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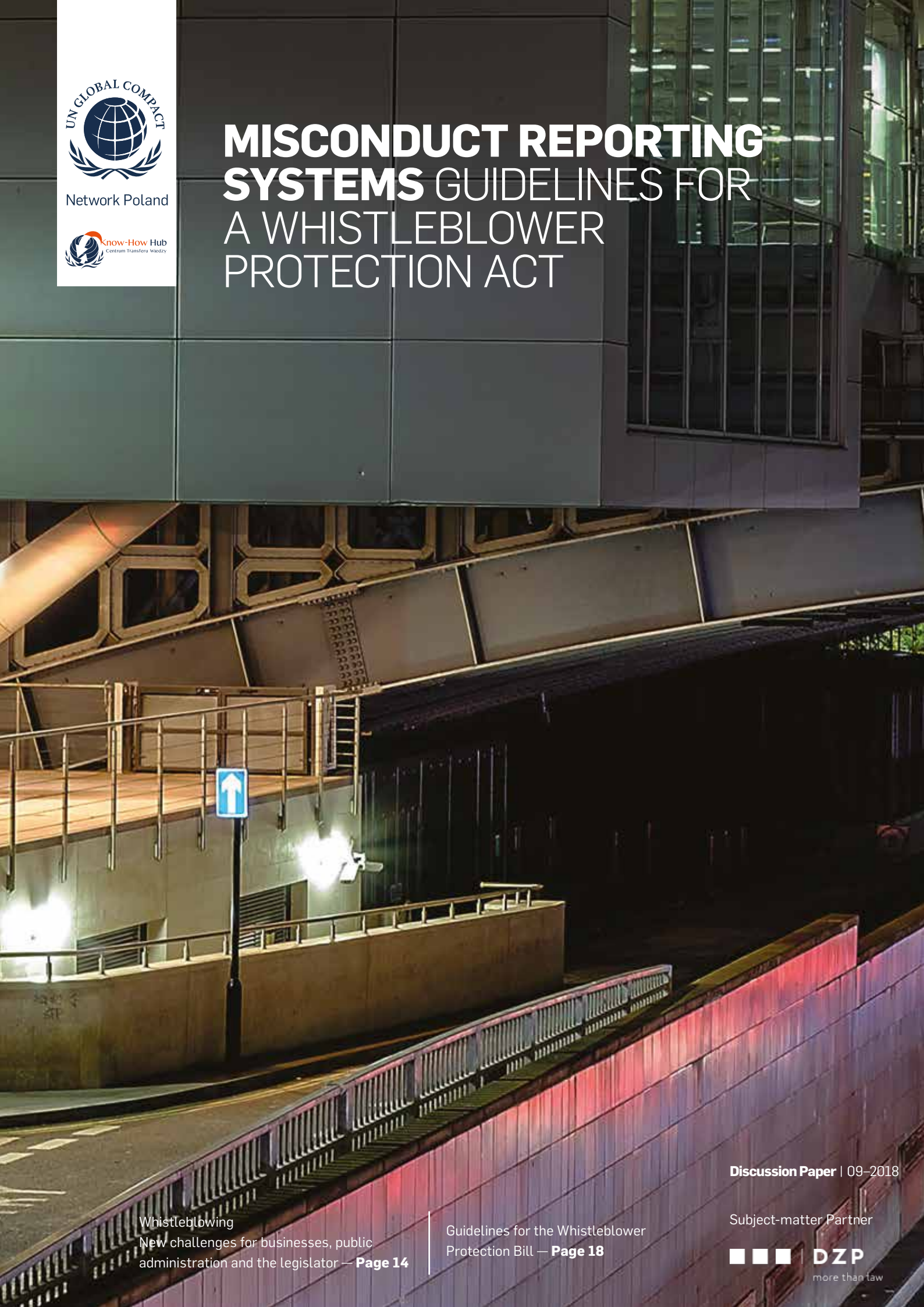
MISCONDUCT REPORTING SYSTEMS GUIDELINES FOR A WHISTLEBLOWER PROTECTION ACT



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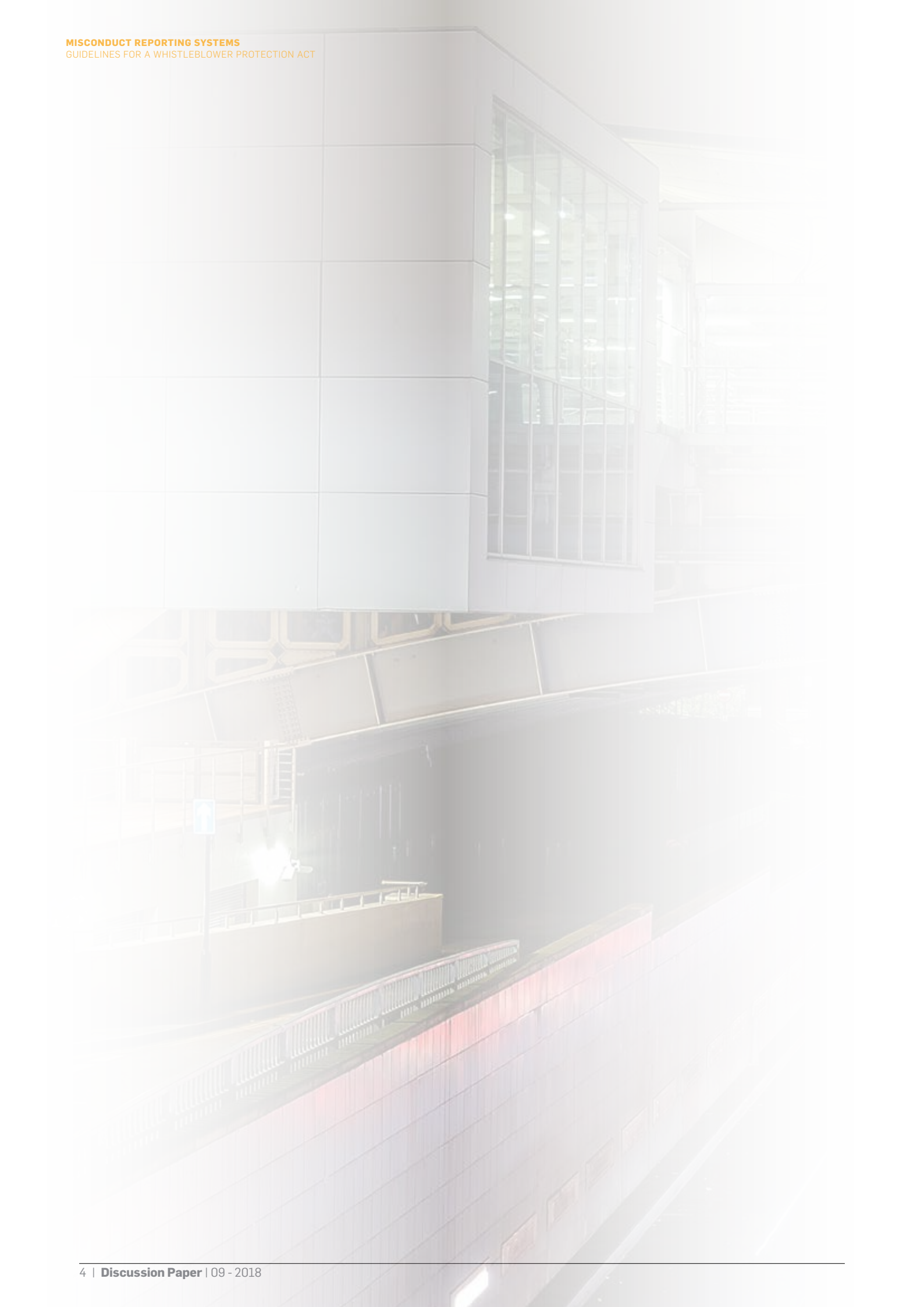

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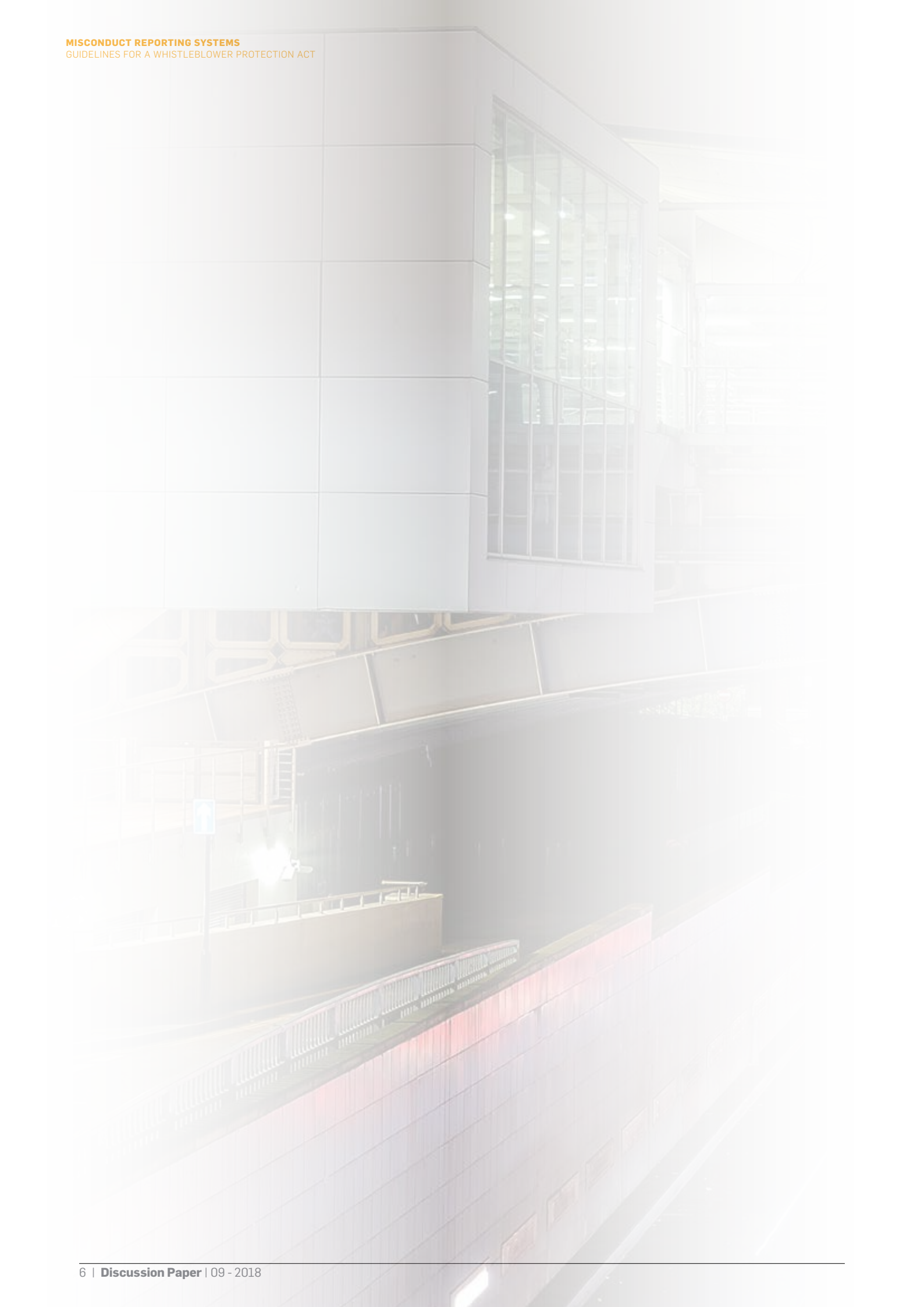

Ministry of Justice

Whistleblower protection as a crime prevention tool

The last two decades have shown that competition between companies frequently involves socially undesirable outcomes. Unfair market practice, malpractice in applying for and carrying out public contracts or, finally, failure to ensure right working conditions and decent pay for employees are particularly harmful phenomena. Not only do they involve measurable social damage, undermine the respect for legal regulations and public institutions, but they also petrify unfavourable trends in the economy, and weaken innovation. In the longer term, those phenomena are, consequently, harmful for companies themselves, and, more broadly, they pose a threat to Poland's sustainable development.

Despite the self-evident nature of such conclusions, no comprehensive legal regulations which could effectively contribute to limitation of those unfavourable phenomena have been prepared to date. The regulations adopted were usually sectoral in nature and based on the administrative and legal method of regulation, including the administrative manner of enforcing the compliance with the norms in question. Such an approach resulted from the implementation of EU and international solutions in the Polish legal order, but was also partly caused by ineffectiveness of the mechanism of criminal law liability of collective entities. On the other hand, the business milieus have taken initiatives to establish fair relations between companies and towards the environment in which they operate, their business partners, employees, and natural environment. However, those two trends were not complementary. The administrative solutions did not take into account the standards and codes of conduct developed by companies themselves, or even ignored, if not directly required by law, the already introduced mechanisms and procedures for reporting and responding to misconduct. Furthermore, there was no legal protection for recording and disclosing such misconduct.

Consequently, current business regulatory environment should be considered as one which does not create favourable conditions for taking effective and, first and foremost, pre-emptive actions against misconduct. What is also limited is effectiveness of bottom-up actions taken by companies themselves and their associations. Various problems which are against law or good commercial practice remain hidden as nobody is interested in disclosing them: neither the company - e.g. because of possible sanctions - nor other persons, including employees, who may be subject to reprisal from the employer for reports which expose the employer to sanctions.

One way out of this situation is to legally regulate the status of the whistleblower - a person who reports misconduct in the company's operation. The standardisation of this issue proposed by the Ministry of Justice in the draft bill on collective entities' liability for acts prohibited under penalty is a step in this direction. The provisions on whistleblower protection included in the bill will constitute a separate regulation, and, at the same time, they will complement the solutions included in the draft bill on transparency of public life. Their distinct nature and scope is caused by a broader material and personal scope of the regulations of the future law on collective entities' liability for acts prohibited under penalty, as well as the different function that the whistleblower institution is expected to play in the context of the criminal law liability of a collective entity.

According to the legislative solutions drafted, protection provided to whistleblowers is expected to reduce misconduct classified as prohibited acts. Consequently, it is an approach directed towards ex ante actions, aimed at causes of misconduct before they take place. At the same time, the regulations drafted will be closely connected with one of the main changes in the rules applying to collective entities' liability - the adoption of the concept of such an entity's own fault.

As a result of that change, assessment of the level of guilt will be one of the key elements of the proceedings regarding liability of that collective entity. What will be

important in this context is to investigate the entity's response to the misconduct reported, including the circumstances of establishment and actual implementation of appropriate procedures for dealing with tips.

According to the bill, tips provided by whistleblowers may concern the following categories:
1) suspected preparation, attempt at or commission of a prohibited act;
2) failure to fulfil obligations or abuse of powers by the bodies of a collective entity or other obligated persons;
3) failure to exercise due care required in certain circumstances for actions of the bodies of a collective entity or other obligated persons;
4) malpractice in the internal workings of the collective entity which could lead to a prohibited act.

If the collective entity ignores a tip provided by whistleblowers and the prohibited act is actually committed, the liability may be stricter than otherwise. In this context, whistleblowers themselves will receive better employee protection.

The proposed regulations should, therefore, aim at a situation in which whistleblowing serves both the public interest - as hidden misconduct will be disclosed - and is perceived as such by companies themselves, giving them an opportunity to suffer less liability for a prohibited act.

The key to the usefulness of the information provided by whistleblowers is correct assessment of their good faith. The aim of our actions is to introduce such assessment standards which will allow separating persons who act in good faith from those whose actions result from completely different reasons, including the willingness to do harm to a fair company.

The purpose of the work conducted by the Ministry of Justice is to change the legal environment in such a way as to prevent companies' unfair and criminal practices. On the other hand, the mechanisms drafted will be equipped with guarantees thanks to which honest companies will have nothing to fear.

The proposed regulations should, therefore, aim at a situation in which whistleblowing serves both the public interest - as hidden misconduct will be disclosed - and is perceived as such by companies themselves, giving them an opportunity to suffer less liability for a prohibited act.

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The whistleblower in three dimensions - truth, time and cooperation

The whistleblower topic has been known in Poland for many years. However, it was not until recently that the generally applicable legal regulations governing expressis verbis the institution of the whistleblower were adopted. It may be exemplified by the provisions of the following acts: Capital Market Supervision Act (Article 3a), Act on Trade in Financial Instruments (Article 83a, clause 1a) and Act on Prevention of Money Laundering and Terrorist Financing (Article 53). In the public space there are two more bills which must be noted, i.e. the government bill on transparency of public life and citizens' bill on whistleblower protection. Both of them give a lot of food for thought. This time, a review of these bills has allowed analysing the whistleblower's situation in three dimensions: that of factual findings, making them in the shortest possible time and cooperation between the public and private sectors.

A review of the norms regulating the institution of the whistleblower suggests that their main objective is to establish procedures for anonymous reporting of breaches and protection of those who report it. What also should be pointed out is the fact that these norms constitute an integral part of a whole system of norms whose main objective is to establish a system for the prevention and combat of breaches. Breach prevention consists in identification and elimination of circumstances which create favourable conditions for breaches to occur, i.e. ones which allow them to take place. On the other hand, breaches are combated through ascertaining facts and circumstances in which they took place, and then identifying perpetrators and holding them to account. The main task of the system for breach prevention and combat is to enable and facilitate the organisation to avoid losses and generate profit. What plays a crucial role in completing this task is the truth, and, specifically, factual findings. These are findings presenting something which reflects facts and corresponds to the objective reality. The closer the findings are to the actual state of affairs, the better the decisions taken on their basis are, and the more effective the system for preventing and combating breaches is (whistleblowing being one of its numerous elements).

Consequently, despite the fact that establishment of procedures for anonymous breach reporting and provision of protection for those who report such breaches is an initial link in the process chain which just initiates the process of making actual findings, it has significant impact on the final link of the chain, i.e. reaching a conclusion or making a decision. One can, therefore, assume that the more reliable, i.e. the closer to the truth, anonymous tips are, the better final conclusions or decisions are.

The pursuit of truth is by itself not a sufficient condition guaranteeing effectiveness of the system for preventing and combating breaches. What plays an equally important role is time, and, in fact, efficiency of making factual findings. This is because the efficiency of the pursuit of truth translates into:
1) less potential losses, e.g. financial, moral, professional and image-related ones,
2) more opportunity for generating profits,
3) better outcomes of the upbringing and preventive activities.

In other words, an efficient process of making factual findings prevents the direct relationship between the moment of the breach and conclusion/decision from being blurred.

It has to be pointed out that efficiency of the pursuit of truth is especially important when it comes to whistleblowers, in particular with respect to their legal, financial, professional and private situation. This is due to the fact that an efficient conclusion or decision eliminates the state of uncertainty which is one of the biggest challenges and limitations not only for the whistleblower, but also for all participants of the anonymous breach reporting system. Inefficiency of the system for preventing and combating breaches weakens the

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authority of public bodies, adversely affects perception of employers, discourages whistleblowers from reporting misconduct and, consequently, may strengthen the perpetrators' feel of impunity. In such a situation, it is difficult to argue with the opinion according to which justice delayed is justice denied.

Breach prevention consists in identification and elimination of circumstances which create favourable conditions for breaches to occur, i.e. ones which allow them to take place. On the other hand, breaches are combated through ascertaining facts and circumstances in which they took place, and then identifying perpetrators and holding them to account. The main task of the system for breach prevention and combating is to allow the organisation to avoid losses and generate profit.

Given the ownership structure, breaches can be committed in the public, private and public-private sector. However, irrespective of the place or the gravity of breach, a tip may result in the need of cooperation between both sectors. This interaction may vary. In one case, the private sector may be the injured party, whereas in another one – the perpetrator. On the other hand, in yet another case the public sector will be the injured party and vice versa. In theory, both sectors should be interested in cooperation, in particular when it comes to reaching a conclusion or taking a decision as a result of a breach which has occurred. In practice, such cooperation does not always take place, or is not always sufficiently effective. This is due to the differences resulting from different aims and mechanisms shaping the manner in which both sectors operate, as well as mutual understanding of the characteristic features and needs. In fact, cooperation of both sectors may have significant impact on the effectiveness and efficiency of the pursuit of truth, in particular thanks to better access to data.

One of the most effective systems for anonymous reporting of misconduct exists in the USA (Whistleblower Program on the basis of the Dodd-Frank Act). According to the former Head of the United States Securities and Exchange Commission responsible for the implementation of that programme, effectiveness of the system for anonymous reporting of breaches depends on three elements:
1) significant financial reward,
2) effective whistleblower protection measures,
3) short tip verification period.

This study focuses on the last of the above-mentioned items. After some thought and more in-depth analysis, one can come to the conclusion that implementation of a short tip verification period depends, to a significant extent, on the efficiency and effectiveness of making factual findings, as well as cooperation between the public and private sectors. For this reason, what is a de lege ferenda requirement is to create a system for anonymous reporting of breaches and whistleblower protection in such a way as to take into account the three above-mentioned dimensions: truth, time and cooperation.

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The situation of whistleblowers in the international context

Whistleblowers' activity, which becomes more and more accepted in democratic countries, has quite a long history, featuring such figures as Benjamin Franklin or Colonel George Custer, known from the Battle of the Little Bighorn.

The term "whistleblower" - understood as a person who speaks up about activity which they believe is illegal, unfair or unethical - is said to have been popularised by the American activist Ralph Nader, who at the beginning of the 1970s wanted to avoid negative associations with the term "informer".

Whistleblowers inform superiors, public authorities, or the general public about misconduct which harms the public interest, about cases of fraud or embezzlement, acts of corruption, violations of procedures and regulations, often at the organisations which employ them, by reporting a case to persons responsible for ethical or disciplinary actions, but there are also whistleblowers who inform the general public, law enforcement authorities or other controlling institutions about such misconducts, bypassing the reporting channels within the organisation.

The European Commission proposes a narrow definition of whistleblowers as persons who provide or disclose information on breaches of European Union law, observed by them during their work-related activities. This definition does not include only employees, but also self-employed persons, consultants, subcontractors, suppliers, volunteers, interns and persons who apply for a job as part of the recruitment process. Transparency International defines "whistleblowing" as the disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations which are of concern to or threaten the public interest, to individuals or entities able to take appropriate action, whereas whistleblowers are private or public sector employees who provide such information, and are at risk of acts of retaliation.

The need to protect whistleblowers is connected with the fact that a vast majority of them experience reprisal for their activity. The above-mentioned Colonel Custer was demoted by President Grant for the information he provided, whereas the stories of New York policeman Frank Serpico or Karen Silkwood are part of the history of cinema. What is widely known in Australia is the case of Allan Kessing, who, on the basis of a valid verdict, was sentenced in 2007 to suspended imprisonment for providing information on corruption at the Sydney airport. Also in Australia, by 2003 no verdict had been delivered under the existing whistleblower protection legislation, and the research conducted in the 1990s showed that 71% of whistleblowers suffered official consequences of their actions, whereas 94% unofficial ones.

The situation is similar in Europe. The 2015 data from the Netherlands indicate that 85% of whistleblowers suffered negative consequences of their actions, out of whom 22% lost job, whereas the remaining persons experienced various forms of mobbing. In Luxembourg, Antoine Deltour, a former PwC employee who faced 18 months' imprisonment for disclosing that international companies practised tax evasion as part of the so-called "LuxLeaks scandal", was cleared of all charges as late as in May 2018, whereas a Swiss banker Herve Falciani, sentenced in 2015 to five years in prison for disclosing tax fraud at HSBC, waits for extradition in Spain.

Comprehensive legal protection of whistleblowers dates back to the 1980s, and varies depending on the country. At the international level, demands for such protection increased at the beginning of the 21st century, including the guidelines issued by the Council of Europe, UN (United Nations Convention against Corruption of 2005) or OECD.

In the USA, the first attempts at ensuring protection to those who provided tips on fraud appeared in the 1863 US False Claims Act. What was the turning point, however, was Sarbanes-Oxley Act of 2002, which

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criticised the state solutions in this respect. Currently, there is a number of legal solutions protecting whistleblowers, but President Trump has announced his intention to repeal the Dodd-Frank legislation, which may weaken that protection in practice.

Since 2007, the Public Servants Disclosure Protection Act has been in force in Canada, implemented by the Office of the Public Sector Integrity Commissioner of Canada. The aim of this Institution is to strengthen public trust in the Canadian federal institutions and ensure ethical conduct by civil servants.

In Australia, whistleblowers started to be protected about 20 years ago as a result of corruption scandals and the legal situation in which employees did not have the right to disclose information about their place of work. However, it was not until 1989, as a result of Fitzgerald Inquiry, that the need to protect whistleblowers and introduce relevant legislation was noticed. Those activities differed in various states. The most advanced work was conducted in New South Wales, where in 2000, as part of NSW Committee on the Office of the Ombudsman and Police Integrity Commission, a formal recommendation was made to establish an independent institution to protect whistleblowers. In the years 1993–2006, all states and territories passed regulations on whistleblower protection. These regulations differ, however, by the approach to which misconduct can be disclosed, how to protect against "whistleblowing" abuse, and what to do in a situation of so-called "news leaks" made in the public interest.

At the federal level, the Public Interest Disclosure Bill was adopted in 2001, followed by the Public Interest Disclosure Act in 2013 which introduced solutions for the public sector. In December 2017, after a long period of consultations with the business environment and public organisations, the federal government proposed a bill aimed at improving whistleblower protection in the corporate, financial and tax sectors.

The currently proposed Treasury Laws Amendment (Whistleblowers) Bill 2017, which is expected to enter into force in 2018, is aimed at ensuring uniform whistleblower protection in the above-mentioned sectors.

Comprehensive legal solutions aimed at whistleblower protection exist also in New Zealand, South Africa, Japan, India, South Korea, Ghana and Uganda. Also in Jamaica, the Protected Disclosure Act protecting whistleblowers was enacted in 2011. Advanced work on whistleblower protection legislation is also underway in Kenya and Rwanda.

From among the European countries, the most extensive whistleblower protection exists in the United Kingdom, where, as a result of a report published in 1990 by Social Audit and the work of the whistleblowing charity "Public Concern at Work" and "Campaign for Freedom of Information" the Public Interest Disclosure Bill was prepared, which, after numerous consultations and amendments, was adopted in 1998 as the Public Interest Disclosure Act. The Act ensures protection of whistleblowers against employers' acts of retaliation, imposing, however, certain restrictions of employees who disclose misconduct outside their place of work, thus bypassing internal ways of proceeding with them.

In Ireland, whistleblower protection is guaranteed under the Protected Disclosure Act of 2014. The Act protects persons who disclose information concerning crimes, abuse of law, threats to health and security, embezzlement of public funds or improper management thereof by persons who hold public positions, both against acts of retaliation, and criminal liability, and is considered to be a "good European practice".

In the Netherlands, after nearly 20 years of debates, in 2016 the Whistleblowers Authority Act was adopted, as a result of which Huis voor klokkenluiders has been established - an institution where public and private sector whistleblowers can report misconduct in the area of regulations, health and environment threats, as well as operation of public services and institutions. The legislation forbids retaliatory actions if the employee provides information in good faith. However, it does not apply to employees of the justice, intelligence and

security sector, and part of military personnel. Critics of this legislation point to its shortcomings with regard to penalties for those who use retaliatory actions, or absence of the possibility to force the employer to reinstate dismissed whistleblowers.

In Switzerland, whistleblower protection is included in the amendments to the Swiss Code of Obligations of 2014, which obliges employees to report misconduct to employers before they can be reported to authorities, but the legislation provides certain exceptions from that rule. Critics indicate that the above-mentioned legislation does not improve employees' protection against dismissal, and does not protect their identity, either.

One of the best European legal solutions aimed at whistleblower protection exists in Romania. In 2004, on the initiative of Transparency International, the country adopted the Whistleblower Protection Act, which provides broad protection to public sector whistleblowers. However, the Act does not directly protect private sector employees, but private companies have the possibility of adopting the public sector solutions. Also Hungary, as a result of the 2013 amendment of the existing law, offers legal protection to whistleblowers, but Transparency International experts point out that there are no institutions providing such protection, and no procedures as part of which cases of reported misconduct are analysed.

In Poland, work has been underway for some time on a public life transparency act, which could ensure better whistleblower protection. It obliges all companies to use internal anti-corruption procedures. The draft bill, which imposes on companies, under pain of heavy fines and personal liability of management board members, a number of obligations, including the need to keep a register for civil law agreements for some of them, is criticised by companies. Furthermore, it does not offer broad whistleblower protection, the need for which was indicated by the Commissioner for Human Rights in his letter of 16 April 2018 to the Prime Minister. What seems to be really interesting in this context is European Commission's recent initiative proposing a new directive to strengthen whistleblower protection. The protection mechanisms proposed provide for clear information reporting channels, three-level system for reporting breaches, feedback obligations, legal advice for whistleblowers and ban on retaliation.

It needs to be pointed out that there are proposals for business self-regulation which concern ethical standards, including whistleblower protection. What is a good example here is the unique - on the global scale - initiative of the Polish office of United Nations Global Compact Network Poland and actions taken by the Ethics Ambassadors Coalition.

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Whistleblowing: New challenges for businesses, administration and the legislator

The government's 2014–2019 Anti-Corruption Programme of 1 April 2014 (Journal of Laws of 2014, item 299) does not address whistleblowing. It was not believed to be important until 2014, and later there was no intention to do something about it, either. However, government support in this area is necessary. Systemic whistleblower protection had not been defined until Resolution of the Council of Ministers No 207 of 19 December 2017 on the 2018–2020 Government Anti-Corruption Programme (Journal of Laws of 2018 item 5) was adopted. The whistleblowing issues have finally become important in Poland in legal and organisational aspects.

Growing scale of abuse in Poland

Addressing whistleblowing in the government programme should be considered an important development, particularly in the context of the latest trends regarding cases of abuse in business, their perception and activities aimed at disclosing them. A PricewaterhouseCoopers study (PwC, "Kto i jak okrada polskie firmy? Badanie przestępczości gospodarczej w Polsce 2018", Warsaw 2018) indicates that over the last two years cases of abuse took place at half of Polish companies. In 2016, only 36% of Polish companies indicated abuse at their organisations. In 2018, the most common offence at Polish companies was theft of property (47%). However, the list of the types of abuse identified by the respondents for the first time included unethical business practices and conflict of interest (43%). As a result of the abuse identified, every second company in Poland has suffered losses exceeding PLN 400,000 over the last years. The scale of the losses indicates that serious crimes are committed in the Polish business. To make matter worse, they are more often committed by employees - 55%, out of which 54% are managers. Whistleblowers disclosed abuse much more often than in 2016. As much as 45% of the cases of abuse were identified thanks to their tips. In 2016, the rate was as low as 9%, whereas the global average was 27%. This surprising trend in the Polish circumstances needs to be taken advantage of fast and efficiently. What is necessary in these conditions is to engage business associations, NGOs, change the law and ensure government support for all organisational initiatives in this area.

New whistleblowing law finally in Poland

The Act of 5 August 2015 on Macroprudential Supervision of the Financial System and Crisis Management in the Financial System (Journal of Laws of 2015, item 1513) amended the Banking Act (Article 9.1 section 2a, 2b and Article 9f) and implemented CRD IV directive. On 1 November 2015, whistleblowing at banks became compulsory. However, that obligation did not take concrete shape until 1 May 2017, when Chapter 5 of the Regulation adopted by the Minister of Development and Finance of 6 March 2017 on Risk Management System and Internal Control System, Remuneration Policy and Detailed Manner of Calculating Bank's Internal Capital came into force (Journal of Laws item 637). At that time, the first comprehensive whistleblower protection regulation appeared in Poland. The procedure for anonymous reporting of misconduct by bank's employees must set out, among other things, the manner in which reported information about abuse is received; the manner in which the reporting employee is protected, ensuring at least protection against retaliatory actions, discrimination or other forms of unfair treatment; the manner in which the personal data of the employee who reports information and the one who is accused of abuse are protected; rules ensuring confidentiality to the employee who reports information, if the employee has disclosed their identity or the identity can be disclosed; list of persons responsible for collecting information on abuse reported; types and nature of follow-up actions taken as a result of receiving and verifying information

on abuse and how these actions are coordinated; deadline for deleting the personal data included in the bank's disclosure.

The implementation of those regulations is of crucial importance for the organisation of the whistleblowing system in Poland. This is due to the fact that the obligation applies to institutions with the most developed risk management culture, including the risk of abuse. Employees of financial institutions have been trained to fulfil that obligation for years. In addition, whistleblowing at banks may be aimed against abuse involving the risk of potential financial losses.

AML/CFT incorporates whistleblowing, too

Pursuant to Article 53 of the Act of 1 March 2018 on Prevention of Money Laundering and Terrorist Financing (Journal of Laws of 2018, item 723), the obliged institutions shall develop and implement an internal procedure for anonymous reporting by employees or other persons carrying out actions for an obliged institution of actual or potential abuse of the regulations covered by that Act. The procedure specifies, in particular, the person responsible for the receiving of tips, the manner in which tip is received; the manner in which the reporting employee is protected against retaliatory actions, discrimination or other forms of unfair treatment; the manner in which the personal data of the reporting employee and the one who is accused of abuse are protected; type and nature of follow-up actions taken as a result of receiving the tip; deadline for deleting the personal data included in the tip submitted by the obliged institutions. The Act also provides for the possibility of imposing administrative penalties on companies for their failure to fulfil the obligation to implement an internal procedure for anonymous reporting.

Undoubtedly, whistleblowing in the AML/CFT area will boost development of the whole whistleblowing system in the Republic of Poland. First of all, the obligation applies to a big group of obliged institutions, and, consequently, its nature will be universal. Secondly, it will apply to the area which, as such, is associated with reporting crime. Thirdly, it provides for a two-level reporting regime - employees submit tips to management boards, but also to the General Inspector of Financial Information, being a government administration body.

Proposed whistleblowing laws in the European Union and Poland

On 23 April 2018, the European Commission presented a proposal for a directive on the protection of persons reporting on breaches of law. It defines the whistleblower as a person who reports or discloses, in good faith, information on a breach of the European Union law acquired in a work-related context. This term is expected to include both employees (persons having the status of worker), and self-employed persons, contractors, counterparties, suppliers, volunteers, interns as well as job applicants. The draft directive also stipulates that all enterprises with 50 employees or more, or whose annual turnover exceeds EUR 10 million, as well as all public central and local authorities (including local government units with over 10 thousand inhabitants) shall be obliged to introduce internal channels for reporting information about misconduct in a manner ensuring data confidentiality and protection of whistleblowers' identity.

In Poland, the Ministry of Justice presented a bill on collective entities' liability for acts prohibited under

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penalty. The bill sets out, among other things, collective entities' obligation to accept information on misconduct, compulsory internal proceedings aimed at investigating the information reported, as well as detailed whistleblower protection measures in the case of collective entity's acts of retaliation. On the other hand, the Minister Coordinator of Intelligence Services has prepared a bill on the openness of public life, which provides for the institution of the whistleblower as a person cooperating with the judiciary in the form of reporting information about a possible corruption crime committed by the entity with which the person is bound under employment contract, service relationship or another contractual relationship, and which may adversely affect their personal, professional, financial situation and who have been awarded the whistleblower status by a public prosecutor. Once a relevant decision is taken, such a person shall be provided by the state with special protection against possible acts of reprisal.

Both bills have been heavily criticised from the beginning, especially the second one. There are claims that it fails to meet any institutional element of the definition of the whistleblower. It is true that the place of both solutions within the whistleblowing system is expected to be completely different, and their tasks will be different too. It seems, however, that in the Polish circumstances there is a place for both of them, in particular due to insufficient involvement of public authorities in this respect in the last two decades, as well as much more dynamic citizen's activity over the last two years.

Not just a change in law...

NGO activity is needed to develop the Polish whistleblowing system. What is expected is proposals of numerous promotional activities, intensive information campaigns and studies diagnosing, among other things, the directions of judicial decisions regarding information reported by whistleblowers, reasons for withdrawal of public authorities from relevant actions in this area, as well as the phenomenon of more intensive whistleblowing over the last two years.

Innovative technologies facilitating transfer of, processing and gathering information, as well as communication between citizens and public administration bodies should be used more extensively to curb abuse. This can be facilitated by, for instance, automation which may reduce the potential for corruption in routine administrative and business procedures; boosting transparency to help to eliminate discretionary situations which lead to abuse; establishment of channels for reporting situations leading to corruption or for reporting specific cases of abuse, or promotion of social portals allowing discussion about ethical conduct. Consequently, actions taken by the government and business should be focused on the construction and standardisation of the national whistleblowing system. This can be facilitated by new communications technologies which help to build effective whistleblowing systems to ensure a higher level of anonymity. For instance, information transfer through smartphones, tablets, iPhones or social media messengers can all be potentially implemented in the whistleblowing system.

Draft guidelines for the Whistleblowing and Whistleblower Protection Bill

Bill of 4 September 2017 (updated on 19 June 2018)

Draft guidelines for the Whistleblowing and Whistleblower Protection Bill

1. The need for and objective of the proposed law

1.1. Current laws and condition of social relations in the regulated area

The reporting of misconduct at work by whistleblowing has not been comprehensively regulated in the Polish legal system. The currently applicable regulations are fragmentary and dispersed, can be found in various legal acts, and do not ensure effective whistleblower protection. As a result - despite the fact that whistleblowing is favourable to public interest and employers' interests - reporting misconduct is a high -risk activity in Poland. According to a 2015 survey on the situation of whistleblowers at Polish institutions and companies, they often face "unfavourable or even hostile reactions from the environment", and experience various forms of retaliatory actions from employers, including "attempts at getting rid of them from the organisation, marginalisation of their job position by ignoring them in assignments of responsible tasks (also aimed at preventing the whistleblower from accessing information), various forms of mobbing and psychological pressure". At the same time, "a majority of whistleblowers feel lonely in their efforts, whereas some of them lack knowledge and insight as to what they should do, which institutions they should get in touch with and who they should ask for support"[1]. The lack of comprehensive regulation of whistleblowing issues translates into a low level of public awareness, which, in turn, may result in significant tolerance for misconduct at the place of work and passive attitude of their witnesses. This phenomenon has a significant corruption-generating potential, which adversely affects the competitiveness of the Polish economy.

In the currently applicable regulations, the universal whistleblowing obligation, i.e. to report misconduct observed, is provided for under Article 304 § 1 of the Code of Criminal Procedure (public obligation to inform about a suspected crime) and under Article 100 § 2.4 of the Labour Code (obligation to report misconduct in the operation of the workplace). However, these obligations are not accompanied by any specific legal protection of whistleblowers. As a matter of principle, only persons who remain in the employment relationship are protected on the basis of general rules, and the level of guarantees they are entitled to varies depending on the basis of employment (it is higher in the case of employment contract for an indefinite period, and lower in the case of contracts for a definite period, work on the basis of nomination and appointment). Persons who perform work on the basis of civil law agreements and those who remain in the relationship of service are not protected. However, the employee protection set out in law is secondary in its nature, and materialises only during proceedings before the labour court in the case of the notice of termination of the employment contract, termination of the employment contract without notice, or notice changing the terms and conditions of the employment contract submitted by the employer in connection with the employee's whistleblowing activity. Consequently, the burden of proof that the cause for termination of the employment contract indicated in the termination notice is just a pretext rests on the employee (this is due to the fact that usually the employer does not indicate the whistleblowing activity, but other circumstances attributable to the employee as the reason for the dismissal)[2]. To this end, the employee is obliged to present evidence

1 A. Kobylińska, M. Folta, Sygnaliści - ludzie, którzy nie potrafią milczeć. Doświadczenia osób ujawniających nieprawidłowości w instytucjach i firmach w Polsce, Instytut Spraw Publicznych, Warsaw 2015.

2 The employee can also cite the provisions of the Labour Code which forbid mobbing (Article 943) or the provisions on equal treatment in employment (Article 183). However, research into judicial decisions of labour courts suggests that these provisions usually do not ensure sufficient protection to the employee-whistleblower (A. Wojciechowska-Nowak, Założenia do ustawy o ochronie osób sygnalizujących nieprawidłowości w środowisku zawodowym. Jak polski ustawodawca może czerpać z doświadczeń państw obcych?, Warsaw 2012).

confirming the misconduct reported by them, which is particularly difficult in the absence of material evidence or documents[3].

Apart from the Labour Code, fragmentary regulation of whistleblowing and whistleblower protection can be found, for example, in:

- Act of 13 April 2007 on the National Labour Inspectorate, by which:
  - employees of the National Labour Inspectorate who perform control activities are obliged not to disclose information that an inspection is conducted as a result of a complaint, unless the person who filed the complaint has given written consent for that (Article 44.3),
  - the labour inspector is exclusively authorised to decide if the circumstances allowing the identification of the employee who discloses information about misconduct, including their personal data, will be kept confidential (Article 23.2)

- Banking Act of 29 August 1997, which lays down:
  - requirement to establish, as part of the bank's management system, procedures for anonymous reporting - to the designated management board member, and, in particular cases, to the bank's supervisory board - breaches of law as well as the procedures and ethical standards in force at the bank (Article 9.2a)
  - requirement to provide employees who report breaches with protection against at least retaliatory actions, discrimination and other forms of unfair treatment (Article 9.2b);

- Act of 1 March 2018 on Prevention of Money Laundering and Terrorist Financing, which obliges its addressees ("obligated institutions", including, mainly, entities which operate in the financial market) to develop and implement internal procedures for anonymous reporting - by employees and other employed persons - actual or potential breaches of regulations in the area of prevention of money laundering and terrorist financing, which should set out, among other things, the manner in which such persons are protected against retaliatory actions, discrimination and other forms of unfair treatment;
- Act of 25 June 1995 on the Protected Witness, which regulates the status of a suspect who has been allowed to testify as a witness in proceedings in cases related to crimes, including fiscal ones, committed in an organised criminal group or structured group;
- Act of 6 June 1997 - Code of Criminal Procedure - whose Article 184 governs the status of the anonymous witness, reasons for and manner of anonymisation, as well as the course of the interrogation;

- bills on which work is currently underway:
  - bill on transparency of public life (UD314), which obliges enterprises to implement internal systems for reporting corruption proposals and the procedure for handling misconduct reported, as well as covers persons who report to the prosecutor information on suspected corruption crimes with a special protection regime established by the prosecutor by way of a decision;
  - bill on liability of collective entities (UD74), which provides for stricter sanctions imposed on the collective entity in the case of the failure to conduct investigation or eliminate breaches reported by employees, members of corporate bodies or persons acting on behalf or in the interest of that entity, and, at the same time, provides protection to the person reporting information about misconduct prior to the termination of the contract entered into with the collective entity in connection with the information reported;
  - bill amending the Act on Combating Unfair Competition (document No 2549), which provides for exclusion of unlawfulness of disclosure of information constituting business secrecy made by the whistleblower, i.e. one made to representatives of employees, in connection with holding certain functions by them, when it is necessary for correct performance of those functions.

The sources of legal risks connected with whistleblowing activity in connection with absence of a special whistleblower legal protection regime and/or special status of persons who disclose information in the public interest include:
- provisions of the Code of Civil Procedure regulating liability for breach of personal rights (Article 24),
- provisions of the Penal Code regulating:
  - criminal liability for slander (Article 212),
  - criminal liability for disclosing secrets protected

3 Cf. M. Raczkowski, Ekspertyza w sprawie ochrony osób zatrudnionych sygnalizujących nieprawidłowości przed nadużyciami ze strony podmiotu zatrudniającego, Kielce 2009.

by law (Articles 265–267),
• liability for malicious or persistent breach of employee rights (Article 218).

1.2. Need to enact the proposed regulation

The need to enact the proposed act results from the necessity to create a comprehensive regulatory system defining the legal status of whistleblowers, and to establish a system of guarantees which will ensure effective protection to persons disclosing misconduct in a work-related context, irrespective of the sector or problem reported. The currently applicable regulation needs to be considered insufficient from the point of view of adequate protection of those persons' interests, which is confirmed by a survey conducted in 2012, according to which "implementation of better whistleblower protection could result in a wider use of whistleblowing"[4]. At the same time, the phenomenon is really beneficial both from the point of view of the public interest, and employers' interest - this is due to the fact that whistleblowing activity is an effective "tool streamlining control mechanisms as well as fight with mismanagement and corruption both in the public and private sector"[5]. Anonymous informers and internal misconduct disclosure systems are one of the most effective instruments to identify abuse, apart from a system for reporting suspicious transactions and internal audit[6].

The need to adopt the solutions drafted also results from the international obligations adopted by the Republic of Poland, including those under Article 9 of the Civil Law Convention on Corruption of 4 November 1999, which stipulates that the parties shall provide in their internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities. What is also necessary is transposition into the Polish legal order of 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. The Directive obliges Member States to, among other things, ensure that if a trade secret is acquired, used or disclosed as a result of revealing misconduct, wrongdoing or illegal activity, liability of the person who has disclosed it should be dismissed, provided that that person acted for the purpose of protecting the general public interest;

Moreover, the solutions in force in Poland should be considered to be insufficient in terms of the international whistleblower protection standards resulting, among other things, from:
- Resolution 1729 of the Parliamentary Assembly of the Council of Europe on the Protection of "whistleblowers",
- Recommendation 1916 of the Parliamentary Assembly of the Council of Europe - Protection of "whistleblowers",
- Recommendation of the Committee of Ministers CM/Rec (2014) on whistleblower protection,
- Report of the UN Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression concerning protection of journalist sources of information and whistleblowers' rights (document ref. No A/70/361),
- report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe "Improving the protection of whistle-blowers",
- case law of the European Court for Human Rights.

Furthermore, in April 2018 a proposal for a directive on the protection of persons reporting on breaches of Union law prepared by the European Commission was published. In the document's preamble, the Commission encourages Member States to consider - as part of the directive's implementation - the possibility of creating comprehensive and consistent national framework for whistleblower legal protection.

1.3. Objectives of the proposed regulation

The intention of the proposed Act is to create a comprehensive, consistent regulation of whistleblowing in a work-related context and a system for effective whistleblower protection, as well as to adapt the regulations in force in Poland to the international standards. The aim of the proposed act is to protect the public interest, employers' interest, as well as interests

4 Centrum Badania Opinii Społecznej for Stefan Batory Foundation, Bohaterowie czy donosiciele? Co Polacy myślą o osobach ujawniających nieprawidłowości w miejscu pracy? Report on qualitative research, Warsaw 2012.
5 D. Głowacka, A. Ploszka, M. Szczaniecki, Wiem i powiem. Ochrona sygnalistów i dziennikarskich źródeł informacji, Warsaw 2016, p. 11.
6 Badanie przestępczości gospodarczej. Polska 2011, Cyberprzestępczość rosnącym zagrożeniem w biznesie, PwC 2011.

of persons who report misconduct. These interests remain closely interrelated - according to the drafters of the bill, establishment of consistent legal framework for whistleblowing activity will contribute to significant reduction in factors leading to corruption and increase the competitiveness of the Polish economy. From the employers' point of view, what is also important is the possibility of early identification and elimination of misconduct reported as part of internal procedures, which helps to significantly reduce the financial and reputation risk connected with them. The aim of the regulation drafted is also to promote civic responsibility, improvement in public perception of whistleblowers and change of the public paradigm of whistleblowing activity, which is frequently perceived as morally questionable activity (being an informer).

2. Scope of the proposed Act

2.1. General guidelines

2.1.1. Personal scope

The personal scope of the proposed regulations should be determined by the definition of the "whistleblower", i.e. the person who has disclosed misconduct in a work-related context, or helped another person to disclose it by providing that person with information on misconduct, or otherwise taking active part in the process of disclosing it.

In order to ensure completeness of the regulation and effectiveness of the solutions proposed, it is recommended that as broad subjective scope of the act as possible is adopted. This scope should include all persons who perform work, irrespective of the basis of employment. Consequently, not only a person who remains in the regular employment relationship, but also a person employed on the basis of a civil law contract or one which provides services to a given entity - both in the private and public sector - may become a whistleblower.

2.1.2. Material scope

Reporting misconduct (whistleblowing) is submitting a tip on a breach or a tip indicating a breach suspected by the whistleblower within the organisation (internal whistleblowing), or - in absence of an appropriate procedure for internal reporting or when the organisation does not take any action - to competent bodies or external entities (external whistleblowing).

Whistleblowing should be limited only to actions which lead to disclosure of misconduct in a work-related context, are taken in good faith and in the public interest. Protection should not be awarded for actions motivated by the urge to take revenge or ones aimed at obtaining personal or financial gain. At the same time, protection should cover whistleblowing on the basis of at least reasonably justified suspicion that a misconduct has taken place, i.e. a suspicion based on the information held by the whistleblower which objectively lends credence to the misconduct reported. The good faith requirement should be deemed to have been met, if the whistleblower is genuinely convinced that the information is true.

The following categories of breaches may, in particular, be reported by whistleblowers:
- breaches of human rights which are or may be a threat to life, health or personal freedom,
- breaches of employee rights, including mobbing and discrimination, as well as all forms of abuse of the dependency relationship in employee and professional relations,
- breaches which are or may be a threat to the public security or natural environment,
- corruption-related activities, including active and passive bribery, fraud, forgery, use of deception in order to obtain attestation of false information in a document, etc.,
- breaches of public law obligations, including tax ones,
- actions aimed at withholding any of the above-mentioned breaches.

2.2. Detailed guidelines

2.2.1. Detailed reasons for providing protection

The drafted act should indicate detailed reasons

for granting protection to whistleblowers, i.e. the conditions which need to be collectively met in order to classify a given misconduct report as whistleblowing subject to protection. The reasons should correspond to the standards developed in the case law of the European Court for Human Rights, and be in adequate proportion to the act's objectives, guaranteeing effective implementation of its main principles. The reasons include:

- existence of relationship between disclosure of information and the public interest - the whistleblower acts in the public interest, and the disclosure is not aimed at obtaining personal benefit;
- actions taken in good faith and authenticity of information disclosed - the whistleblower acts in a justified (genuine) conviction that the information disclosed indicating existence of misconduct is true; presumption of good faith precludes any charge that they acted for a purpose which contravenes the law or rules of social coexistence;
- subsidiarity of external disclosure - before the external disclosure was made the whistleblower used all internal whistleblowing measures available (the person acted as part of the internal compliance procedure, and in absence of such a procedure - informed the superior, or another competent body/entity), unless taking advantage of such measures would be impossible or evidently impractical in a given case[7],
- proportionality of the possible damage resulting from the misconduct disclosed to the benefit resulting from the whistleblower's action - in order to secure employers' interests, benefits resulting from the fact that the misconduct was disclosed should be bigger than its costs; the whistleblower should act on the basis of a justified conviction that in a given case there is a right proportion between such gain and loss, taking as the point of reference possible damage and benefits of his action to the public interest.

2.2.2. Misconduct disclosure procedure - priority of the internal procedure

The aim of creating in the act a mechanism which gives priority of use to the internal whistleblowing procedure adopted by the company is to secure employers' interests, and in certain cases also the public interest (e.g. when the whistleblower reports misconduct with significant strategic importance for the state, misconduct which pose threat to the state's security or public order, phenomena which adversely affect the investment attractiveness or competitiveness of the domestic market, etc.). The preference for the use of the internal whistleblowing procedure should be reflected in limited protection offered to whistleblowers who, when disclosing misconduct did not, first of all, use the measures guaranteed by the compliance system in force at the company. The whistleblower should be obliged to use internal whistleblowing measures, if all of the following conditions have been collectively met:

- a compliance system or dedicated procedures aimed at detecting and reporting misconduct are in place at the company,
- the compliance system or procedures in place at the company meet the minimum standard, i.e.:
  - are safe (anonymous), easily available, as well as guarantee that the information reported will be reliably checked and relevant steps will be taken if misconduct is confirmed,
  - allow one to monitor the results of the misconduct reported,
  - are subject to periodic review regarding correctness and effectiveness of their operation,
- the circumstances of a given case or nature of the misconduct reported do not prevent the whistleblower from using internal procedures.

If the above-mentioned obligation is not fulfilled, the whistleblower shall not be entitled to special legal protection provided for in the act, and such actions shall be subject to protection in line with general principles.

2.2.3. System encouraging companies to introduce compliance systems and internal whistleblowing procedures

The persons drafting the bill believe that implementation by the employer of an effective compliance system or internal misconduct reporting procedure is the most effective tool to achieve the act's objectives. Consequently, it is proposed that the act provides for establishment of a system encouraging companies themselves to introduce such solutions. These procedures should indicate who at the company is responsible

7 Such a solution is recommended by the Resolution of the Parliamentary Assembly of the Council of Europe on whistleblower protection, according to which the external channel of reporting misconduct may be used when no internal channel exists, it does not function properly or cannot be reasonably expected to function properly, given the nature of the problem disclosed.

for gathering information on misconduct, as well as determine the whistleblowing procedure, and rules for looking into the doubts reported. What seems to be the optimal solution is introduction of the rule according to which the decision as to whether a given tip or report constitutes whistleblowing within the meaning of the act is made by a person designated by the employer (a dedicated employee, e.g. compliance officer). In such a case, further steps as part of the internal whistleblowing procedure will be taken on the basis of the preliminary assessment of the information reported by that person, which should increase the system's efficiency and effectiveness. This situation is desirable not only from the employer's but also from the employee's point of view - thanks to transparent internal whistleblowing rules the latter can act in trust that the information reported will be looked into in a timely and unbiased manner by the person designated.

It is suggested that the following incentives are offered in the act to introduce compliance systems or internal whistleblowing procedures:
- if a company has introduced a compliance system or an appropriate whistleblowing procedure, if a given disclosure is to be deemed whistleblowing activity, the whistleblower should have used the internal measures for dealing with misconduct; otherwise, such activity is not subject to the special protection provided for whistleblowers under the act (see section 2.2.2 above),
- if a compliance system is in place at the company, or it has introduced an appropriate whistleblowing procedure, the company may expect that the penalty imposed on it if the misconduct reported is confirmed will be reduced.

2.2.4. Specific whistleblower legal protection regime

2.2.4.1. Definition of retaliatory actions

Retaliatory actions shall be understood as all actions which:
- have been taken in connection with employee's whistleblowing activity, i.e. there is connection between adverse consequences for the whistleblower and the fact that the person has disclosed misconduct, or helped to disclose it, and
- they lead to deterioration of the whistleblower's situation, do damage or harm to her/him.

It does not mean that all decisions which have negative consequences for the employee constitute retaliatory actions within the meaning of the bill drafted. Both above-mentioned conditions need to be met jointly, thus it is also necessary to establish the cause-effect relationship between those decisions or actions with the fact that misconduct has been reported. The bill drafted should provide for the ban on taking retaliatory actions understood in such a way. Such actions should be deemed to be acts prohibited under penalty, whereas all disciplinary decisions taken as part of retaliatory actions should be deemed invalid by operation of law.

2.2.4.2. Protection of the whistleblower's data (identity)

What should be one of the elements of the specific whistleblower protection regime is statutory guarantees of anonymity. However, in order to prevent abuse of the mechanisms provided for in the bill it is necessary to point out that the entity which receives information on misconduct is not required to look into information provided anonymously, unless it indicates evidence which lends credence to the existence of the misconduct[8]. What should apply is the rule ensuring confidentiality of the whistleblower's personal data, which may be lifted only:
- on the basis of the explicit consent of the person interested,
- upon court's approval,
- when it is necessary to protect an important public interest or other persons' rights.

Disclosure of data in other circumstances than those indicated above shall constitute an act prohibited under penalty. At the same time, acceptance of the information reported may not be made contingent on the whistleblower's prior consent for data disclosure.

2.2.4.3. Distribution of the burden of proof

What is also an important element of the whistleblower's special legal status is appropriate presumptions

8 The same solution has been adopted in the Hungarian act - Article 5.7.

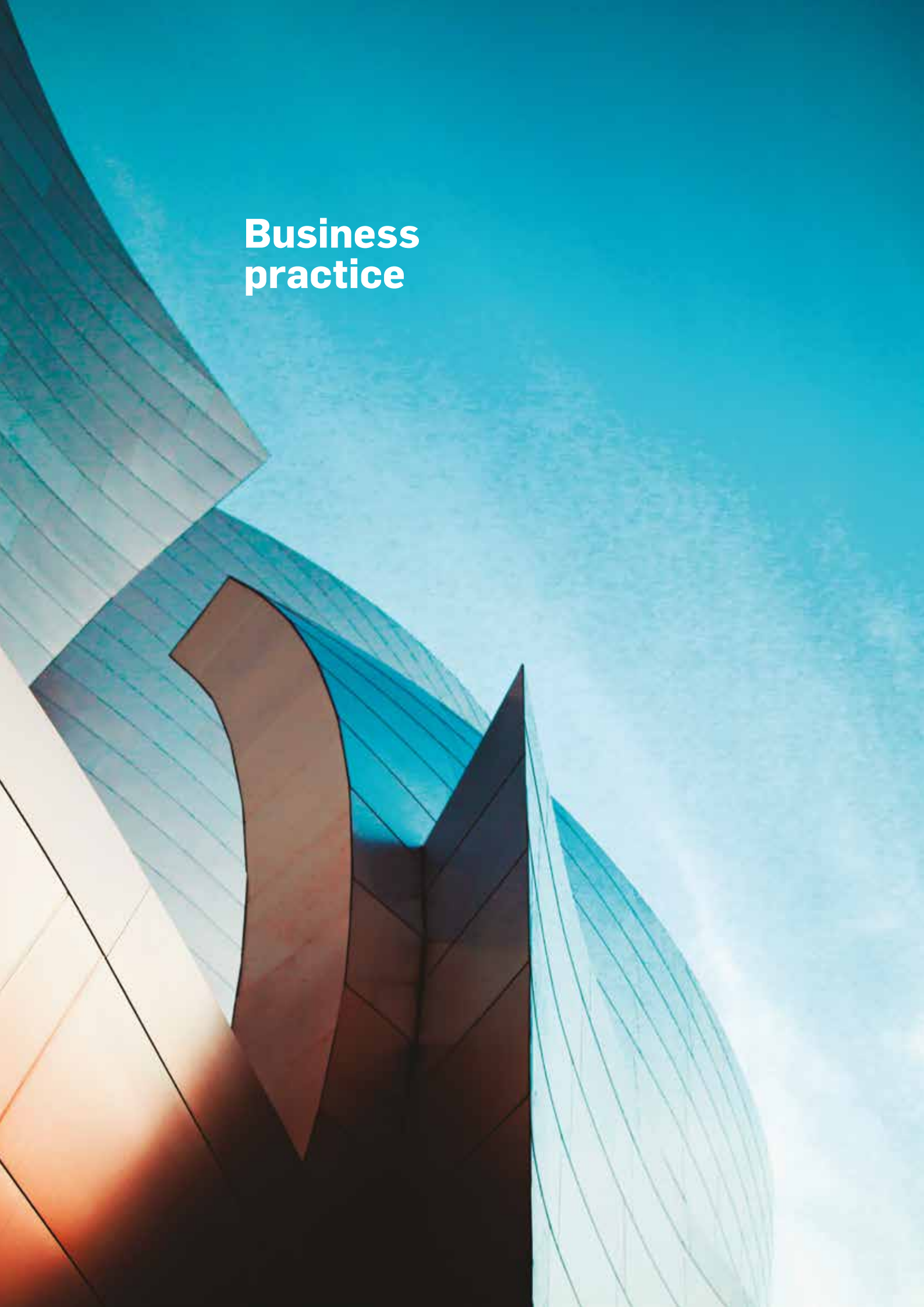
of law and distribution of the burden of proof. In the case of judicial proceeding, it is the employer that should prove that the actions taken against the whistleblower (e.g. termination of the employment or association relationship, transfer to another position, change of remuneration terms, personnel decisions and disciplinary penalties) were not connected with disclosure of misconduct by that person (i.e. with whistleblowing).

Furthermore, a presumption of law needs to be established according to which whistleblowing activities took place in good faith. Its rebuttal would require evidence indicating whistleblower's bad faith (e.g. actions motivated by personal interest which contravene law or rules of social coexistence).

2.2.4.4. Protection against criminal and civil liability

The act should offer the person who, acting in good faith and the public interest, discloses misconduct in a work-related context protection against criminal and civil liability on that account (i.e. slander, loss of reputation, disclosure of confidential information or statutory secrecy). To this end, the act should provide for precise exclusions of application of relevant provisions of the Code of Civil Procedure and Penal Code for persons who conduct whistleblowing activity within the meaning of the act.

8 The same solution has been adopted in the Hungarian act - Article 5.7.



Business practice

3M POLAND | Iwona Czerwińska-Engel

3M is an organisation which cares for the development of ethical culture. What constitutes part of that culture is the dialogue we conduct with our employees, as well as development of their responsibility and loyalty towards the company. 3M Code of Conduct obliges the employees to inform the company about situations which may indicate actual or potential breaches of law or ethical principles of our Code. Our business partners are also authorised to report such cases, as a result of which not only an employee, but also a client, supplier or company's another partner may become a whistleblower at 3M. The reporting and dialogue system in place allows us not only to respond adequately to any existing misconduct present, but also gives us an opportunity to take preventive actions, as well as actions which protect the company and its employees against difficult legal and ethical problems. 3M operates as part of "Speak Up" corporate programme and allows a number of ways in which information can be provided:

- In person - through contact with any member of the management staff, representative of the global or local Compliance, HR or Legal Department chosen by the reporting person;
- By e-mail to the address dedicated for "Speak Up" programme or
- On the telephone, at a dedicated, toll-free number for each country.

Irrespective of the manner of reporting, information may be provided in any language, including Polish. 3M Code allows the possibility of submitting anonymous reports, but in order to comply with the regulations applicable in Poland, we invite everybody to provide information overtly, guaranteeing them compliance with personal data protection regulations in the procedure.

3M provides full protection to persons who report breaches - 3M Code forbids taking any retaliatory actions against persons who submit tips, doubts and ask questions, as well as those who cooperate in the investigation procedure. "Non-Retaliation Policy" is an internal regulation which applies globally at 3M.

LOTOS GROUP | Agnieszka Kowalczyk

LOTOS Group is aware of the scale of misconduct and business crime in the contemporary world, as well as damage they do to companies' image, brand, position and value. We are part of the group of companies which prevent both ethical breaches, cases of abuse and situations in which there is suspicion that they have taken place. What constitutes the basis of the company's systemic approach is the Abuse Prevention Policy of the LOTOS Group. The implementation of the Policy demonstrates the organisation's commitment to constant improvement of the management processes, in order to effectively protect the company's reputation and assets. The Abuse Prevention Policy contains an explicit declaration of zero tolerance of any abuse.

Furthermore, we have implemented two programmes: Ethics Programme and Abuse Risk Management Programme, as well as the Code of Ethics, which sets out the system of ethical values as well as norms and standards of conduct which we, as LOTOS Group employees, should follow at work and in contacts with the external world.

At LOTOS Group there are as many as five channels for reporting abuse, depending on the type of report:

REPORTING ABUSE

Cases of abuse can be reported through the "report suspected abuse" tab, which can be found on the company's intranet, Lotostrada, by e-mail, telephone or in writing to the address of the Director of the Internal Audit Office of LOTOS S.A.

LOTOS Group allows reporting information anonymously, and employees who do it in good faith are protected against all forms of retaliatory action.

REPORTING NON-COMPLIANCE

Compliance is about ensuring that the business activity is conducted in accordance with legal regulations and norms, as well as other sets of recommendations, in order to avoid financial losses, legal sanctions or loss of reputation.

The task of the Compliance Department of Grupa LOTOS S.A. is to minimise the risk of non-compliance of the company's operations with legal regulations, internal procedures and standards of conduct adopted by the company.

The employees are obliged to report identified cases of non-compliance, abuse or risk of non-compliance. The information is provided by e-mail non-anonymously.

The personal data of the persons who report cases of non-compliance, abuse and risk of non-compliance, as well as those whom the reported information concerns are protected and confidentiality of the information is ensured.

REPORTING BREACHES OF THE CODE OF ETHICS

Tips on breaches of the Code of Ethics are reported through Ethics Programme portal available on Lotostrada, by e-mail, telephone, in writing or during a one-to-one meeting. Information reported on breaches of the Code of Ethics is investigated by the Ethics Ombudsman of LOTOS Group.

The Code of Ethics offers protection and discretion to all persons who decide to report a suspected breach of its provisions. Its aim is, in particular, to prevent any negative consequences against the employee who decides to disclose a breach.

REPORTING HAZARDOUS SITUATIONS

The aim of reporting hazardous situations is to eliminate misconduct and prevent accidents. Information can be reported anonymously through Lotostrada or by e-mail.

REPORTING ABUSE IN THE AREA OF WORK CONDUCTED BY THE DIVISION OF SECURITY AND INTERNAL CONTROL

The employees report information to the manager of an organisational section/unit of LOTOS S.A. Group or the LOTOS group companies which employ them, or may also take advantage of the procedures resulting from the Abuse Prevention Programme or Ethics Programme in force at LOTOS Group. If the managers of the organisational sections/units of Grupa LOTOS S.A. and LOTOS Group companies obtain the above-mentioned information, they are obliged to send it to the Director for Security and Internal Control in the written or e-mail form.

POLPHARMA | Anna Wyrkowska, Jakub Kraszkiewicz

Protection of the whistleblower's identity is the basis on which the breach reporting system operates. The results of a survey conducted in 2017 among Compliance Officers in Poland show that a vast majority of the companies surveyed, i.e. as many as 94%, apply this rule[1]. Polpharma Group is one of them. It is clear to us that whistleblowers may be afraid to report breaches, if they suspect that their identity will be disclosed.

Consequently, how do we protect their identity in our procedures?

The most important document is Polpharma Group Code of Ethics, which provides for the need to protect the whistleblower's identity and ensure appropriate discretion. We also protect the identity of persons the misconduct reported concerns (until the alleged accusations are identified as credible). A separate sub-chapter of the Code of Ethics is devoted to identity protection.

The corporate procedure for receiving tips and looking into breaches has been developed on the basis of the Code. It allows the possibility of reporting a misconduct by a whistleblower who provides their identity, and in certain cases, e.g. breaches of the Act on Prevention of Money Laundering - anonymously. The whistleblower's identity is protected by the person who receives the tip. It may be superiors (if the whistleblower has decided to report a misconduct to them) and in each case the Compliance Officer. The details of the reporting person may be disclosed only with their consent - if it is necessary to investigate the case or if the identity must be disclosed to law enforcement authorities. These rules apply to all breaches reported, including mobbing and discrimination. The group of the persons to which the latter misconduct can be reported includes members of the Management Board and so-called Trusted Persons (selected from among the employees).

Explanatory proceedings are confidential. If there are more people who conduct the proceedings, they should sign the confidentiality obligation.

In practice, the Compliance Officer may not disclose the whistleblower's identity even if asked by direct superiors or managers of the department in which the whistleblower is employed. The register of breaches kept by the Compliance Officer is protected with passwords. Any information about the status of proceedings is anonymised, and reported misconduct is encoded. It also happens when the whistleblower's identity can be figured out from the context of the misconduct reported.

1 Compliance w Polsce. Raport z badania stanu compliance i systemów zarządzania zgodnością w działających w Polsce przedsiębiorstwach. Viadrina Compliance Center, Instytut Compliance, Wolters Kluwer and EY, 2017, p. 40.

SKANSKA | Justyna Olszewska

Skanska's commitment to operate in a fair and transparent manner is based on the culture in which everybody feels that they are authorised to report breaches of Skanska's Code of Conduct, including cases of suspected illegal or unethical behaviour. It can be done in a number of ways. First of all, we indicate the direct superior, a HR team or legal team employee as the basic point of contact. We ensure that they are well prepared to play such a role through training in the area of ethical standards. We want to build the culture of openness and willingness to jointly solve dilemmas in everyday work.

Secondly, if the above-mentioned form of contact does not satisfy the employee, we enable them to report their doubts to the Ethics Committee. All Skanska business units have such a Committee. It must consist of at least one internal legal advisor, one human resources manager and a high-ranking operational manager. The Ethics Committee investigates breaches of the Code of Conduct and provides guidelines on ethics-related questions. The Committee may be contacted by e-mail. It is also possible to get in touch with each of its members. Such a procedure is available not only to the company employees, but also to everybody who wants to report a suspected illegal or unethical activity, as contact information is available on our website.

Thirdly, misconduct can be reported through Skanska Code of Conduct Hotline - over the telephone or by e-mail. The language used by the whistleblower does not matter. The reported case is encrypted and looked into as completely anonymous, which subsequently leads to relevant corrective actions.

Skanska does not tolerate reprisal against employees who report suspected misconduct in good faith. "Good faith" means that according to the employee's best knowledge and belief, everything they report is true and nothing is concealed. Disciplinary steps will be taken against any employee involved in retaliatory actions. Any retaliatory action need to be reported as suspected improper actions.

Skanska has a programme protecting whistleblowers, whose role we appreciate. We perceive them as persons who do not accept unethical and illegal actions, which is why they speak up about them. If an organisation has developed a system detecting signals about possible abuse and reacts to them properly, it gains an effective tool for warning against internal threats and the possibility of taking corrective actions at an early stage. Ethical standards protect the interest of the company, its employees and business partners - this awareness is more and more common, which is confirmed by various studies indicating ethics and values as positive elements helping a modern company stand out.

T-MOBILE POLSKA | Piotr Chmiel

All research into ways of detecting and tackling misconduct at companies clearly indicates the key role of solutions enabling provision of information by employees, associates, business partners and customers. Without such a communications mechanism as much as a half of misconduct which take place may remain undetected. Despite that, a technical solution itself is insufficient - it needs to be accompanied by appropriate procedures, and all stakeholders must take seriously the information provided.

Persuading the stakeholders (first of all, the employees and business partners) seems to be crucial for the success of the whole operation. Without faith in confidentiality of data processing, whistleblower protection and actual involvement in the investigation of misconduct, nobody will want to "step out of line" and share the information. In order to build such trust, it is not sufficient to act in compliance with rules and effectively process the cases reported, as the capital of trust built in such a way will be too "localised", and known only to a small group of stakeholders. The approach of the whole company needs to change.

T-Mobile Polska delivers a "Speak Up!" programme, encouraging all employees to share information. The main aim is to change the organisation's culture, eliminate inhibitions connected with disclosing (in a controlled and organised manner) information which may indicate possible misconduct. The word "misconduct" itself goes beyond the standard in the context of these actions. We do not talk only about abuse, but first of all about events which are unfavourable to the company and may consist in inefficient use of resources or non-optimal implementation of a project. At the same time, a change of the culture is also supposed to encourage employees to share ideas which originate at various places of the company. As we want to change the culture, it is a long-term programme involving various persons at various stages - we have started with the persons who manage the whole Deutsche Telekom Group and who have recorded video messages and taken part in workshops attended by lower tiers of management staff, instilling the new rules and ways of procedure in them. The subsequent steps, naturally, involve communication and tasks assigned to the remaining employees and associates.

In changing the company culture, we want to persuade as many people as possible that reporting potential misconduct and, in general, events that raise concerns is in the vital interest of each employee, providing the company with an opportunity to take informed decisions, which has positive influence on its business activity.

UNILEVER POLSKA | Łukasz Szymański

At Unilever, we believe that success is, to a significant extent, achieved thanks to reliability, integrity and respect for the rights of those who create the organisation, as well as those who cooperate with Unilever as third parties. To this end, in order to ensure the possibility of work in an ethical environment, Unilever has developed a number of solutions to safeguard the system for assessment of compliance of the actions taken with the ethical rules described in Unilever Code of Business Conduct. A key element of this system is procedures which ensure that all breaches or doubtful situations will be efficiently identified and eliminated, and the persons who inform about such events will not be exposed to any retaliatory action.

Consequently, Unilever offers a few modes of reporting potential breaches, including ones which ensure total anonymity to the whistleblower. The following procedures may exemplify specific solutions:
- the person reporting a misconduct may get in touch with the organisation through a dedicated, local-language hotline. These telephone numbers are generally available;
- the person reporting a misconduct can use the IT system available to all employees, which also ensures complete anonymity;
- each stakeholder may inform the superior or Business Integrity Officer about a misconduct, and they are obliged to provide complete anonymity to the person submitting the tip;
- at Unilever, we accept all forms of reporting potential misconduct, and do not leave any such report unanswered, irrespective of form. Respecting the wish to remain anonymous, we look into cases reported in anonymous letters or e-mails sent from accounts created only for the need of reporting a given case;

Our experience indicates that the procedures adopted are understood and accepted by whistleblowers. In the history of our company there have been no case in which the whistleblower's identity has been disclosed or they suffered retaliatory actions despite their willingness to remain anonymous.

Furthermore, all above-mentioned examples of specific actions aimed at whistleblower protection have been entered into the Unilever Business Code of Conduct, which additionally provides full protection to such persons. The Code is available on Unilever global websites, allowing potential whistleblowers to become acquainted with its rules and assuring them that their data will remain protected by Unilever.

UNITED NATIONS GLOBAL COMPACT

It was founded in July 2000 on the initiative of United Nations Secretary-General Kofi Annan. The UN Global Compact calls on the private sector worldwide to align their business strategies with universally accepted principles in the areas of human rights, labour, environment and anti-corruption, and to take action in support of UN goals. The United Nations Global Compact is the world's largest business initiative with over 13,500 members in 170 countries. The UN Global Compact coordinates activities within the UN Business Action Hub, where the United Nations works with business to implement the Sustainable Development Goals.

GLOBAL COMPACT NETWORK POLAND

A national network operating under the official authorization of the United Nations Global Compact. The Polish network was launched in July 2001 together with the United Nations Development Program, and since 2013 is has been run and managed with the support of the Global Compact Poland Foundation. It is the secretariat of the UN Global Compact members, the UN Global Compact's project office, its local contact and information point. Its mission is to promote and implement global initiatives of the UN Global Compact in Poland and to respond to the unique challenges facing the private sector on the way towards sustainable development. All initiatives of the Global Compact Poland are conducted in partnership with the world of business.

KNOW-HOW HUB

A think-tank and scientific foundation. Created by UNDP in Poland in 2011, it groups together experts who create and implement development projects. Currently, KHH also acts as the Scientific Council to the Global Compact Network Poland.

EXPERTS CONTRIBUTING TO THE STUDY AND MEMBERS OF THE STEERING COMMITTEE

PIOTR CHMIEL

He is one of the first persons to have built the Compliance Management System at T-Mobile Polska S.A. Earlier he worked as an auditor at PricewaterhouseCoopers, where he dealt with analysis and design of control mechanisms in business and IT processes. His experience and skills are confirmed by CFE (Certified Fraud Examiner), CIA (Certified Internal Auditor) and CISA (Certified Information Systems Auditor) certificates. The Chairman of the Polish ACFE Branch (ACFE Chapter #183).

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A lawyer (PhD, university professor, criminal law specialist). In the past e.g.: Undersecretary of State at the Ministry of Finance, General Treasury Control Inspector, General Financial Information Inspector, Government's Plenipotentiary for Combating Financial Fraud to the Detriment of the Republic of Poland and European Union. An expert of the Financial Information Board at the Ministry of Finance. A participant of EU research projects. A lecturer at Polish and foreign universities. The author of more than 150 academic and popular science articles, as well as the best business guide in Poland in 2013 - "Abuse at the Enterprise. Prevention and Detection".

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Vice-President of Lewiatan Employer Organisation in Kujawsko-Pomorskie Province and Deputy Chairman of the Economic Assembly of Kujawsko-Pomorskie Province. Since 2013 he has been the Lewiatan Conference's representative for human rights and business in the Corporate Social Responsibility Team reporting to the Prime Minister of the Republic of Poland and Ministry of Economy, and since 2016 in the Sustainable Development and Enterprises' Social Responsibility Team.

BEATA KOPYT

A journalist and coordinator of special projects at Kulczyk Foundation. She deals with the key CSR aspect - relationship between the human being, his goals, needs and the business. She creates projects connected with building internal relations, emphasising employee's role and potential, as well as inspiring the business to implement social change in its closer and more distant environment.

AGNIESZKA KOWALCZYK

Director of Communication at Grupa LOTOS S.A., with which she has been associated since 2003. She has worked, for example, at units dealing with purchase of crude oil, price policy, strategic studies, regulation, international relations and EU funds. A graduate of the Management and Marketing Department and Post-graduate Studies in Project Management at Warsaw School of Economics.

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Since 2016 the Chief Compliance Officer of Polpharma Group, responsible for developing, improving and handling compliance systems. He has 16 years' experience in preventing and detecting misconduct as well as building systems and procedures ensuring compliance with law and good market practice.

ROBERT LIZAK, PhD

A holder of a PhD in legal studies. An expert of the Central Anti-Corruption Bureau. An expert for National Science Centre's OPUS 11 project called "Compliance as Corruption Prevention Tool" conducted at the Institute of Legal Sciences of the Polish Academy of Sciences. Former expert of the European Commission for the avoidance of conflict of interests (2014–2016). Former deputy director of the Financial Information Department of the Ministry of Finance (2016–2017). He specialises in ethics, comparative criminal law, compliance, white-collar crime, and broadly understood repressive law.

JUSTYNA OLSZEWSKA

She is responsible for ethics at Skanska Commercial Development Europe. Justyna graduated from Jan Kochanowski University in Kielce and Kielce University of Technology. A PhD student at Kozminski University in Warsaw in economics (management). She is interested in media, internal and external communication at organisations, building the employer's brand. A long-standing editor-in-chief of Skanska publications. Furthermore, a leader of projects connected with promotion of ethics, sustainable development and safety in the construction industry; a member of Skanska Ethics Committee.

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A legal counsel and partner at Domański Zakrzewski Palinka law firm; leader of the Compliance Team. She holds a PhD in law, and, on an ongoing basis, provides advice on compliance, abuse risk management, pharmaceutical law and health care. For years she has been dealing with issues connected with transparency of internal and external processes, advertising, corruption, corporate governance, communication, as well as restructuring and optimisation of systems and enterprises. She has been in charge of numerous projects in the field of compliance and investigative audits, as well as those connected with implementation and streamlining of processes and procedures.

ANNA POTOCKA-DOMIN

Vice-president of Business Centre Club, director of the Institute of Economic Interventions; member of the Programming Board of GC Poland. A graduate in journalism at the Department of Journalism and Political Sciences of the University of Warsaw, post-graduate studies in marketing and advertising, as well as MBA Executive studies (GFKM; University of Gdańsk; Rotterdam School of Management), where she defended with honours a diploma paper in Corporate Social Responsibility.

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Corporate Communication and CSR Director at Polpharma SA, where she has worked for 18 years. She is responsible for all activities in the field of internal and external communication, corporate sponsorship and Polpharma's social responsibility. She is involved in Polpharma Group's key CSR projects, such as Ethical Programme, Sustainable Supply Chain, CSR Strategy, non-financial reporting, etc. A member of the Steering Committee of the Coalition of Ethics Ombudsmen and Global Compact in Poland, as well as the CSR Team at the Ministry of Development.

MARIAN SZCZEŚNIAK

The Plenipotentiary of the Management Board for Social Issue, Ethics Ombudsman at PKP Energetyka S.A. He has cooperated with PKP Energetyka S.A., which originated from Energetyka Kolejowa, since 1976. A graduate from Adam Mickiewicz University in Poznań (Department of Social Sciences), as well as Post-graduate studies in Organisation and Management of Human Resources and Strategic Management of Human Resources.

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A legal counsel, Head of Legal Department and Business Integrity Officer Unilever Poland and Baltics. He is responsible for legal affairs and compliance at the Unilever Group companies operating in Poland, Lithuania, Latvia and Estonia. He has conducted numerous proceedings and audits in the field of compliance with ethical standards, as well as those connected with streamlining and development of the existing processes. A member of teams in the Unilever Group organigram which are responsible for supervision of compliance of activities with the processes in force at the organisation.

JACEK WOJCIECHOWICZ

A GCP expert, economist and sociologist, he studied in Poland and Australia. He works at PKP S.A., where he was the Ethics Ombudsman of PKP Group, and created the first code of ethics for the Group and implementation practices at PKP companies. A former long-standing employee of the World Bank. An expert of the European Commission and United Nations Economic Commission for Europe.

ANNA WYRKOWSKA

A Compliance Expert with over 10 years' experience in verification of economic entities, as well as preparation and work with misconduct prevention solutions. At Polpharma Group, she is responsible for, among other things, developing compliance solutions and reporting on the basis of compliance systems.

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The director responsible for the Sustainable Development project at ERGO Hestia Group. He has been associated with the insurance sector since 1995. He worked for ABA Seguros, an insurance company in Mexico. At ERGO Hestia Group since 1998, where he was responsible for, among other things, Hestia Kontakt - C. O. K., sales network management and the You Can Drive brand project. Currently, he deals with responsible business and sustainable development topics, including implementation of the CSR strategy and social reporting process. He is involved in the health insurance area.

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UN GLOBAL COMPACT

MOBILIZE A GLOBAL MOVEMENT OF SUSTAINABLE COMPANIES AND STAKEHOLDERS TO CREATE A WORLD WE WANT

FROM THE MISSION OF
THE UN GLOBAL COMPACT

PROGRAM ACTIVITIES SUPPORTING IMPLEMENTATION OF SDG TARGETS:

16.5
Substantially reduce corruption and bribery in all their forms

16.5.2
Proportion of businesses that had at least one contact with a public official and that paid a bribe to a public official, or were asked for a bribe by those public officials during the previous 12 months

8.8
Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment

8.8.2
Increase in national compliance of labour rights (freedom of association and collective bargaining) based on International Labour Organization (ILO) textual sources and national legislation, by sex and migrant status

Global Compact
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