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**Provisions on the protection of whistle-blowers' rights****Terms related to the implementation of the Directive on the protection of the rights of whistleblowers**

By December 16, 2021, Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019, on the protection of persons reporting breaches of EU law, the so-called Whistleblower Protection Directive (Directive). This directive will enter into force on 17 December 2021. This means that, at least for employers with 250 or more employees, the effective date of the provisions will be December 17, 2021. The directive provides for the possibility of postponing the implementation of obligations for entities employing 50 to 249 until December 17, 2023. employees.

The obligation to protect whistleblowers will apply to all entrepreneurs employing more than 50 employees, but this criterion does not apply if the entrepreneur is covered by one of the EU acts listed in Annex I to the directive. This applies, inter alia, to regulations concerning financial aspects or AML (counteracting money laundering and terrorism), entities that participate in public procurement tenders or use EU funds as part of their activities. Then the entrepreneur is to be subject to the obligations to implement the whistleblower protection requirements, regardless of the number of employees. Additionally, the directive explicitly encourages the national legislator to extend the obligations also to other areas of law and a broader scope of entrepreneurs. Therefore, it will be specified in the Polish act implementing the Directive.

**What is the purpose of the directive and what does it concern**

The purpose of the Directive is to introduce a standard of legal protection for persons who provide information about irregularities noticed in an enterprise. The introduction of institutionalized whistleblower protection at the EU level is intended to serve better law enforcement and the public interest. The requirements resulting from the Directive will have to be part of the compliance program in the company. Not only the procedure regulating the reporting of violations should be implemented, but also it should be harmonized with the procedures already in force and a process enabling anonymous reporting of violations should be implemented and an entity should be appointed to coordinate this process. Training should also be carried out and internal and external communication implemented on the reporting procedure. In addition, the process should be audited and also reported. All these elements need to be thought over, developed, and implemented, so it is worth thinking about it now.

**Works on the implementation of the Directive into Polish law**

The Ministry of Development, Labor, and Technology is working on a draft separate act dedicated to the protection of whistleblowers and transposing the Directive into national law.

Conducting public consultations is planned for the third quarter of 2021. The deadline for its implementation is in 4 months. However, based on the content of the Directive itself, we know the subjective and objective scope as well as the minimum standards for implementing the regulations. The procedure of anonymous reporting of violations was introduced by an amendment to the Act on Counteracting Money Laundering and Terrorism Financing, therefore the obliged entities to which this Act applies will have to unify both of these processes with an indication of how both obligations will be performed.

### **Who is the Whistleblower and what the report may be about**

**A whistleblower** is defined in pt. 1 of the preamble to the Directive as a person acting for an organization (public or private) in a work-related context, reporting threats or damages to the public interest. Anyone who makes the notification will be a whistleblower - an employee, associate (contractor, self-employed), shareholder, partner, member of the management or supervisory body, or an employee of a subcontractor.

**Whistleblowing channels:** effective and efficient ways of reporting whistleblowers created in enterprises, which are safe for whistleblowers. The directive divides the channels into: **internal channels**, which are to be the first choice for reporting irregularities, and **external channels** understood as the possibility of reporting to competent authorities (judicial, regulatory, supervisory, prosecuting, anti-corruption bodies, or the Ombudsman) and **public disclosures** (media). The implemented procedures must ensure confidentiality and the inability to identify the whistleblower. Reports of irregularities may be made anonymously in writing or orally. Oral reporting may be made by phone or through other voice communication systems implemented in the organization, but also at the request of a whistleblower, as a result of a direct meeting organized within a reasonable time. In the case of written submissions, regardless of the choice of the form of communication: i.e. mailbox, dedicated e-mail address, IT system, it must meet the criteria of anonymity and confidentiality.

**The notification may concern:** violation of legal acts in the following areas: public procurement, services, products, and financial markets, as well as the prevention of money laundering and terrorist financing, product safety and compliance with requirements, transport safety, environmental protection, radiological protection and nuclear safety, food safety and feed, animal health and welfare, public health, consumer protection, the protection of privacy and personal data, and the security of network and information systems. The scope of infringements may be extended by national regulations.

**Obligation to respond to a report:** The Directive sets out an obligation to follow up on reporting and provide feedback to the whistleblower within a reasonable period (generally three months for internal channels, possibly six months if justified for external channels).

**New obligations of entrepreneurs: (i) implementation of the process and (ii) ensuring real protection of the whistleblower**

#### **Implementation of the process:**

The directive introduces many obligations to protect whistleblowers, such as the need to create safe information channels, implement procedures, such as investigations, and establish broad protection against retaliation. The entrepreneur will be obliged not only to introduce a real possibility of anonymous reporting of violations but also to fulfill the obligation to protect the whistleblower. For this, entrepreneurs will have to implement:

- new procedures/policies/regulations for reporting breaches and making them consistent with those already in force;
- security systems to preserve the anonymity of the whistleblower;
- a new information channel with the appointment of a person/team responsible for receiving notifications, verification, and conducting explanatory proceedings;
- develop a reporting system and a record of internal declarations;
- provide systematic internal audit and monitoring process and its effectiveness, implement corrective actions
- communicate the process internally in the company and externally on the website;
- train people supporting the process;
- taking steps to build trust in transparency, security, data protection, reliability, integrity, efficiency, and security of the implemented breach reporting process

This will require a thorough analysis of the regulations in force in a given company and the development of operating procedures. The composition of the team appointed to receive and examine applications should be quite broad in terms of substantive and automatically from a given process, both superiors and whistle-blowers' subordinates should be excluded. The composition of the team may be dedicated to a specific type of report, but it is also necessary to provide permanent representatives, e.g. Compliance Officer, HR Director, Ethics Officer, or a lawyer. The initial verification process or the entire process of handling notifications may be outsourced to an entity that guarantees confidentiality and data protection, e.g. a legal office.

It is important that the process is safe, that it convinces employees that it is worth using this way of reporting irregularities rather than escalating the report outside.

### **Whistleblowers' protection:**

The Directive gives whistleblowers broad protection against the prohibition of disclosure of identity (without the explicit consent of the person concerned) and other information based on which the identity of the reporting person can be directly or indirectly identified, through measures of protection against retaliation in employment relationships (e.g. prohibition of dismissal, prohibition of demotion, prohibition of compulsory unpaid leave, prohibition to change the place of work, prohibition of reducing remuneration, prohibition of changing working hours, prohibition of suspending training, prohibition of a negative assessment of work results, prohibition to apply disciplinary measures) and in other legal relations (e.g. prohibition of early termination of the contract with the contractor), up to compensation for the damage related to the loss of income as a result of submitting the notification. The scope of the protection instruments is open-ended. In addition, protection is to cover not only whistleblowers but also those who help them (colleagues, family members).

To benefit from protection under the Directive, reporting persons should have reasonable grounds to believe, in the light of the circumstances and information at the time of reporting, that the matters they report are genuine. This requirement sets the appropriate legal boundaries and at the same time protects against bad faith, frivolous or abusive reports. This means that those who deliberately and knowingly provided incorrect or misleading information at the time of reporting do not benefit from the protection of.

### **Sanctions for obstructing the actions of whistleblowers**

Member States are required at the national level to establish effective, proportionate and dissuasive sanctions against natural or legal persons that hinder or attempt to obstruct reporting, retaliate against whistleblowers, initiate burdensome whistleblower proceedings and breach the obligation of confidentiality the identity of the reporting persons.

**Benefits for entrepreneurs**

Good implementation of this process will allow a given company to deal with irregularities on its own and allow drawing conclusions from them and will streamline procedures and processes in the organization. In this way, you can prevent many serious organizational crises, including the company's image.