

**Providing an Alternative to Silence:**

**Towards Greater Protection and Support for  
Whistleblowers in the EU**

**Country Report: Poland**

This report belongs to a series of 27 national reports that assess the adequacy of whistleblower protection laws of all member states of the European Union. *Whistleblowing in Europe: Legal Protection for Whistleblowers in the EU*, published by Transparency International in November 2013, compiles the findings from these national reports. It can be accessed at [www.transparency.org](http://www.transparency.org).

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**Providing an Alternative to Silence:  
Towards Greater Protection and Support for Whistleblowers in the EU.**

**Poland - Country Report**

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**I. INTRODUCTION**

In Poland no legal or social concepts exist that would define a whistleblower, set the bottom line for *bona fide* whistleblowing, explain the role of whistleblowing in the protection of public interest, inducing social activity and sense of responsibility for common wealth.

Polish legal system does not contain a stand-alone whistleblower protection act. Legal protection for those who reported a wrongdoing must be derived from a variety of laws, e.g. the Labor Code, the Criminal Code, the Code of Criminal Procedure. In many cases there will be no legal provisions at all to refer to while seeking protection. Even the existing provisions do not allow for construing a comprehensive protection system. Instead they protect or sometimes only declare to protect some aspects of a whistleblower's situation. Furthermore, these are provisions which were not specifically meant for the protection of whistleblowers. Therefore there are practical difficulties in applying such provisions to whistleblowers' cases in an efficient way.

It seems the concept of whistleblowing, and in particular its ethical dimension, is not entirely clear to the wider public. The Poles on the one hand, declare to support whistleblowers on the other, though – are afraid of social stigma and being labeled a snitch. As many as more than 60% of Poles do not believe the existing law would be effective in protecting their rights should they blow the whistle.

Political climate does not seem to be encouraging the social activity, including whistleblowing and the protection of such.

Probably due to the above circumstances no adequate equivalent of a *whistleblower* can be found in Polish language. There are synonyms such as *denouncer* or *informant*, though none of them carries positive or at least neutral connotations<sup>1</sup>.

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<sup>1</sup> For the last couple of years the Batory Foundation has been promoting a noun *sygnalista* stemming from a verb *to signal*. The *sygnalista* is a newly created noun and on the one hand is open to absorb positive connotations, on the other, still sounds unnatural to Polish native-speakers and may be associated with a certain occupation in army or aviation. Though, given that the language dilemma is impossible to be solved other actors in non-governmental sector seem to accept and use *sygnalista* in their works as well.

The lack of an appropriate word is to some extent a reflection of Poland's history. The long lasting periods of being either under the power of alien states or socially rejected communist regime shaped a specific model of a good citizen, i.e. a person fighting, sabotaging or plotting against the state. Cooperating with the state authorities in many cases did mean betrayal of the common interest. It can be said that it is only for the last twenty years when mature citizenship based on trust and cooperation with the state and its authorities could grow.

## II. LEGAL FRAMEWORK

The effectiveness of labor law provisions in protection of employees reporting a wrongdoing was analyzed in the research carried out by the Batory Foundation in 2010 in the employment courts<sup>2</sup>. The assessment of Labor Code presented below is based on, apart from analyzes of legal provisions and judicial practice, that research.

### 1. Protection Under Labor Code

The relatively widest range of protection can be derived from Labor Code. The mechanisms of the protection against unlawful acts of an employer are common for all the employees no matter whether they are whistleblowers or not.

#### 1.1. Unlawful dismissal

The scope of protection against unlawful dismissal, including the one which is based on reporting a wrongdoing, depends on whether it is a definite or indefinite-time employment agreement.

**Fixed-term employment agreement.** Should the agreement be concluded for less than six months, it cannot be terminated upon a notice. Thus an employee who reported a wrongdoing will keep the job until the expiration of the agreement until he/she is dismissed disciplinary. An employment agreement for longer than six months can be terminated upon a notice provided that the termination option was provided for by the parties. In such a case an employer is not required to present grounds for termination. Both parties are free to quit the agreement for any reason. Therefore should an employee be willing to question the dismissal in court, the reason will not be the subject matter of the court proceeding. Only formal aspects of the termination can be questioned at court in such a case.

After the term of an agreement expires the Labor Code offers no protection to an employee. A whistleblower cannot demand that the agreement should be prolonged. In one of the cases monitored by the Batory Foundation an employer refused to continue a fixed-term agreement with the whistleblower's wife hired at the same company on the position of accountant. No claim could be raised in court.

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<sup>2</sup> Anna Wojciechowska-Nowak, *Ochrona prawna sygnalistów w doświadczeniu sędziów sądów pracy. Raport z badań*; Fundacja Batorego, Warsaw, 2011

**Trial employment agreements.** Similar rules as to the termination upon a notice refer to trial employment agreement. An employer is not obliged to cite the cause of termination thus the dismissal may be challenged at court only if formal flaws can be shown. A whistleblower will not be protected after the trial period expires.

**Agreement for the completion of a task.** Interestingly, the Labor Code does not provide for the termination upon a notice of an agreement for the completion of a certain task. Thus a whistleblower will keep the job until the agreement expires unless it is terminated with an immediate effect (usually disciplinary dismissal). It should be noted that this type of agreement, as it serves very specific aim, is not commonly used.

**Indefinite-term employment agreement.** Just like any other employee, a whistleblower is protected against an unlawful (having procedural flaws) or groundless termination.

An employee who was dismissed due to reporting a wrongdoing may file a claim to the employment court claiming the termination was groundless. In such case it will be the employer to prove that the grounds for the termination of an agreement were genuine (existent) and justified. Despite the burden of proof lies on the employer, the whistleblower claim will face the following barriers.

Damage to employer's repute. As one of the most popular grounds for termination employers indicate that the employee broke the duty of loyalty by revealing false information and putting at risk the employer's repute. As a general rule of civil law it is presumed that the infringement of one's repute is illegitimate. The trespasser may avoid the liability by establishing that defaming information was true and revealed for sake of public interest. Even though labor law is not exactly civil law the mentioned rule influences how the cases are handled in employment courts.

A research carried out by Batory Foundation in the employment courts in 2010 shows that the judicial practice may slightly differ depending on the judge though predominant opinion is that an employee who was fired on the grounds of damaging the employer's repute will need to show the irregularities actually took place. Most of the interviewed judges were of the opinion that the existing law does not allow to held the disclosure legitimate based only on good faith of a whistleblower.

*It will depend on a concrete case and also on the approach of a judge. Maybe, should this aspect was referred to in law, the judge would have a clear answer whether it should be examined if the reported irregularities really occurred or good faith is sufficient.*

The interviews show that the standard set out in the Council of Europe Resolution 1729 (2010) "Protection of «whistle-blowers»" is in judicial practice questionable and depending on a judge approach will or will not be applied in the trial.

An example of an approach in a spirit of Resolution 1729 is the judgment held in case of a chief editor of "Poczta Polska" gazette who disclosed financial misuse of public

funds to journalists of a nation-wide daily and was fired based on the ground of spreading false and defaming information. The court held that an employee is entitled to raise his/her concerns, including media, especially when the internal disclosure was not treated seriously. Also, it was stressed that it is not the task of the employment court to examine slander claims, which should be considered before a civil court.

Illegitimate disclosure of trade secret. It may also be difficult to protect a whistleblower dismissed by reason that he/she disclosed information qualified by the employer as trade secret. The definition of trade secret (a company's secret) in Polish law is broad. This will include any information of economic value, including technical, technological or organizational information, provided that it was not revealed in public domain and the entrepreneur undertook the necessary activities aimed at keeping the information secret (Article 11 of the Act on Counteracting Unfair Competition). In many cases an employer will easily establish the disclosure pertained protected information.

In such a case an employee will need to convince the court that revealing information was necessary for the protection of valid public interest.

Redundancy. The employment court may examine whether the termination of an employment agreement based on redundancy was grounded in a narrow scope. The redundancy may be held fictitious for instance if the position previously occupied by the whistleblower was merely renamed or shortly after a dismissal a new employee was hired to do the work the whistleblower used to do. Where economic or organizational reasons are cited as the grounds for dismissal, though, the courts do not examine the employer's decision in order to ascertain whether it is well-founded from the business point of view. According to well established judicial practice "decisions whether it is purposeful and expedite to maintain a position belong to the competences of an employer"<sup>3</sup> and not the employment court.

A whistleblower may challenge redundancy by establishing that the selection criteria were unfair. The employer's decision who would be made redundant must take into account objective criteria, e.g. qualifications, professional experience, but also socio-economic aspects, such as being the sole bread-winner in the family or being eligible to pension benefit. Though this path of questioning the employer's decision will not be available should the whistleblower occupy a position which is unique in the company, e.g. chief accountant or simply an accountant in a small company.

Poor performance, high rate of absenteeism or another true cause. According to judicial practice a cause for the dismissal does not need to be exceptionally significant to be held a fair one. This in practice means that an employer may, in order to get rid of a troublemaking employee, use an excuse, e.g. unsatisfactory performance or high rate of absenteeism etc. Such a cause may suffice as long as the employer proves it is genuine (existent), concrete and justified.

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<sup>3</sup> The judgment of the Supreme Court of 4 September, 2007, case reference No: IPK 92/07

Another barrier arises upon the well-established judicial practice according to which the employment court is bound with causes cited in the termination notice. For this reason the subject matter of the trial is limited to what was cited in the termination notice. In the light of such approach the actual grounds for dismissing a whistleblower will not even be verbalized, not mentioning examined, by the court. As one of the judges noted:

*The reason cited in the termination notice proves to be genuine - the employee in question was not a saint. He did not steal, but oftentimes let's say he was late or sick and disorganized the work. In such a case the court focuses on the cause cited, even though there were irregularities in the background reported by that employee.*<sup>4</sup>

In practice the above approach means that a whistleblower will not be able to even argue he/she was fired on the grounds of reporting a wrongdoing as such circumstance is not the subject matter of the trial. Thus, the actual grounds for the termination may never emerge in the court room. **The situation would be different should the employer be obliged to prove not only that the cause cited in the termination notice was genuine, concrete and justified but also that the termination had nothing to do with the reporting of irregularities by an employee in question.** In such a case the employment court would need to verify not only whether the grounds are real and justified but also whether termination might have constituted retaliation against a whistleblower.

### **Employment Relationship Based on Appointment**

Managers in public administration are oftentimes employed based on *the appointment*. Such an employee may be at any time revoked by a body which appointed the person to the position. An employee may be revoked also with an immediate effect. The competent body is not obliged to cite a cause for revoking except for the case of the disciplinary dismissal.

### **Available remedies**

The scope of available remedies is determined by the type of the agreement based on which a whistleblower was hired.

Only compensation may be awarded to a whistleblower hired based on a trial agreement, a fixed-term agreement, an agreement for the completion of a certain work. In case of indefinite-term agreement the whistleblower may claim either compensation or the reinstatement to his/her job. Should the employee be placed back, he/she will be also entitled to the remuneration for staying out of job. The remuneration however may not be claimed for the entire period of being unemployed. It may be awarded for no longer than two months.

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<sup>4</sup> Anna Wojciechowska-Nowak, *Ochrona prawna sygnalistów w doświadczeniu sędziów sądów pracy. Raport z badań*; Fundacja Batorego, Warsaw, 2011, p. 21

Also, the compensation available under the Labor Code is more a lump-sum rather than the full recovery of all damages incurred by a whistleblower. It is limited to the equivalent of the maximum three-month remuneration. Under the Labor Code an employee is not entitled to the compensation which would cover all incurred damages (the actual loss and loss of reasonably expected profits). Neither is an employee entitled to the compensation for the pain and suffering. The full compensation may be claimed under the civil trial where a whistleblower will be required to show all premises of employer's liability<sup>5</sup>.

Interim relief. A whistleblower may ask for an interim relief ordering the employer to reinstate the whistleblower until the court trial is completed and the judgment becomes final and binding. Though, the interim relief may not be issued before the court delivers the sentence. This means in practice that a whistleblower has no chance to be temporarily reinstated over the trial before the court of the first instance. Also, the interim relief can be issued only before the termination notice period did not expire yet. The longest notice period provided for in the Labor Code is three month. Given the length of an average trial it is hardly possible or at best very seldom that a court delivers the sentence before the expiration of termination notice period.

**Termination without a notice.** Each type of employment agreement may be terminated without a notice (usually meaning disciplinary dismissal). Any such case requires an employer to present a fair ground for the dismissal. Contrary to termination upon a notice the Labor Code allows the employer to terminate the agreement with an immediate effect only in extraordinary cases provided for in an enumerative list. This makes a significant difference from the perspective of a court trial - proving the fairness of a disciplinary dismissal is usually more difficult for the employer compared to termination upon a notice. Therefore employers relatively seldom get rid of whistleblowers in this manner.

## **1.2. Protection Against Demotion, Stripping of the Duties, Reduction of Pay or Unwanted Transfer**

Terminating the terms of employment agreement (proposing new employment terms). Demotion, limiting duties, reduction of pay or transfer are treated as proposing new employment terms (terminating the existing ones). A whistleblower is protected against such acts on the same rules as he/she is protected against unfair termination of the agreement. An employer intending to demote or transfer an employee who reported irregularities to a new place or position needs to terminate *the terms* of the employment agreement upon the notice. The limitations of challenging the notice of termination of the terms of the employment agreement are the same as when the termination of the entire agreement is at stake (see the remarks on the type of an employment agreement and judicial practice).

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<sup>5</sup> Judgment of the Constitutional Tribunal of 2007-11-27; reference No SK 18/05

Exception. An employer is allowed, though, to transfer any employee to a new position, a new place, or to entrust an employee with new tasks for not longer than three months in a calendar year provided that such a transfer will not result in a decrease of remuneration and will correspond to the qualifications of an employee being transferred. Reduction of pay under this exception is not allowed.

### **1.3. Protection Against Discrimination**

Interviews carried out with judges in the employment courts showed that judicial practice with regard to whether a whistleblower may successfully claim that retribution constituted discriminatory treatment (in the meaning of Article 18<sup>3a</sup> Paragraph 3 of the Labor Code) can be much diversified. Judges indicated two problems:

- (i) identifying the relevant criterion of unfavorable treatment,
- (ii) naming the group of employees compared to which a whistleblower was subjected to less favorable treatment.

The dilemmas reported by judges participating in the research were also reflected in one of the court trials monitored by the Batory Foundation, where the employment court dismissed discrimination claim logged by a whistleblower. The court did not accept the argumentation that dismissal of an employee reporting dangerous practices constituted discriminatory treatment.

### **1.4. Protection Against Mobbing**

Out of three different claims filed in the employment courts by whistleblowers, i.e. a claim against unfair dismissal, discriminatory treatment and mobbing, the last one confronts the whistleblower with biggest difficulties. The barriers stem mainly from the burden of proof which lays on the employee who is to establish that mobbing took place. Judges interviewed in the research referred questioned this solution claiming the Polish legislator had made a mistake. The judicial practice show most of the claims resulting from mobbing are dismissed.<sup>6</sup>

### **1.5. Penalties for retributive actions**

The law does not specifically provide penalties for individuals who *retaliate against whistleblowers*. Though, in some cases the Criminal Code may be of help, as it is forbidden to maliciously and repeatedly infringe the employee's rights resulting from the employment relationship or social insurance (Article 218 of the Penal Code). Given the requirement that the infringement needs to be notorious, many forms of retaliation against a whistleblower, e.g. dismissal, demotion, will not fall within the scope of criminal protection.

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<sup>6</sup> Anna Wojciechowska-Nowak, *Ochrona prawna sygnalistów w doświadczeniu sędziów sądów pracy. Raport z badań*; Fundacja Batorego, Warsaw, 2011, p. 67

## 2. Civil Code Contracts

It is common in Poland that people work based on civil-law contracts (including self-employment). Such contracts may be terminated according to what was provided for in this respect in the contract itself or in the Civil Code, should the parties enter into one of the contracts provided for and regulated by the Civil Code (e.g. commission agreement). Reporting a wrongdoing by the other party to the contract cannot be raised in order to challenge the termination. A whistleblower may challenge the termination only by establishing the breach of contract.

Generally speaking civil-law contracts are based on the motion of free will – each party is free to enter or quit.

## 3. Where to Get Assistance? Genuine Day in Court.

Assistance within Public Sector. No specialized agency deals with whistleblowers' claims pertaining retribution as such claims have not been *per se* provided in Polish legal system. Whistleblowers seeking help need to screen the system for a public body whose competences would correspond to whistleblower's needs.

Whistleblowers that have, or have just lost, the status of an employee may:

- file a complaint with the State Labor Inspectorate,
- lodge a claim in court (employment court or in some cases administration court),
- report reprisal to the prosecutor's office should the employer's unfair treatment suffice to an offence, or
- file a claim with the Human Rights Ombudsman.

Being a whistleblower does not automatically imply the right to a genuine day in court. The entitlement is available depending on the type of legal relationship based on which work is or has been rendered.

Assistance within Non-Governmental Sector. So far within the non-governmental sector there has been only one project specifically dedicated to whistleblowers. The project has been set up and continued up to now by the Batory Foundation. The available assistance embraces counseling on how to disclose irregularities in a safe way, legal advice to those who suffered retributive actions, including appointing an attorney at law to represent the whistleblower in court, monitoring court trials as a representative of public interest<sup>7</sup>.

Polish whistleblowers may also be supported by other non-governmental organizations should the case fall within the subject matter such an organization focuses on (e.g. employment rights, strategic litigation in cases significant from the social perspective).

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<sup>7</sup> [http://www.batory.org.pl/programy\\_operacyjne/przeciw\\_korupcji/wsparcie\\_i\\_ochrona\\_sygnalistow](http://www.batory.org.pl/programy_operacyjne/przeciw_korupcji/wsparcie_i_ochrona_sygnalistow)

## **4. Disclosure**

### **4.1. Participation of Whistleblower in Follow-Up Procedure**

As there are no legal provisions on the internal discloser, question whether and to what extent a whistleblower may play an active role in the activities undertaken by an employer as a result of the disclosure, is an entirely employer's decision.

As for the external disclosures, the Polish legal system is based on the assumption that an individual who reports a wrongdoing is a source of information (a witness) with limited possibilities to actively participate in the follow-up procedure that results from the disclosure. An example of this is the status of an individual reporting an offence provided for the Code of Penal Procedure. Unless the crime undermines an individual interest of the informer, he/she is not entitled to appeal from the prosecutor's decision to drop the case. Only a victim of a crime may challenge such decision. For example an employee of a town hall who reported financial abuses to the prosecutor's office will not be eligible to appeal against decision on dropping the case. Instead the mayor will be entitled to do so as a representative of the sole victim, i.e. the town.

### **4.2. Protection of Whistleblower's Identity**

There are no general legal provisions which would deal with the protection of a person reporting a wrongdoing. Provisions of such nature can be found only in the selected legal acts and have limited application.

For instance the Act on State Labor Inspectorate allows a labor inspector to issue a decision under which all circumstances allowing to identify the informer remain confidential. It is though up to the assessment of the labor inspector whether there is a justified concern that providing information could cause put informer's interests at risk. The labor inspector is not bound with the informer's motion to issue the decision. In other words, a whistleblower may not take the decision on disclosure provided that security of his/her personal data is granted. Also, only the employer may appeal from the decision (Article 23 Paragraph 3-5 of the Act on State Labor Inspectorate).

Under the criminal procedure a whistleblower may apply for a status of so called anonymous (*in cognito*) witness. The decision can be taken only in a narrow range of circumstances, i.e. in the existence of danger to life, health, freedom of the witness or his/her closest ones, or to the property of a significant value. Furthermore, the decision may refer only to identifying information which are meaningless for the case. Both the witness and the accused may appeal against the decision.

### **4.3. Procedures for Disclosures**

As there are no universal legal provisions, the practice of public bodies in the area of receiving information about possible wrongdoing is very diversified. Some of them facilitate disclosures by setting up dedicated e-mail boxes (e.g. the Central Anti-Corruption Bureau, State Mining Authority), on-line disclosures forms (the Supreme

Audit Office, the State Labor Inspection, tax offices) or hot-lines (e.g. the State Veterinary Inspection), while others indicate general contact details on their websites. The widest range of contact options is offered by the Central Anti-Corruption Bureau.

As for the practices in business sector, the newest research conducted by Ernst&Young in 2012 show that 29% of companies use the hot-lines allowing employees to report a wrongdoing<sup>8</sup>. An earlier research of 2008 run by Deloitte showed that 27% of companies already applied whistleblowing schemes allowing also for anonymous disclosures<sup>9</sup>. At the same time the data gathered by Earn&Young seem to suggest that corporate governance tools are not taken seriously by the management (40% of managers declared that internal guidelines on counteracting corruption were not translated into Polish, 64% declares that in their companies no sanctions were imposed on those who infringed anti-corruption policies, 70% declared that in their companies no training on anti-corruption policy were available to employees). If that conclusion is correct, there is a risk that the existing whistleblowing schemes may be a facade, as no prevention tool can operate properly without genuine ethical leadership.

Anonymous disclosures. The practice also differs when it comes to anonymous disclosures. Some of the public bodies do not require a whistleblower to reveal his/her identity, i.e. the Central Anticorruption Bureau, prosecutors' offices, the State Mining Authority. Others, like the Supreme Audit Office, the State Labor Inspectorate or the General Office of Building Control, do not accept anonymous disclosures invoking in this respect the Code of Administrative Procedure demanding each application to indicate the person it comes from and their address (Article 63 § 2).

Non-governmental sector. Irregularities occurring in public life have been monitored by non-go governmental organizations. Whistleblowers may occasionally be able to get attention of one of the non-governmental organizations. Though the interest of such organizations is usually limited to some particular issues (e.g. transparency of public procurement systems, equal treatment regardless sexual orientation, rights of foreigners etc) and constrained to projects' duration.

#### **4.4. Disclosure of state secret or other confidential information.**

Disclosing alarming information by a whistleblower may constitute a crime. The Penal Code criminalizes revealing classified information that bears a "classified" or "strictly classified" clause (state secret). Also unintentional disclosure of such information is forbidden under the penalty should a perpetrator acquire the information in the course of conducting duties of a public officer or based on the clearance (Article 265 Paragraph 1 and 3 of the Penal Code).

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<sup>8</sup> *O krok dalej: miejsce na uczciwość w biznesie. 12 Światowe badanie nadużyć gospodarczych*; Ernst&Young, 2012

<sup>9</sup> *Nadużycia – niewidzialny wróg przedsiębiorstw 2008. Raport z badania nadużyć gospodarczych w polskich firmach*; Deloitte, 2008.

Criminal liability may also arise out of disclosing information with a breach of a statute or an obligation should the disclosed information be acquired in the course of fulfilling professional duties, work, public, civic, economic or scientific activity (Article 266 Paragraph 1 of the Penal Code).

### **III. PERCEPTIONS AND POLITICAL WILL**

#### **1. Public Perception of Whistleblowers**

##### **1.1. Social Awareness**

The latest public opinion poll carried out in April 2012<sup>10</sup> shows that fear of being branded a snitch (“I would not report it because I’m not a snitch”) is the second, after the attitude “it is none of my business”, disincentive and it is even stronger than fear of employer’s reprisal. On the one hand, respondents predict that a whistle-blower would be confronted with ostracism on the part of co-workers. Most often Poles predict unpleasant reaction towards a whistleblower (at least the keeping of that person at a distance - 28%, through deliberate, trivial unpleasanties - 20%, to isolation from the rest of his/her colleagues - 19%).

On the other hand, the respondents asked what they would call a person reporting irregularities most often use descriptions with positive connotations (a brave person - 35%, a person taking care of common good – 28%, a responsible person 20%, a loyal employee taking care of employer’s good – 20%).

The above contradiction may show that Poles in fact might have undergone a change in social awareness since the collapse of communism though they are still not sure if their countrymen have changed their point of view too.

Acceptance of whistle-blowers depends to a significant extent on the circumstances – this is determined in particular by the nature of the reported irregularity. The greatest acceptance of whistle-blowing is found in cases in which there is a generally recognized danger to people: physical danger (non-compliance with safety procedures, driving a vehicle while intoxicated) or mobbing. Approximately 2/3 of people polled approve of stepping forward by an employee. The level of social acceptance of reporting of corruption is equally high. On the contrary, blowing the whistle on the abuses which can be defined as “acting for one’s own benefit” (putting petrol in a private vehicle at the firm’s expense or making use of unjustified doctor’s certificates to go on sick leave) is less supported. A considerable number of Poles – more than 30% - consider loyalty towards co-workers to be more important than loyalty towards

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<sup>10</sup> *Bohaterowie czy donosiciele? Co Polacy myślą o osobach ujawniających nieprawidłowości w miejscu pracy?*; Fundacja Batorego; 2012  
[http://www.batory.org.pl/upload/files/Programy%20operacyjne/Przeciw%20Korupcji/Raport\\_Sygnalisci.pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Przeciw%20Korupcji/Raport_Sygnalisci.pdf)

the employer: more than one in three respondents consider it improper to inform an employer that a co-worker was working for a competitor.

Fear of reprisal on the part of the employer (“I would not report it because it could get me into trouble with my employer”) is another main reason not to disclose a wrongdoing. Poll participants said expressly that they would expect a negative reaction on the part of the employer: dismissal (51%), harassment (13%), or formal disciplinary action towards the whistle-blower (8%). At the same time 63% of Poles perceive the existing legal provisions as ineffective in protecting good-will whistleblowers compared to 17% who are of the opposite opinion.

Surprisingly, the opinion poll participants expect persons working in professions such as the medical profession, teachers, clerks working in public administration and police who became aware of a wrongdoing to take action to report it internally rather than seeking the intervention of outside authorities. This even applies to cases in which offences are evidently committed such as sexual abuse of schoolchildren or corruption in the police force, except in cases in which there is danger to life or health of employees (falsifying readings of the concentration of gases in a mine). In such a case almost 60% of poll participants would expect this to be reported to the state prosecutor's office.

To sum up, Poles do not feel safe to report irregularities which may occur in their workplace either in terms of legal protection, or the social acceptance. Though, the latter disincentive may have been weakened in recent years.

## **1.2. Business about Whistleblowing**

The 2012 research by Ernst&Young shows that 62% of managers in Polish enterprises support the idea of rewarding whistleblowers<sup>11</sup>. It is surprisingly high compared to the score in so called Western Europe (38%). Also, significant differences appear in numbers of respondents who are against the idea (22% in Poland compared to 40% in old Europe). Given the fact that research was carried out in the group of biggest Polish enterprises the strong support to whistleblowers among Polish managers may not be easily extrapolated to the whole business sector. It should also be mentioned that together with the prevailing positive opinions, the poll seems to show a relatively high ambivalence (16% of respondents say they do not know if would be willing to support the idea of rewarding whistleblowers), which corresponds to ambivalent attitudes towards various aspects of whistleblowing revealed in the general public opinion poll referred to above.

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<sup>11</sup> *O krok dalej: miejsce na uczciwość w biznesie. 12 światowe badanie nadużyć gospodarczych*; Ernst&Young, 2012

### 1.3. Whistleblowing in Media Coverage and Public Domain.

Whistleblowing is not often but regularly covered by media, both newspapers and broadcasting media. These are usually whistleblowers' individual stories putting stress on the interconnection between stepping forward by an employee and the retaliation following his/her disclosure ("They Fired a Contester", "He Criticized and Was Demoted") and difficult choice a witness of a wrongdoing is confronted with ("Punished for Counteracting Corruption", "The Loneliness of Whistleblower"). Another aspect raised in publications is the social stigma and ostracism on the part of co-workers some whistleblowers encountered („No One in Coalmine Would Talk to an Agent"). By highlighting public interest being involved such publications show what whistleblowing is really about („They Suspected Price Manipulations and Lost Their Jobs", "Army Harasses for Scandal Disclosure").

Another group of publications, oftentimes appearing in specialized or brand media ("Law Gazette Daily", "Corporate Governance Overview"), shows whistleblowing as a prevention tool applied in business sector („This is How You Target Corporate Fraud", "What One Would Not Do To Win the Investors' Trust").

Rare publications present researches carried out by NGOs ("How to Protect a Whistleblower" - an interview with a judge-expert to the aforementioned research run by the Batory Foundation; „Whistleblower – Person Of The Year Or Snitch?" – press article summing up the public opinion poll by Batory Foundation).

Unfortunately, even though the journalists generally understand the importance of whistleblowers' role, the mechanisms of retaliation and social stigma, often times the publications are accompanied with a drawing, a title or a lead which seem to contradict the article contents, e.g. by diminishing the importance of a disclosure (a drawing of a passer-by reporting to a policemen on an elderly couple crossing the street one hundred meters from zebra), denying the ethical cause for whistleblower's conduct ("Whistleblowers, Those Who Whistle, The Snitches", "Denounce Effectively") or refer to a stereotype ("Ethical Snitches", "Do Love The Snitches! Do Love Them Damn It!").

There are also rare publications, the authors of which present whistleblowing as a negative phenomenon, do not distinguish between personal revenge and acting in public interest ("Poles came to the conclusion that for instance those who evade paying taxes steal also from them. Therefore the number of snitches rapidly grows.") and equal blowing the whistle to ratting on Jews during the Second World War ("... it is only the difference in scale of harm"). Such publications are harmful to the social awareness by sustaining social stereotypes and causing confusion in ethical assessment of *bona fide* whistleblowing ("Encouraging to denouncing certainly is not against the law but it is against the fundamentals of social morals"<sup>12</sup>).

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<sup>12</sup> Marcin Król, *Państwo zachęca obywateli do donosów, zamiast działać samemu.*; Law Gazette Dayily, 2-4 March, 2012

Equally harmful was the social campaign drawing public attention to the use of illegal software. The TV-spots depicted employees reporting on their employers in revenge for unfair treatment, and a wife reporting on her husband in revenge for his betrayal<sup>13</sup>.

Except for singular cases Polish media have not yet took up the challenge to analyze the folded nature of whistleblowing, its new role in the democratic society, possible risks to social bounds, border line between good and bad faith, between acting for the benefit of common good and one's own personal interest as well as the scope of legal protection. The thorough debate on these topics is still ahead.

## **2. Political Will**

When it comes to declaring political will of enhancing the legal protection of whistleblowers, Polish politicians belong to the supporters of the idea. In the fall of 2011 at an annual conference organized by the Alliance of Non-Governmental Organizations Against Corruption (AKOP) all parties being represented in the Parliament declared strong support to the enhancement of legal protection of whistleblowers<sup>14</sup>.

Though, when it comes to taking concrete actions by politicians at power political will becomes a problematic issue. The example of such is the latest opinion of the Ministry of Labor and Social Policy assuring the existing labor law sufficiently protects whistleblowers against any forms of retaliation. The opinion was issued in response to the letter of the Batory Foundation asking whether the government will take into account the newest results of public opinion polls showing that vast majority of Poles do not believe the existing law could be an effective shield for an employee reporting a wrongdoing.

A response of the same contents had been sent to the Human Rights Ombudsman in 2009 who had asked the Minister of Labor to consider strengthening the protection by the law amendments. The Ombudsman had referred to cases monitored by the Bureau of the Ombudsman showing the systemic barriers in protecting the whistleblower's interests.

In the previous term of the Parliament, the then Government Anticorruption Plenipotentiary, declared the support to whistleblowers, though the declaration did not result in any concrete activities.

It may be predicted that Law and Justice party, at present in opposition, would be willing to work on draft law on the protection of whistleblowers. At the same time, though, based on the so far activities undertaken by Law and Justice politicians it may be assumed that a draft law supported exclusively by one club only has no chances to be passed.

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<sup>13</sup> Małgorzata Kolińska-Dąbrowska; „Piracy, Boss and Employee's Revenge”, “Wyborcza” Gazette, 18-19 June, 2011

<sup>14</sup> See <http://www.akop.pl/dzialania-akop/obietnice-wyborcze-2011.html>

#### **IV. STRENGTHS, WEAKNESSES AND RECOMMENDATIONS**

The first and primary weakness is the absence of the concept of whistleblowing and a *bona fide* whistleblower both in Polish law and social awareness.

Usually it is expected that the law evolution will follow the social change. Though many times it was the change of law that induced the social change. It seems introducing whistleblowing into legal system has great potential for such a change.

Firstly, whistleblowing is in a sense a new phenomenon in Poland. Obviously reporting a wrongdoing as such is not, but its role in building modern, active and responsible society is a new opportunity. This new role and the new meaning resulting from a changed historic and economic reality need to be promoted.

Secondly, public opinion seems to be confused about how people reporting irregularities should be perceived, whether they are troublemakers or protectors of common good? While the dilemma seems to be clarified by some media, the others contribute to the confusion by reaffirming social stereotypes.

Finally, a contradiction is contained within the legal system. On the one hand, the law encourages individuals to report offences (Article 304 Paragraph 1 of the Code of Penal Procedure), though on the other, it does not provide for protection mechanism which would be effective in the court room.

Introducing the concept of whistleblowing into the law might make the law system more coherent. It also could clarify the ethical opinions about blowing the whistle within the society and thus strengthen social acceptance.

On a practical level it should be recommended that:

- legal protection embraces wide group of whistleblowers, regardless what kind of legal relationship is the basis for rendering work - it needs to be extended to civil-law contractor, trainees, volunteers, temporary workers etc;
- the burden of proof remains on an employer though its contents changes – the employer should be obliged to establish that the cause for dismissal was not related to the disclosure;
- whistleblower is not required to prove that irregularities he/she raised actually took place;
- whistleblowers be protected against retributive defamation and slender claims;
- penalties be imposed on those who retaliate against whistleblowers;
- a universal legal act on the protection of whistleblowers is passed.

The last but not least, it should be recommended that thorough public debate on various ethical and legal aspects of blowing the whistle should be continued. Public opinion poll show that social awareness campaign is needed.

## V. REFERENCES AND SOURCES

- the Labor Code
- the Penal Code Procedure
- the Civil Code
- the Code of Administration Procedure
- the Act on State Labor Inspectorate
- *O krok dalej: miejsce na uczciwość w biznesie. 12 światowe badanie nadużyć gospodarczych*; Ernst&Young, 2012
- *Nadużycia – niewidzialny wróg przedsiębiorstw 2008. Raport z badania nadużyć gospodarczych w polskich firmach*; Deloitte, 2008
- Anna Wojciechowska-Nowak; *Ochrona prawna sygnalistów w doświadczeniu sędziów sądów pracy. Raport z badań*; Fundacja Batorego, Warsaw, 2011
- report on public opinion poll *Bohaterowie czy donosiciele ...*, Fundacja Batorego, Warsaw 2012
- press publications referred to in above.

## VI. CHART

The information contained in the chart is based on the Labor Code, Penal Code and the practice of the employment courts, public administration and business sector.

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		Polish legal system do not contain specific provisions devoted to whistleblowing and consequently no definition of whistleblowing is available.
Broad definition of whistleblower		X		No definition of a whistleblower
Broad definition of retribution protection			X	
Internal reporting mechanism		X		Internal whistleblowing schemes are entirely facultative. No such schemes are applied within the system of Civil Service. No data available on other administration units. The schemes are operating in some companies – no data representative for the entire business sector are available.
External reporting mechanism		X		A policja i prokuratura??? Obowiązek przyjęcia zgłoszenia, co z inspekcjami?

Whistleblower participation		X		A whistleblower participates as a witness. Passive role.
Rewards system		X		No rewarding program applied in public sector at present.
Protection of confidentiality			X	Protection of confidentiality by an employer is entirely facultative;
Anonymous reports accepted			X	The practice differs depending on the authority
No sanctions for misguided reporting		X		Reporting a concern which does not turn out to be true may result in a slander claim and a dismissal.
Whistleblower complaints authority			X	No specific authority. Whistleblowers who were employees may lodge their claims in the employment court.
Genuine day in court			X	In practice, a genuine day in court is available only to employees.
Full range of remedies			X	Under the Labor Code only lump-sum compensation, full compensation available under the regular civil trial.
Penalties for retaliation				No penalties provided specifically for <i>retaliation against whistleblower</i> , Instead - penalties for infringing employee's rights
Involvement of multiple actors				