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THE LEGAL CONDITIONS FOR IMPLEMENTING A COMPLIANCE MANAGEMENT SYSTEM IN PUBLIC ADMINISTRATION

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Abstract. The implementation of compliance management systems is surely related to the introduction of integrated compliance management models which will be adopted separately in business and in the public administration sector. The introduction of legal changes in the form of the Whistleblower Protection Act should be followed by a prompt adoption of legal regulations concerning the implementation of the compliance system in public administration. A prerequisite to the successful implementation of the compliance management system in public administration is to undertake measures aimed at promoting compliance culture in public administration.

Keywords: public administration; Polish legal system; European Union directives; Whistleblower Protection Act.

INTRODUCTION

The legal basis for implementing a compliance management system results from both European Union laws and domestic regulations included in the Polish legal system. The Polish legal system has been waiting long for a law governing the issues that arise from relevant European Union directives, as it was nearly four years. The Whistleblower Protection Act, enacted in June this year and in force as of the end of September, was anticipated not only by European institutions but also by Polish consumers and those taking active part in economic life. While compliance systems have been functioning in business for several years now, the public administration sector has never encountered such solutions before.

This area has not been subject to in-depth legal research, as the institution of compliance management system in public administration has not been functioning until recently. The studies that are referred to in the theoretical part of this paper take into account the grounds for establishing the compliance management system in the public administration sector. In the analytical part, selected legal provisions related to the process for the implementation of the compliance management system in the public administration sector have been analysed.

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The objective of this paper is to analyse the legal aspects of implementing the compliance management system in the public administration sector. The research hypothesis is the statement that legal regulations concerning the implementation of the system must be organised not only in general terms but also need to allow for the specific nature of certain public administration sectors (from the perspective of personal and material scope). The proposed research field was analysed with the use of the doctrinal legal research method, the monographic method and, in a minor extent, the historical method.

1. PROTECTION OF WHISTLEBLOWERS

The work on preparing a domestic act as a response to EU legal regulations lasted for nearly four years. The Whistleblower Protection Act is aimed at implementing the provisions of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.[1] It is noted that "the legal regulations applicable in the European Union demonstrate how insufficient level of protection in one Member State negatively affects the functioning of the other Member States and the European Union as a whole" [Socha and Wołoch 2022, 82]. The new Act replaced the term "a person who reports breaches" with the term "whistleblower", which the legislator justified with the fact that the notion is present in social perception in the context of breaches of law.

First, the subject-matter of the legal regulations should be analysed. The statutory subject-matter of the legal regulation includes: 1) the conditions for providing protection to whistleblowers reporting or publicly disclosing information on breaches of law, 2) measures for the protection of whistleblowers reporting or publicly disclosing information about breaches of law, 3) the rules of procedures for internal reporting of breaches and following up on reports, 4) the rules for reporting breaches to a public authority, 5) the rules for public disclosure of information on breaches, 6) the responsibilities of the Commissioner for Human Rights related to reporting information on breaches of law, 7) the responsibilities of public authorities in relation to reporting information on breaches of law and to following up on such reports.[2] The enumerated subject-matter of the legal regulations demonstrate the full scope of the functioning of the Act.

The detailed analysis of the scope of the Act is inherently related to the conceptual framework that has been assigned to this issue. The first notion to be discussed here, namely "information on breaches", is of key

[1] OJ EU L 305 of 26.11.2019, p. 17 as amended.

[2] Article 1 of the Act of 14 June 2024, the Whistleblower Protection, Journal of Laws No. 928 [hereinafter: WP].

importance. Such information should be understood as "information, including reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the legal entity in which the whistleblower has participated in a recruitment process or in other negotiations preceding the conclusion of an agreement, works or has worked or in another legal entity with which the whistleblower is or was in contact through his or her work, and/or information about attempts to conceal such breaches of law" (Article 2(3) WP).

Another important term is "follow up" which should be understood as "any action taken by the recipient legal entity or public authority, to assess the accuracy of information included in the report and to counteract the breach of law reported, including through actions such as an investigation, institution of inspection or administrative proceedings, prosecution, an action for recovery of funds, or the closure of the procedure carried out as part of internal reporting of breaches and taking follow up measures or procedures for external reporting and taking follow up measures (Article 2(1) WP). Both these notions fully illustrate the scope that has been stipulated in the Act.

Both the above concepts in the context of the issue under analysis in respect of public administration refer to the definition of a public authority which means "supreme and central government administration authorities, local branches of government administration, local government entities, other state authorities and other entities performing statutory tasks in respect of public administration, competent for taking follow up measures" (Article 2(6) WP). This is an exhaustive definition of a public authority which covers a full range of administration entities. In line with the legislator's thought, it is worth providing more specific information which would provide guidance, counterparties to whistleblowers, as to exactly which specified public administration authorities are covered by the provisions of the Act.

The key issue in understanding the Act is to provide a detailed explanation of the term breach, which means "an act or omission that is unlawful or aimed at circumventing the law, and which concerns: 1) corruption, 2) public procurement, 3) financial services, products and markets, 4) prevention of money laundering and terrorist financing, 5) product safety and compliance, 6) transport safety, 7) protection of the environment, 8) radiation protection and nuclear safety, 9) food and feed safety, 10) animal health and welfare, 11) public health, 12) consumer protection, 13) protection of privacy and personal data, 14) security of network and information systems, 15) the financial interests of the State Treasury of the Republic of Poland, local government entities, and the European Union, 16) the internal market of the European Union, including competition and state aid rules, and rules of corporate tax, 17) the constitutional human rights and freedoms – in relationships between individuals and public authorities and not

related to the spheres listed in points 1-16" (Article 3(1) WP). The list was taken from the aforementioned Directive and constitutes a comprehensive approach to the issues of compliance. Due to the focus of the discussion relating to the public administration sector, it is worth exploring the spheres of public finance and corruption.

Moreover, the legislator provided the possibility to report information on breaches concerning internal regulations or ethical standards in place at a given legal entity, established by this legal entity under generally applicable legal regulations and in compliance with such laws. This wording is particularly important from the point of view of promoting ethical conduct among public officials, which seems to be an issue that is pushed aside in the operations of public administration.

The legislator further compiled a comprehensive list defining a whistleblower who, according to the Act, may be "a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities, including as a 1) an employee, 2) a temporary worker, 3) a person performing work under other legal basis than a contract of employment, including under civil-law agreements, 4) entrepreneur, 5) registered commercial representative, 6) shareholder or partner, 7) member of a governing body in a legal entity or in an organisational unit without a legal personality, 8) a person performing work under the supervision and management of a contractor, subcontractor or supplier, 9) an intern, 10) a volunteer, 11) a trainee, 12) an officer within the meaning of Article 1(1) of the Act of 18 February 1994 on the provision of retirement benefits for the officers of the Police, Internal Security Agency, Intelligence Agency, Military Counter-Intelligence Service, Military Intelligence Service, Central Anti-Corruption Bureau, Border Guard, Marshal's Guard, State Protection Service, State Fire Service, Customs and Revenue Service, Prison Service, and their families (Journal of Laws of 2023, Items 1280, 1429 and 1834), and a soldier within the meaning of Article 2(39) of the Homeland Protection Act of 11 March 2022 (Journal of Laws of 2024, Items 248 and 834)" (Article 4(1) WP). In my opinion, based on the analysis of the above list, it has certain inaccuracies which might ultimately affect the functioning of the entire compliance management system. Particularly controversial issues concern interns and volunteers, as the whistleblower's actions do not necessarily need to be taken in good faith, because such individuals might not feel any connection with the entity where they are trained or do volunteer work, or are willing to act in bad faith if they have no prospects for employment there. It seems that such comprehensive and in-depth catalogue of matters covered by the Act should also concern persons who have long-term connections with a given entity.

Furthermore, it should be noted that a person who is awarded the whistleblower status enjoys special protection which mainly includes the prohibition of retaliation, or any attempts or threats of such actions. If work, "was, is, or is expected to be performed under a contract of employment, the whistleblower may not be subject to retaliation, consisting in: 1) refusing to enter into a contract of employment, 2) terminating employment with or without notice, 3) failure to make a temporary employment contract or a contract of employment for an indefinite term upon the termination of a trial period, failure to enter into a contract of employment for an indefinite term upon the termination of a temporary employment contract – where the whistleblower could reasonably expect that such contract would be made with him/her, 4) reducing remuneration for work, 5) withholding promotion or omitting a given person in promotion procedures, 6) omitting a given person in the award of work-related benefits other than salary or reducing the amount of such benefits, 7) transferring to lower-rank positions, 8) suspending a given person in his/her performance of work or official duties, 9) transferring the whistleblower's existing work duties to another employee, 10) an unfavourable change to the place of work or working hours, 11) a negative performance assessment or employment reference, 12) imposing or administering disciplinary measures, including financial penalties or similar measures, 13) coercion, intimidation, or ostracism, 14) harassment, 15) discrimination, 16) unfavourable or unfair treatment, 17) withholding training or omitting the whistleblower in the selection of employees to take part in training aimed to improve their professional qualifications, 18) unjustified medical referrals, including psychiatric examination referrals, unless separate legal regulations provide the possibility to refer an employee to such examinations, 19) actions aimed at hindering future employment in the sector or industry on the basis of a sector or industry-wide informal or formal agreement, 20) causing financial loss, including loss of business or loss of income, 21) other non-pecuniary harm, including infringement of personal interests, particularly harm to the whistleblower's good reputation" (Article 12(1)). It is an extensive list which meets all applicable standards and is properly constructed.

The above elements of the personal and material scope of the Act seem to be fully justified, with minor exceptions regarding the personal-scope issues related to such persons as interns or volunteers. The material scope indicated in the said Act will surely be reviewed in the process of implementing laws referring to whistleblowers. From the perspective of public administration, it is necessary to point to two aspects. Firstly, the material scope of the Act is significant from the perspective of the areas which are particularly vital to public administration, i.e., public finance and corruption issues. Secondly, it is a positive thing that the legislator has provided

the possibility to include in the compliance system the issues of responding to the breach of internal regulations and/or codes of ethics, as it is often indispensable and crucial for the full transparency of clerical work. It should also be noted that, according to the views found in the literature on the subject, "whistleblowing plays a crucial role in a democratic society, allowing a better response to a call for public life transparency and a verification of the functioning of public institutions and persons in public positions" [Pietruszka 2020, 128].

2. THE COMPLIANCE SYSTEM IN PUBLIC ADMINISTRATION

The implementation of the compliance management system in the public administration sector began after the Whistleblower Protection Act entered into force. Before that, the system was not fully in place in public administration, although some of its elements could have been implemented. It should be stressed that "the flexible and comprehensive approach to compliance highlights the fact that, in addition to the legal obligations organisations are bound by, they may independently define their compliance targets that reach beyond the statutory framework and outline them in their compliance policies, as non-obligatory compliance rules. The main tasks of compliance functions are: a) identification or monitoring of risk resulting from violations of legal norms and internal regulations; b) early warning, understood as an assessment of the potential impact of changes taking place in the regulatory setting on the functioning of a given organisation; c) provision of advice to senior management on observing internal regulations and procedures adopted in line with legal guidelines, and in the matter of new products and services from the compliance perspective; d) identification and evaluation of all management's actions or decisions that might pose or increase risk of non-compliance or the risk that the organisation's reputation might be infringed" [Wiatrak 2012, 132-33]. It can be stated with certainty that compliance functions are aligned with public administration functions.

It should be stressed that the process of transposing European Union law to the Polish legal order took much too long, and "as regards the public administration sector, the discussion on current trends in administration management processes has been held for years. Without doubt, the application of a code of good practices, in combination with modern management and legal regulations, will allow a full integration of compliance processes into the public administration system" [Szewczak 2020, 164]. The ultimate success in the process of implementing the compliance management system in the Polish legal system through the enactment of the Whistleblower Protection Act will surely have a positive influence on the issue. Legal commentators are right to say that "a proper and effective compliance

programme in this sphere is to ensure that statutory and contractual obligations are fulfilled, including in particular the effective protection of employees' lives and health. Compliance might also contribute to the success of enterprises and reduce the number of events which affect a company's reputation or result in the payment of high fines or suspension of permits and licences, which might make further business operations impossible. Of particular significance is the need to intensify compliance measures aimed at protecting employees' lives and health through detecting and effectively penalising persons who are responsible for failing to ensure safety measures to prevent accidents at work, either due to fraudulent intent or negligence. If penal and/or administrative liability is proven, it is necessary to apply relevant, useful and effective sanctions that would deter other entities from causing further harm" [Ramirez Barbosa 2023, 61-63].

All processes related to the implementation of the compliance management system in the public administration sector must go hand in hand with the process of adopting a compliance culture. "A preliminary list of tasks related to compliance culture" is said to include "a) a requirement to formulate a list of values and organisations, b) a proper verification of work candidates, c) assurance of uniform treatment of all organisation members, d) regular training on compliance issues, e) ongoing compliance communication outside training, f) provision of information about successes in the sphere of compliance" [Jagura and Makowicz 2020, 33-34]. It is, of course, only an example of a task list. It is by no means exhaustive, and it is bound to be extended as the implementation of the compliance management system in the public administration sector advances.

It goes without saying that the process related to the implementation of compliance culture is not a short-lasting one, and will not be "forced" through the application of statutory provisions. Public administration, both at the government and local-government levels, will need to engage in a number of actions with a view to developing compliance culture. The list of tasks related to compliance culture is far from being final and exhaustive. It is also worth noting that the development of compliance culture is due to be closely related to the development of artificial intelligence and its role in public administration. It is believed that employers will be responsible for "determining a) the scope and basis of administrative liability for damage caused by artificial intelligence, b) the technical properties of artificial intelligence ensuring safety and human control over its operations, c) the administrative structure dealing the certification of artificial intelligence devices or services" [Stasikowski 2024, 146]. In such specific sphere as the implementation of the compliance system in public administration, artificial intelligence is bound to become a considerable challenge.

In conclusion, it should be noted that the process of implementing the compliance management system in public administration will not be an easy task to complete quickly, as it requires specific preparation of public administration staff, particular to the implementation of compliance culture.

CONCLUSIONS

The implementation of the compliance management system in public administration is not a process that can be considered completed once the Whistleblower Protection Act entered into force. In fact, it is only the beginning of an arduous road to the development of compliance culture in the public administration sector. The implementation of compliance management systems is surely related to the introduction of integrated compliance management models [Biggeri, Borsachi, Braito, et al. 2023]. Integrated models depend on the sphere that is shaped by the compliance system. It can be said with certainty that such models will be adopted separately in business and in the public administration sector.

Based on the above analysis, emphasis should be placed on two aspects. First of all, the introduction of legal changes in the form of the Whistleblower Protection Act should be followed by a prompt adoption of legal regulations concerning the implementation of the compliance system in public administration. This particularly refers to the functioning of local government entities and their organisational units, and to a number of other entities, for example local government cultural institutions or educational establishments. Detailed legal provisions should directly touch upon the specific nature of individual entities and the range of their operations. Secondly, a prerequisite to the successful implementation of the compliance management system in public administration is to undertake measures aimed at promoting compliance culture in public administration.

It should be asserted that after four years of waiting for the national transposition of the EU directive, the process of implementing the compliance management system is sure to advance, in particular in respect of its adoption in the public administration system which is also experiencing rapid transformation and facing numerous challenges. The final outcome will depend on the due application of the system in the operations of public administration entities.

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