



# **Mutual Learning Programme**

DG Employment, Social Affairs and Inclusion

**Peer Country Comments Paper - Poland**

**Who really cares about whistleblowers?  
Although a popular subject of public  
debate, concrete actions are marginal**

**Peer Review on “Enhancing whistleblower protection  
through better collaboration between responsible  
authorities – a tool to prevent and tackle  
work-related crime”**

**Norway, 14-15 February 2019**



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## **1. Introduction**

This paper has been prepared for the Peer Review on "Enhancing whistleblower protection through better collaboration between responsible authorities – a tool to prevent and tackle work-related crime" within the framework of the Mutual Learning Programme. It provides a comparative assessment of the policy example of the host country (Norway) and the situation in Poland.

## **2. Overview of key trends**

The Polish police keeps track of crimes against rights of persons who perform paid activities that are included in penal code. The last accessible data for 2016 show that the most common crimes in this group were violation of employees' rights (68%), exposure of employees' lives and health to dangers (20%), failure to report social insurance records (12%) and failure to notify accidents in the workplace (1%). A more detailed picture of work-related crimes is provided by the State Labour Inspectorate (PIP) statistics. The most common offences against employees' rights detected after PIP's controls in 2017 are cases of violation of HSE regulations (51,1%), misconduct while paying salaries and other benefits to employees (16,6%) and infringements of working time, parents' eligibilities and employment of adolescents rules (8%). What we know from labour complaints received by PIP, informants focus very much on remunerations and other payments (37,1%), hiring and terminating (20,3%) and working time (8%) (PIP 2017). The majority of complainants are former employees (32,3%) or employees (23%). Around 15% of all notifications are anonymous (PIP 2017, p. 210).

2,9 % of the complaints handled by PIP come from foreigners, although their increasing presence on the Polish labour market is followed by a large scale of illegal practices in their employment. In 2017 regression in working conditions and payments of foreigners has been notified by PIP (PIP 2017, p. 108). Data from PIP controls indicates that 12% of foreigners from "third countries" worked illegally, and 94% of them were Ukrainian citizens (PIP 2017, p. 105).

A study of CBOS in 2014 indicated that two out of five employees have suffered from mobbing between the years 2009 and 2014 (CBOS 2014). However, cases of discrimination, sexual harassment and mobbing remain at a stable level of 2% of all reported wrongdoings according to PIP reports of the last years. A possible explanation is the difficulty of proving such practices. Under equal treatment regulation, at the judicial stage the employer has to provide evidence to show a lack of discrimination, but this rule does not apply to investigations conducted by labour inspectorates who should find proof of discrimination themselves (PIP 2015, p. 12). Another possible explanation is that harassment cases may be effectively tackled at organizational level under internal anti-mobbing policy; hence, the lower number of mobbing-related reports to external agencies. Employers that are committed to combat mobbing in general might allow anti-mobbing commissions consisting of employees' and employers' representatives to handle relevant complaints inside the organization.

A problem that particularly touches the youngest employees is the replacement of employment contracts with civil law contracts when the latter are required by the labour code, which happens even in public administration. One-fourth of employees work on a different basis than on an employment contract or without any contract (CBOS 2018). The PIP forced employers to enter into 17 100 new employment agreements with persons who were in a similar situation following on-site inspections in 2017 (PIP 2017). This clearly shows that the type of contract in these cases did not resemble the real character of the work.

Employees' consent to illegal work, their tolerance for harassment practices by supervisors and their willingness to enter into inappropriate contracts are partly consequences of a deficit of well-paid jobs in Poland. Additionally, employers may use several deceitful tactics

in order to pay employees less than the statutory minimum wage, such as extra fees for work clothes. These practices characterize the cleaning and guarding industries (Szymaniak 2018).

Another CBOS research provides critical assessments of the role of trade unions in the protection of the rights of employees. Most respondents who work in places where trade unions exist consider their efforts as ineffective (43%) or do not see any effects of their activities (34%) (CBOS 2017). The share of trade union members in the entire population of employees is around 11%. They are not frequent complainants to PIP; only 2% of wrongdoing reports were addressed by trade unions (PIP 2017).

The last research on combating fraud in Polish companies states that whistleblowers became the key tool to prevent wrongdoings in business. In 2018 45% of fraud cases were detected as a result of their tips, while in 2016 this indicator reached only 9% (PwC 2018).

### **3. National policy / measures**

There are several public institutions in Poland where employees may report work-related offences. The most relevant is the State Labour Inspectorate (PIP) institution which controls whether employers comply with the labour code. The Chief Labour Inspector, who is in charge of the institution, is appointed by the presidium of Sejm, the lower chamber of Parliament. Besides that, there are authorities and law enforcement agencies which may deal with employees' complaints occasionally like the prosecutor's office, the police, the sanitary-epidemiological station or the Commissioner for Human Rights. Crimes against rights of persons that perform paid activities are categorized under offences which are prosecuted ex officio. Therefore, everybody who witnesses them is obliged under the code of penal proceedings to report these to prosecutors or the police, although no penalty is imposed for failure to disclose these cases.

Generally, whistleblowing meets a lot of barriers in Poland which leads to the conclusion that national policy aimed to protect whistleblowers in terms of systemic and cohesive activities, based on mutual collaboration of public authorities and social partners, does not exist. In the following paragraphs this thought will be further developed by analyzing institutional practices, legal, organizational and cultural factors which are detrimental for the status of whistleblowers in Poland, in respect of the Norwegian example.

Unlike the Norwegian Working Environment Act, the Polish labour code does not recognize employees who report wrongdoings in the workplace to protect the interests of other employees, the employer or society, and that for this reason he or she may suffer from discrimination or other retaliation. Grounds of discrimination determined in the code do not include disclosure of irregularities. Another important gap is related to the issue who has the burden to prove a fact of retaliation – employer or employee. This might be interpreted differently depending on the particular process and court, which are often unacquainted with the specificity of whistleblower cases. At the same time, the employer has the facility to hide the real reason of terminating the employment contract with the whistleblower by providing a false rationale which is investigated by a judge only in a formal way (Wojciechowska-Nowak 2011). In the case of reporting persons who have different work contracts and do not enjoy rights given by the labour code, their dismissal from the organization is even easier.

In accordance to the labour code, employees need to remain loyal towards their employer. This leads to ambiguity concerning the boundaries of acceptable criticism in the workplace, a problem that was being elaborated upon in several judgments by the Polish courts. Other regulations pose other risk for whistleblowers, such as being sued for the breach of professional secrecy, the violation of personal rights or defamation. These and more arguments are raised by NGOs and the Commissioner of Human Rights to prove that Poland needs a stand-alone act in whistleblowers' protection, similar to legislation applied in other European countries.

The competence of public authorities is another aspect that proves the shortcomings of whistleblowers' protection. It has been already indicated that labour inspectorates, similar to Norway, are responsible for handling complaints of employees. Inspectorates receive anonymous as well as non-anonymous complaints. In the second case, inspectorates are obliged to answer within 30 days and to try to keep the identity of the informant confidential. Taking into account the structure of notifications addressed to the PIP mentioned in point 2, it is difficult to define complainants as whistleblowers, since PIP informants often act in their own interest as a significant share is motivated by problems with salary. Wrongdoings which would potentially concern at least a small group of employees, such as different types of harassment or risky activities in the workplace, are very rarely subject of reports. This may partly be an effect of low awareness among insiders about the possibility to report directly to the PIP. Another possible explanation is the poor competence of the authority to deal with whistleblowers' cases. Every year the PIP sets priorities for their inspections in the forthcoming 12 months. Assistance to whistleblowers was not mentioned among these priorities so far. Perhaps the process of reporting to the labour inspectorates is additionally undermined by the limited consequences that unfair employers face after inspections, beside the payment of small fines (Makowski, Waszak 2016). The limited scope of interaction between whistleblowers and the PIP resembles the situation in Norway, where a small percentage of the total reports of insiders leads to notification to supervisory authorities. However, the Norwegian joint action plan involving 14 public authorities addressed this problem, while the Polish authorities did not start any initiative to rethink their role in this area.

The development of advisory services addressed to different groups that have an interest in the whistleblowing systems, i.e. employees who consider reporting, employers, public authorities and whistleblowers themselves that are part of the Norwegian policy are for sure worth copying in Poland. The current free legal aid system established in Poland a few years ago is in general unavailable for people of working age. Whistleblowers may eventually count on legal assistance provided by district labour inspectorates, the Commissioner for Human Rights, NGOs like the Helsinki Foundation for Human Rights, student legal clinics at universities and trade unions, but their limited resources and basic level of consultancy versus the demanding, multi-faceted character of whistleblowers' cases makes this offer absolutely insufficient. The Commissioner for Human Rights is entitled to reject to disclose personal data of the whistleblower, even when public authorities demand them, if it is necessary to protect the freedom, rights and interests of the individual. What can dissatisfy employees is an attitude of prosecutors towards violations against employees. These crimes are often treated as soft crimes which do not involve much harm and therefore investigations are dropped. Formal agreement about collaboration of prosecution services with the state labour inspectorate aims to make prosecutors more sensitive to the harmful character of work-related crimes.

One of the biggest differences between Poland and Norway concerns the conditions for reporting irregularities inside organizations. Obligatory internal whistleblowing procedures in Norwegian entrepreneurship with at least 5 employees contrast with the lack of similar regulation in Poland. Larger private companies with over 50 employees often implement systems of reporting to someone inside the organization or to external firms which offer confidential whistleblowing services (EY et al. 2018). However, there is not one consistent, widely used set of standards with which reporting systems must comply. In the public sector, reporting schemes seem to be less popular than in foreign companies that have an organizational culture in which whistleblowing has a longer tradition. Moreover, the strongest pressure to guarantee whistleblowers' protection at the organizational level is a result of activities of international organizations like the UN Global Compact Network Poland. This network motivated a part of the big companies in Poland to apply standard minima of ethical policy, one of which is a tool to establish safe mechanisms of reporting irregularities. EU legislation is often decisive in making such practices mandatory in particular sectors, among them the banking sector and institutions that are connected with anti-money laundering. With regard to new commitments towards financial institutions,



the Financial Services Authority is the only public authority that issued educational material on whistleblowing so far (Cichy 2017). Another example of the EU impact is the experience that the Ministry of Investment and Economic Development and regional administration now have with operating channels through which any fraud with EU funds can be reported confidentially. Perhaps the future directive on the protection of persons reporting on breaches of the Union law will spread these practices to other sectors and branches.

Substitutes of internal whistleblowing mechanisms in organizations where trade unions exist are social labour inspectorates. They are elected by employees among trade unions members and are supposed to be permanent supervisors on the legal protection of work and HSE regulations. Despite the fact they are managed by trade unions, they represent all workers. They are sometimes identified as an "institution of whistleblowing" in the workplace, to whom different wrongdoings might be reported and who subsequently raise these wrongdoings to trade unions and state labour inspectorates (Makowski, Waszak 2016). However, limited space for trade union activities decides that also social labour inspectorates cannot be present in every organization. The Norwegian indicator of trade unions membership is almost eight times higher than in Poland. Approximately 11% of employees are members of trade unions in Poland (CBOS 2017). In most of public sector organizations at least one trade union operates (62%), distinctly more often than in the private sector (38%) (GUS 2014). Moreover, their activities are concentrated on a few specific sectors where they have the strongest influence, such as mining, energy production, education, transport and health service. The basic form of trade union activities is to represent and protect the rights of organizational members or other groups of people. They most often perform their task by supervising social funds, giving opinions and agreement regarding employers' decisions directed at individual employees, creating collective agreements, co-producing internal work regulations and ethical codes and intervening when the law, internal regulations, standards and ethical codes are violated (GUS 2014). There is no identified practice in Poland to engage trade unions in consultations of processes for internal reporting. The Stefan Batory Foundation, the Helsinki Foundation for Human Rights, the Institute of Public Affairs and the trade union NSZZ Solidarity 80 proposed in 2017 the citizens' bill on whistleblower protection as a grassroots initiative, based on their previous experience with assistance to whistleblowers and analysis of their situation. Among other things, they proposed to oblige employers to consult trade unions or other employees' representatives with regard to internal processes for reporting. However, the draft triggered public discussion whether trade unions will be keen to collaborate in this field.

One of the major barriers which prevents development of whistleblower protection policies in Poland is a lack of institutional collaboration among the main stakeholders. When the Ministry of Family, Labour and Social Policy held a meeting in 2016 addressed to social partners about their assessment of the scope of whistleblower protection provided by the labour code, opinions given by employers' organizations and trade unions turned were contradictory (Letter from 23.06.2016). Because it was agreed that the problem is cross-sectoral and has more owners than only one ministry, the conclusion of the meeting was that the issue should be delegated to the Social Dialogue Council. The Social Dialogue Council is the public body for consulting and negotiating public decisions and policies among representatives of employees, employers and government. Since then, only one action was undertaken by the Social Dialogue Council. This concerned a short, general declaration issued by one of its thematic groups on the development of social dialogue about the necessity to dedicate to whistleblowers a separate legal act that should take into consideration similar regulations in other countries and recommendations of international organizations.

National trade union organizations avoid to engage in advocacy efforts for a legal framework of whistleblower protection (Wojciechowska-Nowak 2016). Employers' organizations still remain sceptical towards protection; hence, they emphasize that educational measures aimed to build a positive image of whistleblowers in society are

appropriate, although no similar activities are conducted by themselves. Initiatives of independent organizations such as a social coalition established by the Stefan Batory Foundation or Global Compact, which produced their own general recommendations regarding whistleblower legislation were not followed up by Polish government so far. Instead, the citizen's draft law received approval of the Commissioner for Human Rights. This is one of the institutions that is the most active in fighting for whistleblowers' protection, particularly for those employed in uniformed services. Whistleblower protection is complex for those employed in uniformed services for several reasons. Firstly, these employees need to be careful with secrets that may refer to national security information. Secondly, the character of their profession requires absolute obedience to supervisors and respect for strong organizational hierarchy, what makes them particularly vulnerable for retaliation. Thirdly, they these employees work in hermetic institutions and cannot count on trade union assistance, as these unions are not allowed to operate in the army and secret services. The Ministry of National Defense agreed with the arguments of the Commissioner and suggested analytical and legislative actions to enhance whistleblower protection among armed forces personnel (The Letter from 31.08.2017), which have not taken place until now.

Furthermore, in the last years the Polish government undertook a few actions concentrated on whistleblower legislation. One of them was consultations held by the Ministry of Justice about the main points of the upcoming draft whistleblower law in 2016. These consultations were conducted by using questionnaires addressed to government agencies, public authorities, trade unions, employers' organizations and NGOs. However, the initiative had no continuation and collected answers were not used for the purpose of preparing stand-alone whistleblower legislation. The plan of implementing proper regulation was put into the new Government Anti-Corruption Strategy for 2018-2020. Generally, the last government activities around the problem of a lack of whistleblower protection are closely linked to fighting corruption, and not as much related to workers' rights. As a result, two legal initiatives, the Bill on Transparency in Public Life and the Bill on Liability of Collective Entities for Prohibited Acts, were presented and consulted in the last period. The initiatives proposed processes for reporting, which were supposed to be useful for law enforcement agencies in their investigation of unfair entrepreneurial practices. However, both drafts were criticized by social partners who considered them as irrelevant in the light of the recommendations of the Council of Europe, the OECD, the United Nations or the Transparency International. The social partners especially opposed the poor measures linked to whistleblower protection, the limited scope of wrongdoings that might be subject to protected disclosures and the lack of guarantees for confidential reporting (Waszak 2018). The Bill on Transparency in Public Life stays in limbo now, whereas The Bill on Liability of Collective Entities for Prohibited Acts is still proceeding at parliamentary stage. Another government document, the National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights 2017-2020, mentions a promise of new legislation to protect whistleblowers and the need for action to enhance social awareness of the role of whistleblowers role in society. The plan specifies that broad social campaign about the positive impact of whistleblowers on public interest protection is necessary. This declaration has not been accompanied by concrete actions so far.

The note above leads to final difficulties with regard to the introduction of whistleblower policy in Poland: cultural aspects. It was necessary to create a new neutral word, "sygnalista", as an equivalent of "whistleblower" in Polish. This was proposed over 10 years ago by the Stefan Batory Foundation and now is commonly used in public debate, in order to avoid stigmatising connotations of people who associate wrongdoings in the public interest with 'snitches'. The perception of whistleblowers in the workplace is still burdened with reminiscences from the communist age when informants collaborated with hostile authorities and secret services for personal profits. Nowadays, there are still employers as well as other employees who question the intentions of whistleblowers (Makowski, Waszak 2016). The Norwegian working environment seems to be free from this kind of harmful

stereotypes. This helps to reach broad consensus about activities enhancing whistleblower protection.

The preventive and informative activities undertaken by the PIP are practices which may be of interest to Norway. These activities are mainly addressed to Ukrainian workers who are often not familiar with the Polish law. One of these activities is the social campaign "Work legally", a common initiative with the Social Insurance Institution (PIP 2017, p. 149-153). PIP's efforts focus on raising awareness of employers and employees about labour law, consequences of its violation and elimination of potential work-related offences in the scope of illegal work. It involved numerous publications, media releases, posters, discussions, free trainings, meetings and the website [www.prawawpracy.pl](http://www.prawawpracy.pl) as a compendium of relevant information. The Social Insurance Institution evaluated that educational materials reached 49% of entrepreneurs and 20% of employees. A second example is the additional hotline for Ukrainian employees that has been launched as a result of an accident of a Ukrainian who worked illegally. When she had a stroke, her employer did not call for an ambulance. Telephone advices are provided from Monday to Friday for eight hours every day by persons who speak Ukrainian. The initiatives mentioned in this section show the growing demand of foreigners for professional support when in conflict with their employer. Between 2016 and 2017 the number of complaints sent to the PIP by foreigners tripled (Matłacz 2018). However, the effectiveness of PIP activities depends highly on its reputation. For instance, a corruption scandal in a district labour inspectorate in Lublin the last year triggered an internal investigation of a whistleblower instead of an attempt to verify the allegations. These situations undermine the competence of the PIP to provide assistance to whistleblowers (Brzuszkiewicz 2018).

#### **4. Assessment of public policy implications and success factors**

Comparing public policies between Norway and Poland regarding whistleblower protection indicates the following success factors:

- character of the labour market, especially access to stable and well-paid work and treatment of employees;
- effectiveness in executing responsibility for work-related crimes;
- self-awareness among external authorities about being part of national whistleblower protection systems and their readiness to build capacity in this field;
- ability to build broad consensus that involves government, other public authorities, employers' organizations, trade unions and NGOs and general conditions of social dialogue;
- level of social trust in trade unions taking into account the scale of membership and presence in organizations within the public and private sector;
- social attitude towards persons who report illegal and unethical practices in the workplace which might be related directly to their colleagues and/or supervisors;
- systematic, permanent efforts aimed to collect and analyze data on the social effects of whistleblowers that enhances its further development. Taking advantage of findings from updated recent field research is crucial for the development of evidence-based policies.

#### **5. Questions**

- How does protection of whistleblowers against retaliation work in practice? What measures do you implement to prevent unfair dismissal and/or blacklisting?

- What types of work-related offences are reported to labour inspectorates? How many of these would you define as information from whistleblowers or concerning whistleblowers?
- Are there more external agencies in Norway, besides labour inspectorates, which handle whistleblowers' notifications? Do labour inspectorates collaborate with these institutions on a regular basis?
- Do labour institutions in Norway provide any systemic and regular evaluation of whistleblowing procedures? Does any public entity have the power to assess and control to what extent their standards and effectiveness meet expectations of employees?
- Are public sector institutions committed to establish processes for internal reporting similar to the processes in enterprises with at least five employees? Is whistleblowing of uniformed services personnel based on the same principles as in other workplaces?
- How do trade unions and health, safety and environment representatives who receive whistleblowers' complaints proceed with investigation afterwards? What measures do they use to identify and eliminate potential wrongdoings?
- How are business associations and employers' organizations engaged in actions to strengthen the rights of whistleblowers in the workplace?

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## **Annex 1 Summary table**

The main points covered by the paper are summarised below.

### **Overview of key trends**

- According to statistics of 2017, the offences reported most frequently to labour inspectorates were connected to remuneration, although according to results of inspections a violation of HSE regulation took place more often;
- An increasing number of employees from Ukraine are particularly vulnerable for violation of their rights, which is connected with illegal work;
- The small percentage of mobbing and discrimination cases reported to labour inspectorates do not reflect the real scope of the problem;
- The tolerance of employees for work-related offences is connected with the limited access in Poland to well-paid jobs;
- Trade unions seem to be too weak to protect the rights of employees effectively.

### **National policy / measures**

- Elements of protection that are guaranteed by labour code are considered as insufficient and addressed only to part of employees. Other legislation does not provide effective measures to stop retaliation against whistleblowers;
- Public authorities that deal with whistleblowers' cases require capacity development, trainings and educational actions to handle these problems properly;
- Processes for internal reporting adopted voluntary or under EU pressure are adopted only in particular entities, mainly in the private sector, and there is a lack of standards how they should be implemented;
- The attempts thus far to build broad consensus among main stakeholders involved in whistleblower protection policy failed;
- The government is active in issuing controversial, corruption-oriented draft laws, although declarations about protection of whistleblowers in uniformed services or social campaigns about the public benefits of whistleblowing are still waiting to be implemented.

### **Assessment of public policy implications and success factors**

- Factors related to collaboration of social partners and initiatives taken by public authorities and more influential trade unions put Norway in a better position than Poland to create successful policies;
- The country context, such as a culture of reporting, the perception towards whistleblowers or labour market conditions, can be decisive in making the policy effective or not;
- Institutions that execute labour regulations need to have the right capacities to effectively prevent activities which whistleblowers may suffer from;
- In-depth research provided on regular basis is necessary to properly define objectives and measures of the policy.



## Questions

- How does protection of whistleblowers against retaliation work in practice? What measures do you implement to prevent unfair dismissal and/or blacklisting?
- What types of work-related offences are reported to labour inspectorates? How many of these would you define as information from whistleblowers or concerning whistleblowers?
- Are there more external agencies in Norway, besides labour inspectorates, which handle whistleblowers' notifications? Do labour inspectorates collaborate with these institutions on a regular basis?
- Do labour institutions in Norway provide any systemic and regular evaluation of whistleblowing procedures? Does any public entity have the power to assess and control to what extent their standards and effectiveness meet expectations of employees?
- Are public sector institutions committed to establish processes for internal reporting similar to the processes in enterprises with at least five employees? Is whistleblowing of uniformed services personnel based on the same principles as in other workplaces?
- How do trade unions and health, safety and environment representatives who receive whistleblowers' complaints proceed with investigation afterwards? What measures do they use to identify and eliminate potential wrongdoings?
- How are business associations and employers' organizations engaged in actions to strengthen the rights of whistleblowers in the workplace?

