within the scope of the Union acts set out in the Annex that concern the listed regulatory areas, including, for example, public procurement; financial services, products and markets, and prevention of money laundering and terrorist financing; product safety and compliance; transport safety; protection of the environment etc., but not European labour law and social policy). However, the Directive is without prejudice to the power of the Member States to extend protection under national law as regards areas or acts not covered by the Directive. Recital 5 of the Directive clearly encourages Member States to do so. In this regard, it is very unlikely that the Hungarian legislature would broaden the material scope, including for example labour law. The Directive itself still offers some room for optimism in this regard, as it stipulates in Article 27(3) that the Commission shall, by 17 December 2025, prepare a report assessing the impact of national law transposing this Directive. The report will evaluate the way in which the Directive has functioned and consider the need for additional measures, including, where appropriate, amendments with a view to extending the scope of the Directive to further Union acts or areas, in particular the improvement of the working environment to protect workers’ health and safety and working conditions.

It is also noteworthy that in Hungary, there seems to be a preference in practice for anonymous reporting.⁵² However, the Directive basically leaves this issue up to

50 The list includes mostly (but not only) typical employer measures.

51 Including collective agreements.

52 E. Dénes, *Whistleblowing: bejelentés vagy beárulás? (Whistleblowing: reporting or betrayal?)*, Munkajog (HVG-ORAC), 2020/4, p. 43.

national law. Thus, according to the Directive, there is no compelling need to improve the existing regulation in this regard. Article 6(2) provides that without prejudice to the existing obligations to provide for anonymous reporting by virtue of Union law, the Directive does not affect the power of Member States to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches.

Conclusions

The new Directive certainly contributes to a more uniform understanding of whistleblowing within the European Union. However, it is the task of the domestic legislators to give real “teeth” to the rather framework-like, technical standards of the Directive. It is difficult to predict, but it seems to be very unlikely that the Hungarian legislature would go much beyond the required minimum. On the other hand, it is very important to recall the fact that when dealing with whistleblowing, regulation is just one side of the coin and the de facto functionality of whistleblowing depends on many factors. As, for example, Abazi points out, “whether the Directive will attain the expected high standards of protection depends, inter alia, on the transposition of the rules into national law, the enforcement of the Directive’s protections and the embeddedness of the rules in organizational culture.”⁵³ Ambrus also emphasises in a similar vein that “even the best-constructed whistleblowing system will remain ineffective if it is not used by employees.”⁵⁴ If one takes into account these observations, it is very difficult to be highly optimistic about the prospective success of the forthcoming Hungarian implementation of the Directive. No matter what legal framework on whistleblowing Hungary had, has or will have, the above-described country-specific cultural aversions, organisational and structural barriers and poor legal enforcement practices related to whistleblowing most certainly will not evaporate easily and quickly.

Abstract

The aim of this chapter is to take a general account of the past and current practices, experiences and challenges of whistleblowing legislation and whistleblower protection in Hungary. The emphasis will be put on the critical analysis of the currently effective regulatory environment of whistleblowing and whistleblower protection in Hungary, with specific regard to

53 V. Abazi, *The European Union Whistleblower Directive: A ‘Game Changer’ for Whistleblowing Protection?*, *Industrial Law Journal*, Volume 49, Issue 4, December 2020, p. 641.

54 I. Ambrus, *Considerations for Assessing Corporate Wrongoings – a Hungarian Approach to Whistleblowing*, *Elte Law Journal* 2016/2, p. 22.

labour law aspects. Furthermore, the context, prospects and basic requirements of the future implementation of the EU Directive will also be highlighted. In this vein, Section 2 sketches the historical, societal and constitutional context. Section 3, as the central part of this study, examines in detail the currently effective legislative framework of whistleblowing in Hungary. Section 4 deals specifically with the labour law-related aspects of whistleblowing, while Section 5 takes a brief look into other related fields of law (including anti-discrimination, criminal law, and trade secrets). Section 6 considers recent and relevant critical opinions and motions for reform. Section 7 looks into the possible challenges and the main tentative tasks of the upcoming transposition of the Directive into Hungarian law. Finally, Section 8 draws some broad, general conclusions.

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Workplace Whistleblower Protection in Poland: Current Situation and Perspectives

Dagmara Skupień¹

<https://doi.org/10.18778/8220-639-5.08>

1. Legal sources of general application

Disclosures of breaches of law have a long tradition in the Polish history and date back to the times of monarchy.² Disclosures reinforcing the rule of law were approved of by the rulers and rewarded financially.³ The positive approach to whistleblowers during the era of independence of Poland was undermined during the period of occupation, namely during the 19th-century partitions of the country, the Second World War and afterwards during the communist times.⁴ The times of unwanted foreign rule left the reticence for collaborators or denounciators, which did not disappear completely after the return to democracy in 1989.⁵ On the other hand, the reinforcement of the rule of law and fulfilment of international obligations after the political transformation led to the creation of different institutions and measures

1 Dr hab. Dagmara Skupień, Professor at the University of Lodz.

2 See more about the history of whistleblowing in Poland: M. Ożóg, *Sygnalizacja naruszeń prawa a zasada praworządności w dziejach prawa polskiego – zarys problematyki (Disclosures of breaches of law and the principle of rule of law in the history of Polish law – the outline of problems)*, [in:] B. Baran, M. Ożóg (eds.), *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości (Protection of whistleblowers. Rules concerning persons disclosing irregularities)*, Wolters Kluwer, Warsaw 2021, pp. 241–257.

3 See M. Ożóg, *Sygnalizacja naruszeń prawa...*, op. cit., p. 247.

4 See Ł. Bolesta, *In Search of a Model for the Legal Protection of a Whistleblower in the Workplace in Poland*, Peter Lang, Berlin 2020, pp. 94–95 or A. Savage, *Whistleblowers for change. The social and economic costs and benefits of leaking and whistleblowing*, Open Society Foundations 2018, p. 12.

5 Compare T. Kocurek, *Działalność sygnalistów jako przejaw społeczeństwa obywatelskiego w szerszym kontekście historycznoprawnym (Whistleblower activity as a manifestation of civil society in a broader historical and legal context)*, [in:] B. Baran, M. Ożóg (eds.), *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości (Protection of whistleblowers. Rules concerning persons disclosing irregularities)*, Wolters Kluwer, Warsaw 2021 pp. 263–264, or H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia (Whistleblowing. Disclosing irregularities in employment relations)*, Scholar, Warsaw 2020, p. 44.

supporting disclosures of irregularities and providing whistleblowers with protection against retaliations.

The rules for the protection of workplace whistleblowers in Poland do not arise from one legal act which would define the concept of a 'whistleblower' and regulate the material scope of whistleblowing, giving right to legal protection. The state guarantees protection to whistleblowers on the basis of various (global, regional and domestic) dispersed acts. Some of them concern only certain areas of economy or public policy.

Poland is bound by international conventions concerning measures against corruption which also regulate the protection of whistleblowers,⁶ such as conventions of the Council of Europe adopted in 1999, namely the Civil Law Convention on Corruption⁷ and the Criminal Law Convention on Corruption,⁸ the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1999 (Anti-Bribery Convention)⁹ and the United Nations Convention against Corruption of 2003.¹⁰ Polish criminal legislation concerning corruption is extensive. It does not contain measures for the protection of whistleblowers.¹¹ However, it grants impunity for bribe-givers who denounce the crime of bribery to the competent investigative organ and inform it about all the important circumstances of the case, before the competent organ learned of it (Article 296a § 1 of the Polish Criminal Code).¹²

It is also worth mentioning that Poland is a party to the ILO Convention No. 176 concerning Safety and Health in Mines, 1995 which, inter alia, establishes not only the right but even a duty of employees to report dangers concerning health and security at their workplaces,¹³ as well as the ILO Chemicals Convention No. 170, which obliges workers to inform their supervisor immediately about the danger resulting from the use of chemicals.¹⁴ On the other hand, Poland has not ratified the ILO Convention Termination of Employment Convention, 1982 (No. 158) which, in its Article 5(c),

6 See A. Pietruszka, *Ochrona sygnalistów (whistleblowers) w kontekście wolności wypowiedzi (Protection of whistleblowers in the context of freedom of expression)*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1/2020, p. 116.

7 Ratified by Poland on 11 September 2002, entry into force: 1 November 2003. It is worth mentioning that Article 9 of the Civil Law Convention on Corruption refers directly to employment relationships.

8 Ratified by Poland on 11 December 2002, entry into force: 1 April 2003.

9 Ratified by Poland in 2000.

10 Ratified by Poland in 2006.

11 Compare Phase 3 Report on Implementing the OECD Anti-bribery Convention in Poland, June 2013, p. 42, <https://www.oecd.org/daf/anti-bribery/Polandphase3reportEN.pdf>, accessed 01/09/2021.

12 See M. Pazdan, M. Zachariasiewicz, *The Effects of Corruption in International Commercial Contracts*, [in:] B. Lewaszkiwicz-Petrykowska (ed.), *Rapports polonais, XIX Congrès international de droit comparé*, Vienne, 20–26 VII 2014, Lodz University Press, Lodz 2014, p. 111.

13 See H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawidłowości...*, op. cit., p. 49.

14 *Ibidem*.

guarantees that filing of a complaint or participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities shall not constitute valid reasons for termination of an employment contract. Likewise, Poland has not ratified the ILO Violence and Harassment Convention No. 190, which imposes the obligation on Member States to take appropriate measures to guarantee protection against retaliations to whistleblowers disclosing acts of violence and harassment at the workplace (Article 10).

As regards the protection of whistleblowers, it is important to mention Article 10 (Freedom of expression) of the European Convention on Human Rights (ECHR) ratified by Poland. According to the case law of the European Court of Human Rights (ECtHR), Article 10 (Freedom of expression) of the ECHR is applicable to the workplace.¹⁵

Under the ECHR, freedom of expression and information is not absolute. The state may interfere with that freedom in certain circumstances (irrespective of the medium through which opinions, information and ideas are expressed). Article 10 §2 ECHR provides that, to be permissible, any restriction on freedom of expression must pursue one of the aims recognized as legitimate: national security, territorial integrity or public safety, protection of health or morals, prevention of disorder or crime, protection of the reputation or rights of others, prevention of the disclosure of information received in confidence or maintenance of the authority and impartiality of the judiciary.¹⁶

On 30 April 2014, the Committee of Ministers of the Council of Europe addressed the Recommendation on the protection of whistleblowers, CM/Rec (2014) 7, to Member States. This recommendation defines the 'whistleblower' as "any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector."

Article 54(1) of the Constitution of the Republic of Poland guarantees to everyone the freedom to express opinions and to acquire and to disseminate information as one of personal freedoms and rights. Within the scope of the employment relationship this right may constitute a legal basis allowing employees to express justified critical opinions about the employer. In cases of public whistleblowing, the exercise of the above-mentioned right may collide with the constitutional right to legal protection of a person's good reputation (Article 47 of the Constitution) or with human dignity which, in the light of Article 30 of the Constitution, shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.¹⁷

¹⁵ See also M. Górski in this monograph.

¹⁶ Freedom of expression in Europe, Case-law concerning Article 10 of the European Convention on Human Rights, Human Rights files, No. 18, Council of Europe Publishing, 2007, p. 7.

¹⁷ Compare D. Skupień, *Whistleblowing in Poland According to Legislation and Case Law*, [in:] G. Thüsing, G. Forst (eds.), *Whistleblowing – A Comparative Study*, Springer, Cham 2016 p. 223 and, by the same author, *The legal protection of whistleblowers in Poland*, [in:]

In the light of Article 31(2) of the Constitution, everyone shall respect the freedoms and rights of others. Possible restrictions to the freedom of expression may result only from Article 31(3) of the Constitution, which states that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

As a member of the European Union, Poland implemented Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.¹⁸ In the light of Article 5 of the above-mentioned Directive, the alleged acquisition, use or disclosure of a trade secret is not sanctioned where it takes place in order to exercise the right to freedom of expression and information as set out in the Charter of Fundamental Rights of the EU, including respect for the freedom and pluralism of the media, for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest, for the purpose of protecting a legitimate interest recognized by Union or national law or in case of disclosure by workers to their representatives as part of the legitimate exercise by those representatives of their functions in accordance with Union or national law, provided that such disclosure was necessary for that exercise. Article 5 of this Directive was implemented in Poland by the means of the Act of 16 April 1993 on combatting unfair competition (*ustawa o zwalczaniu nieuczciwej konkurencji*).

In the public sector, Article 63 of the Constitution may apply to whistleblowers. According to this provision, everyone shall have the right to submit petitions, requests and complaints in the public interest, in his/her own interest or in the interest of another person— with his/her consent—to public authorities, as well as to organizations and social institutions in connection with the performance of their prescribed duties within the field of public administration. The procedures for considering complaints and proposals are specified by the Code of Administrative Procedure (Articles 227–259). Complaints are lodged to public or local administration bodies and may concern, *inter alia*, acts of negligence or improper fulfilment of tasks of administration bodies or of their workers or breaches of rule of law (*praworządność*). Requests may aim at improving the organization, strengthening the rule of law, making work more effective, preventing abuse, protecting property or a better fulfilment of societal needs.

According to Article 225 §1 of the Code of Administrative Procedure, a person lodging a complaint or a request or delivering press material assimilated to

B. Lewaszkiewicz-Petrykowska (ed.) *Rapports polonais, XIX Congrès international de droit comparé*, Vienne, 20–26 VII 2014., Lodz University Press, Lodz 2014, p. 259.

18 OJ L 157, 15.6.2016, pp. 1–18.

a complaint or request in its content may not be exposed to any harm or accusation, if he/she acted within the limits of law. The procedure of considering complaints and requests is set up in the Regulation of the Council of Ministers of 8 January 2002 on the organization of the receipt and processing of complaints and requests.¹⁹ According to this regulation, proceeding with an anonymous complaint or request is excluded.

Special protection is granted to members of local government assemblies. They cannot be dismissed for reasons related to their political activities.²⁰

There are also legal acts which concern public sector with respect to preventing and fighting corruption. In this context, we should draw attention to the Communication from the Commission of 28 May 2003 on a Comprehensive EU Policy against Corruption²¹, whereby revealing corruption acts can only be achieved by the effective protection of whistleblowers against victimisation and retaliation (loss of job, personal threats etc.) and witness protection instruments as suggested in the Millennium Strategy on the prevention and control of organised crime.

In the public sector, references to whistleblowing may also be found in codes of ethics. As it concerns civil service, Order No. 70 of the Prime Minister of 6 October 2011 concerning guidelines on the respect of principles of civil service and ethical principles in the corpus of civil service²² regrettably does not concern whistleblowing. However, there are some other examples to mention. Certain codes of deontology (police, prosecutors) contain an obligation to 'react', not to 'tolerate' or not to neglect breaches of ethical principles by colleagues.²³ Certain codes of ethics for local government employees established by local authorities in Poland introduce a legal obligation to denounce waste, fraud of public funds, abuse of power or corruption to appropriate institutions.²⁴

19 Ordinance of the Council of Ministers of 8 January 2002 regarding the organisation of the acceptance and processing of complaints and requests, Dz. U. 2002.5.46.

20 See Article 25(2) of the Act on municipal self-government (*ustawa o samorządzie gminnym*), Article 22(2) of the Act on district self-government (*ustawa o samorządzie powiatowym*), Article 27(2) of the Act on voivodship self-government (*ustawa o samorządzie wojewódzkim*).

21 COM(2003) 317(01).

22 Zarządzenie nr 70 Prezesa Rady Ministrów z 6 października 2011 r. w sprawie wytycznych w zakresie przestrzegania zasad służby cywilnej oraz zasad etyki w korpusie służby cywilnej, Polish Monitor No. 93, item 953.

23 Cf. § 6 of the Code of Professional Ethics of Prosecutors (*Zbiór Zasad Etyki Zawodowej Prokuratorów*, Załącznik do uchwały Krajowej Rady Prokuratorów Przy Prokuratorze Generalnym z dnia 12 grudnia 2017 r.), <https://pk.gov.pl/prokuratura/krajowa-rada-prokuratorow/zbior-zasad-etyki-zawodowej-prokuratorow/zbior-zasad-etyki-zawodowej-prokuratorow/>, accessed 01/09/2021, or § 24 of the Principles of Professional Ethics of a Police Officer (Załącznik do zarządzenia nr 805 Komendanta Głównego Policji z dnia 31 grudnia 2003 r.), <https://isp.policja.pl/isp/prawa-czlowieka-w-poli/akty-prawne-i-dokumenty/9072,Zasady-etyki-zawodowej-policjanta.html>, accessed 01/09/2021.

24 Compare § 7(3) of the Code of Ethics of the employees of the Marshall's Office of Lodz, <https://bip.lodzkie.pl/urząd-marszałkowski/kodeks-etyki>, accessed 01/09/2021.

Both in the public and private sector the protection against retaliations may be based on the general provisions of the Labour Code concerning protection against dismissal, deterioration of work conditions or discrimination.

2. Sectoral provisions

Polish legislation covers provisions concerning whistleblowing in different sectors. The following examples can be cited here: the Act of 27 May 2004 on Investment Funds and Alternative Investment Fund Management, the Act of 29 July 2005 on Capital Market Supervision, the Act of 5 August 2015 on Macroprudential Supervision of the Financial System and Crisis Management in the Financial System, Geological and Mining Act or Aviation Act. Mechanisms for whistleblowing provided for on the basis of these legal acts were adopted to implement EU legislation.²⁵

The legal basis for receiving and processing disclosures of money laundering and financing terrorism is established in Article 80 of the Act of 1 March 2018 on Counteracting Money Laundering and Terrorism Financing²⁶. Competence to receive information about real and potential infringements of legal provisions concerning money laundering or terrorism financing is vested in the institution of the General Inspector for Financial Information (*Generalny Inspektor Informacji Finansowej*). The framework for the aforementioned proceedings was provided for in the Regulation of Minister of Finance of 16 May 2018 concerning the Receipt of Notifications of Infringements of Provisions on Counteracting Money Laundering and Terrorism Financing.²⁷

According to the above-cited Regulation, whistleblowers include both current and former workers of the institution concerned as well as persons who carried activities for this institution on the basis other than an employment relationship. The disclosure does not affect the obligation of confidentiality.

The General Inspector is obliged to guarantee protection of personal data of persons disclosing infringements and also of persons who are accused of infringements of provisions relating to money laundering or terrorism financing. Data should be gathered in a separate data file. In particular, written and electronic documents concerning disclosures should be kept in a way that guarantees personal data protection.

25 See Ł. Bolesta, *In Search of a Model...*, op. cit., pp. 108–113, A. Krasuń, *Sygnalista w prawie lotniczym (Whistleblower in the Aviation Act)*, [in:] B. Baran, M. Ożóg (eds.), *Ochrona sygnalistów...*, op. cit., pp. 173–183.

26 Ustawa z dnia 1 marca 2018 r. o przeciwdziałaniu praniu pieniędzy oraz finansowaniu terroryzmu, Dz. U. 2021, items 1132, 1163, 1535.

27 Rozporządzenie Ministra Finansów z dnia 16 maja 2018 r. w sprawie odbierania zgłoszeń naruszeń przepisów z zakresu przeciwdziałania praniu pieniędzy oraz finansowaniu terroryzmu, Dz. U. 2018, item 959.

Disclosures may be introduced in a traditional correspondence format or electronically. In either case, contact address should be indicated by a whistleblower. Means of communication should be organized in a way that guarantees confidentiality and protection from access by unauthorized persons. The General Inspector indicates employees of the organizational unit to support the Inspector in the fulfilment of his/her tasks and who are to receive and process disclosures, especially with regard to follow-up measures. Access to documents related to disclosures is given exclusively to assigned workers. The content of disclosures is transmitted to assigned employees while ensuring confidentiality of personal data of the whistleblower and of the alleged perpetrator. The General Inspector may use the contact address to request additional information from the whistleblower. Information about the possible follow-up measures should be given to the contact address no longer than within 30 working days of the receipt of the disclosure.

3. Legislative proposals concerning whistleblower protection

Citizens' initiatives to develop a single legal act on whistleblowers first came from the Batory Foundation (2012) and then from the coalition of Forum Związków Zawodowych (the Trade Union Forum), Instytut Spraw Publicznych (the Institute of Public Affairs), the Helsinki Foundation for Human Rights and the Stefan Batory Foundation.²⁸ The governmental proposal to regulate the legal status of whistleblowing in criminal proceedings was prepared in 2018 by the Ministry of Justice within an act with larger material scope, namely the transparency of public life (*ustawa o jawności życia publicznego*).²⁹ The work on this latter proposal was stopped in the same year. Chapter 9, Articles 61–65 of the above-mentioned proposal regulated the requirements and procedure to grant the status of a whistleblower in criminal proceedings. Such status could be granted on the basis of the above-mentioned proposal only to persons denouncing certain criminal acts such as corruption (corruption in sports), malpractices on the pharmaceutical market, organized crime and certain other criminal acts related to commercial activities. The status could be granted by the public prosecutor to whom the irregularities were to be reported. During the period for which the status of whistleblowing was granted, and during one year after the discontinuance of proceedings or termination by a final judgment of criminal proceedings instituted against the perpetrator of a crime, the whistleblower was

28 The proposal is available in the Polish language on the following website: <https://www.syg-nalista.pl/projekt-ustawy/>, accessed 01/09/2021.

29 *Ustawa o jawności życia publicznego*, Proposal of 8 January 2018, <https://www.rpo.gov.pl/sites/default/files/ustawa-o-jawnosci-zycia-publicznego-projekt-z%208-stycznia-2018.pdf>, accessed 01/09/2021.

to be protected against the dismissal or deterioration of work conditions and, in case of a self-employed whistleblower, against the dissolution of the contract concluded with such a person or against the deterioration of contractual conditions. However, this prolonged protection did not apply in case of the acquittal of the accused person and also in several specific situations where criminal proceedings were discontinued. This legislative effort to regulate the status of a whistleblower could be acknowledged for the fact that it concerned not only persons employed under an employment contract but also self-employed persons. However, justified criticisms concerned the dependence of the whistleblower status on the decision of the public prosecutor, who could give the consent to the dismissal of the worker or the dissolution of a contract in case of a justified request of the employer/party to the contract.³⁰ Provisions concerning the protection of whistleblowers were also inserted in the Draft Act on the Liability of Collective Entities for Criminal Acts of 2019.³¹

Nowadays, by 17 December 2021, Poland is obliged to implement Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 (with the exception of internal procedures). In the context of the implementation obligation imposed on Poland complex proposals have been formulated in legal scholarship.³²

4. Personal and material scope of whistleblowing

At present, measures of protection against retaliation are mainly granted to employees in the strict meaning of this term, namely according to the definition provided in Article 2 of the Labour Code, i.e. natural persons employed on the basis of the employment contract, appointment, election, nomination or an employment contract in a cooperative. In case of workers employed under civil law contracts or self-employed persons, the level of protection is very weak. The available remedies consist only in claiming the compensation for damages resulted from the breach of a contract according to civil law provisions and contractual clauses. On the other hand, in accordance with the principle of freedom of contract, the parties may not conclude a consecutive contract after the expiry of the previous one. As regards temporary workers, there are no means of protecting such workers when

30 For a critical voice about this proposal, see T. Kocurek, *Działalność sygnalistów...*, op. cit., p. 261, H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawdowości...*, op. cit., pp. 131–135, Ł. Bolesta, *In Search of a Model...*, op. cit., p. 139.

31 *Ustawa o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, Proposal, [http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1211-2019/\\$file/8-020-1211-2019.pdf](http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1211-2019/$file/8-020-1211-2019.pdf), accessed 01/09/2021. For details, see Ł. Bolesta, *In Search of a Model...*, op. cit., p. 129.

32 See Ł. Bolesta, *In Search of a Model...*, op. cit., pp. 135–139 or H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawdowości...*, op. cit., pp. 334–337.

they report irregularities at user undertaking. Future legislation should regulate protection against reprisals at a temporary work agency for whistleblowing at user undertaking.

In principle, protection does not extend beyond the duration of the contract except for persons covered by special protection against dismissal or a change of employment conditions to the detriment of an employee, in particular such as trade union officials, members of works councils or European Works Councils, social labour inspectors as well as employee representatives in supervisory boards.³³ The period of protection extending beyond the duration of the term is defined in respective provisions of law.

The Act of 30 August 1996 on commercialization and other competencies of employees³⁴ regulates conditions of membership and number of employee representatives in supervisory boards and management boards of commercial companies set up as a result of transformation of former state-owned companies. Employee representatives in supervisory boards of commercial companies³⁵ are entitled to supervise and to control activities of the company according to the provisions of the Code of Commercial Companies and Partnerships. It should be noted that in a typical private business, participation of employee representatives in boards is optional and depends on the internal bylaws of the company concerned.

Board-level employee representatives are protected against dismissal with notice or against the modification of employment conditions to the detriment of an employee during the term of his/her office and during one year after the expiry thereof.³⁶ This protection does not concern dismissals without notice³⁷ as well dismissals within the collective redundancies procedure.

Candidates in the recruitment process are protected against discrimination under non-discrimination provisions of the Labour Code (see point 10). No protection is guaranteed for volunteers and trainees.

There is no law of general application which would define 'breaches' which may be subject of whistleblowing. However, certain sectoral provisions contain such catalogues of breaches. For example, these breaches are enumerated broadly in § 5 of the Regulation of Minister of Development and Finance of 6 March 2017 concerning

33 For details, see D. Skupień, *Whistleblowing in Poland...*, op. cit., pp. 225–226, Ł. Bolesta, *In Search of a Model...*, op. cit., pp. 104–106, H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawidłowości...*, op. cit., pp. 256–259.

34 Ustawa z dnia 30 sierpnia 1996 r. o komercjalizacji i niektórych uprawnieniach pracowników, Dz. U. 2021, items 425, 1535.

35 For details about the scope of the board-level representation in Poland see, for instance, D. Skupień, *Board-level employee participation in Polish limited-liability companies*, [in:] G. Löschnigg (ed.), *Arbeitnehmerbeteiligung in Unternehmensorganen im internationalen Vergleich*, OGB Verlag, Wien 2011, pp. 139–161.

36 Article 15 of the Act of 30 August 1996 on commercialization and certain competencies of employees.

37 Compare Judgment of 29 March 2001 of the Supreme Court, I PKN 327/00, OSNP 2003/1/10.

the system of risk management and internal audit system, remuneration policy and detailed method of internal capital evaluation in banks.³⁸ The catalogue covers not only infringements of law but also infringements of procedures and standards of ethics binding at banks.

5. Internal reporting

Obligatory provisions on setting up internal channels for reporting irregularities or infringements are set out in the banking sector.³⁹ We should mention Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.⁴⁰ Article 32(1) of this Regulation imposed the obligation on Member States to ensure that competent authorities establish effective mechanisms to enable reporting or actual or potential infringements of this Regulation to competent authorities. The aforementioned Regulation of Minister of Development and Finance of 6 March 2017⁴¹ adopted on the basis of the Banking Act regulates these duties.⁴²

The obligation to set up an internal whistleblowing system extends onto all banks. However, the reporting channels are available only to employees. Provisions of the aforementioned regulation do not explicitly exclude oral reporting.

According to § 45 point 4 of the Regulation of 2017, internal channels should be constructed in such a way as to keep the identity of the whistleblower confidential. It is not clear to what extent anonymous disclosures are accepted. The appointment of persons operating internal channels is regulated in the banking legislation. According to § 45 point 6 of the Regulation of 2017, the management board of a bank adopts a decision to appoint a management board member responsible for the current operation of the system of internal whistleblowing to whom infringements are to be disclosed. This appointment must be confirmed by the supervisory board of the bank. In case the disclosure concerns a management member, it should be received by the supervisory board. The selection of persons who will be responsible for processing a disclosure is done on ad hoc basis, namely: after having received

38 Rozporządzenie Ministra Rozwoju i Finansów z dnia 6 marca 2017 r. w sprawie systemu zarządzania ryzykiem i systemu kontroli wewnętrznej, polityki wynagrodzeń oraz szczegółowego sposobu szacowania kapitału wewnętrznego w bankach, Dz. U. 2017.637.03.24.

39 Ł. Cichy, *Whistleblowing w bankach*, Komisja Nadzoru Finansowego, Warsaw 2017, https://www.knf.gov.pl/knf/pl/komponenty/img/Whistleblowing%20w%20bankach_58774.pdf, accessed 01/09/2021.

40 OJ L 173, 12.6.2014, p. 1–61, hereinafter: “Market Abuse Regulation”.

41 Hereinafter: „Regulation of 2017”.

42 Article 9f (1) and Article 128(6), ustawa z dnia 29 sierpnia 1997 – Prawo bankowe.

a disclosure, a member of the management board or the supervisory board respectively should nominate workers, organizational units or smaller organizational divisions to be responsible for coordinating the verification of the denouncement and taking follow-up measures. In principle, the whistleblowing channel should be operated by employees of internal structures.

There is no requirement in the Regulation of 2017 that the internal channel of communication be exploited prior to the use of external reporting. While there are no legal deadlines for the response, such deadlines may be set out in internal documents establishing the whistleblowing system.

There is no legal obligation to inform the whistleblower about the follow-up of the disclosure. However, an internal document regulates the type and character of follow-up measures. An alleged 'wrongdoer' is informed at a time specified in the document establishing the internal whistleblowing system about the disclosure if the verification of the reported facts is positive while the identity of the whistleblower is protected. In case of a negative verification, the person whom the disclosure concerns is informed without any delay while the confidentiality of the whistleblower is protected.

If the verification of the report is negative, the personal data contained in the disclosure are deleted from the bank's systems. However, other information concerning the disclosure and the follow-up measures is to be kept for five years, running from the year following the year of disclosure. In case of a positive internal verification of the report, the method of protection of personal data and the duration of the protection is regulated in the internal document establishing the whistleblowing system, in accordance with personal data protection provisions.

Even without formal obligations, companies set up whistleblowing schemes which become part of systems to combat abuses and malpractices in their organisations.⁴³ One example is the Anti-Corruption Policy of the Orlen Group,⁴⁴ which establishes an anonymous internal system of reporting irregularities or a whistleblower platform set up by KGHM for reporting.⁴⁵ There are also numerous Polish companies or groups of companies listed on the Polish stock exchange which operate internal whistleblowing schemes,⁴⁶ as recommended in the standards adopted by the Warsaw Stock Exchange to prevent corruption and protect whistleblowers.⁴⁷

43 Ł. Bolesta, *In Search of a Model...*, op. cit., pp. 123–124.

44 *Polityka antykorupcyjna (Anti-corruption policy)*, https://www.ornlen.pl/PL/Odpowiedzialny_Biznes/Polityka_antykorupcyjna/Strony/default.aspx, accessed 01/09/2021.

45 Linia etyki KGHM (KGHM Ethics Line) <https://liniaetyki.kghm.com/pl>, accessed 01/09/2021.

46 For details, see Ł. Mroczyński-Szmaj, *Ochrona sygnalisty na rynku kapitałowym. Perspektywa wybranych spółek giełdowych (Whistleblower protection on the capital market. Perspective of the selected companies listed on the stock exchange)*, [in:] B. Baran, M. Ożóg (eds.), *Ochrona sygnalistów...*, op. cit., pp. 141–167.

47 See *Standardy rekomendowane dla systemu zarządzania zgodnością w zakresie przeciwdziałania korupcji oraz systemu ochrony sygnalistów w spółkach notowanych na rynkach organizowanych przez Giełdę Papierów Wartościowych w Warszawie S.A. (Recommended standards for*

There is no obligation to consult or agree the procedure of internal whistleblowing with trade unions or works councils at the workplace. In the future, introduction of such procedures should be agreed or at least consulted with the trade unions or, in their absence, with other employee representatives at the workplace.

Another question concerns the right of disclosure in the case of worker representatives who get informed about irregularities during the information and consultation procedures. Trade unionists or members of works councils are allowed to disclose such a fact. However, it may be the case that trade unionists or members of works councils reveal irregularities while having access to confidential information shared by the employer. In the latter case, the employer may pursue claims for damages related to the breach of confidentiality. In this context, attention should be drawn to the fact that trade unionists and works councils members benefit from special protection against dismissal.

6. External reporting

There is no single designated body responsible for receiving disclosures of breaches of law or other irregularities within external channels. Complaints may be addressed to different institutions depending on the material content of the reported breach, namely: the Ombudsman Office, Central Anti-Corruption Bureau, General Inspector of Financial Information, State Inspectorate of Labour, Inspectorate of Environmental Protection, Sanitary Inspectorate and others. There is no clear, publicly available list for potential whistleblowers indicating the bodies to receive disclosures.

There are no provisions of general application which would guarantee the protection of a whistleblower identity within external reporting. Such protection is set out in specific legal acts.⁴⁸ In the realm of the controlling activities of the State Inspectorate of Labour (infringement of employment provisions or of environmental norms by the employer, etc.), the controlling inspector is not allowed to reveal to the inspected entity that the inspection was initiated by the complaint unless the complainant gives his/her written consent.⁴⁹

the compliance management system with regard to anti-corruption and whistleblower protection system in companies listed on the markets organized by the Warsaw Stock Exchange S.A., <https://www.gpw.pl/pub/GPW/files/PDF/Standardy.pdf>, accessed 01/09/2021.

48 See also A. Wojciechowska-Nowak, *Providing an Alternative to Silence. Towards Greater Protection and Support for Whistleblowers in the EU*, Country Report Poland, Transparency International 2013, p. 11, D. Skupień, *Whistleblowing in Poland...*, op. cit., p. 230, Ł. Bolesta, *In Search of a Model...*, op. cit., pp. 106–107.

49 Article 44(3) of the Act on State Inspectorate of Labour (*ustawa z dnia 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy*, Dz. U. 2019, item 1251, consolidated text).

Moreover, during the inspection procedure, the labour inspector may request information about the inspected entity from workers (not only employees but also workers employed under civil law contracts or self-employed persons). In this regard, the labour inspector may deliver a decision concerning the non-disclosure of the identity of a worker if there is a justified risk that such disclosure could entail damage or allegation against this worker⁵⁰ (Article 23(2) of the Act on the State Inspectorate of Labour). In case of a positive decision, personal data of the worker concerned are known exclusively to the labour inspector. The report containing the worker's testimony may be revealed to the employer in a way that protects the worker's identity.

The decision of the State Inspectorate of Labour on confidentiality of personal data of a worker of the inspected entity is discretionary, and the refusal to guarantee confidentiality may not be contested by the worker concerned. The employer may contest the decision concerning the data confidentiality by lodging a complaint to the Regional Inspectorate of Labour within three days from the notification of the decision. The procedure concerning the complaint takes place without employer's attendance and behind closed doors. If the complaint is accepted, the report of the worker must be destroyed and information about the destruction of the report should be mentioned in the post-inspection report.

If the disclosed irregularities constitute criminal offences, the whistleblower may demand the status of the so-called 'incognito witness' (Article 184 of the Code of the Criminal Procedure). The status of the incognito witness may be granted by the given tribunal or during investigations by the prosecutor if there is a justified threat to life, health, freedom or substantial property of the witness or his/her close relatives (Article 184 § 1). This means that the circumstances enabling the identity of the witness to be revealed, personal data included, are kept in secret if they are irrelevant for the judgment in the case.

The decision concerning the incognito status of a witness within criminal proceedings may be contested by the witness concerned and the accused person as well as by the prosecutor, if this is a judicial decision. The appeal against the decision is adjudicated by the court competent to judge the case. If it is revealed that there was no threat to life, health, freedom or substantial property of the witness or his/her closest relatives, or if the witness consciously provided a false testimony, the decision on anonymity may be repealed by the tribunal in judicial proceedings or by the prosecutor during the investigation.

Anonymous disclosures are not accepted in the realm of criminal proceedings or controlling activities of the State Labour Inspectorate. Likewise, this is not allowed in the proceedings based on complaints or requests addressed to administrative authorities.

External channels may be accessed in a written or oral form. Disclosure of criminal acts may be both written and oral. In the latter case, a report is drawn up to

⁵⁰ Article 23 para. 2 of the Act on the State Inspectorate of Labour.

confirm the acceptance of the oral notification of criminal offence (Article 304a of the Code of Criminal Proceedings). Disclosures to the State Inspectorate of Labour may also take an oral or a written form, or they may be filed electronically. Complaints and requests to administrative authorities may also be lodged in a written or oral form.⁵¹ The Central Anti-Corruption Bureau accepts phone calls from whistleblowers disclosing acts of corruption.⁵² Deadlines for response (feedback) to the whistleblower depend on the authority to which the disclosure is submitted.

7. Public disclosures and the freedom of expression

There is no legal definition of ‘public disclosure’. On the basis of the case law of the Supreme Court, this notion may be defined as disclosing irregularities in public, namely through the press, social media or during public meetings or gatherings. According to Article 5(6) of Directive 2019/1937/EU, ‘public disclosure’ means the making of information on breaches available in the public domain.

There is no general obligation under the law stating that public denouncement must always be preceded by internal and/or external whistleblowing. However, this may be the case in certain professions. As an example, we may cite Article 52(2) of Chapter III of the Polish Code of Medical Ethics⁵³, entitled “Mutual relations between physicians,” which provides that “A physician should display particular caution in formulating opinions on the professional conduct of another doctor and in particular he/she should not in any way discredit him/her publicly.” According to Article 52(3) of the above-cited Code, any comments on the observed erroneous conduct of a physician should, in the first place, be shared with that physician. Further on, if such an intervention appears to be inefficient or if the erroneous conduct or the violation of ethical principles causes serious damage, the relevant body of the medical chamber must be notified.⁵⁴

Similar restrictions in formulating criticisms concerning colleagues are defined in the Code of Ethics of Nurses and Midwives (point III.3).⁵⁵ In the light of this

51 Compare § 5 of the Regulation on the organization of receipt and proceeding with complaints and requests.

52 See the official webpage of the Central Anti-Corruption Bureau, <https://cba.gov.pl/pl/kontakt/97,Kontakt.html>, accessed 01.09.2021.

53 Kodeks etyki lekarskiej (Code of Medical Ethics), <https://nil.org.pl/dokumenty/kodeks-etyki-lekarskiej>, accessed 01/09/2021.

54 Kodeks etyki lekarskiej (Code of Medical Ethics), https://nil.org.pl/uploaded_images/1574857770_kodeks-etyki-lekarskiej.pdf, accessed 01/09/2021.

55 Kodeks etyki zawodowej pielęgniarstwa i położniczej Rzeczypospolitej Polskiej (Code of Ethics of Nurses and Midwives of the Republic of Poland), <https://nipip.pl/prawo/samorzadowe/krajowy-zjazd-pielgniarok-i-poloznich/kodeks-etyki-zawodowej-pielgniarok-i-poloznich-rzeczypospolitej-polskiej/>, accessed 01/09/2021.

provision, criticism should be formulated in an impartial way and it should be primarily shared directly with the person concerned. In case there is no reaction and if erroneous acts are repeated, the nurse/midwife should inform the relevant body of the Nurses and Midwives' Chamber.

Pursuant to Article 5 of the Act on the Press⁵⁶, anyone may give information to the press in line with the principle of freedom of expression and the right to criticism. No one can suffer any harm or receive any pleas as a consequence of having passed information to the press if he or she acted within the limits of law.

On the other hand, the breach of personal interests such as good reputation or secrecy of correspondence of a person incurs civil liability for the perpetrator.⁵⁷ Article 24 of the Civil Code provides for ways of redressing infringements of personal rights. According to that provision, a person facing the danger of an infringement may demand that the prospective perpetrator refrain from the wrongful activity unless it is not unlawful. Where an infringement has taken place, the person affected may, *inter alia*, request that the wrongdoer make a relevant statement in an appropriate form, or just claim satisfaction from him or her. If an infringement of a personal right causes financial loss, the person concerned may seek damages. According to Article 43 of the Civil Code, provisions concerning the protection of personal interests of physical persons also apply respectively to personal interests of legal persons. The breach of personal interests of legal persons involves allegations which, taken objectively, would ascribe improper conduct to them, such as mistreatment of workers (e.g. mobbing, improper customer handling, non-fulfilment of public or private obligations that may result in the loss of confidence in this person, necessary to achieve his/her goals in the course of business⁵⁸).

In a case concerning allegations that homeopathic medicines produced by a certain company may transmit avian flu and, therefore, represent a lethal risk for patients, it was judged that the defendant infringed the good reputation of the company by publicly presenting information which was not truthful.⁵⁹

In this context, in the light of the case law of the Polish civil courts, we may distinguish claims concerning infringements of Article 23 of the Civil Code filed against journalists and against other persons. This distinction was based on Article 12(1) of the Act on Press which states that a journalist should show particular diligence while gathering and using press materials, and especially check the veracity of the information received or indicate its source.

A resolution of the Supreme Court of 18 February 2005 (III CZP 53/04 OSNC 2005, No. 7–8, p. 114) clarifies the scope of assessment of legality of journalists' actions. According to the conclusion of this resolution, a journalist's actions would not be considered illegal if they were made in the public interest and the duty to

56 Dz. U. 2018, item 1914, consolidated text (ustawa z dnia 26 stycznia 1984 r. Prawo prasowe).

57 Articles 23–24 of the Civil Code.

58 See judgment of the Supreme Court of 18 September 2019, IV CSK 297/18.

59 Judgment of the Supreme Court of 10 May 2007, III CSK 73/07.

act with due diligence was fulfilled. Imposing an obligation on a journalist to prove the veracity of each statement would unjustifiably limit the freedom of the press in a democratic society. This approach was confirmed in a recent case law of the Supreme Court,⁶⁰ where it was underlined that the requirement of due diligence in case of journalists is higher than elsewhere.

In case of criticisms publicly expressed by persons who are not journalists, there was a requirement to prove the truthfulness of statements in order to escape civil liability. According to the case law of the Supreme Court in civil cases,⁶¹ restrictions to the freedom of expression have to be interpreted as exceptions to the rule and must fulfil the criteria of purposefulness, legality and necessity. However, the right to the legal protection of good reputation has the same importance and merits the same protection as freedom of expression. The necessity to prove the true character of the information transmitted in a public debate in a press interview is not an excessive requirement. This approach of the Supreme Court was questioned by the ECoHR in the case of *Braun v. Poland* of 4 November 2014.

The case of *Braun v. Poland* of 4 November 2014 concerned the complaint by a film director and historian who was ordered to pay a fine and to publish an apology for having damaged the reputation of a well-known professor to whom he had referred, in a radio debate, as an informant of the secret political police during the communist era. The ECoHR did not accept the Polish courts' approach that required the applicant to prove the truthfulness of his allegations. In the light of the ECoHR case law and the circumstances of the case, it was not justified to require the applicant to meet a standard more demanding than that of due diligence only on the grounds that the domestic law had not considered him to be a journalist. The Court held that there had been a violation of Article 10 (freedom of expression) of the Convention.

We should also mention other interesting ECoHR cases against Poland concerning the breach of Article 10 ECHR (freedom of expression), which ended with positive rulings for the complainants. In the case of *Wojtas-Kaleta v. Poland*,⁶² the ECoHR decided that the infringement of Article 10 by Poland took place in a situation where the journalist, who was an employee and, at the same time, a trade unionist, was reprimanded by the employer (a public television company) for having publicly criticized the employer's broadcasting policy.

The case of *Frankowicz v. Poland* of 16 December 2008 concerned a gynaecologist and the President of the Association for the Protection of the Rights of Patients in Poland. Disciplinary proceedings were initiated for the complainant's report on the treatment of a patient in which he was critical of another doctor, following which he was sanctioned by the Medical Court and given a reprimand. The ECoHR held that

60 Judgment of the Supreme Court of 9 February 2018, I CSK 325/17.

61 Cf. judgment of the Supreme Court of 25 February 2010, I CSK 220/09.

62 *Wojtas-Kaleta v. Poland*, 2009, ECoHR 20436/02 (Fourth Section, 16 July 2009).

there had been a violation of Article 10 of the Convention, finding that the interference with the applicant's freedom of expression had not been proportionate to the legitimate aim pursued, namely protecting the reputation of others. It observed in particular that, in the applicant's case, the Polish authorities had concluded, without having attempted to verify the truthfulness of the findings in the medical opinion, that the applicant had discredited another doctor. That decision was made on the basis of the absolute prohibition of any criticism between doctors in Poland, which was set out in the Code of Medical Ethics binding at that time. The Court considered that the absolute prohibition was likely to discourage doctors from providing their patients with an objective opinion on their health and any treatment received, which could compromise the very purpose of the medical profession, namely to protect the health and life of patients⁶³.

It should be added that on 23 April 2008 the Constitutional Court delivered a judgment (SK16/07) in which it found that Article 52 § 2 of the Code of Medical Ethics was unconstitutional in so far as it prohibited the truthful public assessment of the activity of a doctor by another doctor in the public interest.

In the case of *Stankiewicz and Others v. Poland* of 14 October 2014, the applicants were two journalists and the publisher of the national daily newspaper where they both worked. The case concerned an article they published in that paper, in which they alleged that a high official of the Ministry of Health was involved in corrupt practices. The applicants complained that the Polish courts' decisions had violated their right to freedom of expression. The Court held that there had been a violation of Article 10 (freedom of expression) of the Convention, finding in particular that the Polish judicial authorities had not carried out a careful balancing exercise between the right to impart information and protection of the reputation or rights of others. The reasons relied on by Poland to justify the interference with the applicants' right to freedom of expression, although relevant, were not sufficient to show that that interference was necessary in a democratic society.

On the other hand, in the case of *D. Kania v. Poland* of 19 July 2016, the ECoHR did not find the violation of Article 10 of the Convention by Poland. This case concerned the applicant's conviction on charges of defamation after publishing an article in a national weekly, claiming that the communist secret police had created the Polish mafia and protected it throughout the 1980s. The article also claimed that government officials who became members of the police services under the post-1989 democratic system had continued to protect their former colleagues still involved in the thriving world of organised crime. The Court held that there had been no violation of Article 10 (freedom of expression) of the Convention, finding that the applicant's conviction and sentence were not disproportionate to the legitimate aim pursued, namely the protection of the reputation or rights of others. The Polish authorities could therefore reasonably find that the interference with the exercise by

63 Compare also ECoHR judgment in the case of *Sosinowska v. Poland* of 18 October 2011.

the applicant of her right to freedom of expression was necessary in a democratic society in order to protect the reputation and rights of others.⁶⁴

To summarise, in case of journalists who have a social duty to provide information, a whistleblower can avoid civil liability for false criticisms if they fulfilled the duty of due diligence when gathering and presenting the information. On the other hand, Polish courts required a higher standard: that of veracity in case of persons other than journalists. This latter approach was not shared by the ECoHR and became mitigated in the recent caselaw of the Supreme Court (e.g. I NSNc 89/20).⁶⁵

As regards disclosures of criminal acts which are pursued in the criminal proceedings following an act of whistleblowing, a court should not release a journalist from the obligation to protect the personal data of a person who was an author of a press material, a letter to the editor or other material as well of persons transmitting information which was later published or transferred for publication if these persons requested anonymity⁶⁶. A journalist's refusal to reveal such personal data does not exempt them from criminal liability which may arise due to the publication of specific information.

8. Case law in labour disputes concerning control of dismissals due to the public presentation of criticism about the employer

The case law of the Supreme Court adjudicating in labour cases suggests that an employee is entitled to public criticisms about the employer.⁶⁷ However, certain conditions should be met for criticism to be permissible. According to the Supreme Court judgment of 18 July 2012 (I PK 44/12), critical statements about the employer and disclosure of information to the owner of the establishment about possible irregularities do not represent a serious infringement of the employee's duties even if the charges appear to be unjustified at a later date. However, the allegations should be made in good faith with the belief that the irregularities exist at the workplace. In its judgment of 25 November 2014 (I PK 98/14), the Supreme Court stated that when assessing permissibility of criticism, the court should consider whether criticism is substantive, reliable, adequate to specific factual circumstances and presented in an appropriate form. According to the Supreme Court, in that case

64 https://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf, accessed 01/09/2021.

65 See more about the ECoHR caselaw M. Górski in this monograph.

66 Compare Article 180 § 3 of the Polish Code of Criminal Proceedings.

67 See also D. Skupień, *Whistleblowing in Poland according to Legislation and Case Law*, [in:] G. Thüsing, G. Forst (eds.), *Whistleblowing – A Comparative Study*, Springer, Cham Heidelberg New York Dordrecht London, p. 228.

the basic feature of permissible criticism is the employee's 'good faith', i.e. if the employee has a subjective belief that criticism is based on truthful facts (while exercising due diligence in checking their veracity) and acts in the justified interest of the employer.⁶⁸ Moreover, public criticism should not lead to violation of employee obligations consisting, in particular, in acting in the interests of the workplace and maintaining confidentiality of information which, if disclosed, could expose the employer to harm (duty of loyalty, respect of employer's interests as in Article 100 § 1 point 4 of the Labour Code), as well as in compliance with the internal rules of social co-existence (Article 100 § 2 point 6 of the Labour Code).

According to the Supreme Court judgment of 7 December 2006 (I PK 123/06), permissible and constructive criticism made by the manager of an establishment who criticises actions taken by the owner of an organizational entity does not violate the obligation of protecting the employer's interests but, on the contrary, it is a proof of such care. The employer's retaliatory actions aimed at discrediting the employee and detrimental to the employee's personal rights (Article 111 of the Labour Code), undertaken in response to permissible and constructive criticism made by the manager with regard to unfavourable decisions adopted by the founding body or owner, may be classified as a serious breach of essential obligations towards the employee, entitling the employee to terminate the employment contract without notice due to the employer's fault (Article 55 § 1¹ of the Labour Code).⁶⁹

9. Financial incentives

The EU Market Abuse Regulation allows Member States to provide for financial incentives to persons who offer relevant information about potential infringements of this Regulation to be granted in accordance with national law where such persons do not have other pre-existing legal or contractual duties to report such information, and provided that the information is new, and that it results in the imposition of an administrative or criminal sanction, or the taking of another administrative measure, for an infringement of this Regulation (Article 32(4)). However, Polish Regulation of 2017 does not provide for financial incentives. In this context, we may also draw attention to the institution of a person cooperating with the police who is not a police officer.⁷⁰ This person may be remunerated. On the other hand, such police informers cannot be assimilated to whistleblowers.

68 See also judgement of the Supreme Court of 10 May 2018, II PK 74/17 and I PK 48/13.

69 S. W. Ciupa, *Niedozwolona krytyka pracodawcy ze strony pracownika jako przyczyna wypowiedzenia umowy o pracę (Illegal worker criticism of the employer by the employer as the reason for dismissal with notice)*, Monitor Prawniczy (Legal Monitor) 2002, No. 20, p. 925.

70 Article 22 of the Act on Police (ustawa z dnia 6 kwietnia 1990 r. o policji), Dz. U. 2020, items 360, 956, 1610, 2112, 2320 with later amendments.

10. Obligation to blow the whistle

The obligation for workers to disclose irregularities existing at the workplace may be derived from Article 100 §2 point 4 of the Labour Code, which states that employees are obliged to take care of the interests of their workplace (the obligation which is not identical with the good or interests of the employer). This opinion is not universally shared in literature.⁷¹

The analysis of whistleblowing in the context of duty or faculty only should take into consideration variety of infringements which may be disclosed. Certainly, any employee has the duty to denounce criminal acts he/she became aware of at the workplace. They are also obliged to report about the accidents at work or the risks to human life or health (Art. 211 point 6 of the Labour Code). As regards other infringements, the assessment of the obligatory character of disclosure should include such elements as the position and the range of responsibilities of the employee concerned.

The qualified level of duty to care for common values is assumed for civil servants, local government employees and employees of state administration bodies. The obligation to protect interests of the State is a primordial duty of employees of state administration bodies.⁷² Likewise, civil servants are obliged, *inter alia*, to serve the interests of the Polish State (Article 50 of the Act on civil service). Local government workers are obliged to take care of public interests, and their service to the public precedes the care for the interests of a public entity (Article 18(1) of the Act on local government workers). This obligation is confirmed in the words of oath taken by the employee.

The general duty of citizens to inform the Public Prosecutor's Office or the police applies to anyone who received information about a criminal offence prosecutable by public prosecution (Article 304 § 1 of the Code of Criminal Procedure). This duty is not legally enforceable, except for the duty to report the most serious crimes against peace, humanity and state security etc.

The legally enforceable obligation to notify the police or the Public Prosecutor's Office and to undertake all necessary actions in order not to allow the traces and proofs of the infringement to be destroyed lies with the State and local administration institutions which receive information about the commitment of criminal infraction prosecuted by a public prosecutor in relation to their activities (Article 304 § 2 of the Code of the Criminal Procedure). However, this reporting obligation does not apply to any employees of the institution but only to persons who have managerial or controlling functions. The non-fulfilment of this duty may result in penal

71 See A. M. Świątkowski, *Sygnalizacja (whistleblowing) a prawo pracy (Whistleblowing and the labour law)*, Przegląd Sądowy (Judicial Review) 2015/5/6-25.

72 Article 17 of Act on state administration bodies, *ustawa o pracownikach urzędów państwowych*, Dz. U. 1982 No. 31, item 214.

responsibility provided for civil servants in Article 231 § 1 of the Criminal Code (the sanction of maximum three years of imprisonment).⁷³

Trade unions are entitled to inspect the employers' compliance with labour law provisions as well as health and safety regulations and to require that competent public bodies eliminate the irregularities disclosed (Article 23 of the Polish Trade Unions' Act of 1991).

We should also mention social labour inspectors whose competencies cover the inspection of compliance with health and safety regulations, environmental legislation as well as employer's compliance with labour law provisions.

11. Protection against retaliation

The Polish legislation of general application does not stipulate a catalogue of possible retaliatory measures against whistleblowers. However, such a general catalogue is inserted into the Regulation of 2017 relating to the banking sector. According to § 45(4) point 2 of that Regulation, when denouncing infringements through the internal whistleblowing system, the whistleblower is protected against reprisals, discrimination and other forms of unfair treatment. No provisions regulate the protection of supporters of whistleblowers (e.g. witnesses), their family members unless it concerns witnesses or supporters in discrimination cases on grounds of whistleblowing.

According to Article 55 § 1 of the Labour Code, an employee may request a change of job if holding a medical certificate confirming a detrimental effect of the current job for the employee's health. If the employer refuses to transfer the employee to another job that would be appropriate with regard to his/her health and qualifications, the employee may terminate the contract without notice. Such option may be applied in case of the deterioration of a psychic conditions of a worker provoked by a conflict with colleagues or a supervisor.

The judicial control of valid grounds for dismissal with notice is possible only in case of an open-ended contract of employment. In case of fixed-term contracts as well as probation contracts, the labour court may only control the legality of notice.

If the employment contract is still binding, the employee may request that the labour court renders the notice ineffective. If a fixed-term contract or a probation contract has expired, the dismissed employee may only demand damages in case of illegality of the dismissal with notice. In case of open-ended contracts, the employee may also demand reinstatement in work if she/he was illegally or unfairly dismissed

73 See also M. Derlacz-Wawrowska, *Whistleblowing a ochrona informacji poufnych pracodawcy (Whistleblowing and the protection of the confidential information of the employer)*, [in:] G. Uścińska (ed.), *Prawo pracy. Refleksje i poszukiwania (Labour Law. Reflections and Explorations)*, Studia i Monografie IPISS, Warsaw 2013, pp. 397–398.

with notice (Article 45 § 1 and 2 of the Labour Code). However, also in case of open-ended contracts, the labour court only awards damages if the reinstatement in work is impossible or aimless (the request for reinstatement is always possible for persons at the pre-retirement age and benefitting from special protection related to maternity/paternity, unless it is not the case of liquidation or insolvency of the enterprise).

If a whistleblower is unfairly dismissed without notice (disciplinary dismissal) for a serious breach of employee's duties, he or she may request either reinstatement in work or payment of damages, independently of the type of employment contract held. However, an employee is not entitled to reinstatement if a fixed term contract has expired or there is only a short period left until expiry. In that case, an employee may only request the payment of damages. Trade union officials and works council members benefit from special protection against dismissal.⁷⁴

In case of open-ended contracts, compensation for unfair dismissal with notice amounts to the remuneration for the period of two weeks to three months, however it may not be lower than the remuneration for the whole period of notice. Moreover, in case of reinstatement in work, the worker is entitled to remuneration for the time of joblessness, but for no more than two months, and for no more than one month in case of a three-month period. The limitation of damages does not apply to persons benefitting from special protection related to maternity/paternity and workers at the pre-retirement age.

In case of illegal dismissal with notice applied to workers employed under a probation contract, damages are paid in the amount covering the period until the date when the contract was supposed to expire.

Damages to an illegally dismissed employee who was employed under a fixed-term contract amount to their remuneration covering the period until the date when the contract was supposed to expire but no more than three months' worth of remuneration.

In case of unfair disciplinary dismissal, the employee may get damages amounting to his/her remuneration for the period of notice. In case of unfair disciplinary dismissal of an employee employed under a fixed-term contract, the damages amount to the remuneration for the period left until the expiry date of the fixed-term contract but no more than for the notice period.

Individuals who are not employees and whose contract has been terminated or whose conditions of work were deteriorated as a result of whistleblowing may only claim compensation for the damages resulted from the breach of contract under the civil law provisions and the contractual clauses.

No protective measures are provided for in the case of trainees or job candidates who have made a disclosure.

74 Compare respectively Article 32 of the Trade Union Act and Article 17 of the Act on informing and consulting with employees.

12. Whistleblowing and anti-discrimination measures

Whistleblowing is not included expressly in the catalogue of forbidden criteria of discrimination according to the Labour Code. According to Article 183a § 1 of the Labour Code, employees should be treated equally with regard to conclusion and termination of employment contracts, the terms of employment, promotion and access to vocational training aimed at upgrading their professional qualifications, in particular independently of gender, age, disability, race, religion, nationality, political opinion, trade union membership, ethnic origin, belief, sexual orientation, employment for a fixed term or for an indefinite period of time, part-time or full-time employment. Doubts persist if this catalogue is an open or a semi-open set of criteria. According to the case law of the Supreme Court, discrimination is defined as a situation where an employee is treated less favourably when this is not justified by objective grounds for reasons such as personal attributes which are relevant from the social point of view or for the reason of being employed for a fixed term or for an indefinite period of time, or being employed part-time or full-time (Supreme Court case II PK 82/12). According to this judgment, a reversal of the burden of proof in discrimination cases would apply to alleged discrimination on grounds of the above-mentioned criteria (Article 183b § 1 of the Labour Code) or other personal characteristics or features. Recently, the prevailing interpretation has been that Article 183a § 1 of the Labour Code sets out an open catalogue of criteria.

The Act of 3 December 2010 on the implementation of certain provisions of the European Union concerning equal treatment⁷⁵ applies to conditions where professional or economic activity is undertaken or carried out. This latter Act is complementary to anti-discrimination provisions of the Labour Code as it regulates legal measures and claims pursued by self-employed persons and persons employed under civil law contracts. This legal act defines a closed catalogue of grounds of discrimination which refer to criteria announced in directives 2006/54/EC, 2000/78/EC and 2000/45/EC, namely gender, racial and ethnic origin, nationality, religion, confession or beliefs, disability, age or sexual orientation.

Moreover, sanctioning the discriminative refusal to employ a candidate for a vacancy with a fine in amount of no less than PLN 3,000 concerns only discrimination on particular grounds referred to in the above-cited EU anti-discrimination directives, namely gender, age, disability, racial origin, religion, nationality, political beliefs, ethnic origin, confession or sexual orientation.⁷⁶

If labour courts follow the interpretation that the catalogue of discrimination criteria referred to in Article 18^{3a} § 1 of the Labour Code is an open one, whistleblowers

75 Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania (Dz. U. 2020 r. item 2156).

76 See Article 23 of the Act on the promotion of employment and labour market institutions (ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy, Dz. U. 2020, items 1409, 2023, 2369, 2400).

would be obliged only to plausibly demonstrate the facts of discrimination and it is upon the employer to prove that unequal treatment was due to objective reasons. The burden of proof is not reversed in case of whistleblowers who sue their employers for unequal treatment if they are employed under a civil law contract. As indicated above, the Act on the implementation of certain provisions of the European Union concerning equal treatment contains a closed catalogue of criteria.

According to the Labour Code, the legal time limits for employees to pursue claims is three years from the date the claim becomes enforceable (Article 291 § 1 of the Labour Code).

13. Whistleblower and the criminal liability

A whistleblower who diffuses false information on irregularities at the workplace may be held responsible for the defamation, as per Article 212 § 1 of the Criminal Code. The offence of defamation consists in accusing someone of conduct or characteristics that may degrade him/her in public opinion or expose him/her to loss of confidence necessary for a given position, occupation or type of activity. The proceedings are pursued upon the request of the defamed person. In case of conviction for the offence of the defamation, the court may award damages for the victim or payment towards any social cause indicated by the victim. Penalties include a fine or limitation of liberty (Article 212 § 1 of the Criminal Code). The penalty is more severe when the offense of defamation takes place through the media (Article 212 § 2 of the Criminal Code) and it includes a fine, limitation of liberty but also imprisonment for up to one year. It is also more difficult for the whistleblower to liberate herself/himself from the charge of defamation if the accusation is done through the media. In case of non-public defamation, it is sufficient to prove that the accusation was true. In case of defamation through the media, there are two conditions to be met: firstly, the critical opinion must be true and secondly, it must serve a socially justified interest (Article 213 § 2 point 2 of the Criminal Code).

With regard to the alleged offence of the defamation, only truthful allegations (in pursuit of socially justified interest, in case of the defamation through the media) exonerate the whistleblower from criminal liability. In consequence, the Supreme Court (judgment of 4 September 2003, IV KKN 502/00) indicated that the condition of socially justified interest is not fulfilled if the accusation is not confirmed (uncertain) even though it would appear later to be true. Moreover, the Supreme Court has judged that the defamation done while knowing that the information delivered and the alleged characteristics of another person are not truthful, never serves a socially justified aim.

In this context, we should draw attention to the Council of Europe Resolution 1577 (2007), entitled “Towards decriminalisation of defamation.” According to this Resolution, statements or allegations which are made in the public interest, even if

they prove to be inaccurate, should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm, and their truthfulness was checked with proper diligence.

In this Resolution, the Council of Europe urged countries whose laws still provide for prison sentences—although imprisonment might not be actually adjudicated—to abolish them without delay so as not to give any excuse, however unjustified, to countries which continue to impose such penalties, thus provoking a corrosion of fundamental freedoms. The Council of Europe recommended that only incitement to violence, hate speech and promotion of negationism be punishable by imprisonment.⁷⁷

When analysing criminal responsibility, one has to bear in mind that if information about criminal offence is reported to the prosecution bodies while knowing that no such offence was committed, this constitutes a criminal offence in itself and is penalized with a fine, limitation of liberty or imprisonment of up to two years (Article 238 of the Criminal Code).

On the other hand, we may also draw attention to the type of criminal offence described in Article 266 § 1 of the Criminal Code, namely the disclosure of information in breach of legal provisions or against the obligation imposed on the disclosing person, where such information was obtained in relation to a function, job or public, social, commercial or scientific activity. Such an act is penalised with a fine, limitation of liberty or imprisonment of up to two years. A qualified form of this offence is provided for in Article 266 § 2 of the Criminal Code, which refers to disclosure of information to a person who is not entitled to receive it and where information was identified as ‘reserved’ or ‘confidential’ and was received in connection with official duties. If the disclosure of such information may cause prejudice to legally protected interests, this is sanctioned with the penalty of imprisonment of up to three years. This offence is prosecuted at request of a victim.

14. Whistleblowing and the protection of trade secrets (professional secrets)

According to Article 11(1) of the Act of 16 April 1993 on combating unfair competition⁷⁸, disclosure, use or acquisition of information constituting a secret of an enterprise constitutes an act of unfair competition. Breach of confidentiality may lead to civil liability for damages caused to the enterprise as well as to criminal liability.

The secret of an enterprise is understood as technical, technological, organizational information about the enterprise or other information of economic value which, as a whole or in a particular combination and collection of their elements, is

⁷⁷ See also ECoHR in case *Matalas against Greece*, complaint No. 1864/18, 25 March 2021.

⁷⁸ Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji, Dz. U. 2020, item 1913.

not commonly known to persons usually dealing with this type of information or is not easily accessible to such persons, provided that the person authorised to use or dispose of the information has undertaken, with due diligence, to keep it confidential (Article 11(2) of the Act on combating unfair competition).

Article 11(8) of the Act of 16 April 1993 on combating unfair competition states that the disclosure, use or acquisition of information that constitutes a trade secret is not an act of unfair competition when it was aimed to protect a legitimate interest protected by law as part of exercising one's freedom of expression or to disclose irregularities, misconduct, actions in breach of law to protect public interest, or when disclosure of a trade secret to employees' representatives in the performance of their functions under the law was necessary for proper performance of those functions.

However, only entrepreneurs may be sued in a civil action for acts of unfair competition. According to the jurisprudence of Polish courts⁷⁹, workers may also be sued in exceptional cases if there is a causal link between the act of unfair competition and the commercial activity carried out by the entrepreneur.

In any case, in the light of Article 100 § 2 and 4 of the Labour Code, an employee is obliged to observe the secrecy of information which, if revealed, could be prejudicial to the employer and also to respect professional secrets defined in respective legal acts. The breach of the aforementioned duty may lead to a disciplinary dismissal of the employee concerned.

In this context, we should also mention that various other legal acts binding in Poland provide for the obligation of confidentiality in certain professions (medical doctors, barristers, legal counsels, tax consultants, etc.).

15. Sanctions for interrupting or preventing whistleblowing

No sanctions exist that would directly refer to acts consisting in interrupting or preventing an act of whistleblowing. However, sanctions provided for certain types of criminal acts may be applied, for example for the criminal offence of a punishable threat (Article 190 of the Criminal Code), punished with imprisonment of up to two years. Qualified types of offences refer to the use of violence or punishable threat in order to influence a witness, judicial expert, interpreter, accuser or accused, or in relation to violating their bodily integrity (penalised with imprisonment of three months to five years, as per Article 245 of the Criminal Code). The sanction of at least one year and up to 10 years of imprisonment is applicable to public functionaries or other persons acting on command of a public functionary in order to guarantee that the public functionary can receive, for instance, a certain testimony

⁷⁹ Cf. judgment of the Appellate Court in Cracow of 23 September 2017, I ACa 411/2017.

or declaration, and also to individuals who use violence, punishable threat or other forms of physical or psychological forms of abuse against another person.

There are also specific provisions establishing penal sanctions for acts of inhibiting or scotching activities undertaken by specific inspection bodies, such as the sanitary inspectorate or the environmental protection inspectorate.

Such acts are respectively punishable with arrest, or alternatively with limitation of liberty or a fine, and in case of environmental inspections they are punishable with a fine between PLN 10,000 and 100,000 (cf. Article 38 of the Act on Sanitary State Inspection⁸⁰ and Article 31c of the Act on Environmental Inspection⁸¹).

Conclusions

According to the common opinion, the present Polish legislation does not guarantee an appropriate level of protection for whistleblowers. The means of protection are set out in various legal acts. There exists an unquestionable necessity to adopt a legal act dedicated to whistleblower protection and such an act is currently being developed by the Polish government. This act should implement the EU Whistleblower Protection Directive and go beyond it.

The main drawback of the present regulations concerning the protection of whistleblowers against dismissal or discriminative measures under the Labour Code in Poland is that the Labour Code provisions do not protect workers employed under civil law contracts. Thus, this is contrary to the recommendation of the Council of Europe⁸² and to Directive 2019/1937/EU, whereby the legal protection of whistleblowing should cover all individuals working in either the public or the private sector, irrespective of the nature of their working relationship and whether they are paid or not.

The material scope of whistleblowing should cover breaches not only of the EU law enumerated in Article 2(1) of the Directive 1937/2019 but also breaches of law or regulations in general. The legislator should also include acts such as mobbing, violence at work, harassment or breaches of health and safety provisions. The catalogue of prohibited retaliatory measures should be defined broadly. In case of labour disputes concerning dismissal or discrimination of a whistleblower, the burden of proof should be reversed.

Internal channels for whistleblowing should be set up in all companies employing at least fifty workers. The structure of such channels should guarantee confidentiality of whistleblowers' personal data and precise timetables for the internal

80 Dz. U. 2020, items 322, 374, 567 and 1337.

81 Dz. U. 2020, items 995 and 1339.

82 Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and explanatory memorandum, Protection of whistleblowers, point 3.

investigative procedures and responses to whistleblowers. Trade unions should have the right to negotiate internal regulations concerning whistleblowing schemes with the employer.

A dedicated whistleblower central office should be established with the aim to guarantee measures of support for whistleblowers, to provide them with information about the appropriate external channels in specific sectors and possibly also transmit the reports to the competent external bodies. Sanctions concerning the disclosure of the whistleblower's personal data should be dissuasive and should cover fines related to the turnover of the company as well as imprisonment for natural persons who reveal the identity of the whistleblower. Certainly, employers have to be protected by appropriate instruments of civil and criminal law as well as a procedure against false disclosures. The freedom of expression should not be misused to harm the reputation of natural and legal persons. However, the penalty of imprisonment imposed for alleged defamation by the whistleblower seems too severe and, as such, should be eliminated. Finally, apart from setting up new procedures and institutions, a positive image of whistleblowers needs to be created in society: this may be crucial for postcommunist countries, helping to overcome psychological barriers related to disclosures of irregularities.

Abstract

The chapter analyses the current legal situation of whistleblowers in work-related context in Poland. Protection of whistleblowers is not regulated by a single comprehensive legal act but may be granted on the basis of different pieces of legislation as well as according to the case law of the Supreme Court, which established the concept of 'permissible criticism' expressed by a worker. The level of whistleblower protection is by no means satisfactory, especially as regards atypical workers. The author assesses the shortcomings of the current legal situation and presents proposals for improvement in the light of the EU Whistleblower Protection Directive and international conventions ratified by Poland.

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Challenges in the Field of Whistleblower Personal Data Protection in Polish Law Compared to European Solutions

Edyta Bielak-Jomaa¹

<https://doi.org/10.18778/8220-639-5.09>

Introduction

The issue of whistleblower protection in the EU has been recognized relatively recently. Until the entry into force of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 of October 2019 on the protection of persons who report breaches of Union law,² whistleblower protection had a sectoral nature (it concerned the financial sector). The provisions introducing whistleblower protection in this sector included Regulation (EU) 596/2014 of the European Parliament and of the Council on market abuse (MAR Regulation),³ and an act issued on the basis of the authorization for the European Commission to issue an implementing act contained in the regulation, i.e. EU Commission Implementing Directive 2015/2392 on Regulation (EU) 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation.⁴ Apart from these acts, however, there was no comprehensive whistleblower protection, a situation which exposed them to retaliation.

On the basis of solutions developed in the indicated legal acts and the jurisprudence of the European Court of Human Rights, the Committee of Ministers of the Council of Europe and the Parliamentary Assembly (PACE) began work to develop recommendations aimed at placing the system of protection of persons reporting irregularities in the field of human rights protection in the context of their right to freedom of expression. Moreover, the recommendations assumed that better whistleblower protection would help to combat corruption already at the preventive stage, and would also strengthen the need to build a civil society. The recommendations indicate that an effective reporting process must ensure transparency and anonymity for the person reporting the breach. The fragmentary whistleblower

1 PhD, assistant professor at the University of Lodz.

2 Official Journal of the European Union L 305/17 of 26.11.2019.

3 Regulation 16.04.2014, Official Journal of the European Union L 2014.173.1.

4 MAD Directive, Official Journal of the European Union L 2015.332.126.

protection in the EU so far was the reason why work was commenced to develop a separate, comprehensive act devoted to whistleblowing in the workplace, in the hope to achieve the unification of whistleblower protection standards.

1. Practical problems arising from the lack of regulations regarding the protection of whistleblowers' personal data

There is currently no comprehensive regulation on whistleblower protection in Poland. There are also no provisions relating to the protection of whistleblowers' personal data. The existing sectoral legislation (mainly in the financial sector) protects employees and other whistleblowers from retaliation only to a limited extent. It fails to provide comprehensive regulations regarding the protection of whistleblowers, to define the concept of 'whistleblower' or 'irregularity', to define detailed procedures or mechanisms ensuring safe processing of whistleblowers' personal data. As a result, it should be assumed that whistleblowers in Poland are subject only to the provisions of the General Data Protection Regulation (GDPR) in terms of the protection of their personal data.⁵

In common understanding, a whistleblower is a person who reports or discloses irregularities or ethical doubts regarding behaviour, activities or phenomena occurring in the workplace,⁶ a person acting in good will to notify irregularities taking place at the workplace that are detrimental to public interest, and sometimes to the employer,⁷ or a person who, acting in good faith and in defence of values that are important from the point of view of social interest, decides to reveal irregularities noticed in the professional environment.⁸ A whistleblower is a person who, taking

5 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal of the European Union, L 119, p. 1.

6 *Sygnalista po polsku – dobre praktyki i rekomendacje wdrożeniowe Budowa systemu zgłaszania nieprawidłowości w oparciu o etykę i wartości*, raport PWC (*The whistleblower in Polish – good practices and implementation recommendations. Building a whistleblowing system based on ethics and values, PWC report*), <https://www.pwc.pl/pl/pdf/sygnalista-po-polsku-poradnik-pwc.pdf>, accessed 1/09/2021, E. Andreis, *Towards common minimum standards for whistleblower protection across the EU*, <https://www.europeanpapers.eu/en/europeanforum/towards-common-minimum-standards-for-whistleblower-protection-across-eu>, accessed 01/09/2021.

7 Online dictionary of new words in Polish, <http://nowewyrazy.uw.edu.pl/haslo/sygnalista.html?pdf=1>, accessed 01/09/2021.

8 A. Kobylińska, *Posłańcy złej nowiny. Rola i sytuacja sygnalistów w Polsce i na świecie (Messengers of bad news. The role and situation of whistleblowers in Poland and in the world)*, „Przegląd Antykorupcyjny” 2016, No. 2(7), p. 12.

into account, in particular, the interests of their workplace, and often also the interests of the public, provides (primarily to their superiors, and, in the absence of an appropriate response, also to the relevant law enforcement authorities or the media) information about irregularities that occur in a given workplace.⁹ Although the provisions of various acts refer to the issue of whistleblowing, they do not contain a definition of a whistleblower. Likewise, the notion of a whistleblower itself has not been comprehensively regulated in any legal act.

The statutory definition of a whistleblower is included in Article 2 clause 15 of the draft act on transparency in public life, whereby a whistleblower is “a natural person or an entrepreneur whose cooperation with the judiciary consists in reporting information about the possibility of a crime being potentially committed by an entity he or she is bound with by an employment contract, service relationship or other contractual relationship, where this may adversely affect their life, professional and financial situation, and for whom the prosecutor granted the status of a whistleblower.” However, this act is currently at the stage of legislative work¹⁰ and neither its final shape nor the date of entry into force are known.

The processing of personal data of whistleblowers who are employees is subject to the data processing rules under GDPR (which indicates the grounds for legalizing data processing, general rights of data subjects, obligations of the data controller, i.e. the employer) and the provisions of the Polish Labour Code, which define the scope of personal data that may be processed on the basis of the need for the employer’s execution of the employment relationship. This gap is not filled by the provisions of the Code of Administrative Procedure, which provide public administration bodies with instruments to investigate irregularities reported by persons without disclosing the source of information. Provisions of the Code of Administrative Procedure (Article 61 § 1) enable public administration bodies to investigate such signals by initiating proceedings *ex officio*. Then (pursuant to Article 28 of the Code of Administrative Procedure), only the person against whom the allegations are made becomes a party to it but not the person notifying possible violations. Therefore, the whistleblower is not informed about the course of the procedure and its results, but at the same time their personal data are not disclosed, and thus the whistleblower’s privacy is not violated. However, this only applies to administrative proceedings.

The legislation regulating the protection of whistleblowers and their personal data is most fully visible in the Act of 1 March 2018 on counteracting money laundering and financing of terrorism.¹¹ Pursuant to Article 80 clause 1, the Chief Inspector of Financial Information (Polish: GIFI) is obliged to accept reports of actual or potential violations of provisions on counteracting money laundering and

9 <https://poradnikprzedsiebiorcy.pl/-kim-jest-sygnalista-i-jakiej-ochronie-prawnej-podlega>, accessed 01/09/2021.

10 <https://legislacja.rcl.gov.pl/docs//2/12304351/12465433/12465434/dokument324982.pdf>, accessed 01/09/2021.

11 Consolidated text Journal of Laws of 2020, item 971, as amended.

terrorist financing from employees, former employees of obligated institutions or other persons who perform or performed activities for the obligated institutions on a basis other than an employment relationship (whistleblowers). Detailed rules for dealing with whistleblowers' reports are set out in the Regulation of the Minister of Finance of 16 May 2018 on receiving reports of violations of provisions on countering money laundering and financing terrorism (Polish Journal of Laws, item 959). The regulation provides for a specific procedure for accepting and handling notifications. First of all, the GIFI is obliged to establish an independent means of communication for the receipt of declarations, separate from the means of communication used in the ordinary activities of the office. The reporting of irregularities is also regulated by the Act of 29 August 1997 – the Banking Law and the Act of 29 July 2005 on Trading in Financial Instruments, both of which require the implementation of procedures for anonymous reporting of violations of the law and ethical procedures and standards applicable in the organization (reporting to a member of the Management Board or a representative of the Supervisory Board) and provide the reporting breaches with protection at least against repressive actions, discrimination or other types of unfair treatment. Such obligations are also provided for in the Regulation of the Minister of Development and Finance of 6 March 2017 on the risk management system and internal control system, remuneration policy and the detailed method of estimating internal capital in banks, and in the Regulation of the Minister of Finance of 29 May 2018 on detailed technical and organizational conditions for investment firms, banks referred to in Article 70 clause 2 of the Act on Trading in Financial Instruments, and custodian banks. The provisions of this act require the institutions (including banks) specified in the Act to develop and implement procedures for anonymous reporting of violations of law by employees and the procedures and ethical standards applicable in these institutions, as well as to ensure that employees can report violations through a special, independent and autonomous communication channel.

As regards other sectoral acts, whistleblower protection is dispersed and fragmented. In the case of whistleblowers who are not employed (officers, persons working under civil-law contracts, interns), it should be noted that such individuals are not covered by any protection against repressive actions. This means that whistleblowers currently have virtually no legal safeguards against potential retaliation, as there is no guarantee of the confidentiality of the whistleblower's data and the persons assisting the whistleblower, or the whistleblower's family.

The lack of a whistleblower protection system raises the question of whether whistleblowers should be protected under the same terms and conditions in the private and public sectors. There is no regulation that would answer the question of whether people from inside or outside of the organization are protected (employees, former employees, collaborators). It is not clear whether whistleblower protection applies only to current violations (or suspected violations) or also to those that occurred in the past. This is important from the perspective of the processing of the employee's personal data because, in the light of the applicable regulations, the

employer may process the employee's personal data on a basis other than the fact of being a former employee, and therefore for a different purpose.

From the point of view of the protection of whistleblowers' personal data, the lack of a whistleblower protection under the Polish law is also serious. The Labour Code does not provide for solutions that would oblige the employer to take any action to protect whistleblowers, nor does it entitle the employer to introduce such solutions in internal regulations (e.g. work regulations). This raises further questions as to where the whistleblower should report irregularities or suspected irregularities and whether the whistleblower should first inform their immediate supervisor (only the superior), who will then forward the information to the employer, or whether the employee can directly notify the employer and how (orally, in writing, electronically, using an internal form) and whether the information should be sent to the indicated department. Failure to indicate the possibilities, channels and methods to signal violations means that it becomes unclear who has access to the whistleblower's personal data in an organization, under what terms, and which whistleblower's data may be processed in connection with irregularity reporting. It should be emphasized that the employer is the controller of the employee's personal data. Neither the immediate superior nor employees of the indicated department may have access to personal data which may need to be processed to report irregularities. There is no indication whether the entity (division, department, indicated person) is supposed to act under a general authorization or a special authorization to process the whistleblower's personal data, and whether this authorizes them to report violations outside the organisation, i.e. to law enforcement agencies, the media, or public opinion.

Another problem that arises in this context is the protection of whistleblowers' personal data and, more specifically: the rules for disclosing personal data, the prohibition of disclosing their personal data to the public, the legal basis to legalize the processing, the place of processing (whether the information signalled by an employee should be stored in employee's personal file or in separate documentation kept for all whistleblowers and reported irregularities), the time of data processing, as well as rules for data removal. The provisions of the Labour Code provide for data retention periods for the purposes of executing an employment relationship or fulfilling obligations arising under specific provisions (e.g. provisions on pursuing claims from an employment relationship, provisions on archiving), but they do not apply to whistleblower data retention. Therefore, it is not clear whether the period of storing the whistleblower's personal data should be related to the period of employment with a given employer (a person providing work on a different basis for the period of work for a specific entity) or to another period, longer than the period of employment.

Another problem directly related to the procedures for reporting breaches and the principles of personal data processing, in particular the principle of data security, is the processing of personal data of job candidates who report irregularities in the recruitment process.

The lack of legal regulations regarding whistleblowers and the protection of their personal data also leads to the lack of guarantees of whistleblowers' rights: the right to access and correct data, and the right to be forgotten.

2. Protection of whistleblowers' personal data in the Directive on the protection of persons who report breaches of Union law

This situation will have to change given the need to implement Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 of October 2019 on the protection of persons who report breaches of Union law, which must be implemented into the Polish legal system by 17 December 2021. The aim of the Directive is to introduce common standards for the protection of persons reporting illegal activities or abuses of law, both in the private and public sectors, who have obtained information on breaches in a work-related context in the following areas (Article 2): public procurement, services, products and financial markets and the prevention of money laundering and terrorist financing, product safety and compliance, transport safety, environmental protection, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, protection of consumers, the protection of privacy and personal data and the security of information networks and systems, the financial interests of the Union, breaches of the Union competition rules and state aid, as well as breaches of the internal market in relation to activities which constitute an infringement of corporate tax law or aimed at obtaining a tax advantage contrary to the object or purpose of the applicable provisions on corporate tax. It should be emphasized, however, that the Directive provides for a minimum scope of whistleblower protection, and therefore EU Member States may introduce a broader scope of protection in their national regulations and cover areas and sectors other than those indicated in Article 2 of the Directive.

Directive 2019/1937 states that a whistleblower should be defined as anyone who, while working in the private or public sector, obtains information on breaches in a work-related context, including at least:

- employees (including civil servants and former employees),
- volunteers, interns and other people working with the organization, even if they are not paid,
- self-employed individuals (including people cooperating with the organization on the basis of managerial contracts or B2B contracts),
- shareholders, partners and persons performing functions in the bodies of the organizational unit,

- contractors, subcontractors, suppliers and persons acting under their supervision, i.e. their employees or persons employed by them, whistleblowers should also be understood as persons whose employment relationship with a given employer has already ended or is about to be established (whistleblower protection applies to information obtained in the course of recruitment or negotiations related to the acceptance of a position). The protection provided for whistleblowers will also apply to persons assisting in submitting a report, as well as to those who, although not personally involved, would be exposed to retaliation due to the report.

In order for a person to be considered a whistleblower, it is not enough for them just to report information about irregularities. A person who discloses information about irregularities to the public enjoys the protection under Directive 2019/1937 only if one of the following conditions is met:

- a) internal or external reports were made prior to public disclosure and no appropriate timely action was taken as a result of those reports;
- b) the person has reasonable grounds to believe that the disclosed breach may constitute a direct or obvious threat to the public interest; or

that they will face the risk of retaliation in case of internal or external reporting; or there is a low probability of effectively remedying the breach due to the specific circumstances of the case, such as the possibility of concealing or destroying evidence or the possibility of collusion between the authority and the perpetrator of the breach or the authority's involvement in the breach.

In the light of Article 5 of the Directive, a notification is defined as each communication of information on infringements, both in writing and orally. An oral notification is primarily a telephone notification or notification via other voice telecommunication systems as well as reporting in the course of a previously arranged meeting with persons designated to receive such reports. Reporting includes information about violations, including reasonable suspicion, regarding actual or potential violations that have occurred or are likely to occur in the organization where the reporting person works or worked, or in another organization with which the reporting person maintains or has maintained contact in the context of the work performed, or concerning attempts to conceal such violations.

3. Whistleblower personal data protection: The perspective of Polish law

One of the key concerns regarding whistleblower protection is the protection of their personal data. There is no doubt that the whistleblowing system is a challenge in terms of ensuring the security of the processing of personal data of persons who

report a breach. When implementing a breach, an important aspect is to ensure that the personal data of all participants in the proceedings are protected and that the rights of the data subjects are respected. Since whistleblowers' reporting of breaches may be open or anonymous, it must be remembered that it is the whistleblower who has the right to decide whether or not they want to disclose their identity when reporting a breach. In this context, the primary duty of the employer is to ensure the confidentiality of the whistleblower's personal data so as to ensure their safety from retaliation. This should be done by defining and implementing procedures for reporting violations, defining the rules of operation for the reporting channels, keeping whistleblowers' personal data confidential, fulfilling the information obligation and ensuring compliance with whistleblowers' rights in terms of personal data protection. The legislator should take into account the means of protection against retaliation available to the whistleblower and other persons protected alongside the whistleblower. For this purpose, it seems necessary to harmonize sectoral regulations, link these provisions with the provisions on the protection of personal data by creating uniform and comprehensive whistleblower protection mechanisms. It is worth noting that the protection of whistleblowers' personal data should include organizational and technical measures.

Therefore, it can be postulated that the Act should set out obligations for employers to introduce procedures specifying the rules for reporting violations, which should be transparently described by employers, available, and presented to employees, associates, contractors and business partners. The employer should develop documents and apply the procedures specified therein: counteracting irregularities, reporting them, and responding to violations. It would also be important to oblige the employer to introduce a policy to manage the occurring violations. Such a policy should regulate the operation of the reporting system, covering, inter alia, specification of the violation or its nature, the person or team responsible for accepting reports, the method of receiving violation reports, confidentiality and personal data protection rules, deadline for deleting personal data, actions taken after notification of violations. Documents developed by the employer should be specific at the level of the organization, define threats in a specific entity, set out a detailed procedure, indicate the tasks and responsibilities of the indicated departments or designated employees to receive whistleblowers' notifications, violation reporting forms, and the deadline for reporting. It would also be important to indicate when, how often and how employers should provide employees with information about the possibility of reporting violations. At the employer's level, the documents and procedures should be clarified, taking into account the singularities of the entity concerned.

3. 1. Channels for reporting violations

Information on breaches may be reported through the internal reporting channels (Article 7 of the Directive), via the external channel (Article 10) or public disclosure

(Article 15). Although the EU legislator does not explicitly indicate that the whistleblower should first use the internal channel for reporting violations, it seems that this is most often the natural way of reporting violations. Prior to public disclosure, the whistleblower should report either internally or externally. If no appropriate action has been taken in a timely manner following these reports, the whistleblower should resort to public disclosure, provided that the breach can be remedied by internal means, rather than disclosing the whistleblower to public authorities.¹² Pursuant to Directive 2019/1937, Member States, and through them private organizations, should encourage people who are aware of breaches to submit internal reports.

3.1.1. Internal channels

The design of internal channels of communication about violations may depend on the employer's size, organizational structure, industry or sector of operation, available financial resources or the level of risk of potential fraud. It seems, therefore, that the situation of employers and, consequently, their obligations in terms of creating and maintaining internal channels may vary. An employer with a more complex structure, employing a large number of employees, cooperating with a larger number of contractors, operating in market segments at risk of breaches, who is a public authority or a critical infrastructure entity, operating in a larger territory, will have to engage more organizational, technical and financial measures to handle a reporting channel than a smaller employer, covering a smaller territory, employing fewer people and operating in an area less exposed to the risk of breaches.¹³ An employer with a large and complex organizational structure should introduce solutions consisting in the creation of an internal team (department, division) with specialists in explaining various cases of irregularities. Taking into account the complexity of the structure, e.g. whether the business activity is conducted in the form of a main organizational unit and its subsidiaries, and their location in different countries, the employer will have to develop a methodology of conduct, find out where irregularities are signalled (headquarters or a branch), and decide on an operating procedure. It is permissible for the preliminary procedure, under which the whistleblower reports the violation, to be initiated at the branch, and the remaining parts (clarification, evidence) as well as the decision to be made by the central unit. This solution allows for the concentration of experts in the field of infringements in one place, ensuring that they have access to all information

12 More on the role of social networks in whistleblowing: H. Lam, M. Harcourt, *Whistle-blowing in the digital era: motives, issues and recommendations*, New Technology, Work and Employment, 2019.

13 A. Kantor Kilian, *Organizacja modelu kanałów sygnalizowania nieprawidłowości w świetle dyrektywy 2019/1937 (Organization of the model of whistleblowing channels in the light of Directive 2019/1937)*, [in:] B. Baran, M. Ożóg (eds.), *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających naruszenia (Whistleblower protection. Regulations concerning persons reporting irregularities)*, Wolters Kluwer, Warsaw 2021.

necessary to conduct the proceedings, and ensures efficient cooperation.¹⁴ Therefore, experts should be equipped not only with the knowledge of violations of the law, knowledge of the functioning of the organizational unit, working methods for a given employer, but also the knowledge about the protection of personal data. They should have detailed employer prerogatives, authorizing them to access full documentation, to communicate with all persons whose clarifications may contribute to a fair settlement of the matter within a reasonable time, ensuring cooperation and information exchange. From the point of view of personal data protection, it is extremely important that these persons have specific authorizations to process personal data for the purpose of resolving the signalled case and recognizing that there has been a breach or not, and that they are obliged to ensure special confidentiality of whistleblowers and other persons.

For employers with complex organizational structures, in particular those conducting cross-border activities, the availability of internal signalling may mean not only the possibility of easy transfer of information, in many formats (also going beyond traditional paper), but also the possibility of using a dedicated telephone line, website or e-mail box, and to enable signalling in different languages.

In the case of employers with a less complex organizational structure, or operating in a sector or industry not exposed to the risk of irregularities, or with limited organizational and financial resources, if there is no need or possibility to set up a separate team for internal investigations, these activities may be undertaken by an indicated person. However, it should be emphasized that this person must have appropriate knowledge in the field of dealing with infringements as well as the laws and practices regarding the processing of personal data.

If it is not possible to establish an internal channel, the employer may consider using an external expert or an entity to conduct internal proceedings. This may take place when there is a need to use a consultant's specialist knowledge or experience, in particular when internal resources do not allow certain activities (e.g. data protection and analysis), or when it is not possible to conduct proceedings due to the fact that the reported breach refers to a management team member (a senior manager, a member of the management board or the supervisory board) or it is impossible to ensure the independence or impartiality of the opinion of the person or persons appointed to conduct the proceedings, or to avoid a conflict of interest.¹⁵ It should also be noted that such circumstances should also be provided for in the documentation of internal proceedings. Personal data of an external entity should be processed under an entrustment agreement, specifying the kind of data to be processed and the purpose of processing. The employer who is the data controller should also reserve the possibility for the processor to control and audit the principles of personal data protection.

¹⁴ *Ibidem*.

¹⁵ D. Tokarczyk, *Whistleblowing i wewnętrzne postępowanie wyjaśniające (Whistleblowing and internal investigation)*, Wolters Kluwer, Warsaw 2020.

3.1.2. External channels

External reporting channels are available for whistle-blowers who do not wish to use internal channels, e.g. for fear of retaliation or where there are no internal reporting channels, e.g. because there are no legal bases to create them or if they are not created by the employer of such a channel. The whistleblower may report the breach to the competent authority if:

- they have reported the breach previously through an internal channel, but the issue is still not resolved,
- there are reasonable grounds to suspect that the whistleblower will suffer retaliation as a result of an internal report, or that the competent authorities would be more appropriate to run an investigation. Member States are required to designate competent authorities to receive reports, provide feedback and follow-up. The reporting procedures in this case should generally meet the same conditions as under internal channels, including the obligation to notify the reporting person of the decision and its justification. The authorities receiving the notification also have the same obligations, e.g. regarding the identification of a procedure to protect against retaliation and the availability of confidential advice to those considering reporting.

3.2. Protection of whistleblowers' personal data confidentiality

The internal channel for reporting violations collects personal data of various people, coming from various sources, such as documents, applications, IT systems, messaging systems, emails, explanatory interviews etc. The personal data processing rules must be observed in the course of the proceedings. This results directly from the provisions of Directive 2019/1937, which obliges Member States to ensure that the implementing provisions provide for the principles of processing and protection of personal data, in accordance with the GDPR provisions (recitals 83–85, Article 13(d) and Article 17). Taking this requirement into account, it should be assumed that the legislator should refer to the provisions of the GDPR, in particular to Article 6 of the GDPR, which defines the conditions for the lawful processing of personal data. Under this provision, the processing of personal data is legal if:

- the data subject has consented to the processing of their personal data for one or more specific purposes,
- processing is necessary to perform a contract to which the data subject is party, or to take steps at the request of the data subject prior to entering into a contract,
- processing is necessary to fulfil the legal obligation incumbent on the controller,

- processing is necessary to protect the vital interests of the data subject or another natural person,
- processing is necessary to perform a task carried out in the public interest or in the exercise of public authority entrusted to the controller,
- processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where these interests are overridden by the interests or fundamental rights and freedoms of the data subject, which require protection of personal data, in particular when the data subject is a child.

In the current legal order, the premise for the processing of whistleblowers' personal data is the fulfilment of the legal obligation incumbent on the controller with regard to the provisions governing mandatory whistleblowing procedures, whereas in other cases it is the existence of a legitimate legal interest, i.e. preventing irregularities at the workplace.

It is worth noting, however, that the employer may also process other types of data, belonging to a specific category of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and the processing of genetic data, biometric data in order to uniquely identify a natural person or data regarding the health, sexuality or sexual orientation of that person (Article 9(1) of the GDPR). As a rule, the processing of this category of personal data is prohibited, and the conditions of admissibility of their processing are specified in Article 9(2) of GDPR. In explanatory proceedings, the grounds for legalizing data processing may include the consent of the data subject, the need to process such data in order to fulfil the controller's obligation, or the need to process such data in order to establish, assert or defend claims.

From the point of view of the confidentiality of whistleblowers' data, other rules of personal data processing (apart from the lawfulness rule discussed above) are also extremely important. In the light of Article 5 of GDPR, personal data should be processed in a fair and transparent manner for the data subject, collected for specific, explicit and legitimate purposes and not processed further in a manner inconsistent with these purposes.¹⁶ In relation to infringement reporting procedures, the aim is to prevent irregularities from occurring, to reliably establish all circumstances of infringements or potential infringements, and to take measures against persons responsible for infringements. Data processed for the purposes of infringement proceedings must also be adequate, relevant and limited to what is necessary for the purposes for which they are processed. Such data must also be accurate, stored for no longer than necessary, and processed in a manner ensuring

¹⁶ P. Drobek, *Komentarz do art. 5 RODO (Commentary on Art. 5 GDPR)*, [in:] E. Bielak-Jomaa, D. Lubasz (eds.), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz (GDPR. General Data Protection Regulation. Commentary)*, Warsaw 2018, pp. 326–328.

their appropriate security, including protection against unauthorized or unlawful processing and accidental loss, destruction or damage, and with the use of appropriate technical or organizational measures.

In its capacity of controller, the employer who obtains data from a person should fulfil the information obligation specified in Article 13 of GDPR. In connection with the procedure for reporting a violation or suspecting a violation, the employer is obliged to provide the whistleblower with information, inter alia, on the basis and purpose of processing their data, the processing time and the rights of the whistleblower in the context of processing such data. From the point of view of the whistleblower's personal data protection, the main issue is to ensure confidentiality and the need to maintain anonymity. In this regard, Article 29 Data Protection Working Party stated that anonymity will not prevent effective 'guessing' of the source of the information and will not focus third parties' attention on the substance of the breach reported rather than the potential source of information. Anonymity prevents internal investigators from asking additional questions after receiving information, and fosters bad faith whistleblowing and hampers whistleblower protection, especially when guaranteed by law.¹⁷ In turn, the European Data Protection Supervisor (EDPS), in his recommendations for officials of EU institutions, indicates that maintaining confidentiality and anonymity is a guarantee for the security of signalling through the internal channel and may constitute an incentive for those employees who, fearing retaliation, would not opt for signalling if their data were to be disclosed.¹⁸ According to the position of the EDPS, a whistleblower's data may be disclosed only if the person concerned agrees to that or for the purposes of criminal proceedings resulting from the reported irregularities. The protection related to ensuring confidentiality and anonymity should not extend to those who knowingly provide false information. Even in this case, the personal data of such a person should be protected, at least until it is proved that the information signalled is false (the burden of proof rests with the institution that employs the informant), in order to protect against possible stigmatization among the professional community. One must agree that data protection rules can be used to strengthen whistleblowing procedures, as the application of data protection rules helps to create reliable channels by enhancing the security of whistleblowing procedures.¹⁹

17 Article 29 Data Protection Working Party, *Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime*, p. 11, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2006/wp117_en.pdf, accessed 1/09/2021.

18 EDPS, *Guidelines on processing personal information within a whistleblowing procedure*, p. 6, https://edps.europa.eu/sites/default/files/publication/19-12-17_whistleblowing_guidelines_en.pdf, accessed 1/09/2021.

19 *Ibidem*, p. 5.

Conclusions

As indicated above, there is currently no comprehensive whistleblower protection regulation in Poland. The directive, which aims to unify national systems and introduce minimum standards of whistleblower protection, should be viewed as an opportunity to introduce legal solutions that will ensure genuine whistleblower security. For this purpose, the Polish legislator should create a uniform model of whistleblowing as an institution. It seems that comprehensive whistleblower protection should be regulated in a separate legal act.²⁰

It would be reasonable, therefore, at the level of an act of law, following the Directive, to recognize that the protection may cover employees and persons performing work also outside the employment relationship, persons cooperating with the employer, former employees, candidates for employees, and interns.

It is also worth noting that the provisions of the act implementing the Directive introduce and specify the circumstances that allow the use of the external channel for reporting violations, bypassing the internal channel, and designate authorities (e.g. the police, prosecutor's office, tax offices, customs authorities) which are responsible for receiving information from the declarant, confirming their receipt and conducting follow-up activities aimed at solving the reported problem.

The legislator should also introduce solutions that ensure the confidentiality of whistleblowers' personal data and exhaustively indicate the reasons for their disclosure by recognizing that the rule is keep the data secret. Disclosing personal data without the whistleblower's consent could be treated as a retaliatory action. As a general principle, whistleblowing should not be anonymous. Whistleblowers should provide information about themselves in order to ensure effective protection against retaliation and to minimise the potential abuse of whistleblowing procedures. Anonymous signalling could be permitted under specific circumstances. The French supervisory authority (CNIL) indicates that anonymous reporting can be processed if: the description of the violation is sufficiently detailed, specific precautions have been taken, such as prior analysis by the first recipient of the report of the legitimacy of its dissemination within the whistleblowing management system.

For this reason, controllers should implement internal notification channels and information protection. The identity of a whistleblower who reports a violation should be treated as confidential in order to protect him against any form of retaliation. From the point of view of the protection of whistleblowers' personal data, it is important to have a functionality in place within the IT system to ensure anonymity of the notification (the system is operated by the IT department responsible for network security, and therefore, even if the name is not provided, employees of this department can identify the whistleblower)²¹.

20 H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia (Whistleblowing, Disclosing irregularities in employment relationships)*, Scholar, Warsaw 2020, pp. 312–314.

21 H. Jo, J. Nam, S. Shin, *NOSArmot: Building a Secure Network Operating System, Security and Communication Networks*, 2018.

Another element that should be regulated at the level of the act dedicated to the protection of whistleblowers concerns the need to introduce the obligation for the employer and other employees not to retaliate against the whistleblower (e.g. by extending the scope of the premises of employees' organizational liability). Such an obligation would need to be introduced into the Labour Code and regulations governing specific types of employment, e.g. officers or interns²².

The legislator should also regulate the issues related to the methods of providing feedback to the whistleblower (the manner of providing the information and indicating the person/department/team that provides this information) with the obligation to maintain confidentiality and impartiality. It should be remembered that the contact with the person or persons appointed to conduct the reporting procedure will usually need to occur on more than one occasion. The very notification of a violation or suspected violation will require feedback: confirmation of receipt, information about the initiation of the procedure, request for additional information or clarifications. This means that the smallest possible number of people should communicate with the whistleblower to improve the guaranteed confidentiality of the whistleblower's data.

The provisions of the legal act should oblige employers (employing entities) to develop and implement whistleblower data processing procedures. This can be done, for example, in an annex to the work regulations. A desirable solution would also be to encourage employers to develop and implement codes of conduct / codes of good practice in a given entity, which would provide for specific procedures, indicate the methods and forms of communicating irregularities, indicate the persons responsible for the processing of whistleblowers' personal data, and clearly define the rules for exercising whistleblowers' rights with regard to their personal data and indicate the forms of training, including training in the area of whistleblower personal data²³. The scope of the procedure must be clear and transparent to avoid abuses when reporting irregularities. The purpose of the whistleblowing procedure must therefore be clearly stated in internal rules and documents. They should clearly set out the circumstances for using different information channels when reporting breaches.

Finally, and importantly, the legislator should oblige the employer to provide reliable and transparent information to whistleblowers about their rights. The requirement of fairness is related to the need for the controller to take into account the interests and legitimate expectations of the data subject. This principle is understood broadly and requires a balance between the right to personal data protection and the interests of data processors (i.e. the whistleblower's right to protect personal data and their confidentiality, and the employer's interest to use this information in order to proceed with infringement. What matters is the principle of transparency: personal data processing operations should be transparent to data subjects. As part of the

22 H. Hassink, M. de Vries, L. Bollen, *A Content Analysis of Whistleblowing Policies of Leading European Companies*, *Journal of Business Ethics* 75, 2007, pp. 37–40.

23 R. Moberly, *Confidentiality and Whistleblowing*, 96 N. C. L. Rev. 751, 2018, p. 759.

implementation of this principle, the provisions of the regulation significantly expand the obligations regarding the information to be provided to data subjects. Among others, data subjects are enabled to exercise their powers whereas the controller is required to formulate messages addressed to data subjects in clear and plain language.

It is also worth adding that the employer should be obliged to raise employees' awareness of the importance of whistleblowing, the need to report violations, rules of conduct in the event of becoming aware of a potential violation, responsibility for the processing of personal data in the organization and maintaining confidentiality of all information related to the reports that they may come across within individual or team activity.

Abstract

In this chapter, the author presents the problem of the protection of whistleblowers' personal data in the workplace in connection with the processing of their data in the channels for reporting breaches in the context of the transposition of the Directive on the protection of persons who report breaches of Union law into Polish law. The existing regulations ensure limited protection for employees and other individuals against retaliation or violation of privacy. The author postulates the necessity to develop comprehensive whistleblower legislation. The purpose of the legislation will be to oblige the employer to develop and implement solutions that will guarantee genuine confidentiality and protection of whistleblowers' personal data.

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Slovak Whistleblowing Law after Revision – a Step Forward?

Peter Varga, Veronika Zoričáková¹

<https://doi.org/10.18778/8220-639-5.10>

1. Legal sources of whistleblowing in Slovakia

The Slovak legal framework regulating whistleblower protection has been developed in recent years. The first legislation was drafted based on the resolution of the Government of the Slovak Republic on the draft measures to ensure compliance with the recommendations adopted by the OECD Working Group on Bribery in International Business Transactions for the Slovak Republic as part of Phase 3 of the evaluation.

1.1. Development of Slovak legislation of whistleblower protection

The first piece of legislation was also defined in the Programme Statement of the Government of the Slovak Republic for the years 2012–2016, which set the goal to strengthen the protection of whistleblowers, including by adopting new legislative measures. With regard to international conventions, the Slovak Republic ratified the Civil Law Convention on Corruption as a member state of the Council of Europe, the Criminal Law Convention on Corruption as a member state of the Council of Europe, the United Nations Convention against Corruption (UNCAC), and the (partly related to whistleblowing) Convention of the International Labour Organisation concerning Termination of Employment at the Initiative of the Employer No. 158 of the year 1982.

The proposal was based on several international documents:

- Criminal Law Convention on Corruption;²
- Civil Law Convention on Corruption;³

1 Doc. JUDr. Peter Varga, PhD – Mgr. Veronika Zoričáková, PhD, Trnava University, Faculty of Law.

2 ETS No. 173, see Article 22: *Protection of collaborators of justice and witnesses*, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f5?module=treaty-detail&treatynum=173>. accessed 01/09/2021.

3 ETS No. 174, see Article 9: *Protection of employees*, source: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f6?module=treaty-detail&treatynum=174> accessed 01/09/2021.

- United Nations Convention against Corruption;⁴
- Recommendation CM/Rec(2014)7 of the Committee of Ministers to Member States on the protection of whistleblowers,⁵ which stipulated several principles addressed to the Member States with regard to drafting legislation as well as guidelines in the area of whistleblowing.

The Parliament adopted the first legislation protecting whistleblowers in 2014 (Act No. 307/2014 Coll. on certain measures related to the reporting of anti-social activities and on change and amendment of some laws, hereinafter ‘the previous Act’).

1.2. Current legislation on whistleblower protection

The previous Act was, however, relatively soon replaced by the current Act No. 54/2019 Coll. on the protection of whistleblowers of anti-social activities and on change and amendment of some laws (hereinafter ‘the Act’), which completely replaced the previous regulation. The Act became effective as from 1 March 2019. The purpose for adopting the new Act was to strengthen the position of whistleblowers in criminal proceedings (e.g. granting them the right to propose and submit evidence and the right to be informed about the cessation or conditional cessation of criminal proceedings) by increasing their protection or establishing an independent state administration body with national competence to protect whistleblowers.

There is one general act protecting whistleblowers in the Slovak Republic, i.e. there are no specific sectoral acts that would cover specific areas of law. The Act applies to both the private and the public sector, as it covers whistleblower protection also with regard to public sector employees and other employees in the public sphere (Section 2(e) of the Act)⁶.

1.3. Anti-discrimination legislation in the context of whistleblower protection

The Act No. 54/2019 Coll. extended the grounds for which discrimination is prohibited. The declared purpose of this measure was to protect employees against

4 See Article 33: *Protection of reporting persons*: source: https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, accessed 01/09/2021. See p. 33 of the document.

5 See the text https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5, accessed 01/09/2021.

6 See A. Olšovská, V. Hrušovská, *Whistleblowing na pracovisku – právna úprava, teória a prax na Slovensku – Whistleblowing at the workplace – legislation, theory and practice in Slovakia*, [in:] *Whistleblowing*, J. Pichrt (ed.), Wolters Kluwer ČR, Prague 2013.

unlawful actions from the employer. The Act No. 365/2004 Coll. on equal treatment in certain areas and on protection against discrimination and on amendments to certain acts (Anti-discrimination Act) enumerates the grounds on which discrimination is prohibited (the list of grounds is not closed). The list explicitly includes the ground of reporting a crime or other anti-social activity (Section 2(1) of the Anti-discrimination Act).

The application of the Anti-discrimination Act enhances the protection of whistleblowers due to reverse burden of proof that may be applied. The reverse burden of proof requires the defendant to prove that he/she has not infringed the principle of equal treatment if the plaintiff informs the court of facts from which it can reasonably be concluded that the principle of equal treatment has been infringed. The whistleblower as an applicant is firstly required to identify in the application the person alleged to have infringed the principle of equal treatment. The whistleblower should also provide the facts he/she is aware of that prove the defendant breached the equal treatment principle. Based on these facts, the court may decide that the burden of proof is on the defendant.

1.4. The Labour Code in the context of whistleblower protection

The Slovak Labour Code (Act No. 300/2001 Coll.) stipulates that the employer is obliged to treat employees in accordance with the principle of equal treatment established for the area of labour relations. The Labour Code enumerates the grounds for which discrimination is prohibited, but it refers to the Anti-discrimination Act, i.e. the Anti-discrimination Act must be applied as a specific act in addition to the Labour Code⁷.

If a person would be discriminated in labour relations due to whistleblowing, it would be considered as unjustified sanction. The Anti-discrimination Act stipulates that “unjustified sanction” (Section 2a(8) of the Anti-discrimination Act) is an act or omission which is unfavourable and directly related to the person concerned and has direct connection with: (a) seeking legal protection against discrimination on his/her own behalf or on behalf of another person; or (b) giving a witness statement or explanation or participating in proceedings in matters related to the violation of the principle of equal treatment, (c) making a complaint alleging breach of the principle of equal treatment⁸.

7 See H. Barancová a kol., *Zákoník práce. Komentár (Labour Code. Commentary)*, 2. edition, C. H. Beck, Bratislava 2019.

8 See: Debréceniová J., *Antidiskriminačný zákon. Komentár. Občan a demokracia (Anti-discrimination law. Commentary. Citizen and Democracy)*, Bratislava 2008, pp. 85–89.

1.5. The Office for Whistleblower Protection

One of the most important modifications of the whole whistleblowing process in the Slovak Republic was that the Act established a new Office for Whistleblower Protection (hereinafter the “Office”). The Act stipulates that the Office is an independent state administration body with nationwide competence, which protects the rights and legitimate interests of whistleblowers who notify anti-social activities (Section 13(1) of the Act). However, the Office started to fulfil its tasks only in September 2021, as the head of the Office was elected by the Parliament only in February 2021 (despite the Act being effective from 1 March 2019).

Among the general tasks of the Office are the general monitoring of compliance with the Act and the way the Act is applied. The Office for Whistleblower Protection has a competence in terms of protection of whistleblowers, e.g. it may suspend the effectiveness of an act affecting employment terms or working conditions of an employee made by the employer with a negative consequence to the employment of the whistleblower unless the employer persuades the Office that there is no connection between the act and the whistleblower’s report (for more detail see further below). In addition, once an employee obtains the status of a whistleblower, the Office needs to grant its prior consent to every act affecting employment terms or working conditions with a negative impact on the employment, otherwise the act is invalid. The Office may also monitor whether the employer’s internal CSR standards and internal verification process of reports are in compliance with the Act and may impose fines if these duties are not duly fulfilled. After the Office is fully established, it is expected to serve other functions in the area of providing advice and consultation in connection with the notification of anti-social activities, such as issue expert opinions and methodological guidelines in matters of whistleblower protection, provide to employers advice as well as practical training and education, and cooperate with other authorities in the Slovak Republic and with similar institutions and organizations of the European Union and other countries. The Office is going to cooperate with the Slovak National Centre for Human Rights⁹ and with non-governmental organizations in matters of whistleblower protection.

9 The Slovak National Centre for Human Rights is a national human rights institution (NHRI) established in the Slovak Republic. The Centre acts also as the only Slovak equality body. It performs a wide range of tasks in the area of human rights and fundamental freedoms and observance of the principle of equal treatment. While the old Act No. 307/2014 Coll. (effective until 28 February 2019) was in force, the Centre used to be obliged to regularly evaluate and publish legal documents, court decisions, certain provisions and other relevant information related to criminal social conduct and protection.

1.6. Future development of legislation in the Slovak Republic

The Act has not been changed or amended yet. However, the EU Member States have an obligation to transpose the 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 law¹⁰ by 17 December 2021, i.e. the Act is expected to be amended. As the draft of a new act that would transpose the Directive has not been prepared or even discussed yet, we are not aware whether an amendment or a completely new act will be adopted.

2. Personal scope of whistleblower protection granted by the new Act

The new Act provides the definition of a whistleblower in Section 2(a). The Act considers a whistleblower to be any natural person who in good faith reports information on antisocial activities to any relevant authority competent to receive such a report, including the Office and his or her employer. This means that the Act does not define a whistleblower as an employee only. Quite the contrary, the goal of the new Act is to provide adequate protection against any unlawful conduct or reprisal measure to the broadest possible spectrum of notifiers of anti-social activities. The definition provided by the Act therefore includes not only employees under employment relations (as legal relations established under both employment contracts and work agreements outside employment), but also civil servant employees and service employees, including temporary workers in all the mentioned forms of employment. Moreover, pursuant to the Act, the status of a whistleblower is also assigned to a person close to a whistleblower who works for the same employer as the whistleblower or for an employer directly dependent on the whistleblowers' employer or an employer established by the whistleblowers' employer.

Pursuant to the explanatory memorandum to the Act, a whistleblower is any person that found out about breaches or other anti-social activities in connection with his/her employment, function or status or public service. Therefore, the Act goes even further: since a whistleblower could literally be anyone that makes a report of anti-social activities to the relevant authority or body, the status of a whistleblower is granted also to persons employed on the basis of civil-law or commercial-law contracts, persons that are self-employed and independently provide services to their clients, as well as interns, trainees, volunteers or even members of statutory or other bodies in companies. In order to maintain the fullest effect of the statutory protection of whistleblowers, the term whistleblower is not (and should not be) subject to any future interpretative restrictions.

¹⁰ OJ EU L 305, 26/11/2019, pp. 17–56.

The explanatory memorandum to the Act interprets the whistleblower as any natural person that found out about breaches or other anti-social activities *in connection with his/her employment, function or status or public service*.¹¹ This should not mean that the reported anti-social activity must be somehow related only to the employment or function of the whistleblower. That would necessarily mean that the whistleblower could not possibly notify unlawful activities of his/her employer consisting of for example environmental damage or damage to the public health or corruption, if these unlawful activities did not occur in direct connection with the whistleblower's work or performance. This interpretation would certainly inappropriately limit whistleblower protection and is undoubtedly incoherent with the goal of the Act. This criterion should be, therefore, interpreted in a way that a whistleblower is any person that reported an antisocial activity that he or she *found out* about in connection with his or her employment, performance, status or function¹².

Thanks to the new regulation that came with the Act, Section 7 of the Act states that once the status of whistleblower is granted, the employer may act against its whistleblower employee only if it proves that the proposed action has no causal link with the qualified notification. Otherwise, the employer needs the Office to consent to such an action. The employer has a burden of proof that the action has no connection with the qualified notification. If the employer cannot prove that, the Office will refuse its consent.¹³ Any act made by the employer against a whistleblower without prior consent of the Office is invalid.

Thanks to this new regulation, the Office was given an indeed strong competence to interfere with and intervene in sole-private-labour-law relationships justified by the necessity of whistleblower protection. Although the Office is still not properly established and functioning yet, we consider this particular aspect of *ex ante* protection to be probably the most effective way to secure a whistleblower's employment, since he or she is not forced to initiate a lawsuit in order to declare the invalidity of employment termination any more, which otherwise may have taken months or years before a satisfactory and definite conclusion was achieved. This kind of *ex ante* protection may constitute much-needed motivation, since lack of motivation and fear of negative consequences are presented to be some of the most crucial reasons why people do not notify anti-social activities, even if they know of or find out about such breaches.¹⁴

11 See explanatory memorandum to Section 2 of the new Act. See also T. Mičudová, *Zákon o ochrane oznamovateľov protispoločenskej činnosti. Komentár (Act on the protection of whistleblowers of anti-social activities Commentary to the Act)*, Wolters Kluwer, Bratislava 2019, pp. 16–17.

12 See Nechala P., *Chránené oznamovanie (whistleblowing)*, Inštitút pre verejné otázky (Act on the protection of whistleblowers of anti-social activities), Bratislava 2014, p. 107.

13 It is not possible to appeal against the decision of the Office.

14 See the report of Transparency International Slovensko, <https://transparency.sk/sk/temy/whistleblowing/>, accessed 01/09/2021.

On the other hand, the Act provides for special *ex post* protection against retaliatory measures already taken against a whistleblower. Pursuant to Section 12 of the Act, if the whistleblower considers that an act affecting their employment terms or working conditions with which he or she does not agree has been made in connection with the notification, he or she may request the Office to suspend the effectiveness of this act within 15 days from the day when the whistleblower became aware of the act. The Office immediately suspends the effects of the act affecting employment terms or working conditions if the time limit of 15 days has been complied with and the employer does not prove within a reasonable period determined by the Office that the act has in fact no causal connection with the notification.

It appears that between the two different means of *ex ante* and *ex post* protection, there might be a difference in the personal scope of the provisions. Whereas *ex ante* protection pursuant to Section 7 is limited solely to an employer-employee relationship,¹⁵ which we believe involves both kinds of relations, i.e. established by employment contracts as well as work agreements outside employment, *ex post* protection pursuant to Section 12 is drafted comparatively broadly.

Although in Section 12 of the Act, the terms “act affecting employment terms or working conditions” and “employer” are used, which might indicate that this *ex post* protection is focused solely on labour law relations just as Section 7, subparagraph 7 of Section 12, might indicate differently. Here, the Act states that the Office shall also immediately suspend the effectiveness of an act affecting employment terms or working conditions performed against a natural person who has disclosed facts about anti-social activities which he or she has learned about in connection with the performance of his or her employment, *profession, position, function or public interest activity*, if this natural person could legitimately believe that making the notification would not lead to a proper investigation of the notification or that making the notification could lead to a sanction. *The provisions of subparagraphs 1 to 6 shall apply mutatis mutandis.* Here one may consider whether the authors of the Act wished to broaden *ex ante* protection to cover only those employees that in fact have not made a notification by internal or external reporting channel, but who in fear of possible sanctions or inactivity of relevant authorities have gone public with the information about anti-social activity, or whether they wished to provide *ex post* protection also to persons cooperating with the wrongdoer based on civil-law or commercial-law contracts, or persons who are simply unpaid interns or volunteers.

Although one may think that the broad definition of a whistleblower should guarantee the same extent of protection on all levels of possible harms (including those in sole private-law sphere) to all notifiers of anti-social activities, the issue is rather more complex. It is easy to justify this level of protection by an external body, such as the Office, even in private-law relations, if the potentially harmed person is an employee which as a weaker party is benefiting from standard protective labour law regulations. However, when it comes to the self-employed, subcontractors working

15 See explicitly in the explanatory memorandum to Section 7.

under civil-law or commercial-law contracts or members of statutory or other corporate bodies, the nature of these relationships is noticeably different. The contractual freedom including the free decision on who is going to be one's contractual partner may result in such a contractual agreement that any party, including the other contracting party as the future wrongdoer, may terminate the contract whenever they wish and based on whatever grounds parties have agreed to or even without any obligation to provide grounds for such termination. In sole private-law relationships where all parties to a contract have equal positions, the lack of a protective regulation is justifiable; in civil and commercial law, one may choose with whom and for how long he or she wants to be in a contractual relationship. More importantly, if he or she for some reason loses his or her trust in the other contracting party (regardless of the reason, let it even be a public notification of a wrongdoing), may he or she be forced to remain in such a relationship? For example, a member of a statutory body makes a public notification about a possible severe harm to the environment or to public health due to the company's business activities. Regardless of the benefits and positive impacts of such a notification, may the company be forced by the Office not to revoke such a member, even though there is no possibility that a whistleblower may continue to effectively perform his or her duties as a member of a statutory body? In other words, does Section 12 of the Act apply to whistleblowers that do not at the same time have the status of an employee/a worker?

We believe the answer to this question lies in the systematic approach to Section 12. Unlike Section 7 of the Act and the *ex ante* protection, which has a rather permanent effect (no negative act affecting employment terms or working conditions against a whistleblower may be made without the approval of the Office, otherwise it is invalid) and thus is indeed provided only to employees, *ex post* protection under Section 12 serves a very different purpose. The suspension of the effects of a negative act against a whistleblower (for example termination of a contract or removal from a position) by the Office is only temporary, i.e. it ends after 30 days after the delivery of the notification from the Office about the suspension, unless a motion for preliminary (emergency) ruling has been filed. In such a case, the duration of the suspension of the act's effect is extended until the court's decision on this motion becomes enforceable (Section 12 subparagraph 6 of the Act). Finally, the initiated proceedings lead to the main proceedings pursuant to antidiscrimination law.¹⁶

This means that Section 12 represents nothing more but a strengthening of the protection against severe discrimination behaviour sanctionable by the Anti-discrimination Act. Since the principle of equal treatment is fully applicable in the cases of reporting anti-social activity (see above), it may be concluded that Section 12, unlike Section 7 of the Act, is applicable to cases of whistleblowing even if the whistleblower is not an employee.

Due to the inapplicability of Section 7 outside the employer-employee relationship, the range of whistleblower protection guaranteed by the Act does not fully

¹⁶ See the explanatory memorandum to Section 12 of the Act.

correspond with the broad definition of whistleblower, and the Office has no similar or other competence against potential reprisal measures (let us put aside Section 12, as it more or less acts only as a procedural remedy) if the whistleblower is not an employee, but has the status of an intern or a member of a statutory or another body, is self-employed or simply cooperates with the wrongdoer on the basis of a civil-law or a commercial-law contract. The remedies provided by the Anti-discrimination Act therefore might be considered as suitable means of protection,¹⁷ including invalidity of the discriminatory act, obligation to refrain from discriminatory conduct, satisfaction (even monetary, if justifiable) and claim for damages.¹⁸

3. Material scope of whistleblower protection granted by the new Act

The Act does not specify what is considered an anti-social activity for the purpose of whistleblower protection. However, the Act distinguishes between “anti-social activity” and “serious anti-social activity”, to some extent also with regard the statutory consequences and level of protection of a whistleblower. Although there is no legal definition of anti-social activity, the Act thoroughly defines serious anti-social activity. By serious anti-social activity, the Act understands several particular criminal and administrative offences, i.e. (i) criminal offence of harming the financial interests of the European Union pursuant to Sections 261 to 263 of the Criminal Code,¹⁹ criminal offence of machinations in public procurement and public auction pursuant to Sections 266 to 268 of the Criminal Code, criminal offences of public officials pursuant to Sections 326 to 327a of the Criminal Code, and criminal offences of corruption pursuant to Sections 328 to 336b of the Criminal Code, (ii) an offence for which the Criminal Code provides for a prison sentence with a maximum duration of more than three years, (iii) an administrative offence for which a fine may be imposed with an upper limit determined by calculation, or (iv) an administrative offence punishable by a fine of at least EUR 30,000.

Precisely what is considered as anti-social activity is still not clear due to lack of case law, since the Act has not been implemented in practice yet. The doctrinal interpretation tends to be broad and may encompass all kinds of anti-social activities such as conflict of interest, abuse of power or authority, unprofessional conduct,

17 However, this approach sometimes evokes mixed reactions and concerns about an overly broad interpretation of discrimination. See J. Šamánek, *(Ne)vhodnost zakotvení ochrany oznamovatelů v antidiskriminačním zákoně* (The (in)appropriateness of enshrining whistleblower protection in anti-discrimination law), [in:] J. Pichrt, (ed.) *Whistleblowing*, Wolters Kluwer ČR, Prague 2013, pp. 46–52.

18 See Section 9 of the Anti-discrimination Act.

19 Act No. 300/2005 Coll. Criminal Code, as amended (hereinafter the “Criminal Code”).

workplace bullying, clientelism etc.²⁰ In this regard, a question may arise if also misdemeanours or minor employer's breaches in a workplace or breaches effecting only some, or even only one employee should be considered anti-social activity and thus be covered by the Act and if the whistleblower notifying of such minor breaches should be protected accordingly. As a matter of fact, the Act implicitly provides an answer.

The division into anti-social activity and serious anti-social activity is reflected in two kinds of whistleblower reports. If a whistleblower wants to report minor anti-social activity, he or she files a report. On the other hand, a *qualified* report is a report which may contribute or has already contributed to the clarification of *serious anti-social activity* or to the identification or conviction of a wrongdoer who committed of serious anti-social activity. The main difference between a report and a qualified report lies in the extent of the provided protection. A whistleblower may be granted a special kind of protection in on-going criminal or administrative proceedings only if he or she has filed a qualified report, i.e. he or she has reported serious anti-social activity. Moreover, it appears that the labour law protection pursuant to Section 7 of the Act is also provided only to a whistleblower filing a qualified report. This interpretation might be derived from the title of Section 7: "Protection of the whistleblower when reporting serious anti-social activity". Also financial incentives, which will be addressed below, are connected solely to the qualified report.

Although the Act defines the whistleblower remarkably broadly and we may indeed accept a broad interpretation of (ordinary) anti-social activity, the legislature managed to strip the whistleblower of almost all relevant protection, unless he or she reports serious anti-social activity. In all cases of reporting (basic, ordinary) anti-social activity, the whistleblower is left only with the protection given by the Anti-discrimination Act and logically by Section 12 of the Act as basically the only protective provision from the Act which applies in such cases.

We believe that this is an issue. Efforts to limit protection only to persons reporting criminal offences were already criticized in the past.²¹ Unfortunately, restricting material protection only to cases of reporting more severe criminal or administrative offences may not help with the existing lack of motivation to speak up without having to fear possible retaliatory measures. Leaving the protection of a whistleblower of less serious breaches to antidiscrimination remedies only while having a specialized Act regulation and the established specialized Office for the issue is rather unfortunate and we consider it a setback. The level of protection should not be dependent on the seriousness of the breach, and the issue is even more pressing if we take into account that the legislation continually fails to motivate people to come forward when finding out about miscellaneous unfair practices.

20 See T. Mičudová, *Zákon o ochrane oznamovateľov protispoločenskej činnosti. Komentár* (Act on the protection of whistleblowers of anti-social activities, Commentary to the Act), Wolters Kluwer, Bratislava 2019, p. 19.

21 See P. Nechala, *Chránené oznamovanie (whistleblowing)*, Inštitút pre verejné otázky, Bratislava 2014, p. 109.

4. External and internal reporting

Regarding the process of filing a report, the Act distinguishes between internal and external reporting. There is no priority between internal and external reporting. Thus, a whistleblower may request protection from a relevant authority (an external body) regardless whether he or she exploited an internal channel of communication through the company officer. The choice of communication channels is up to the decision of the whistleblower.

When it comes to filing a report, the new Act has brought a significant change. While the previous Act explicitly determined that the report may also be anonymous (Section 2(1d)(1.) of the previous Act), the Act does not recognize any more an anonymous report, which is interpreted in such a way that an anonymous report concerning any anti-social activity is not considered a whistleblower's report.²² We believe that the logic behind the legislative change is in the perception of the purpose of the legislation, which is to grant adequate protection to a whistleblower against the potential harm of retaliatory measures from the wrongdoer. It is impossible to grant protection if we do not know the identity of the whistleblower.

Another question arises with regard to the anonymous report: has the relevant authority or an officer as a relevant body in the internal reporting channel the obligation to examine the facts provided in an anonymous report, and should an investigation be initiated in the case of reasonable concerns? We believe it is not correct to jump to the simplistic conclusion that if the Act essentially excludes an anonymous report from the material scope of whistleblowing regulation, this automatically means that the authorities have no further obligation to investigate. The subsequent regime after filing an anonymous report must be systematically coherent with other parts of the relevant regulation.

Pursuant to the Slovak Code of Criminal Procedure,²³ if the content of an anonymous submission “does not give rise to a reasonable suspicion that a criminal offence has been committed”, the prosecuting authority is not obliged to handle the anonymous report; if the contents indicate that the matter falls within the competence of another authority, the prosecuting authority forwards such an anonymous submission for examination of its contents to this other authority. Moreover, it is a criminal offence if one learns that another has committed a crime for which the Criminal Code provides for a prison sentence with a maximum duration of at least ten years or one of the corruption offences and does not report such a crime without delay to the relevant authority.

22 See T. Mičudová, *Zákon o ochrane oznamovateľov protispoločenskej činnosti. Komentár (Act on the protection of whistleblowers of anti-social activities, Commentary to the Act)*, Bratislava 2019, p. 21.

23 The Act No. 301/2005 Coll. Code of Criminal Procedure as amended (hereinafter as “Code of Criminal Procedure”).

In conclusion, it appears that although an anonymous report is not considered a whistleblower's report, if the Office or the company officer receive one and the facts provided suggest that a crime or an administrative offence was committed, the authorities competent for further investigation should be informed and provided with all the information obtained from the anonymous report.

4.1. Internal reporting

The current Act stipulates that certain types of employers are obliged to adopt an internal reporting system. The Act makes a difference between private and public employers (i.e. the employer is a public authority) in that public employers have to meet stricter criteria for introducing an internal reporting system in comparison to private employers, i.e. different thresholds of the number of employees are applied: an employer who employs at least 50 employees and an employer who is a public authority employing at least five employees are obliged to designate a responsible person.

4.1.1. Appointment of a “Responsible person” and internal rules

The internal reporting scheme consists of an obligation to (i) appoint a responsible person and to (ii) issue an internal rule regulating the process of handling complaints.

a) Responsible person

Every employer with an obligation to issue and adopt an internal CSR standard also needs to appoint an organizational unit/branch or a person as an officer in charge (the Act uses the term “responsible person”) of receiving reports, carrying out a verification process, informing whistleblowers about the outcome of the verification process and keeping records of all reports made (the records have to be kept for three years). Pursuant to the Act, the officer (= responsible person) needs to be “professionally capable” to duly perform all the obligations. However, the Act does not specify particular prerequisites the officer must meet. The responsible person does not have to be an employee of the employer or an organizational unit of the employer. The employer may also hire an external person to fulfil the functions of the responsible person. In municipalities and in regions with a local government, the responsible person is the chief controller (the appointment of such a person is obligatory under Slovak laws). In the case of fully state-owned entities or public entities established by a public institution, the founding public institution is obliged to perform the function of the responsible person if that entity employs fewer than 50 employees. However, the founding public institution may decide that it will perform the function of the responsible person also in the event that the entity established by it employs more than 50 employees.

The responsible person is bound only by instructions given by a statutory body. The employer is obliged to enable the responsible person to perform his/

her tasks independently, while the responsible person is bound only by the instructions of the statutory body of the employer or the statutory body of the parent company, unless the responsible person is directly a statutory body or a member of the statutory body. The employer is obliged to ensure that the tasks or responsibilities of the responsible person may not lead to a conflict of interests. The employer may not penalize or sanction the responsible person for carrying out his/her tasks. If the responsible person is an organizational unit, the employer cannot penalize or sanction the employees who work for that organizational unit. The employer is obliged to cooperate with the responsible person to the necessary extent in the performance of his/her tasks; in particular, the employer has to provide the responsible person with sufficient resources to carry out his/her tasks and to access personal data and documents. Moreover, the employer has the obligation to continually maintain the professional qualifications of the responsible person.

The employer must clearly identify the responsible person, and the means of reporting must be published and accessible to all employees in the usual and commonly available way, so that at least one method of reporting must be accessible at all times. The employer has to make available information about the internal system for verifying notifications in a concise, comprehensible, clearly worded and easily accessible form.

b) Investigation of notifications

The employer is obliged to accept and verify each notification within 90 days of its receipt. This period may be extended by another 30 days. However, the employer must notify the notifier of the reasons for such extension. The employer is obliged to maintain the confidentiality of the identity of the notifier during the whole process of investigating the notification. The notifier has to be informed about the result of the investigation of the notification and about the measures, if any are taken on the basis of the investigation of the notification, within ten days of the investigation of the notification being completed. If the investigation of the notification is completed by transferring the case under the Criminal Procedure Code or under other special laws, the responsible person has to request the result of the investigation to the extent permitted by special laws and notify the notifier thereof within ten days of delivery.

c) Internal rule regulating whistleblowing – CSR standard

Employers who are obliged to appoint a responsible person (the same criteria are applied as described above with regard to the obligation to appoint a responsible person) likewise have to adopt an internal rule regulating whistleblowing. Such internal rule has to contain the details of the following issues:

- i. submission of notifications,
- ii. verification of notifications and authorizations of the responsible person in the investigation of notifications,
- iii. maintaining confidentiality about the identity of the notifier,

- iv. registration of notifications and keeping records about the notification,
- v. informing the notifier of the result of the investigation of his/her notification,
- vi. processing of personal data referred to in the notification.

4.1.2. Internal reporting and anonymous notifications

Please note that the Act does not recognize anonymous notifications (unlike the previous Act, which explicitly determined that the notification may also be submitted anonymously). The fact that the Act does not recognize anonymous notifications any more is interpreted in such a way that an anonymous notification of any anti-social activity is not considered a whistleblower's report.²⁴

This, however, does not automatically mean that an anonymous report under specific circumstances cannot be accepted as a criminal complaint. Hence, the prosecutor is obliged to initiate an investigation and eventually even criminal proceedings (for further details see above).

4.1.3. Personal data protection and internal reporting

Whistleblowing procedures must be a safe channel for notifications of important information relating to fraud, corruption or serious wrongdoings. This information is investigated in the course of a procedure involving the processing of personal data (for example, information relating to those suspected of wrongdoing as well that of the notifiers, other third parties, witnesses, etc.). The employer has to meet all requirements set forth by the GDPR²⁵ and the national Slovak rules on personal data processing.²⁶

Employers running whistleblowing schemes must ensure that all GDPR requirements are fulfilled. Confidentiality belongs to the most important elements of more than just supporting the notifiers in reporting any wrongdoings. It is also one of the most important requirements with regard to handling personal data. The data are very often sensitive personal data. It is therefore necessary to process the personal data and maintain utmost confidentiality. The employer must also process only the data that are important and not to process more personal data than necessary. Running the reporting scheme means that the employer must ensure an initial

24 See T. Mičudová, *Zákon o ochrane oznamovateľov protispoločenskej činnosti. Komentár (Act on the protection of whistleblowers of anti-social activities, Commentary to the Act)*, Wolters Kluwer, Bratislava 2019, p. 21.

25 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (hereinafter "GDPR").

26 Act No. 18/2018 Coll. on personal data protection.

verification of the reported information and must evaluate which information is relevant. The GDPR requires that the concerned persons have right to information, i.e. the employer must provide information through a general privacy notice,²⁷ but also directly to the persons involved. These persons may include the whistleblowers, the person under investigation, witnesses or other individuals that are mentioned in the notification. However, the employer must consider carefully which information will be provided so that the investigation is not jeopardized. Generally, the concerned persons are entitled to have access to their personal data. It is necessary to keep a balance between the interests of all involved persons, including the notifier and the persons who are accused of wrongdoing. Personal data may not be processed for a longer period than is necessary or than is required by the law (according to Section 11(1) of the Act, records have to be kept for three years). In addition to fulfilling all administrative obligations, the employer must ensure the security of the processed personal data and adopt technical and organizational measures needed to eliminate the risks and to ensure personal data security.

The Office for Personal Data Protection has competence to enforce the compliance with personal data protection legislation including the obligation to maintain all required security measures and mechanisms to ensure the protection of the whistleblower's personal data.²⁸ As has been mentioned above, details about data protection are a mandatory part of the internal rule regulating whistleblowing.

4.1.4. Whistleblowing and anti-discrimination law

As was already mentioned above, the Anti-discrimination Act enumerates the grounds on which discrimination is prohibited. According to the Slovak Anti-discrimination Act, the list of grounds is just enumerative and includes the ground of reporting a crime or other anti-social activity (Section 2(1) of the Anti-discrimination Act). In addition to the Anti-discrimination Act, the Slovak Labour Code (Act No. 300/2001 Coll.) does not contain a closed list of criteria in the case of discrimination.

The Anti-discrimination Act enumerates the criteria in the case of discrimination²⁹. “Whistleblowing” is not included explicitly among these criteria. If a person is discriminated against due to whistleblowing, it would be considered an unjustified sanction. The Anti-discrimination Act stipulates that an “unjustified sanction” (Section 2a(8) of the Anti-discrimination Act) is an act or omission which is unfavourable

27 The privacy notice must contain information specified under Article 13 of the GDPR.

28 See T. Mičudová, *Zákon o ochrane oznamovateľov protispoločenskej činnosti. Komentár (Act on the protection of whistleblowers of anti-social activities, Commentary to the Act)*, Wolters Kluwer, Bratislava 2019, pp. 50–51.

29 See V. Križan, *Antidiscrimination law (equality of treatment): introduction*, [in:] V. Križan et al. (eds.), *Implementation and enforcement of EU labour law in the Visegrad countries*, Palacký University, Olomouc 2014.

and directly related to the person concerned and has direct connection with: (a) seeking legal protection against discrimination on his/her own behalf or on behalf of another person; or (b) giving a witness statement or explanation or participating in proceedings in matters related to the violation of the principle of equal treatment, (c) making a complaint alleging a breach of the principle of equal treatment.

The application of anti-discrimination law brings some benefits to notifiers. The Anti-discrimination Act stipulates that the defendant is required to prove that he/she has not infringed the principle of equal treatment if the plaintiff informs the court of facts from which it can reasonably be concluded that the principle of equal treatment has been infringed.

The whistleblower as an applicant is firstly required to identify in the application the person alleged to have infringed the principle of equal treatment. Furthermore, the whistleblower has to provide the facts he/she is aware of that prove the defendant breached the equal treatment principle. Based on these facts, the court may decide that the burden of proof is on the defendant.

The general three-year limitation period as stipulated by Section 101 of the Civil Code (Act No. 40/1964 Coll.) applies in employees' claims in discrimination cases. The period starts to run from the moment of the unjustified intervention that was objectively capable to violate the employee's right.

4.2. External reporting

There are several authorities with competence in external reporting channels. Firstly, the new established Office provides whistleblowers with labour-law protection pursuant to Section 7 and Section 12. Moreover, the Office has competence to award remuneration to a whistleblower that filed a qualified report (reported serious anti-social activity) amounting to up to 50 times the minimum wage. When examining an application for remuneration, the Office takes into account the extent of the whistleblower's participation in clarifying serious anti-social activity and identifying the perpetrator, the whistleblower's lost earnings and the extent of the seized or returned property, if quantifiable. To that end, the Office seeks the opinion of the prosecutor or administrative authority which has acted in the matter. A whistleblower has no claim on remuneration, as it is solely in the Office's discretion if and to what extent a whistleblower is granted remuneration.

Awarding a whistleblower a monetary reward is generally an issue of controversy. However, the legislature justifies it with the argument that the whistleblower's help to preserve protected property or to return property are a significant benefit to public interest.³⁰ Although this regulation has not yet been fully brought to life as there is only one case presented by the Ministry of Justice when a whistleblower received a remuneration and consequently we have no data to study if granting

³⁰ See the explanatory memorandum to Section 9 of the Act.

remuneration has a motivational effect on future whistleblowers, we consider it to be some kind of a social experiment that may possibly have a positive impact on raising the awareness of the whistleblower regulation and motivating people to come forward. We are of the opinion that this is probably the only place where distinguishing between reporting anti-social activity and serious anti-social activity may be reasonably justified.

When it comes to protection in criminal or administrative proceedings, a whistleblower may request protection from the relevant criminal or administrative body that investigates the case. After filing a request, the whistleblower is automatically granted labour-law protection provided by the Office. Moreover, in criminal proceedings, the court may decide that the identity of the whistleblower as a witness will not be disclosed. The court may decide not to provide personal information of the witness only if there is a reasonable concern that disclosing the witness's identity, residence or whereabouts may endanger his/her life, health or physical integrity or that such a danger is imminent to a person close to him/her.

Conclusions

After analysing the basic elements of the new whistleblowing regulation, it seems that although the new Act defines the whistleblower indeed very broadly, material protection pursuant to the new Act is provided only to whistleblowers reporting serious anti-social activities, i.e. more severe criminal or administrative offences. Furthermore, protection against acts with a negative impact on the whistleblower's position in the workplace is provided virtually only to employees, while other persons (volunteers, interns, self-employed etc.) are left with only remedies provided by the Anti-discrimination Act. Thus, it can be concluded that the new Act is actually not very progressive when compared with the previous legislation, and that the legislature clearly missed an opportunity to protect all types of whistleblowers in the same way by the same specialized Office established solely for the protection of whistleblowers.

To summarize the whistleblowing legislation in the Slovak Republic, it must be stressed that the legislation is not applied very often. Both the previous Act and the current Act require some employers to introduce whistleblowing reporting schemes. In our research, we also made an inspection of Internet sites of employers that are obliged to introduce a whistleblowing reporting system. Generally, public institutions are well aware of their obligation to introduce internal reporting and provide information about submitting and handling notifications on their websites. Private employers usually use internal channels to inform their employees about internal reporting.

The most serious shortcoming in the application of the Slovak whistleblowing legislation is that the Office for Whistleblower Protection has been fully established

only in September 2021 as the chairperson of this office was elected by the Slovak Parliament only months earlier, in February 2021. The functions of the Office were until now performed by the Labour Inspectorate. However, the latest announcement about whistleblowing available on the Labour Inspectorate's website is from March 2019 and contains information about the passing of the Act.³¹ However, we expect that the application of whistleblowing reporting will be more frequent after the transposition of the 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 and after establishing the Office for Whistleblower Protection.

Abstract

In this chapter, the authors try to analyse the main aspects of the new Slovak Act on whistleblower protection No. 54/2019 Coll. Firstly, the authors highlight the fact that although Slovakia has a specialized Act regulating whistleblowing, other applicable legislation exists, as well. As it turns out, the antidiscrimination legislation still plays an important role, as the new Slovak Act does not cover all cases of whistleblowing protection. Furthermore, the authors analyse the personal and material scope of the provided protection and contemplate the connection between the definition of the whistleblower and the protection provided pursuant to the new Act. With regards to the material scope of protection, the act distinguishes between two kinds of anti-social activities depending on their severity. As it turns out, protection pursuant the new Act is provided only to whistleblowers reporting more serious anti-social activities. In other cases, the antidiscrimination legislation is the only platform for protection of such notifiers. Lastly, the new Act establishes both internal and external channels for reporting anti-social activities, with the new established Office for the Protection of Whistleblowers playing an important role. Although the Office is more or less only an administrative and monitoring body, it also grants specialized ex ante and ex post protection directly in labour law employer-employee relations and closely cooperates with relevant authorities competent for investigating criminal or administrative offences.

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31 <https://www.ip.gov.sk/prostispolocenska-cinnost/?ip=nip>, accessed 01/09/2021.

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Part 3

Summary of Legislative Proposals for the Visegrad Countries, France and Slovenia

Workplace Whistleblower Protection in the Visegrad Countries, France and Slovenia – Proposals for Changes¹

Zbigniew Hajn², Dagmara Skupień³

<https://doi.org/10.18778/8220-639-5.11>

Introduction

In the course of carrying out the grant titled “Workplace Whistleblower Protection in the Visegrad Countries, France and Slovenia” (WhistlePro), international team of legal experts⁴ developed proposals of potential improvements in the situation of workplace whistleblowers in the Visegrad countries. The research consisted in an analysis of the currently existing regulations in the Visegrad Group as well as of French and Slovenian legislation, an assessment of these regulations in light of international and European standards and development of proposals *de lege ferenda*. In the course of the research, cooperation was carried out with representatives of scientific centers, public institutions, civil society organizations, trade unions and enterprises.

The opportunity to introduce amendments to the existing provisions stems from the need to transpose the EU Whistleblower Protection Directive.⁵ The amendments may, and even should, go beyond the minimum standards required by the Directive.

The present chapter offers propositions of legislative changes, among others with regard to the methods of implementation, including relations between general

1 Z. Hajn: Introduction, Part I 1, 2.4, 4, Part II 1, 4, 5.1, 8, D. Skupień: Introduction, Part. I, 1, 2.1-2.3, 3, Part. II, 2, 3, 5, 6, 7, 9, 10, 11, Conclusion.

2 Professor, dr. hab., University of Lodz.

3 Dr hab., Professor at the University of Lodz.

4 G. Bargain, University of Tours; E. Bielak-Jomaa, University of Lodz; Z. Hajn, University of Lodz; A. Kun, G. Károli University of the Reformed Church in Hungary (KRE); J. Morávek, Charles University in Prague; A. Olšovská, Trnava University in Trnava; J. Pichrt, Charles University in Prague; D. Senčur-Peček, University of Maribor; D. Skupień, University of Lodz; R. Szuchy, Gáspár Károli University of the Reformed Church in Hungary (KRE); P. Varga, Trnava University in Trnava; V. Zoričáková, Trnava University in Trnava.

5 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 305, 26.11.2019, p. 17–56, further referred to as the EU Whistleblower Protection Directive.

principles of whistleblowing and sectorial provisions, the personal and the material scope of whistleblowing, which should involve protection against negative consequences, the proper organisation of internal and external reporting channels, methods of providing whistleblowers with effective means of protection against retaliatory actions, measures of support for whistleblowers, matters concerning confidentiality and issues concerning criminal liability for disclosing the whistleblower's personal data and hindering or precluding reporting breaches.

I. Current legislation

1. Introductory remarks

The current provisions on whistleblower protection in the Visegrad countries, France and Slovenia vary with regard to the methods and scope. The law of all above-mentioned countries is influenced by international law, especially the Council of Europe Conventions as well as by sectorial provisions concerning whistleblowing adopted at the European Union level. Moreover, Slovakia as well as France and Slovenia ratified ILO Termination of Employment Convention, 1982 (No. 158), according to which the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities shall not constitute valid reasons for termination of the employment (Article 5 point c)⁶.

None of the legislations, however, provides fully effective protection to whistleblowers or is fully compatible with the EU Whistleblower Protection Directive.

It should be mentioned, that despite special laws concerning whistleblowers adopted in certain analysed legislations and general rules applying to persons reporting the breaches, there are still fears linked with whistleblowing not to be perceived as a 'traitor' or a 'snitch'⁷, as well as quite often the lack of knowledge, how and to

6 See A. Olšovská, V. Hrušovská, *Whistleblowing na pracovisku – právna úprava, teória a prax na Slovensku – Whistleblowing at the workplace – legislation, theory and practice in Slovakia*, [in:] J. Pichrt (ed.), *Whistleblowing*, Wolters Kluwer ČR, Prague 2013.

7 Compare report of research prepared for the European Commission, Special Eurobarometer 502, 'Corruption' Report, (June 2020), <https://europa.eu/eurobarometer/surveys/detail/2247> accessed 01/09/2021, according to which 37 % of respondents from Denmark and 30 % from Poland would not decide to report corruption in order not to be perceived as a 'traitor', p. 119. See also about these fears: Oživeni, *Whistleblowing*, June 2020, p. 15–16, https://www.oziveni.cz/wp-content/uploads/2021/01/v4-Whistleblowing_EN.pdf, accessed 01/09/2021 or the survey conducted in Poland by Batory Foundation and Forum Idei, G. Makowski, M. Waszak, *Gnębieni, podziwiani i... zastugujący na ochronę. Polacy o sygnalistach. Raport z badania opinii publicznej (Oppressed, admired and... deserving protection. Poles about whistleblowers. A report*

which authorities the breach of law should be reported. According to the survey of the public opinion conducted within the EU, only 44 % of Europeans know how to report corruption. The level of knowledge in this aspect is lower than the European average in France and Poland (42 %), in the Czech Republic (41 %), Slovakia (37 %) and Hungary (27 %) but higher in Slovenia (48 %).⁸

2. Legislation in the Visegrad Countries

2.1. The Czech Republic

Although several legislative drafts have been put forward since 2012, no law that would comprehensively regulate the procedures of whistleblowing and matters related to whistleblower protection has been adopted in the Czech Republic.⁹ So far, whistleblower protection has been based on general principles of law, including labour law¹⁰ and case law of the Czech Constitutional Court.¹¹ Organizational matters related to reporting, also anonymously, crimes committed in connection with work as a civil servant are stipulated by Government Regulation No. 145/2015 Coll.,¹² issued on the basis of § 205(d) of the Czech code of civil service.¹³ Works are currently underway on a draft legislation developed by the Department for Conflict of Interest and Fight against Corruption of the Ministry of Justice, whose purpose is to transpose the EU Whistleblower Protection Directive in the Czech Republic.

from the public opinion poll), Warsaw 2019, p. 13, https://www.sygnalista.pl/wp-content/uploads/2019/06/Internet_Raport_sygnalisci_12-06.pdf, accessed 01/09/2021. On the other hand, opinion polls in countries covered by the analysis show positive assessments of whistleblowers, see e.g.: Report prepared for Transparency International Slovakia *Závěrečná správa z kvantitatívneho prieskumu pre Transparency International Slovensko*, Focus Marketing and Social Research, May 2016, p. 13, <https://transparency.sk/sk/prieskumy/>, accessed 01/09/2021.

8 Special Eurobarometer 502, 'Corruption' Report (June 2020), p. 115, <https://europa.eu/eurobarometer/surveys/detail/2247>, accessed 01/09/2021.

9 Cf. J. Pichrt, J. Morávek in this monograph.

10 Labour Code, No. 262/2006 Coll.

11 See J. Pichrt, J. Morávek, *Whistleblowing: National Report for the Czech Republic*, [in:] G. Thüsing, G. Forst, (eds.), *Whistleblowing – A Comparative Study*, Springer, Cham 2016, pp. 115–123.

12 Nařízení Vlády ze dne 15. června 2015 o opatřeních souvisejících s oznamováním podezření ze spáchání protiprávního jednání ve služebním úřadu, 145/2015 Coll.

13 See Zákon č. 234/2014 Sb. ze dne 1. října 2014 o státní službě. For more on proposals concerning a proper regulation of whistleblowing in civil service, see J. Morávek, [in:] J. Pichrt et al., *Zákon o státní službě, Komentář (Civil Service Act, Commentary)*, 1st ed., Wolters Kluwer, Prague 2015, pp. 720–724.

2.2. Hungary

In Hungary, whistleblowing is regulated by the Act CLXV of 2013 on complaints and public interest disclosures (further referred to as the Pkbt.).¹⁴ Pursuant to § 1(1) Pkbt., public authorities and local government entities examine complaints and public interest disclosures. Following §4 (1) Pkbt., a public interest disclosure may be made also via a secure electronic system for public interest disclosures guaranteeing anonymity of a whistleblower to the investigating organs. The system for submitting and registering public interest disclosures is maintained by the Commissioner for Fundamental Rights. Matters related to whistleblowing in the public administration sector are regulated by the Government Regulation 50/2013 on the system of integrity management at public administration bodies and the procedural rules of receiving whistleblowers' reports. The means of whistleblower protection are provided by the Act LXXX of 2003 on legal aid. The present regulations are criticised for many reasons, especially for the lack of clarity concerning the support measures, no rules defining which authority shall establish that the whistleblower is at risk, no rules concerning guarantees that a person can benefit from a protection and no psychological support to whistleblowers provided by the Government.¹⁵

2.3. Poland

Poland has no one act that would provide a comprehensive regulation of workplace whistleblower protection. The obligation to establish internal channels and the rules of reporting irregularities are specified for some sectors of business activity, which results from the influence of EU regulations. There is no institution in Poland that would direct whistleblowers to appropriate external channels or offer them legal advice and information on their rights. The rules of whistleblower protection are inferred from various dispersed legal acts, including the labour code,¹⁶ as well as

14 See the English version of the Act: http://www.ajbh.hu/documents/14315/130159/Act_CLXV_of_2013_.pdf/faa3e557-8e16-473f-1fa9-539e7cdb0f22, accessed 01/09/2021. About this act see H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia (Whistleblowing, Disclosing irregularities in employment relationships)*, Scholar, Warszawa 2020, pp. 101–103.

15 See A. Kun in the present monograph as well as European Network of National Human Rights Institutions, *State of the Rule of Law in the European Union, Reports of National Human Rights Institutions*, 2021, p. 305 <https://ennhri.org/news-and-blog/ennhri-publishes-its-second-annual-report-on-the-state-of-the-rule-of-law-in-europe/>, accessed 01/09/2021.

16 See D. Skupień, *Whistleblowing in Poland According to Legislation and Case Law*, [in:] G. Thüsing, G. Forst (eds.), *Whistleblowing – A Comparative Study*, Springer, Cham 2016, pp. 221–224 and, by the same author, *The legal protection of whistleblowers*, [in:] B. Lewaszkiwicz-Petrykowska (ed.), *Poland in Rapports polonais, XIX Congrès international de droit comparé*, Vienne, 20–26 VII 2014, Lodz University Press, Lodz 2014, pp. 258–261.

the case law of the Supreme Court on the acceptable criticism of the employer by the worker, which was developed on the basis of labour law cases initiated in situations when an employer terminated the employment of a whistleblower-worker. The legislation needs to be improved chiefly on account of deficiencies such as: lack of a legal definition of the whistleblower or the material scope of breaches of law or irregularities whose disclosure would qualify for protection, lack of clarity with regard to authorities competent for examining reports made through external channels, the follow-up character of protection against termination of employment, the applicability of protection mainly to workers hired under an employment relationship for an indefinite period, or the lack of clear rules concerning the burden of proof in matters concerning alleged discriminatory actions against whistleblowers.¹⁷

2.4. Slovakia

Slovakia, like Hungary, has chosen the path of standardizing the situation of whistleblowers in one main law. The first Slovak law on this matter was adopted in 2014 (Act No. 307/2014 Coll. on certain measures relating to reporting anti-social activities and on amending and revising certain acts) as part of the government's programme to strengthen whistleblower protection, taking into account the country's international legal obligations.¹⁸ This law was replaced in 2019 by the current Law No. 54/2019 Coll. on the protection of persons who disclose anti-social activities and on the amendment and supplementation of certain laws.¹⁹ The new act strengthened the position of whistleblowers in criminal proceedings, increased protection, and established a nationwide, independent administrative body for the protection of whistleblowers. As a result, there are no special sectorial acts covering specific areas of law in the Slovak Republic, but there is one general act protecting whistleblowers in both the private and the public sector. However, the act does not cover all cases of whistleblowing requiring protection. For this reason, anti-discrimination legislation also plays an important role in protecting whistleblowers who report anti-social behaviour. An amendment to the existing law is expected as a result of the obligation to transpose the Directive.²⁰

17 Cf. D. Skupień in this chapter as well as Ł. Bolesta, *In Search of a Model for the Legal Protection of a Whistleblower in the Workplace in Poland*, Peter Lang, Berlin 2020, pp. 135–139 or H. Szewczyk, *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia (Whistleblowing, Disclosing irregularities in employment relationships)*, op. cit., pp. 334–337.

18 For more details see T. Mičudová, *Zákon o oznamovaní protispoločenskej činnosti. Komentár (Act on reporting anti-social activities. Commentary)*, Wolters Kluwer, Bratislava 2016.

19 Zákon z 30. januára 2019 o ochrane oznamovateľov protispoločenskej činnosti a o zmene a doplnení niektorých zákonov.

20 Cf. P. Varga, V. Zoričáková in this monograph.

3. Legislation in France

France currently has three separate whistleblowing systems. One stipulates the principles of whistleblower protection and methods of reporting breaches in private or public legal persons with at least fifty workers as well as in commune, department and region offices with at least 10,000 inhabitants under Articles 7–15 of Loi Sapin 2²¹ and the implementing provisions to the act.²² Another is a system of reporting acts of corruption and trading in influence committed in France or abroad in partnerships or companies with at least 500 workers or in groups of undertakings with their registered seats in France with at least 500 workers whose turnover or consolidated turnover exceeds EUR 100 million (Article 17 of Loi Sapin 2). In turn, *Loi n° 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (Act No. 2017–399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies) introduced into the commercial code (*Code de commerce*) the duty to establish a vigilance plan in order to assess the risk and counteract serious violations of human rights, fundamental freedoms as well as of provisions on health and safety of persons and environmental protection. One of the elements of the plan is to establish, in cooperation with representative trade unions in the company, a mechanism of reporting and receiving reports about risks or breaches. The above obligation applies to partnerships and companies with their registered seats in France and with at least five thousand direct or indirect workers at their seat and in their subsidiaries as well as to partnerships and companies with their registered seats in France or abroad and with at least ten thousand direct or indirect workers at their seat and in their subsidiaries. Whistleblower protection is complemented by labour law provisions,²³ including anti-discrimination regulations. A special role in the process of reporting breaches is played by Défenseur des droits (Defender of Rights), which has informational functions with regard to whistleblowing and refers whistleblowers' reports to the competent external authorities.²⁴

21 Loi n° 2016–1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique. See P. Adam, *À propos de la protection générale des lanceurs d'alerte dans l'entreprise privée* (Commentaire de la loi dite « Sapin II » du 9 décembre 2016), *Revue de jurisprudence sociale*, 5/2017.

22 Décret n° 2017–564 du 19 avril 2017 relatif aux procédures de recueil des signalements émis par les lanceurs d'alerte au sein des personnes morales de droit public ou de droit privé ou des administrations de l'État.

23 Cf. G. Bargain in this monograph as well as Ł. Bolesta, *In Search of a Model for the Legal Protection of a Whistleblower in the Workplace in Poland*, op. cit., pp. 67–70, A. Rommel, *Ochrona sygnalistów we francuskim systemie prawnym (Whistleblower Protection in the French Legal System)*, [in:] B. Baran, M. Ożóg (eds.), *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości (Whistleblower Protection. Regulations Concerning Persons Reporting Irregularities)*, Wolters Kluwer, Warsaw 2021, pp. 197–204.

24 See Article 4 of Loi organique No. 2011–333 du 29 mars 2011 relative au Défenseur des droits (organic law No. 2011–333 of 29 March 2011 on the human rights defender), JORF No. 0075

4. Legislation in Slovenia

In Slovenia, there is no general or specific legislation providing comprehensive protection for whistleblowers.²⁵ Employees and public servants who report unlawful or harmful conduct enjoy protection only under specific laws, some of which were issued as a result of international obligations binding on the country. They also benefit from general protection under labour law. Leading the way is the Integrity and Prevention of Corruption Act 2010 (*Zakon o integriteti in preprečevanju korupcije*), which regulates the reporting of corruption and protection of the person reporting corruption, the reporting of unethical or illegal conduct and measures to protect the person making the report, implementing the Council of Europe Civil Law Convention on Corruption and the United Nations Convention against Corruption. Furthermore, reporting is regulated by the Slovenian State Holding Company Act (*Zakon o slovenskem državnem holdingu*), with the proviso that the protection of persons who report illegal practices thereunder is governed by the provisions of the Integrity and Prevention of Corruption Act 2010. Moreover, Slovenia has a number of laws implementing European Union regulations and directives in the field of banking, insurance, stock exchange, etc., which make it the responsibility of Member States to regulate the obligations of legal entities and their supervisory authorities to establish internal whistleblowing channels and ensure the protection of whistleblowers. These issues are regulated by acts on: banking (*Zakon o bančništvu*), insurances (*Zakon o zavarovalništvu*), financial instruments market (*Zakon o trgu finančnih instrumentov*), investment funds and management companies (*Zakon o investicijskih skladih in družbah za upravljanje*), prevention of money laundering and terrorist financing (*Zakon o preprečevanju pranja denarja in financiranja terorizma*), and trade secrets (*Zakon o poslovni skrivnosti*). However, it is pointed out that Slovenian labour law does not provide special protection for whistleblowers against retaliation by employers. However, the Labour Relations Act (*Zakon o delovnih razmerjih*) provides all employees (including public employees) with protection against unlawful practices of employers, such as harassment and mobbing, and wrongful termination of employment. In turn, the Law on Inspection (*Zakon o inšpekcijskem nadzoru*) imposes on inspectors the obligation to protect the source of the report or the source of other information. The Law on Mass Media (*Zakon o medijih, ZMed*), which guarantees journalists the right not to disclose sources, as well as the Law on

of 30 March 2011 amended by Loi organique No. 2016–1690 du 9 décembre 2016 relative à la compétence du Défenseur des droits pour l'orientation et la protection des lanceurs d'alerte.

25 See D. Senčur-Peček in this monograph and also by the same author: *Protection of Persons Reporting Corruption and Other Whistleblowers in the Republic of Slovenia*, [in:] G. Thüsing, G. Forst (eds.), *Whistleblowing – A Comparative Study*, Springer, Cham 2016, pp. 263–277, and *Delovnopravno varstvo žvižgačev (Labour law protection for whistleblowers)*, *Delavci in delodajalci*, 2–3/2015, pp. 223–248 as well as A. Nabernik, *Preden prijavim goljufijo, želim vedeti, kakšno zaščito bom dobil (Before I report fraud, I want to know what protection I will get)*, *Pravna praksa*, 33/2019, pp. 22–32.

Witness Protection (*Zakon o zaščiti prič, ZZPrič*) and the Criminal Code (*Kazenski zakonik, KZ-1*) also indirectly address the protection of whistleblowers.

The definition of unlawful, unfair or unethical practices, the methods of reporting and the protection of whistleblowers at the employer level are further regulated by so-called codes of conduct, codes of ethics or corporate integrity policies of larger companies, many of them state-owned. Most of them are also signatories to the 2014 Slovenian Corporate Integrity Guidelines developed by the Chamber of Commerce and Industry of Slovenia, the Managers' Association of Slovenia and the Slovenian Directors' Association upon the initiative of the Faculty of Economics, University of Ljubljana.

Due to the fragmentary nature of the legal protection of whistleblowers, it is proposed to implement the Directive through the adoption of a special law. Proposals to this effect have already been submitted to the Slovenian government by the Ministry of Justice.²⁶ Representatives of legal doctrine also put forward their own proposals.²⁷

II. Proposals for Changes

1. Method of transposition of the EU Whistleblower Protection Directive

Currently, there is a patchwork of legal regulations concerning whistleblowing and the status of whistleblowers in the European Union Member States. EU Directive 2019/1937 establishes common minimum standards for the protection of whistleblowers in the areas covered by its scope.²⁸ That is also the basic scope of its transposition into the law of the Member States. One can, of course, stop there. However, transposition provides an invaluable opportunity to create, throughout the Union and in the individual Member States, a system of whistleblowing and protection for whistleblowers that goes beyond the minimum required by the Directive. According

26 See Vlada R.S., Odgovor na poslansko vprašanje, No. 00104-4/2020/6, of 6/2/2020, [http://vrs-3.vlada.si/MANDAT18/VLADNAGRADIVA.NSF/71d4985ffda5de89c12572c3003716c4/66270c5c8633b33ec125850600373686/\\$FILE/odg_21.pdf](http://vrs-3.vlada.si/MANDAT18/VLADNAGRADIVA.NSF/71d4985ffda5de89c12572c3003716c4/66270c5c8633b33ec125850600373686/$FILE/odg_21.pdf), accessed 01/09/2021.

27 Compare D. Senčur-Peček in this monograph, I. Vuksanović, *Poziv za specialno zakonsko ureditev »žvižgačev«* (Call for special regulation of "whistleblowers"), *Pravna praksa*, 2010/45, p. 8, or A. Sedlar, *Zgodovinska prelomnica pri zaščiti žvižgačev v EU* (A historic turning point for whistleblower protection in the EU), *Pravna praksa*, 2019/13, pp. 6–8.

28 This applies to the articulated part of the Directive, as the recitals have no binding force; see Case C-162/97, Nilsson, (1998) ECLI:EU:C:1998:554, para 54, and are not transposed. However, they are important for the application and interpretation of its provisions, so taking them into account is important for the correctness of the transposition; see J. Mańnicki, *Metody transpozycji dyrektyw* (Methods of directives' transposition), *Europejski Przegląd Sądowy*, 2017, No. 8, p. 5.

to Article 25 of the Directive, Member States may adopt or maintain provisions which are more favourable in terms of the rights of whistleblowers. At the same time, the implementation of the Directive must not lead to a reduction in the already existing level of protection of their rights.

Member States are not bound by the limitations on EU competence set out in Article 2(1) of the Directive. It follows from Articles 2 and 25 that the Directive lays down common minimum standards of protection for persons who only report breaches of Union law. However, Member States may decide to extend the application of national provisions to other areas. In the light of recital 5, such extension should be made with a view to ensuring a comprehensive and consistent framework of protection for whistleblowers at the national level. The extension of protection was also encouraged by the European Commission, which pointed out that “a comprehensive approach is necessary to recognise the significant contribution of whistleblowers in preventing and combating unlawful activities detrimental to the public interest, and to ensure that they are adequately protected across the EU”²⁹

The Directive contains no indication as to the method of its implementation other than a general indication of the importance of ensuring balanced and effective protection of whistleblowers (recital 1). Therefore, it does not matter whether a Member State regulates the protection of whistleblowers in one or more legal acts. However, it seems useful to assume that implementation should ensure a comprehensive and coherent whole, in which reporting and disclosure channels, investigation and correction mechanisms, and legal measures to protect and support whistleblowers effectively interact.³⁰ Therefore, just as the Directive is currently a *lex generalis* for the protection of whistleblowers and leaves room for other, more specialized regimes to apply where such provisions exist in the EU, e.g. for money laundering, a national law on whistleblowing could be a *lex generalis* for specific provisions. In the countries surveyed, the principle of a single general act has been adopted in Slovakia and Hungary.

The possibility of using collective agreements as a means of transposing the Directive raises more questions. First of all, such a transposition route is permissible if the collective agreements are recognized as sources of generally applicable law in the legal system of the Member State.³¹ Besides, the Treaty on the Functioning of the European Union provides this possibility for directives adopted pursuant to its Article 153, which is not the case for Directive 2019/1937. Another issue, on the other hand, is how Member States implement their obligation to ensure that legal entities establish channels and procedures for internal notification and follow-up

29 European Commission (2018), Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Strengthening whistleblower protection at EU level*, COM (2018) 214 final, https://ec.europa.eu/info/sites/info/files/placeholder_10.pdf, accessed 01/09/2021.

30 Cf. Council of Europe, Protection of whistleblowers, Recommendation CM/Rec(2014)7 and explanatory memorandum, 2014, <https://rm.coe.int/16807096c7>, p. 19, accessed 01/09/2021.

31 More: S. Prechal, *Directives in EC Law*, Oxford University Press, Oxford 2005, pp. 85–87.

(Articles 8 and 9 of the Directive). The legal instrument introducing these channels and procedures in individual organizations may be by-laws, orders or similar internal acts. They may also be collective agreements, in particular where the internal channels are only open to employees – Article 8(2) of the Directive. Whichever of these instruments is chosen, the statutory provisions implementing the Directive should give them binding legal effect so that they can be treated as a source of rights and obligations.

Various types of soft law, such as company and group codes of conduct, codes of ethics or corporate integrity policies, can also be of ancillary importance in defining unfair or unethical practices, establishing methods for reporting and protecting whistleblowers.

Both collective agreements and soft law acts may be more relevant in areas not covered by EU law or national whistleblowing legislation. Here too, however, they must comply with the requirements of general legal provisions relevant to the protection of whistleblowers.

2. The relation between general and sectorial provisions

Pursuant to Article 3(1) of the EU Whistleblower Protection Directive, if specific rules on the reporting of breaches are stipulated in the sector-specific EU acts listed in Part II of the Annex, those specific rules apply. The provisions of the EU Whistleblower Protection Directive are applied to the extent to which the matter is not mandatorily regulated in those sectorial Union acts.

The acts listed in Part II of the Annex may be classified by sectors into those concerning: financial services, products and markets, preventing money laundering and terrorist financing, transport safety, and protection of the environment. Typically, the following rules of establishing external and internal reporting channels are specified in those provisions: autonomous, special channels that guarantee the confidentiality of reports and the protection of the personal data of the reporting person and of the person concerned.³² In some instances, anonymous reports³³ as

32 See e.g. Article 24(1)(c) of Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012, OJ L 337, 23.12.2015, pp. 1–34.

33 See Article 5(1)(a) of the Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation, OJ L 332, 18.12.2015, pp. 126–132, or Article 21(2) of Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No. 1781/2006 (Text with EEA relevance), OJ L 141, 5.6.2015, pp. 1–18, or Article 22 of the Directive 2013/30/EU of the European Parliament and of the Council

well as financial incentives for whistleblowers³⁴ are permitted. Moreover, sector-specific provisions include fairly laconic stipulations on the obligation to provide protection of whistleblowers from retaliatory actions, discrimination and other forms of unfair treatment.³⁵ As a prerequisite of granting protection against negative consequences to the reporting person, some sectorial acts explicitly require that they act in good faith.³⁶

In the light of Article 3(1) of the EU Whistleblower Protection Directive, the application of national acts that transpose the EU Whistleblower Protection Directive should be extended to reporting persons within the sectors listed in part II of the Annex to the Directive, while at the same time retaining the distinctness resulting from binding sector-specific provisions. In particular, it is necessary to ensure such persons minimum standards of protection resulting from the EU Directive 2019/1937 as well as to apply to specific sectors minimum requirements with regard to the structure of external reporting channels and to the obligations of the competent authorities as well as to the form of internal channels if provided in the sectorial provisions. Some sectorial provisions, in turn, e.g. concerning the anonymity of the reports, the mechanisms of ensuring data confidentiality or the use of financial incentives in the event of a new report, which result in administrative or criminal sanctions imposed against the entities that commit the breaches, may be a source of inspiration for the transposition of the EU Whistleblower Protection Directive.

3. Material Scope of Whistleblowing

The EU Whistleblower Protection Directive focuses on the protection of persons who report breaches of Union law listed in Article 2. However, it leaves certain freedom to the Member State authorities in terms of the possibility to extend the

of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC Text with EEA relevance, OJ L 178, 28.6.2013, pp. 66–106.

34 See Article 32(4) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance, OJ L 173, 12.6.2014, p. 1–61.

35 Cf. Article 24(1)(b) of Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012.

36 Cf. e.g. Article 37 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73–117.

scope of protection under national law with regard to areas or acts not covered by the Directive (Article 2(2)).

It seems that the scope of the future legislation that will transpose the Directive should be extended in such a way that it covers “breaches of law” in general³⁷, with regard to European Union law and international, national and foreign law. In practice, on account of the broad scope of harmonization or even unification of legal standards, it may be difficult to distinguish between breaches that concern Union law and not national law. Moreover, it would be beneficial to provide protection also to persons who report breaches of foreign law, which is particularly important in the context of groups of undertakings.

Following Article 5(1)(ii) and recital 42 of the EU Whistleblower Protection Directive, the concept of breach covers also abusive practices as defined by the case law of the Court, i.e. acts or omissions that do not seem to be unlawful in formal terms, but are not compatible with the object or the purpose of the law. It would appear useful to define the notion of abusive practices in national legislation by adopting the above-mentioned definition and also covering by the scope of national provisions abusive practices concerning legal acts in general, not only abuses of EU legal acts and areas falling within the material scope referred to in Article 2 of the Directive.

Furthermore, the material scope of breaches should be extended to breaches of codes of ethics, which are binding in some sectors or professions under applicable legislation. Moreover, it seems that future legislation should allow for the possibility for entities establishing internal channels to expand the material scope of breaches which may be reported through these channels under internal regulations applicable in a specific organization, such as CSR documents or codes of ethics. Such broadening of the material scope should result in extending the protection to reporting persons that are defined as such within a specific organization.

According to Article 5(2) of the Directive, the material scope should further cover reports of past (with no time limitation), current and potential breaches.

In light of Article 3(2) of the Directive, it shall not affect the responsibility of Member States to ensure national security or their power to protect their essential security interests. However, matters concerning defence, security and classified information shall not be excluded from the material scope, but rather specific reporting schemes for these issues should be provided.³⁸

37 See M. Łąga, *Unormowania dotyczące sygnalizacji – wzmacnianie demokracji w miejscu pracy (Regulations concerning whistleblowing – strengthening democracy in the Workplace)*, [in:] Z. Hajn, M. Kurzynoga (eds.), *Demokracja w zakładzie pracy. Zagadnienia prawne (Democracy in the workplace. Legal aspects)*, Wolters Kluwer, Warsaw 2017, p. 482.

38 See Transparency International, *Building on the EU Directive for Whistleblowing Protection. Analysis and Recommendations*, Position Paper 1/2019, p 3.

4. Personal Scope of Protection

4.1. General comments

Protection of whistleblowers is subordinate to the objective, expressed in Article 1 of the Directive, of protecting the public interest by improving the enforcement of the law and Union policies in specific areas. Ensuring a high level of protection for whistleblowers is intended to serve that purpose. This objective, suitably modified if the scope of the areas to which whistleblowing applies is extended, should be taken into account in the provisions implementing the Directive. Protection of whistleblowers can be direct, when it is granted directly to the whistleblower, and indirect, when retaliatory action is taken against persons related to the whistleblower (recital 41 of the Directive).

4.2. Personal scope of direct protection

The Directive defines a whistleblower as a “reporting person”. Direct protection is granted to any person who is a reporting person within the meaning of the Directive and fulfils the conditions for enjoying protection set out therein. In accordance with Article 5(7), this is a natural person who reports or publicly discloses information on breaches acquired in the context of their work-related activities.

In order to be protected, a whistleblower must, according to Article 6 of the Directive, have reasonable grounds to believe that the information was true at the time of reporting and falls within the scope of the Directive; in addition, they must not be recognized or registered as paid whistleblower. Whistleblowers may be excluded from protected whistleblowing if they make complaints solely in their private interest related to a conflict with another person. Some of these characteristics and conditions for protection raise questions in the context of implementation or are criticized.

The requirement that the whistleblower be a natural person excludes legal persons from the group of protected entities. We believe that this limitation is accurate. The purpose of the Directive is, as indicated above, to protect the public interest in improving respect for the law by protecting whistleblowers in the context of their work. The special reporting procedures, support measures and protection against retaliation provided for in the Directive are tailored to serve this purpose. This is in itself a sufficiently important, distinct and specific area for combating breaches of the law that threaten society. On the other hand, whistleblowing by legal entities, such as for example contractors of the wrongdoer or civil society organizations combating fraud and corruption, would, if the existing provisions are considered insufficient, require separate legislation. Another issue is the possibility of protecting organizations such as trade unions or other civil society organizations that provide

assistance to the whistleblower. This issue is related to the protection of facilitators and will be discussed in further comments.

The implementation work should also pay attention to the characteristic of the whistleblower, which according to Article 5(7) is the disclosure of information in a context of their work-related activities. This concept is explained in the glossary of the Directive in Article 5(9). It follows from this clarification that a whistleblower is protected if they receive information in circumstances or situations related to their work or professional activities through which they have had contact with the institution concerned by the disclosure. Moreover, they are protected from retaliation related to that activity, although the retaliation itself may be taken outside the work-related context (recital 97). The inclusion of this term in the glossary of the Directive means that it should be understood uniformly throughout the Directive. Thus, if the Directive defines, for example, a facilitator as “a person who assists a reporting person in a work-related context”, it means that they assist the whistleblower in circumstances related to the whistleblower’s professional activity and not their own. Moreover, it should be concluded from the wording of the provision under consideration that information the disclosure of which is subject to protection under the Directive must be obtained in connection to the circumstances of the whistleblower’s work, whereas such a connection does not have to characterize the information itself.

A further condition for the recognition of a whistleblower as a protected person, which is the requirement that the whistleblower must have reasonable grounds to believe that the information was true at the time of reporting and falls within the scope of the Directive, means that the Directive rejects the good faith test often used to protect a whistleblower who has disclosed information about misconduct that has turned out to be wrong. Instead, the Directive introduces a “reasonable grounds to believe” test, which does not refer to the whistleblower’s belief in the veracity of the information, but to the judgment that would be made by a reasonable and objective observer in the whistleblower’s position, i.e. one occupying a comparable position and possessing comparable knowledge and experience. Furthermore, the whistleblower does not have to provide authentic information to benefit from protection; it is sufficient that has a reasonable suspicion that wrongdoing has occurred (Article 5 (2)). As a result, the motives of whistleblowers should not be relevant in deciding whether they should receive protection (recital 32). In such a situation, the introduction in the implementing provisions of a requirement that the whistleblower act in good faith would constitute an impermissible, in the light of Article 25(1), adoption of provisions less favourable to whistleblowers than the standard set out in the Directive. An analogous test was adopted to assess the situation where the whistleblower mistakenly assumed that the reported breach was covered by the Directive. However, persons who intentionally and knowingly provided incorrect or misleading information at the time of reporting do not benefit from protection³⁹ and should be subject to effective, proportionate and dissuasive sanctions and be liable

39 Recital 32.

for damages caused by such conduct.⁴⁰ Special attention should be paid to the situation when a whistleblower makes a report without a proper understanding of whether there are reasonable grounds for reporting and whether the notified breach is covered by the Directive and, for example, reports information that is already publicly known or unfounded rumours or hearsay. In such a situation, according to recital 43, the whistleblower is not entitled to protection. We believe that the denial of protection should be limited only to the case where the misjudgement is due to the whistleblower's gross negligence.

It is sometimes argued that there can be no whistleblowing when disclosure is required by law on pain of sanction⁴¹. We believe this view is wrong. Accepting it would mean depriving whistleblowers of protection in all those cases where the law infers an employee's duty to inform about irregularities from the employee's duty of loyalty to the employer, from the employee's duty of care for the good of the workplace or from the civil servant's duty of care for the public good. On the other hand, we consider it appropriate to point out in recital 30 that the Directive should not apply to cases in which persons who, having given their informed consent, have been identified as informants or registered as such in databases managed by authorities appointed at national level, such as customs authorities, and report breaches to enforcement authorities in return for reward or compensation. Such reports are made pursuant to specific procedures that aim to guarantee the anonymity of such persons in order to protect their physical integrity and that are distinct from the reporting channels provided for under the Directive. At the same time, in accordance with recital 62, the Directive should also grant protection where Union or national law requires the reporting persons to report to the competent national authorities, for instance as part of their job duties and responsibilities or because the breach is a criminal offence.

The Directive refers to the public interest in a number of recitals, underlines the importance of whistleblowing for the protection of the interests of the Union and of Member States, and even links whistleblowing to the protection of the public interest,⁴² but does not make protection of whistleblowers conditional on acting in that interest.⁴³ Only the admissibility of public disclosure has been made subject in certain situations to an action in the public interest.⁴⁴ Therefore, making the

40 Article 23(2) and recital 102.

41 D. Banisar, *Whistleblowing: International Standards and Developments*, [in:] I. Sandoval, (ed.), *Corruption and Transparency: Debating the Frontiers Between State, Market and Society*, World Bank-Institute for Social Research, UNAM, Washington, D.C, 2011, <https://ssrn.com/abstract=1753180>, p. 5–6, accessed 01/09/2021.

42 E.g. recitals 1 and 31.

43 This also applies to whistleblowers who, to the extent covered by the Directive, disclose business secrets acquired in a work-related context. In such a case, the defendant whistleblower does not have to prove that they acted in defence of the general public interest, as required by Article 5(b) of Directive 2016/943 of 8 June 2016 on the protection of secret know-how and classified commercial information (business secrets) against their unlawful extraction, use and disclosure; see Article 21(7) and recital 98 of the Directive.

44 Article 15 (1)(b)(i).

protection in the provisions implementing the Directive conditional on an action in the public interest is unacceptable. At the same time, the Directive indicates a way to relieve signalling systems from reports clearly unrelated to the protection of the public interest. Namely, in accordance with recital 22, reports concerning grievances about interpersonal conflicts between the reporting person and another worker can be channelled to other procedures. We believe it is appropriate to introduce such a regulation to the provisions implementing the Directive. The use of such a model regulation frees the whistleblower and the entities assessing the notification from considerations of the notion of public interest and doubts as to whether the report takes the public interest into account. At the same time, it makes it possible to sift out reports that are clearly not intended to protect the public interest and to extend protection to a broader group of whistleblowers than would be the case if the public interest concept were adopted. It is a simple instrument, easy to understand by the addressees of the law and easy to evaluate by the authorities applying the law, which at the same time has the good effect of not protecting reports obviously made in the private interest. If the solution suggested in recital 22 as described above is not adopted, reports in the purely private interest will enjoy protection under the Directive. However, the protection of whistleblowers motivated by the expectation of personal gain or financial gain should not be excluded or limited. Indeed, such motives do not preclude the disclosure of truthful information concerning an irregularity, the disclosure of which is generally in conformity with the purpose of the Directive as expressed in Article 1.

Some separate remarks are necessary to determine the personal scope of protection of whistleblowers who make a public disclosure. Article 15 of the Directive, which sets out these conditions, makes protection conditional on disclosure where the whistleblower has not received feedback within the required time-limit after making an internal or external report, or where this feedback shows that appropriate follow-up action has not been taken.⁴⁵ Coverage will also be justified without prior internal or external report if the whistleblower has reasonable grounds to believe that the special circumstances indicated in Article 15 (1)(b) have occurred. We are of the opinion, as stated above, that the term “reasonable grounds to believe” refers to the judgment that a reasonable observer in the whistleblower’s position would make. It also follows from an interpretation of the above provision in conjunction with Articles 5(7) and 6 of the Directive that the described conditions of protection in the case of public disclosure are of additional nature, which means that in order to obtain protection, a whistleblower making a public disclosure must comply with the previously described conditions set out in these provisions.

The Directive uses a specific solution with regard to anonymous signalling. Namely, it leaves it to the discretion of the Member States whether legal entities and competent authorities are to accept and follow up anonymous reporting. At the same time, even where national law does not accept anonymous reporting, if such reporting is

45 Cf. recital 79.

accepted or an anonymous public disclosure is made and the whistleblower is identified, they are protected from retaliation. This means that an anonymous whistleblower who has made a public disclosure under the conditions indicated in Article 15(1)(b)(i) and has been identified is protected regardless of whether the Member State accepts anonymous reports through internal and external channels. The Directive also provides that where anonymous reporting is permitted under national law, it should be followed up with due diligence.⁴⁶ It would seem worthwhile to supplement this vague provision with a clear imposition of the obligation on operators of internal and external channels to maintain confidentiality when the identity of anonymous persons is disclosed, and when their identity is ascertainable.

In Article 4(1-3), the Directive indicates a wide range of persons who should be considered whistleblowers. These include both employees and self-employed persons, shareholders, members of corporate bodies, volunteers, etc. This list is illustrative and minimal. Transposition may extend this list, but not close it. Protection should apply to all persons who are reporting persons within the meaning of the Directive and who meet the conditions laid down therein for benefiting from the protection. However, important doubts concern the definition of persons entitled to protection in Articles 4(2) and 4(3). These provisions also recognize as whistleblowers individuals who report breaches of which they become aware after the relationship in which they had with a legal entity has ended, as well as individuals who report breaches concerning information they obtained in the course of recruitment or negotiations that preceded the establishment of a legal relationship with that entity. The English version of the text of the Directive defines this relationship as a “work-based relationship”. In contrast, many other language versions, including the languages of the countries surveyed, use the term “employment relationship”. This difference is significant because it leads to a vital differentiation between the circle of whistleblowers and the possibilities of reporting breaches. In our opinion, the relationship indicated above cannot be equated with an employment relationship. It refers to all relations connected with the broadly understood work of persons mentioned in Article 4(1) and other persons who report or publicly disclose information on breaches acquired in the context of their work-related activities. Such a conclusion is justified by a systematic interpretation of Article 4(1) as a whole and by the purpose of that provision and of the Directive as a whole, which is to create the widest possible opportunities for reporting breaches in a work-related context.⁴⁷ In view of the above, we believe that the term “work-based relationship” (relationship based on work) should be used in the provisions implementing the directive. This is also the safest solution, because this interpretation is more beneficial to whistleblowers’ rights than the use of the term “employment relationship”.

⁴⁶ Article 9(1)(e).

⁴⁷ The correctness of such an interpretation is also confirmed by the last sentence of recital 39, as well as by the Council of Europe’s position explaining the use of the same term; Council of Europe, 2014, p. 20.

Finally, consideration should be given to certain proposals made in the literature to extend legal protection for whistleblowers beyond the personal scope of the Directive. This applies in particular to persons who only intend or attempt to disclose information and to persons who do not disclose or do not even intend to report but are suspected of having done so or may do so.⁴⁸ The protection of these persons is currently limited to requiring Member States to impose a prohibition on hindering or attempting to hinder reporting and sanctions for breaches of this prohibition.⁴⁹ Such protection does not appear to be sufficient, however, as punishing the offender does not remedy the harm suffered through retaliation. Such protection should be afforded, for example, by expressly providing in national legislation for the general rule that a person suspected of whistleblowing, and intending or attempting to carry out whistleblowing, may not for that reason suffer retaliation in a work-related context. Although even without such an explicit reservation in the law the disclosure of such circumstances in court proceedings should result in the court granting protection in the form of, for example, acknowledging the wrongfulness of the termination of the employment contract or another act of the employer, but this may prove ineffective, for example, in a case for compensation for the termination of a civil law contract, where the reason for the termination may be irrelevant. Stronger protection would be provided by an appropriate application of Chapter VI of the Directive to the above-mentioned groups of persons.

4.3. Personal scope of indirect protection

Indirect protection is extended by the Directive to the facilitators, i.e. natural persons who assist the whistleblower in the reporting process, third parties connected with the whistleblower and legal entities which are owned by the whistleblower or are otherwise connected with the whistleblower in a work-related context. Several issues need to be raised in connection with this regulation and in the context of implementation.

The first comes down to the question whether it is permissible to broaden in national legislation the circle of persons covered by indirect protection. A comparison of the way in which the personal scope of direct protection is defined in Article 4(1) and that of indirect protection in Article 4(4) indicates the intention to limit the entities covered by indirect protection to the indicated three groups of persons. Their list, contained in Article 4(4) of the Directive, is not of an open nature. The possibility of extending this protection to other entities would have to be based on an expansive interpretation of Article 25(1), which empowers Member States to adopt provisions more favourable to the rights of whistleblowers. Literalistically,

48 See Transparency International, 2019, pp. 5–6; Transparency International, 2018, pp. 11–13; Council of Europe, 2014, p. 38.

49 Article 23 (1)(a).

the extension of the personal scope of indirect protection is not the adoption of provisions more favourable “to the rights” of whistleblowers. However, this is, as the wording of Article 25(1) is clarified in recital 104, a measure that is more beneficial to whistleblowers. We believe that the latter interpretation is more justified.

The scope of the term “facilitator” also requires some comment. It is argued that the definition of facilitator in the Directive excludes from protection trade unions as such, i.e. as legal persons and other civil society organizations and their activists. We believe that support and protection for such organizations is needed. However, it should be introduced by a special regulation, other than a directive explicitly aimed at protecting individuals. Employees and activists of organizations other than trade unions, on the other hand, remain outside the personal scope of the Directive due to the fact that they are not acting in a work-related context. Including them as natural persons in the protection against retaliation seems justified. However, this would have to entail an extension of the notion of facilitator also to other natural persons operating outside a work-related context. This is because they may, due to lack of organizational support, be more vulnerable to retaliation than civil society activists. We also believe that protection should be awarded not only to those who assist the whistleblower in making the report, but also to those who help the whistleblower after the report has been made, e.g. by protecting the whistleblower from being exposed or by opposing adverse actions taken against them. In our opinion, persons who disclose information supplementing information about breaches previously disclosed by another person are not facilitators. Such persons should be considered as separate whistleblowers.

5. Internal reporting channels

5.1. Obligated entities

According to the Directive, internal channels are of fundamental importance.⁵⁰ It is also in the direct interest of the entities in which such channels should be set up that they are established as well as function smoothly and enjoy the trust of whistleblowers – because this gives such organizations the opportunity to not only remove irregularities, but also examine a case internally, without it being brought to the attention of external bodies or gaining publicity.

In principle, taking into account the exceptions under Article 8(4) and Article 8(7) of the EU Whistleblower Protection Directive, reporting channels should be established in private undertakings with at least 50 workers in the broad sense of Article 45 TFEU. The obligation to establish internal reporting channels in smaller undertakings, with more than 20 and fewer than 50 workers, apart from the

⁵⁰ Article 8(1), recital 47 of the EU Whistleblower Protection Directive.

above-mentioned exceptions resulting from the Directive, does not seem to be a right solution on account of the significant financial effort needed to set up a channel that meets all requirements, i.e. is autonomous, fully confidential and maintained by specialized and professionally trained staff members as well as enables a prompt and efficient internal investigation. What seems problematic is the ability to keep confidential the identity of the whistleblower within minor organizations. This is why it would appear more beneficial for persons who are employed in such entities to make their reports directly through external channels.⁵¹

In turn, it seems that in all legal entities in the public sector, irrespective of the number of inhabitants of the administrative unit in which the entity or body operates, internal channels should be established.

In the Directive, entities obliged to set up internal reporting channels are usually referred to as “legal entities” or “organizations”. Occasionally, the terms “employer”⁵² or “undertaking”⁵³ are used. The occasional use of the latter two terms is understandable, since the entity obliged to establish an internal channel need not be an employer or an undertaking, although it is most often both.⁵⁴

The use of the inclusive term “legal entity” and not the terms “natural person” and “legal person” justifies the thesis that the basis of legal capacity is not a defining criterion for a “legal entity”.⁵⁵ The role of “legal entity” and the semantic contexts in which the term, with one exception,⁵⁶ appears in the Directive support the conclusion that it can cover both natural and legal persons, as well as associations of persons or organizational entities having legal capacity, despite the lack of legal personality, such as general partnerships and partnerships under some national laws. It is essential that it is a unit in which, by virtue of its separation and having its own set of workers and collaborators and tasks, there may be breaches for which an internal channel is needed and that it is equipped with the legal powers to respond appropriately to breaches in accordance with the procedures for the operation of such a channel. It is desirable, however, that that entity should be able to take legal responsibility. It is, in fact, as has been pointed out, most often the person who is the “person concerned” by the report or who is the object of the report, whether it concerns an organ or an employee. Therefore, the Directive defines the “person

51 Cf. K. Wygoda, D. Wasiak, *Poufność informacji o sygnaliście jako ultima ratio systemu compliance (Confidentiality of information about the whistleblower as the ultima ratio of the compliance system)*, [in:] B. Baran, M. Ożóg (eds.), *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości (Whistleblower Protection. Regulations Concerning Persons Reporting Irregularities)*, Wolters Kluwer, Warsaw 2021, p. 111.

52 Recital 47.

53 E.g. Article 4(1)(c).

54 See Z. Hajn in this monograph.

55 Similarly for example, in recital 8 and Article 2(c) of the Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

56 See Article 4(4)(c).

concerned” as a natural or legal person who is referred to in the report or public disclosure as a person to whom the breach is attributed or with whom that person (i.e. person to whom the breach is attributed) is associated. The person identified as the infringer therefore ought to be a natural or legal person, as this guarantees the capacity to bear legal liability, in particular civil liability for damages. As seems appropriate, entities having legal capacity equivalent to legal personality, such as certain companies without legal personality, should be put on an equal footing. However, the lack of such capacity should not disqualify an entity from being a legal entity within the meaning of the Directive. In such a case, the law should ensure that legal liability is borne by the natural or legal persons who “stand behind” such an entity, such as a company behind its branch.⁵⁷

The specificity of the concept of “legal entity” in the Directive is further revealed in relation to groups of undertakings. Internal reporting procedures should enable legal entities in the private sector to receive and investigate in full confidentiality reports by the workers of the entity and of its subsidiaries or affiliates (“the group”), but also, to any extent possible, by any of the group’s agents and suppliers and by any persons who acquire information through their work-related activities with the entity and the group.⁵⁸ The establishment of an internal channel at group level does not prevent it from also being set up at the level of the individual companies in the group. Moreover, it is compulsory for entities with at least 50 employees.

It should be added that a whistleblower may make reports through several internal channels administered by legal entities with which they have a working relationship.

A reporting system at the level of a group’s central management, maintained not only in the official language of the state in which the group is registered, but also in other languages which are appropriate for a given group, would be especially useful in the case of reports concerning breaches involving the group’s supranational activity, e.g. violations of human rights, violations of foreign law or complaints of irregularities in the operation of controlled companies affecting interests of the whole group.

5.2. The role of worker representative bodies

An internal reporting channel should be consulted or agreed upon, depending on the provisions and practice in force in a given country, with trade unions or other worker representatives.⁵⁹

57 This problem may concern countries such as Poland, where the status of employer is also granted to entities without legal personality, if they have the so-called capacity to hire employees. This applies in particular to governmental organizational units, local government units and separate internal units of private sector companies.

58 Recital 55.

59 V. Abazi, Guide. Internal Whistleblowing Channels and the Role of Trade Unions, Eurocadres, 2021, <https://www.eurocadres.eu/publications/guide-internal-whistleblowing-channels-and-the-role-of-trade-unions/>, accessed 01/09/2021.

Furthermore, trade unions or workers' councils should have right to information and consultation with regard to the number of reports and the results of investigations in matters covered by the scope of these bodies' activities, such as in particular breaches of provisions concerning occupational health and safety, anti-discrimination, mobbing or violence in the workplace. Reports of labour law breaches directly to trade unions should not be treated as public reports. Moreover, the content of recital 45 of the EU Whistleblower Protection Directive must be criticized, as it places on an equal level the status of reports made through online platforms or social media and reports directed to trade unions. Situations of public disclosures taking place for example at trade union meetings should be distinguished from reporting to trade union officials or other employee representatives in full confidentiality where a whistleblower counts on their support. The attention should be drawn to a fact, that especially in the context of reporting breaches of labour law, trade unions are natural allies of workplace whistleblowers who could give them advice, support or inform about the appropriate ways or methods of conduct.⁶⁰ For this reason trade union representatives or other employee representatives are qualified as facilitators,⁶¹ granted protection against retaliation and bound by the obligation of confidentiality.⁶²

5.3. Necessary elements of the design of internal channels

When establishing an internal reporting channel, the relevant entity should in a clear and accessible manner specify the material scope of the reports, the reporting procedure, the group of persons entitled to use the channel as well as the follow-up. The relevant information should be easily accessible, including, also to persons other than workers who are in contact with the entity in the context of their work-related activities, such as service-providers, distributors, suppliers and business partners if a given channel is open to reporting from these persons.⁶³ The access to the internal reporting channel should be given not only to workers, but also to other persons who cooperate with the entity in a work-related context.⁶⁴

It should be explicitly mentioned in the information about the internal channel that there is no obligation to use said, prior to making a report through an external channel.⁶⁵

60 See also V. Abazi, *The European Union Whistleblower Directive: A 'Game Changer' for Whistleblowing Protection?*, *Industrial Law Journal*, Volume 49, Issue 4, December 2020.

61 See recital 41 of the EU Whistleblower Protection Directive.

62 See Article 5(8) of the EU Whistleblower Protection Directive. On this subject cf. G. Bargain in this monograph.

63 Cf. recital 59 of the EU Whistleblower Protection Directive.

64 The option to enable other persons than workers to report within internal channels is provided for in Article 8(2) second sentence of the EU Whistleblower Protection Directive.

65 About the autonomy of a whistleblower in this context see W. Vandekerckhove, *Is It Freedom? The Coming About of the EU Directive on Whistleblower Protection*, *Journal of Business Ethics*, <https://doi.org/10.1007/s10551-021-04771-x>, accessed 01/09/2021.

A clear and easily accessible information should be further provided, pursuant to Article 9(1)g of the Directive, regarding the procedures for reporting externally to competent authorities. In addition, the body that operates the internal channel should make it clear that when the whistleblower is in work-related relations with several legal entities, they can make the report to the organization related to the acquisition of information.

An internal channel should be autonomous in relation to other communication channels within the organization and be operated by a constant, limited number of staff members who have been professionally trained in the operation of such a channel and have legal expertise that enables them to assess the character of such a report as well as personal data protection knowledge. Furthermore, they should have relevant authorizations concerning personal data processing.

When an organization decides to cooperate with an external entity, it is recommended that it is an entity that provides services reserved to regulated professions, such as attorneys, attorneys-at-law, auditors or tax advisors, whose representatives are bound by professional privilege and guarantee confidentiality to the persons who make a report through them.⁶⁶

An internal channel should render it possible to make reports not only orally or traditionally, in writing, but also electronically, so as to protect the identity of the reporting person with the use of modern technology.⁶⁷ In this context it is worth noticing that a new norm ISO 37002 Whistleblowing Management System-Guidelines⁶⁸ was elaborated by International Organisation for Standardisation, according to which internal reporting channels should be founded on three principles: confidentiality, impartiality and whistleblower protection.

The time limit for acknowledging the receipt of the report – seven days – is laid down explicitly in Article 9(1)(b) of the EU Whistleblower Protection Directive. The timeframe to provide feedback should not exceed three months (Article 9(1)(f)). Still, if according to the report a criminal offence has been committed or planned, following the necessary assessment of the accuracy of the allegations as part of internal investigation, in our opinion the matter should be immediately referred to the relevant external channel. The internal channels are not appropriate to deal with such matters. In matters other than criminal offences, referring a report to a different channel should be subject to the whistleblower's consent, due to the fact that whistleblowers might have reasons to choose a specific channel.⁶⁹

66 Cf. K. Wygoda, D. Wasiak, *Poufność informacji o sygnaliście jako ultima ratio systemu compliance (Confidentiality of information about the whistleblower as the ultima ratio of the compliance system)*, [in:] B. Baran, M. Ożóg (eds.), *Ochrona sygnalistów. Regulacje dotyczące osób zgłaszających nieprawidłowości (Whistleblower Protection. Regulations Concerning Persons Reporting Irregularities)*, op. cit., p. 111.

67 Cf. E. Bielak-Jomaa in this monograph.

68 Management System-Guidelines, <https://www.iso.org/standard/65035.html>, accessed 01/09/2021.

69 See TI, Transparency International, *Building on the EU Directive for Whistleblowing Protection. Analysis and Recommendations*, Position Paper 1/2019, p. 10.

6. External reporting channels

6.1. The role of the central authority for whistleblowers

None of the national legislations analysed under the WhistlePro Grant provides for one external body that would receive and examine reports of breaches of the law. As a matter of fact, such a solution would not be optimal due to the varied subjects of the reports, which concern matters related to all sorts of areas of the state's activity.

Thanks to a multitude of external channels,⁷⁰ a report may be examined by the authority which is most competent in a given matter. On the other hand, however, it creates uncertainty in potential whistleblowers as to the proper external channel which they should use to make the report, and often discourages them from whistleblowing. A method where whistleblowers are directed to various external channels by an institution operating at the central level is used in France and in Hungary. In both these countries, this role is played by the constitutional body competent for the protection of human rights. In France it is the *Défenseur des droits* (Defender of Rights), and in Hungary – the Commissioner for Fundamental Rights. In Slovakia, an Office for the Protection of Whistleblowers is currently being established. It is going to have broad competences including, among others, the right to suspend, by means of an administrative decision, labour acts performed by the employer against the whistleblower.

It should be advocated that in those countries which have not yet established a central authority for whistleblowers, such an authority be established. Such an authority would ensure, among others, that reports are directed to appropriate external channels by possibly setting up one protected electronic channel as for example in Hungary within the Office of the Commissioner for Fundamental Rights.⁷¹ It would not, however, act as the exclusive external reporting channel. Furthermore, its role would be to inform about the appropriate external channels and to advise potential and current whistleblowers about their rights and means of protection against retaliation.⁷² It is recommended that the authorities designated to perform the above functions join the already existing Network of European Integrity and Whistleblowing Authorities based in the Hague. It is highly desirable that the central

70 As follows from the information provided by the Office of the Hungarian Commissioner for Fundamental Rights, the Commissioner remains in contact with 280 public authorities via an electronic channel for external reports that it maintains. See A. Gulyas, Z. Baksa, [in:] I. Miernicka, A. Pietras, D. Skupień (eds.), *Workplace Whistleblower Protection in the V4 Countries, France and Slovenia. Current Regulations and Proposed Changes. Book of Abstracts. International Scientific Conference Organised Online. Department of European, International and Collective Labour Law. Faculty of Law and Administration, University of Lodz, 15th June 2021*, Lodz University Press, Lodz 2021, p. 16.

71 See chapter 2 of Act CLXV of 2013.

72 Compare Article 20(3) of the EU Whistleblower Protection Directive.

bodies responsible for receiving reports cooperate. Whistleblowing may, after all, concern breaches of foreign or Union law, and the report should be directed to the appropriate whistleblowing authority in another country or to the competent Union body. Albeit it exceeds the scope of the present analysis, it should further be advocated that a central authority for whistleblowers be set up at the level of the European Union. This body would direct potential whistleblowers to the appropriate Union bodies and institutions. At present, such duty to inform about the above-mentioned bodies and institutions falls upon legal entities responsible for the organisation of procedures for internal reporting (Article 9(1)(g) of the directive) what may exceed their competencies.

Projects aiming at entrusting the competences of a national office for whistleblowers to ministry departments or other institutions within government administration should be assessed negatively. Such a role should be performed by an institution with a legislative mandate that is autonomous from the executive power. As it clearly results both from Article 20(3) of the Directive as well as from its recital 89 the administrative authority designed to support whistleblowers should be ‘independent’.

In the event that the central authority competent for whistleblowing does not exist and it is not planned to establish such an authority due to e.g. significant costs, a creation of a separate entity for whistleblowing within an institution enshrined in the constitution, such as the office of the national ombudsman, is recommended. An example could be the Department for Whistleblower Protection and Customer Services at the Office of the Commissioner for Fundamental Rights in Hungary.

6.2. Organisation of the external channels

Reporting channels maintained by “external” institutions should be autonomous and independent in relation to other reporting channels operated by that institution. As follows from the past experience of the Hungarian Commissioner for Fundamental Rights, the boundary between internal channels and external channels in authorities or institutions is often blurred.⁷³ Such a situation should be avoided in the future.

The external reporting channels should guarantee the whistleblower the full confidentiality, the protection of their personal data and of a person whom the report concerns as well as ensure an efficient handling of the report. Depending on the nature of the case, anonymity of the report should be allowed in most serious instances, where the whistleblower or their relatives are in danger of harm to health or life. Currently, certain sector-specific provisions permit anonymous reporting.

73 See A. Gulyas, Z. Baksa, [in:] I. Miernicka, A. Pietras, D. Skupień (eds.), *Workplace Whistleblower Protection in the V4 Countries, France and Slovenia. Current Regulations and Proposed Changes. Book of Abstracts. International Scientific Conference Organised Online. Department of European, International and Collective Labour Law. Faculty of Law and Administration, University of Lodz, 15th June 2021*, op. cit., p. 16.

It seems that, also in those countries which manifest scepticism as to the admissibility of anonymous reports at least a reservation should be made in the general provisions transposing the Directive that such reports have to be examined and the factual circumstances mentioned in the report should be investigated. Another solution would be, in case the central authority for whistleblowing operates the protected electronic channel, that whistleblowers making a public interest disclosure to this protected channel may request that their personal data are made available only to this central authority and the disclosure is transmitted in a anonymised format to a competent external body.⁷⁴

When a report is made non-anonymously, it is necessary to ensure, by analogy to the case of internal channels, full confidentiality of the whistleblower's personal data, taking into account the possibilities offered by modern technologies. An example could be the electronic system for reporting breaches to the Hungarian Commissioner for Fundamental Rights.⁷⁵ Other methods of ensuring confidentiality are for example a dedicated telephone line or a use of double envelopes.

A vital element of an external reporting system that is expected to be safe for the whistleblower is to designate for its operation properly trained staff members – specialists of good repute and high professional ethics.

It does not seem advisable that external channels enable a selection of reports according to the level or priority, even though such an option is allowed by Article 11(3) of the Directive. However, Member States could consider introducing the solution provided for in Article 11(4) of the EU Whistleblower Protection Directive, under which it is possible not to follow up on repetitive reports that contain no new information in comparison to the previous reports.⁷⁶

6.3. Financial incentives

The issue of financial incentives for whistleblowers is controversial. The competence to grant remuneration has been vested e.g. in the Slovak Office for Whistleblower Protection,⁷⁷ albeit such decisions are arbitrary and not actionable. Moreover, the whistleblower may not claim any remuneration. The award of remuneration in Slovakia depends on a number of factors, e.g. whether the report resulted in the detection and punishment of the perpetrator in criminal or administrative proceedings, what the extent of the whistleblower's participation in clarifying serious breaches and identifying the perpetrator was, whether the whistleblower lost any earnings as a result of making the report and what the size of the seized or returned property was.

74 Compare § 6 of Hungarian Act CLXV of 2013. See also M. Terracol, *A Best Practice Guide for Whistleblowing Legislation*, Transparency International, 2018, p. 20, <https://www.transparency.org/en/publications/best-practice-guide-for-whistleblowing-legislation>, accessed 01/09/2021.

75 Cf. Chapter 2 of the Hungarian Act CLXV of 2013.

76 Cf. Section 2/A5 of the Hungarian Act CLXV of 2013.

77 Cf. Section 9 of the Slovak Act of 2019.

The issue of financial incentives for whistleblowers should be left to national legislation. Above all, fight against certain types of breaches may be a political priority in a specific period of a state's functioning. Such priorities could be in particular fight against corruption, terrorism or organized crime. Therefore, state authorities should be free to guarantee financial rewards or a certain percentage of the recovered property. Still, such solutions require a great deal of caution so that whistleblowing, which is an act of social sensitivity, does not morph into commercial activity – into remunerated informing, which has negative historical connotations in Central and Eastern Europe.

7. Public disclosures

Under Article 15 of the EU Whistleblower Protection Directive, a public disclosure is a last resort. On the one hand, a whistleblower should have reasonable grounds to believe that the breach may constitute an imminent or manifest danger to the public interest, for instance where there is an emergency situation or a risk of irreversible damage, or, in the case of external reporting, that there is a risk of retaliation or there is a low prospect of the breach being effectively addressed on account of 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.

In order to qualify for protection in case of the public disclosure, the whistleblower should first make an internal and an external report or directly an external report. A public disclosure may be made when no appropriate action was taken in response to the report. In that context, it should be proposed that national legislations that transpose the EU Whistleblower Protection Directive specify the meaning of the expression “appropriate action”, whose lack opens the door to public disclosures. Recital 79 of the Directive does not give a sufficient explanation of this concept.

Furthermore, the requirements for protection in case of a public disclosure under EU Whistleblower Protection Directive vary from conditions elaborated in the case law of the European Court of Human Rights.⁷⁸ Especially, there is uncertainty concerning the meaning of such concepts used in Article 15(1)b of the Directive as an ‘imminent or manifest danger to the public interest’, an ‘emergency situation’, a ‘risk of irreversible damage’ or a ‘low prospect of the breach being effectively addressed’. This uncertainty may have negative consequences for the protection of a whistleblower against retaliation. Therefore, it is proposed that temporary safeguards in case of public disclosure are introduced into national legislations, in order to prevent any immediate action by the employer before the circumstances are clarified.⁷⁹

78 Cf. M. Górski in the present monograph.

79 Cf. D. Senčur Peček in the present monograph.

8. Protection against retaliation

8.1. General remarks

The protection of whistleblowers against retaliation by the entity to which a report or public disclosure relates is of key importance to achieving the objectives of the Directive as well as the objectives of the national implementing provisions. The problems related to the implementation of the protection provisions of the Directive covered in this section relate to two groups of issues, i.e. the prohibition of retaliation and the measures to protect against retaliation. For the sake of full clarity of further comments, let us recall that, according to the findings set out above in point 4, a whistleblower is protected, including protection from retaliation, if: they are a natural person, they have reported or publicly disclosed information about breaches, they obtained the information in a context related to their work, they had reasonable grounds to believe that the information was true at the time of reporting and falls within the scope of the Directive or possibly legal provisions extending the material scope of reporting breaches, they not been registered as a paid whistleblower and their report is not in the nature of a complaint made solely in their private interest related to a conflict with another person. These conditions derive from Articles 5(7) and 6 of the Directive.

8.2. Prohibition of retaliation

Article 19 of the Directive requires Member States, in implementing its provisions, to prohibit all forms of retaliation as well as threats and attempts of such action against whistleblowers and persons associated with them, as defined in Article 4 of the Directive. Encouraging or recommending retaliation by an employer or other duly placed persons should also be considered as retaliation (recital 87). However, the prohibition applies to the acts of this kind themselves and is in the nature of an obligation to refrain from the conduct indicated. We believe that an important strengthening of the protection at issue would be to complement this prohibition in national legislation by imposing on the employer or other legal entity an obligation to prevent retaliatory behaviour within the organization it manages. Such a provision would also have a preventive function.

The statement in Article 5(11) that retaliation is any direct or indirect conduct occurring in a work-related context means that the retaliation must be linked to the whistleblower's work activities. At the same time, however, it should be borne in mind that action against whistleblowers can also be taken outside the work-related context, e.g. through defamation actions (recital 97). Retaliation is any conduct that causes or is likely to cause harm (recital 44). It is thus any intentional wrong inflicted on the whistleblower or a person associated with him/her within the meaning of

Article 4(4). The implementation of Article 19 must therefore consist first in establishing a general prohibition of all retaliation. A good model for the general form of the prohibition is §11 of the Hungarian whistleblowing law,⁸⁰ which considers as unlawful retaliation any action taken as a result of disclosure that may cause adverse consequences for the whistleblower, even if it would otherwise be lawful. It is then necessary to provide a list of examples of such forms, modelled in particular on Article 19(a–o) of the Directive. This list should also include examples of actions directed against persons whose work-based relationship is not an employment relationship, such as volunteers, suppliers of goods or contractors.

8.3. Measures for protection against retaliation

In order to protect whistleblowers from and in the case of retaliation by the employer (other legal entity), the Directive provides an extensive set of protection measures in Article 21. Member States should ensure that these measures or other rights set out in the Directive cannot be waived or limited by contract, specific policy, form or conditions of employment of the employee, or by pre-dispute arbitration agreement (Article 24).

However, in order to benefit from a substantial part of these measures, the Directive stipulates an additional condition, not provided for in Article 6, which is that the whistleblower must have reasonable grounds to believe that the notification or public disclosure is necessary to disclose the breach in accordance with the Directive. This condition refers to protection from criminal, civil, administrative or employment liability for breach of restrictions on disclosure arising, for example, from loyalty clauses in contracts, confidentiality agreements, etc. (Article 21(2)). In contrast, in legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or compensation claims based on private, public, or collective labour law, the condition concerns the protection against liability arising from making a report or public disclosure and the possibility of exercising the right to discontinue the proceedings (Article 21(7)). As stated in recital 97, in this type of proceedings, the burden to prove that the whistleblower does not comply with the conditions laid down in the Directive should be on the person requesting the proceedings. In our opinion, it should be assumed that the term “reasonable grounds to believe” refers to the judgement that a reasonable observer in the whistleblower’s position, i.e. for instance occupying a comparable position and having comparable knowledge and experience, would make. However, assessing whether reporting or public disclosure is necessary to disclose a breach under the Directive may be difficult in a number of cases and perceived as risky by potential whistleblowers. Fear of taking such risks may also lead to abandonment

80 Act CLXV of 2013 on complaints and public interest disclosures, http://corruptionprevention.gov.hu/download/7/a2/90000/KIM%20555_2013-4.pdf; accessed 01/09/2021.

of the reporting. For these reasons, we believe that Member States should consider whether introducing this condition of protection is necessary.

There is some ambiguity regarding the Directive's rules on the burden of proof in proceedings concerning damage caused by retaliation against the reporting person. In such a case, according to Article 21(5), if the person establishes that they made a report or public disclosure and suffered harm, the person who took the measures which caused the detriment shall bear the burden of proving that they did so for duly justified reasons. Thus, it follows from a literal reading of the quoted provision that the perpetrator of the retaliation can justify it and win the lawsuit if shows that there was some legitimate basis for the measure taken, such as a reason justifying termination. At the same time, recital 93 explains that once the whistleblower has made a *prima facie* proof, the burden of proof should be shifted to the person who committed the damaging action, and that person should then demonstrate that the action taken was in no way related to the notification or public disclosure. It should therefore be requested that the provisions implementing the Directive with regard to the burden of proof take account of the interpretation of Article 21(5) set out in recital 93.⁸¹ It should be added that, in our opinion, the term "a detriment suffered by the reporting person" used in Article 21(5) should be understood broadly as any kind of negative effects or disadvantages resulting from the form of retaliation used. It may therefore include pecuniary damage in the form of lost earnings or income, as well as deprivation of promotion, failure to qualify for training, deterioration of health or suffering.

Another type of postulate is related to the implementation of the provisions related to the so-called "remedies" provided for in Article 21(6) and (8) of the Directive. These are, as it ought to be understood, various legal remedies of procedural nature in the form of the possibility to file applications and bring lawsuits before courts and other bodies applying the law (Article 21(6)), and of substantive nature, in the form of claims for which whistleblowers and other persons mentioned in Article 4 of the Directive (Article 21(8)) may expect satisfaction, in order to nullify or minimize the effects of retaliation. This may be, depending on the situation, compensation covering actual loss and lost profits, restoration, transfer to an equivalent position, payment of retraining costs, payment of medical expenses, compensation for non-material damage, restoration of a deprived promotion, etc. All these possibilities are covered by the laconic content of the provisions mentioned above. However, it is desirable that, in the provisions implementing the Directive, the wording "shall have access to remedial measures in accordance with law" is not simply used with no further clarification but supplemented by an illustrative list of remedies showing the variety of possibilities for redressing the effects of retaliation.

A few words should also be devoted to a special type of remedial measures, which are the so-called interim relief measures (Article 21(6)). Their purpose is to prevent the claimant or plaintiff from actually losing the case before it is heard, such as in the event of termination of the employment relationship due to expiry of the notice

81 Cf. also Transparency International (2019), p. 7.

period before the case is heard by the court. There are two aspects to this issue. The first is to ensure that courts and other authorities applying the law are able to apply sufficiently broad and flexible measures to secure the claim, such as the possibility to suspend the period of notice of termination of an employment contract. The second is to ensure a quick response, e.g. by implementing special judicial or administrative procedures of short duration to secure whistleblower claims.⁸² In their absence, whistleblowers will be left with the “usual” remedial measures of mitigating the damage caused, which may already be irreversible.

9. Measures of support

Article 20 of the EU Whistleblower Protection Directive divides measures of support in particular into three categories, namely: comprehensive and independent information and advice on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned; effective assistance from competent authorities and legal aid. It encompasses thus a whole range of measures that increase the whistleblowers’ sense of security, both in the context of protection of their employment relationship and of protecting them against adverse actions, which in extreme cases can pose a threat to the health or life of the whistleblower or the persons associated with them.

In terms of support measures, it should be advocated that a whistleblower should be exempted from legal fees and be entitled to legal aid *ex officio* in labour law cases and in actions for damages or other proceedings in which they are sued in connection with a previous act of whistleblowing, such as proceedings concerning alleged infringements of personal data, copyright or business secrets, regardless of the whistleblower’s financial situation. An important aspect in this regard would be for the relevant external body that handles the report to certify that a report was made and thus confirm the whistleblower’s status in the proceedings.

When a person is still planning to submit a report, the state should ensure them advice free of charge provided by specialists through the national authority for whistleblowers. Furthermore, the establishment of contact points in individual regions/provinces of a state should be considered. Since more drastic retaliatory actions are imaginable in the case of reports about crimes and other serious breaches of law, an efficient witness protection system should be introduced. It would also be advisable to introduce the right to psychological support in the framework of judicial proceedings.⁸³

82 E.g. in Slovakia, a special administrative body has been established with the power to secure the claims of whistleblowers; see: Act from 30 January 2019 No. 54/2019 Coll. on the protection of whistleblowers of anti-social activities and on change and amendment of some laws, Article 7.

83 Compare Article 20(2) of the EU Whistleblower Protection Directive.

10. Whistleblowing and the duty of confidentiality

The duty of loyalty to the employer is one of the fundamental worker duties. Disclosing a trade secret may result in both civil and criminal liability of the whistleblower in relation to the employer or the entity with which they cooperate. It should be advocated that the principle of reversed burden of proof be applied in proceedings for damages in connection with the alleged disclosure of trade secrets by the whistleblower. According to recital 97 of the EU Whistleblower Protection Directive, reporting persons should be able to rely on having reported breaches or made a public disclosure in accordance with this Directive as a defence, provided that the information reported or publicly disclosed was necessary to reveal the breach. In such cases, the person initiating the proceedings should carry the burden of proving that the reporting person does not meet the conditions laid down by this Directive.

In the light of Article 21(7) of the EU Whistleblower Protection Directive, where a person reports or publicly discloses information on breaches falling within the scope of this Directive, and that information includes trade secrets, and where that person meets the conditions of this Directive, such reporting or public disclosure shall be considered lawful under the conditions of Article 3(2) of the Directive (EU) 2016/943.⁸⁴ It should be recommended that reporting or public disclosure of other breaches of law than these enumerated within the EU Whistleblower Protection Directive shall be considered lawful according to national transposition acts.

Pursuant to Article 3(3)(a) of the EU Whistleblower Protection Directive, the Directive does not affect the application of Union law or national law relating to the protection of classified information. Nevertheless, it seems that the possibility to report breaches of law that involve the disclosure of classified information should be guaranteed in the area of public security, as well. It is important to share Transparency International's view that an appropriate institution that would handle reports in a manner which guarantees full confidentiality should be set up for this purpose.⁸⁵

A pivotal matter is the possibility to report breaches through representatives of the legal or the medical profession as well as other professions whose representatives have the duty to keep professional secrecy. Even though, pursuant to Article 3(3) (b), the EU Whistleblower Protection Directive does not apply to matters involving the protection of legal and medical professional privilege, it appears advisable that national legislation clearly specify the scope of matters which may be reported by

84 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. About weaknesses of the EU Trade Secrets Directive see V. Abazi, *Trade secrets and whistleblower protection in the European Union*, *European Papers – European Forum*, Volume 1, Issue 3, October 2016, <https://www.europeanpapers.eu/fr/europeanforum/trade-secrets-and-whistleblower-protection-in-the-eu>, accessed 01/09/2021.

85 See Transparency International, *Building on the EU Directive for Whistleblowing Protection. Analysis and Recommendations*, Position Paper 1/2019, p. 3.

representatives of professions subject to the duty of professional secrecy and that, in the event of a disclosure, the whistleblower be not liable to disciplinary measures and qualify for protection as a reporting person.

11. Criminal penalties

A worker who has no possibility to make an anonymous report exposes themselves to retaliation in the event that their personal data are disclosed. For this reason, dissuasive criminal sanctions should be available against legal or natural persons who are responsible for revealing the data of the whistleblower or for a leak of such data from an external or internal reporting channel or who hinder or attempt to hinder whistleblowing. The French law *Loi Sapin 2*, which introduces in Article 9(II) the threat of two years of imprisonment and the fine of 30 000 EUR for individuals who reveal the identity of a whistleblower, of persons covered by the report or any elements of the gathered information as well as in Article 13(I), the threat of one year of imprisonment and the fine of 15 000 EUR for persons who hinder the disclosure,⁸⁶ should be viewed positively. With regard to legal entities, in turn, financial penalties contingent on the size of the undertaking and its annual turnover would be suitable.

It should be underlined that the status of a whistleblower should be awarded exclusively to persons who have reasonable grounds to believe that the facts they present as evidence of a breach of law are true.

If the entity that is falsely alleged of breaching the law proves that the reporting person acted in bad faith, a fine should be imposed on the person who abuses the whistleblower status. Another solution could be criminal liability for potential defamation in connection with a public disclosure. In this respect, the abolition of the penalty of imprisonment, as recommended by the Council of Europe, should be advocated.⁸⁷

Conclusion

In developing legislative recommendations under the WhistlePro Grant for the Visegrad Group countries, France and Slovenia, we were guided by the objective that future regulations should increase the whistleblower's sense of security against disclosure of identity, provide protection for the whistleblower's employment and other business relationships, and eliminate uncertainty about the institution competent to receive the report. It is essential that protection be provided also in the

⁸⁶ Cf. G. Bargain in this monograph.

⁸⁷ See the Council of Europe Resolution 1577 (2007), entitled "Towards decriminalisation of defamation".

event of a public disclosure. A clear definition of the conditions for using the option of public disclosure serves this purpose.

Undoubtedly, the introduction of measures for the protection of whistleblowers in order to transpose the EU Whistleblower Protection Directive, and sometimes even introduce provisions that go beyond its scope, will be a financial burden for the state and entities on which the Directive imposes obligations. It appears, however, that this burden will be worthwhile. With the help of appropriate social and educational campaigns carried out with the participation of NGOs, people who notice negative phenomena in the organization for or with which they work should be encouraged to report these breaches through appropriate channels. In turn, providing effective protection for whistleblowers and introducing severe sanctions for impeding reports and retaliatory actions should discourage potential offenders from committing breaches – a development which will undoubtedly benefit the society throughout the European Union.

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About Authors

Gwenola Bargain, University of Tours

Associate Professor and Director of the Master course in employment law at the University of Tours. She specializes in private law and labour law. Her research is concerned with the relationship between labour law and economics. Her PhD thesis, written at the University of Nantes, examines the economic analysis of labour law.

Edyta Bielak-Jomaa, University of Lodz

PhD, previously General Inspector of Personal Data Protection and President of the Personal Data Protection Office ((2015–2019), assistant professor at the Department of Labor Law, Faculty of Law and Administration, University of Lodz, the Data Protection Officer University of Lodz, lecturer, trainer.

She graduated from the Faculty of Law and Administration of the University of Lodz. She was awarded the academic degree of PhD in law and was employed as Assistant Professor at the Chair of Labour Law of UL Faculty of Law and Administration in 2003. In 2013, she became head of the Chair of the Centre for Personal Data Protection and Information Management at UL Faculty of Law and Administration.

She teaches subjects related to personal data protection, labour law and economic migration abroad. She organised conferences and debates on personal data issues. She is the author of over 40 studies and legal opinions on labour law, labour market and personal data protection matters, participant in research projects.

Her research interests include first of all issues concerning the protection of employees' personal rights, medical data, and monitoring and the protection of personal data in the employment context. She is likewise interested in the subject of whistleblowers, protection of their personal data and the right to privacy.

Marcin Górski, University of Lodz

Dr hab., Professor at the Department of European Constitutional Law, University of Lodz, member of the Migration Law Research Centre, Polish Academy of Sciences, attorney, member of the Human Rights Committee of the National Bar of Attorneys, head of the Legal Department of the Local Government of the City of Łódź Office.

Zbigniew Hajn, University of Lodz

Zbigniew Hajn graduated in law from the University of Lodz, has worked there ever since and is currently Full Professor and head of the Chair of European, International and Collective Labour Law at the Faculty of Law and Administration. From 2003, he was a judge of the Supreme Court, retiring in 2016. In addition, he was a member of the Labour Law Codification Commission (2002 to 2006) as well as a member of the Legislative Council (2006). From 1996 to 2009, he was the deputy editor-in-chief of the periodical *Studia Prawno-Europejskie (Studies on European Law)*. At present, he is a member of the scientific councils of the periodicals *Europejski Przegląd Sądowy*

(*European Court Review*) and *Monitor Prawa Pracy (Labour Law Monitor)* as well as a member of the editorial committee of the *Państwo i Prawo (State and Law)* monthly. His scholarly achievements include publications. Among these are books on the legal position of the employer, the legal position of employer organizations and the collective labour law system. He is also the editor and co-author of books on union representation at the workplace, free movement of workers within the EU, legal problems of workplace democracy, labour law in Poland (for the *International Encyclopaedia of Labour Law and Industrial Relations*), commentary to the labour code and others.

Attila Kun, Károli Gáspár University of the Reformed Church in Hungary (KRE)

Professor of labour law and head of the Department of Labour Law and Social Security at the Károli Gáspár University of the Reformed Church in Hungary (KRE), Faculty of Law, Hungary (Budapest). He is also a part-time scholar at the National University of Public Service (NKE), Department of Human Resources. He is a member of the MTA (Hungarian Academy of Sciences) – PTE Research Group of Comparative and European Employment Policy and Labour Law. He is the national coordinator and member of the Hungarian Labour Advisory and Dispute Settlement Service (MTVSZ).

He has been a visiting scholar at numerous foreign universities (e.g. University of Tokyo; Institute for Labour Law and Industrial Relations in the European Union at Trier University; Martin-Luther-University Halle-Wittenberg; University of Amsterdam; Erasmus teaching staff mobility in several countries) and a member of numerous (including EU-funded and other) international research projects. He is a member of several academic networks (e.g.: ILO CEELex Network; Advisory Committee of the LLRN; Hungarian Labour Law Association; Academic network on the OECD Guidelines for MNEs; Organising Committee of the Hugo Sinzheimer Moot Court Competition, HS MCC; national coordinator of the ISLSSL's Hungarian youth section etc.).

He holds the Marco Biagi Prize 2011 (together with Beryl ter Haar from the Netherlands and Manuel Antonio García-Muñoz Alhambra from Spain), awarded by the Association of Labour Law Journals.

Jakub Morávek, Charles University

JUDoc., PhD, an academic counselor and faculty member at the Department of Labour Law and Social Security Law at the Faculty of Law of Charles University, where he teaches primarily labour law and social security law and serves as a guarantor of several select subjects. He also conducts academic research. Between 2010 and 2012, he worked at the Office for Personal Data Protection, where he was the head of the Department of Legal Support and Schengen Cooperation. Jakub Morávek writes regularly for specialized periodicals and is the author or co-author of several publications (such as Labour-Law Case Studies, Public Servants Act, Commentary,

Personal Data Protection in Labour-Law Relations, and Agency Employment in Broader Context).

Jakub Morávek has successfully authored or co-authored a number of grant projects (e.g. GAČR, GAUK). He is a member and vice-president of the Czech Society for Labour Law and Social Security Law. In 2012, he was awarded the title Lawyer of the Year in the category Talent of the Year. Jakub Morávek is also attorney at law in Prague.

Jan Pichrt, Charles University

Professor at the Faculty of Law and head of the Department of Labour and Social Security Law at the Faculty of Law at Charles University (Prague), where he began his career after graduating from studies at this faculty. He is the author or the head of the team of authors of numerous books and scholarly papers focused primarily on issues surrounding labour law. Moreover, he has also made significant contributions to many textbook publications and prestigious commentaries in the area of labour law. He mostly publishes with the publishing houses of C.H. Beck and Wolters Kluwer (in the Czech Republic) as well as Kluwer Law International. Besides publication and academic activities, Jan Pichrt has practiced as an attorney at law for many years. He is an arbitrator entered into the list of arbitrators of the Arbitration Court of the Economic Chamber and Agricultural Chamber of the Czech Republic. He is also president of the Czech Society for Labour Law and Social Security Law and vice-president of the International Society for Labour and Social Security Law (ISLSSL).

Darja Senčur Peček, University of Maribor

Full Professor at the Faculty of Law of the University of Maribor, where she is engaged in teaching labour law and social security law. She is the vice-dean for research and international relations at the Faculty, head of the Labour Law Department and head of the Institute for Employment Relations and Social Security at the Faculty. She is the author or co-author of a number of monographs, including a commentary on the Slovene employment relations act, and the author of many research articles published in legal journals and anthologies. Furthermore, she has been an active participant in many national and international law conferences and research projects. Darja Senčur Peček is a member of the editorial board of some distinguished Slovene law reviews – *Pravnik (The Lawyer)*, *Podjetje in delo (Company and Labour)* and *Delavci in delodajalci (Employees & Employers)*. In addition, she is the vice-president of the Slovenian Business Law Association.

Dagmara Skupień, University of Lodz

Dr hab., Professor at the University of Lodz, Faculty of Law and Administration, and an attorney at law at the Bar of Lodz. Author of monographs and other publications on Polish and European labour law in Poland and abroad. Speaker at Polish and international congresses and conferences Associate member of the International

Academy of Comparative Law (AIDC-IACL). Member of the European Trade Union Institute's "Worker Participation Europe network". Former chairperson of the Polish section of Henri Capitant Association des amis de la culture juridique française (2012–2018). At present, coordinator of the Visegrad Grant Workplace Whistleblower Protection in the V4 Countries, France and Slovenia (WhistlePro).

Peter Varga, Trnava University in Trnava

Associate Professor at the Department of International Law and European Law, Faculty of Law, Trnava University. In his research, he deals with European Union law, EU competition law and anti-discrimination law. He is the chair of the Administrative Board of the Slovak National Centre for Human Rights, which is the Slovak equality body and the National Human Rights Institution (NHRI) in the Slovak Republic.

Veronika Zoričáková, Trnava University in Trnava

Lecturer at the Department of Labour Law and Social Security Law, Faculty of Law, Trnava University. She completed her doctoral studies at the Department of Civil Law and Commercial Law in 2019 with a thesis titled "Restitution after Termination and Invalidity of Contracts". In her academic and professional work, she focuses mainly on the issue of non-contractual obligations, especially unjustified enrichment and liability, primarily liability for damage.

This monograph is an outcome of research completed within the **Visegrad Grant “Workplace Whistleblower Protection in the V4 Countries, France and Slovenia” – WhistlePro (2020–2021), financed from the International Visegrad Fund**. The project aims to contribute to the improvement of the legal framework in the Visegrad countries concerning the protection of workplace whistleblowers and, indirectly, to the change of workers’ attitudes towards whistleblowing.

Contributions prepared by legal experts from various countries and universities concern matters of universal importance such as freedom of expression relative to whistleblowing, personal scope of the EU Whistleblower Protection Directive (2019/1937) or personal data protection. They also discuss the legal situation concerning whistleblower protection in the Visegrad countries, France and Slovenia and present recommendations for changes in the respective countries. The monograph culminates with a summary of proposals for the improvement of the legal situation of persons disclosing breaches of law in the work-related context.

Given its topicality and in-depth analysis of legal problems related to adequate whistleblower protection, the book may be of interest to academics, practitioners, social partners, non-governmental organisations (NGOs) and policy makers in the process of the EU Whistleblower Protection Directive transposition in Member States.

Dagmara Skupień

The project is co-financed by the Governments of Czechia, Hungary, Poland and Slovakia through Visegrad Grants from International Visegrad Fund. The mission of the Fund is to advance ideas for sustainable regional cooperation in Central Europe.

 **WYDAWNICTWO
UNIwersytetu
ŁÓDZKIEGO**

 wydawnictwo.uni.lodz.pl
 ksiegarnia@uni.lodz.pl
 (42) 665 58 63



The publication
is also available
as an e-book

<https://doi.org/10.18778/8220-639-5>