

Whistleblowing à la polonaise

In 2024, after several years of delay, Poland finally implemented the EU's Whistleblowing Directive. Despite the excessively long work on a dozen drafts, the Whistleblower Protection Act as adopted still raises lots of doubts. Resource-sharing by corporate groups is particularly problematic.



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Whistleblower Protection Act of 24 June 2024

→ The **Whistleblower Protection Act** imposes a range of new obligations on businesses. The most important one is for private entities to adopt an internal whistleblowing procedure. The Polish parliament also introduced several provisions that seem to allow corporate group to cooperate on whistleblowing procedures.

Whistleblowing procedures in corporate groups

→ 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

The **Whistleblowing Directive** does not directly address the issue of the functioning of a single shared whistleblowing procedure between companies in a corporate group. The directive does refer to such groups, or more precisely affiliates and subsidiaries, in recital 55 of the preamble: “Internal reporting procedures should enable legal entities in the private sector to receive and investigate in full confidentiality reports by the workers of the entity and of its subsidiaries or affiliates (‘the group’), but also, to any extent possible, by any of the group’s agents and suppliers and by any persons who acquire information through their work-related activities with the entity and the group.”

WHISTLEBLOWER PROTECTION ACT ART. 28(8)

Private entities belonging to a capital group within the meaning of Art. 4(14) of the Competition and Consumer Protection Act of 16 February 2007 may establish a joint whistleblowing procedure, so long as it ensures that the actions taken comply with this act.

According to experts, recital 55 should not be treated as a basis for joint follow-up actions, particularly to designate a single person or unit at the group level responsible for taking such actions (e.g. to conduct proceedings to verify whistleblower reports).

However, **Art. 28(8)** of the Polish act (added near the end of the legislative process) incorporates by reference the definition of a capital group in the Competition and Consumer Protection Act, under which such a group means all undertakings controlled directly or indirectly by one undertaking, including that undertaking. In turn, the notion of an “undertaking” (*przedsiębiorca*) should be understood in accordance with the **Business Law**, and that law excludes foreign entities from the notion of an “undertaking.”

Business Law of 6 March 2018, Art. 4(3)

Consequently, the concept of a corporate group within the meaning of the Whistleblower Protection Act is limited to a group in which all the entities are established in Poland. Thus a group that includes related entities established in different countries does not constitute a corporate group for purposes of the act.

For this reason as well, it is not permissible to adopt a shared whistleblowing procedure in an international group.

But for a Polish corporate group, the possibility of adopting a shared procedure is also not entirely clear.

Under Art. 28(8) of the act, entities can establish a shared procedure, but only under the condition that it ensures compliance with the act. Thus, a shared procedure must contain the same elements as a standard internal procedure, meaning that among other things it must:

- Designate a unit, person, or third party authorised to receive reports, and
- Designate an impartial unit or person within the given legal entity authorised to take follow-up actions.

This means that the Polish act does not provide an exemption from the duty to appoint a person responsible for conducting an investigation, separately for each undertaking within a Polish corporate group.

While Art. 25(1) of the act does admit the possibility of appointing an external entity to receive reports (which could be another company from the group), it does not provide for the possibility of entrusting such entity with taking follow-up actions, including conducting investigations.

In practice, the shared procedure within the meaning of Art. 28(8) of the act cannot be identical—in every group company, an internal person or organisational unit should be designated for taking follow-up actions. In addition, within each entity, the procedure should be introduced after consultation with the employee representative functioning within the entity.

It should thus be recognised that Art. 28(8) of the act does not provide a basis for adoption of a single shared whistleblowing procedure for the entire group, and designation under that procedure of one person or unit authorised to receive reports and take follow-up actions in the event of a report made within any of the entities in the corporate group.

**WHISTLEBLOWER
PROTECTION ACT
ART. 25(1)(1)**

The internal whistleblowing procedure shall identify the internal organisational unit or person within the organisational structure of the legal entity, or an external entity, authorised by the legal entity to receive internal reports.

However, this does not exclude the possibility of engaging external experts or advisers to participate in investigations or to take certain actions. But in this case as well, the proceedings will still be led by a person or unit within the given undertaking, and not by such expert.

“Sharing resources” and “establishing common rules”

The only provision of Directive 2019/1937 that enables the sharing of resources in private entities (and thus—note—also within corporate groups) is Art. 8(6). And significantly, the EU lawmakers limited this possibility to entities with 50 to 249 employees. The notion of “resources” under the directive includes all activities related to receiving reports and conducting investigations.

The provision implementing Art. 8(6) of the Whistleblowing Directive into Polish law is Art. 28(3) of the Whistleblower Protection Act. But where the directive refers to “sharing resources,” the Polish act refers to “establishing common rules” (although the initial drafts of the Polish act employed the same terminology as the directive). What does this mean in practice?

ART. 8(6) OF DIRECTIVE 2019/1937

Legal entities in the private sector with 50 to 249 workers **may share resources** as regards the receipt of reports and any investigation to be carried out. This shall be without prejudice to the obligations imposed upon such entities by this Directive to maintain confidentiality, to give feedback, and to address the reported breach.

ART. 28(3) OF THE WHISTLEBLOWER PROTECTION ACT

Private entities for whom at least 50 persons, but no more than 249 persons, perform gainful employment, **may on the basis of an agreement establish common rules** regarding the receipt and verification of internal reports and the conduct of investigations, under the condition that they ensure that the activities performed comply with this act.

”

The Polish act does not provide an exemption from the duty to appoint a person responsible for conducting an investigation, separately for each undertaking within a Polish corporate group.

In our assessment, the rules whose establishment is referred to in the Polish act are overarching standards intended to help interpret other legal norms and ensure uniformity in application of the whistleblowing procedures within a group of entities. In other words, these “rules” are certain abstract values, which may include for example:

- The principle of the rule of law
- The principle of impartiality in conducting investigations
- The principle of protecting the whistleblower’s identity.

The jointly established rules might also govern issues of the scope and course of investigative proceedings or the selection of persons to conduct follow-up actions.

But in practice, Art. 28(3) of the act has nothing to do with the relevant provision of the directive. Under the Polish realities, entities employing 50 to 249 workers cannot, de facto, share their resources in this respect. The mere possibility of establishing joint rules—on top of that, requiring conclusion of a separate agreement (which seems an unnecessary formality)—is not sufficient for sharing resources.

Since it is not possible to entrust follow-up actions to persons or units located outside the undertaking’s organisational structure, this Polish provision will not be applied in practice.

WHISTLEBLOWER PROTECTION ACT

ART. 28(1)

The authorisation of an external entity referred to in Art. 25(1) (1) requires conclusion of an agreement for entrusting the handling of receipt of internal reports, confirmation of receipt of the report, providing feedback, and providing information on the whistleblowing procedure using technical and organisational solutions ensuring that such activities comply with the act.

The possibility of appointing an external entity to receive internal reports

Under Art. 25(1)(1) of the Whistleblower Protection Act, an external entity may be appointed to receive internal reports. [Art. 28\(1\)](#) specifies what this appointment may concern.

In our assessment, on this basis it is permissible to outsource the following tasks on the basis of such agreement (and importantly, only these tasks):

- Handling the receipt of reports
- Confirming receipt of reports
- Providing feedback
- Providing information on the whistleblowing procedure.

The external entity could also be the provider of a whistleblowing system, a law firm, or for example another company from the corporate group, including one from outside Poland. But in the latter case, it is essential that the reporting channels through which the external entity receives whistleblower reports meet the requirements established by the Polish Whistleblower Protection Act, particularly concerning the possibility of filing reports in Polish and compliance with regulations on protection of personal data.

Summary

Although the Polish parliament has introduced provisions suggesting the possibility of establishing common whistleblowing procedures within corporate groups, in practice only one regulation actually provides a basis for entrusting the performance of certain activities to another company in the group.

This possibility is unfortunately limited to the tasks referred to in Art. 28(1) of the Whistleblower Protection Act, i.e. receiving reports and providing confirmation of receipt, feedback, and information about the whistleblowing procedure.

Nowhere does the Polish act provide for the possibility of authorising another entity to conduct follow-up actions. This task, a key element of the whistleblowing system, must be performed within the entity itself, by persons or units in its organisational structure.

It is therefore justified to state that the solutions adopted by the parliament do not take into account that there are proven, effective whistleblowing systems functioning within corporate groups (particularly international groups), where verification of reports is entrusted to specialised organisational units. It follows that the need to conduct follow-up actions internally, without the possibility of authorising such expert units operating for example in parent companies to conduct follow-up, may have a negative impact on the effectiveness of verification of whistleblowers' reports of irregularities.