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THE POSSIBILITY OF ESTABLISHING THE OMBUDSMAN OF THE REPUBLIC OF POLAND AS A BODY FOR THE PROTECTION OF WHISTLEBLOWERS REPORTING VIOLATIONS OF EUROPEAN UNION LAW. CONSTITUTIONAL ISSUES

Abstract. The purpose of this article is to analyze the constitutional considerations of the possibility of establishing the Ombudsman as a body to receive reports of violations of the law under the authority of Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of whistleblowers. The results of the research lead to the conclusion of the possible admissibility of such a solution, but with the need for appropriate system changes. However, the author recommends entrusting this competence to a newly created body.

Keywords: protection of whistleblowers, Ombudsman, Constitution of the Republic of Poland of 2.4.1997.

1. Introductory remarks

Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of whistleblowers (hereinafter: the Directive, OJ EU.L.2019.305.17) should be implemented in the Polish legal order by December 17, 2021. As of the date of submission of the text for publication, the Polish legislator still has not enacted the relevant law, despite the fact that nine draft laws have already been prepared to date, which were to implement the directive into the national legal order (see the latest draft law dated July 12, 2023, <https://www.legislacja.gov.pl/projekt/12352401/katalog/12822887#12822887>; accessed: December, 29, 2023). This state of affairs seems only to confirm the complexity of the matter and the

difficulty of finding optimal juridical solutions that would gain political and social approval.

The European legislator, in containing the legal regulation of the protection of whistleblowers in the Directive, has left the national jurisdictions free to choose the legal solutions to individual national authorities. This makes it possible to take into account the systemic, social and historical-political conditions of a given state when applying well the means used to achieve the goal envisaged in the directive. It would even be difficult to imagine a uniform model of whistleblower protection to be shaped in a European regulation precisely because of these conditions. Indeed, different historical experiences strongly influence the public perception of whistleblower protection, especially in Central and Eastern European countries (Kocurek, 2021). The constitutional traditions of individual states are also not without significance (Ożóg, 2021).

It is worth recalling that in one of the drafts of the Polish law on the protection of whistleblowers there was a postulate that the public body competent to receive reports of violations of the law should become the Ombudsman (see, for example, the draft proposal of October 14, 2021, <https://legislacja.rcl.gov.pl/projekt/12352401/katalog/12822845>, accessed December, 29, 2023). The idea in question did not meet with the approval of that body's then-president, Professor Adam Bodnar, who was critical of the idea of expanding the Ombudsman's powers (Letter from the Ombudsman to the Director General of the Ministry of Development, Labor and Technology dated June 30, 2021. RPO nie jest organem właściwym do ochrony sygnalistów zgłaszających naruszenia prawa Unii Europejskiej, <https://bip.brpo.gov.pl/pl/content/rpo-nie-jest-organem-wlasciwym-w-sprawie-sygnalistow>, accessed December 27, 2023). This idea collapsed without an in-depth scientific analysis in the legal doctrine, and it should have been undertaken. The subject of this article is the legal analysis of the possibility of establishing the Ombudsman as a body for the protection of whistleblowers reporting violations of European Union law.

2. Determinants of the constitutional regulation of the establishment of the Ombudsman as an external body for reporting violations of the law in the sense of the directive

The Constitution of the Republic of Poland of 2.4.1997 (Journal of Laws 1997 No. 78, item 483, hereinafter: the Constitution) provides for the legal regulation of the body of the Ombudsman in Chapter XI, entitled "Organs

of state control and protection of the law.” From this fact alone, the special role of the Ombudsman in ensuring the rule of law can be assumed. It is worth noting that the Constitution does not unequivocally determine that the task of the ombudsman is to be exclusively to protect the Polish legal order, although such views can be noted in the literature (Banaszak, 2012). Of course, due to the national status of this constitutional body, the basic scope of the ombudsman’s activities concerns the protection of individuals and their associations against violations of constitutional rights and freedoms guaranteed by the Polish Basic Law, but the Ombudsman’s tasks of protecting the law should not be framed in such a narrow way. This is because it should not be forgotten that the evaluation of allegations of violations of certain constitutional rights and freedoms arising from the Polish legal order also requires consideration of the applicable legal and international standards (Machowicz, 2009). The occurrence of the universalization of human rights and binding international obligations should encourage the adoption of such a position. Allegations of violations of rights and freedoms from the Constitution require consideration of this perspective as well.

The constitutional regulation of the Ombudsman is contained in Articles 208–212 of the Basic Law and deals with basic issues concerning the system and competencies of this body, while in detailed matters a reference to the ordinary law is provided for. However, from the existing constitutional provisions, it is possible to identify the legal conditions for the possible assignment of the task of protecting whistleblowers to the Ombudsman. Namely, Article 208(1) of the Constitution stipulates that the Ombudsman shall guard the freedoms and rights of man and citizen set forth in the Constitution and in other normative acts. This provision sets the basic task of this body. Interpreting this provision literalistically, one could assume that the wording concerning “other normative acts” could also include legal regulations arising from acts of European law (Sokolewicz, 2003). Indeed, normative acts of European law also concern the rights and freedoms of individuals, including those protected by the whistleblower directive. From this point of view, it could be considered that there are no obstacles to opening the scope of the Ombudsman’s competence to protect individuals from retaliation against reports of violations of European law.

Determinations on the possibility of recognizing the Ombudsman as a whistleblower protection body require consideration of Article 80 of the Constitution from Chapter II of the Constitution. This provision stipulates that “everyone has the right to apply, on the terms and conditions specified by law, to the Ombudsman for assistance in protecting his freedoms or rights violated by public authorities.” So, from the wording of this legal

provision, it is clear that the Constitution does not grant the right to apply to this body in the case of violation of rights or freedoms horizontally, that is, by private entities, such as an individual or a private entrepreneur (Dybowski, 2016). The legislature has determined that this category of social relations will be primarily the jurisdiction of the judiciary. (Skrzydło, 2013). An issue beyond the scope of this text is whether this approach is still valid in the current reality, given the phenomenon of violations of the law in equal relations. This problem is directly connected with the issue of the horizontal operation of constitutional rights and freedoms (Florczak-Wątor, 2014). The creators of the Constitution thus assumed that the Ombudsman would provide protection to individuals only against the actions of public authorities. The concept of public authority should be understood broadly under this provision, recognizing that it is not only the bodies of the legislature, the executive, the judiciary, but also all other subjects of law that can shape the legal position of an individual with power (Winczorek, 2008).

The above findings are important from the point of view of the directive's assumptions concerning the protection of whistleblowers in relations between the individual and private entities, i.e. in horizontal relations. This is because it seems that a possible extension of the Ombudsman's competence in matters of protecting whistleblowers from violations by private entities would be permissible, but would require appropriate changes in the law. The addition of new competencies of this body would require due authorization in the Constitution, through an amendment to the provision of Article 80 of the Constitution or the regulations contained in Chapter XI of the Constitution. A possible place for this regulation could be in the long-proposed chapter of the Basic Law on integration with the European Union (Balicki, 2015).

Along with the expanded scope of cases in which the Ombudsman could act, his powers with respect to private entities should be correlated, for which a constitutional basis would be expected. It can be considered whether a legal basis in the statutory law would be sufficient, but it seems that a negative position should be taken on this issue, since we would be dealing with a constitutional change, concerning the substantive-legal status of a constitutional body that requires proper authorization and legitimacy. There is no doubt that, based on the existing legal status, the Ombudsman may constitute the competent body for receiving reports of violations of the law by public-law entities. Adoption of such a solution would necessitate the establishment of another, separate body competent to receive reports of violations of law from private sector entities (<https://bip.brpo.gov.pl/pl/content/rpo-nie-jest-organem-wlasciwym-w-sprawie-sygnalistow>, accessed

December 27, 2023). Therefore, the acceptability of such a solution should be assessed from the point of view of the Directive and the Constitution. The Directive does not in any way regulate the number of authorities and the division of powers to receive reports of violations of law, leaving national jurisdictions free to do so. The directive explicitly mentions the Ombudsman as a potential body that can act as a notification body (see the motive 64 of the Directive). The openness of the directive is justified by the existing mosaic of systemic solutions regarding the ombudsman's position in the EU countries. Perhaps the division of competencies will work better in countries that already have a decentralized model of ombudsman institutions. At the same time, much depends on the legal and factual conditions of the ombudsman institution in a given legal system, and it is possible to clearly prejudge the effectiveness of solutions. The standards adopted in this regard in one country do not have to be successfully adopted in another legal order.

The key should be to shape the tasks and competencies of the notification body in the implementation law in such a way that it is possible to realize the goals of the directive as defined in the preamble to the directive and the articulated part. No less important is the effectiveness of the adopted solutions and their functionality for those making notifications of violations of the law. From the point of view of the Constitution of the Republic of Poland, it would be appropriate to assume the absence of legal obstacles to the division of competencies of bodies receiving notifications of violations of European Union law. However, it would be necessary to maintain the symmetry of specific competencies in terms of permissible follow-up measures against violators. In other words, the legislator should not soften or treat more severely the phenomena of violations of European Union law, depending on the status of the entity committing these acts. Of course, the specifics of public law entities should be taken into account, but the value of protecting the European Union legal order should be of primary importance, the key should be the assessment of the act in question, and not the subjective conditions of the violator of the law.

The division of the competence of the authorities on the basis of the criterion of the subject of the violator of European Union law would be formally acceptable, both on the basis of the Directive and the European Union, but such a solution seems to constitute only an unnecessary complication of legal regulation. This type of dichotomy would be troublesome especially for those seeking legal protection, who may not be oriented in the adopted division of competencies, which could also lead to the submission of letters to the wrong authorities, the need to transfer letters to the

competent authority, etc. (<https://bip.brpo.gov.pl/pl/content/rpo-nie-jest-organem-wlasciwym-w-sprawie-sygnalistow>, accessed December 27, 2023). There would also be, with a high degree of probability, positive and negative competence disputes in determining the competent authority in a given case. All these circumstances would only create legal chaos.

3. Tasks of the Ombudsman as an external body for reporting violations of the law vs. the principle of subsidiarity

One of the draft laws implied a dual role for the central institution. This is because it was to be both providing information and support to whistleblowers, as well as receiving so-called external reports (including receiving and preliminary verification of the report, giving the case further course by referring the report to the public institution competent to investigate it on its merits, providing feedback to the whistleblower). As required by Article 11(11) of the Whistleblowers Directive, Member States shall designate authorities competent to receive, provide feedback on and follow up on notifications and provide adequate resources to these authorities. Follow-up authorities may be “judicial, regulatory or supervisory authorities with competence in the specific fields concerned, or authorities with more general competence at the central level within a Member State, law enforcement authorities, anti-corruption authorities or ombudsmen” (recital 64 of the Directive).

It is necessary to juxtapose Polish legal regulations on the tasks and competencies of the Ombudsman with the directive provision. Namely, although Article 11(1)(2) of the Law on the Ombudsman (Uniform text OJ 2023, item 1058) stipulates that after reviewing the application, the Ombudsman may stop at indicating to the applicant the means of action available to him. In the above provision, it is permissible to provide information about the means of action provided, but in principle, this provision expresses the principle of subsidiarity of action. This means that the Ombudsman takes action when the individual maintains his allegations of violation of certain constitutional rights and freedoms. The Ombudsman does not replace the individual in his or her efforts to protect his/her rights (Trociuk, 2005). The Ombudsman, on the other hand, is obliged to take up a case only when, in accordance with Article 8(1) of the Law on the Ombudsman, he becomes aware of news indicating a violation of human and civil liberties and rights. The Ombudsman does not replace applicants in the handling of their cases, and therefore does not provide

advocacy services. However, there is information from the Ombudsman's activities that applicants often apply to the Ombudsman in cases in which they still have full recourse to generally available means (see: Information on the activities of the Ombudsman for 2022, <https://bip.brpo.gov.pl/pl/content/rpo-informacja-roczna-2022>, accessed: December 29, 2023).

The scope of the tasks of the public body of notification of violations of the law is defined very broadly in the directive, and refers to the reception and preliminary verification, notification, giving the case further course by referring the notification to the public institution competent for its substantive examination, which is far beyond the scope of the current activities of the Ombudsman. If such powers are imposed on the Ombudsman, an asymmetry in the scope of the core competencies that derive from the Constitution and statutory law appears. This state of affairs is undesirable. It can lead to difficulties in carrying out core tasks due to the significant burden of directive tasks on the body. Interested parties may be confused as to which situations they can apply to the Ombudsman after exhausting their legal remedies (competencies from the Constitution) and in which they can seek advice (competencies from the Implementation Law). It would therefore be necessary to sort out the Ombudsman's competencies.

4. The standards of the whistleblower directive in terms of the requirement to establish a whistleblowing body vs. the constitutional position of the Ombudsman

As already mentioned, the legislator's regulatory freedom under the Whistleblowers Directive also applies to the implementation of the obligation to establish a public body competent to receive whistleblowing reports. The provisions of the directive do not in any way impose the choice of the body in question. Undoubtedly, however, this body should have an appropriate legal basis in the system of state bodies so that the objectives of the directive can be realized. This is no less important than the choice of means to realize the purpose of the directive.

A situation in which one of the bodies receiving notifications of violations of the law would have a constitutional position (the Ombudsman) and the other would have a mandate based solely on the implementation law may raise some systemic doubts. It would be difficult to achieve a constitutional majority to amend the Basic Law and empower one of the bodies that receive reports of violations of law. It seems that both bodies accepting reports of violations of law should have an identical legal basis in terms

of constitutional position and competence. This requirement also applies to the legal guarantees of the independence of the infringement-receiving body. The whistleblower-receiving body should have adequate guarantees of the “autonomy and independence” of its functioning, as is clear from Article 11(2)(a) of the Whistleblower Directive. The act does not elaborate on how this requirement should be understood.

First of all, this body should, it seems, be provided with adequate systemic guarantees in the independence of its functioning vis-à-vis other state bodies. It is particularly important that this body be appointed in a transparent procedure that takes into account the participation of NGO representatives. Domestic law should precisely define the high qualifications necessary for candidates for the position of the body accepting reports of violations of the law. The person should enjoy broad public trust. It is also important to obtain information about the person’s previous professional activities. From this point of view, it would be reasonable to conclude that the current model for the selection of a person to hold the office of the Ombudsman body meets these requirements. However, there is no guarantee that the established body competent to receive reports of violations of the law from private entities would also be appointed through a similar procedure contributing to the selection of a suitable candidate. In addition to this, it should be emphasized the much lower level of stability of the legal guarantees contained in the law relative to the regulations of the Constitution. With the above in mind, it should be concluded that the division of powers between two bodies accepting reports of violations of law with constitutional and statutory legal standing seems to be a completely unreasonable solution.

In addition, it is particularly important to ensure that the established body for reporting violations of the law is independent of other state bodies. The legal position of the Ombudsman meets these requirements due to the lack of subordination to other bodies (Pieniążek, 1997). In the case of the establishment of a body competent to deal with violations of the law by private entities, the problem of determining the body that supervises its activities would arise. It would be necessary to reject the assumption of subordination of this body in the vertical of government bodies, in order to exclude potential political pressure. A legal institution to strengthen the independence of the established body could be formal and material immunity enjoyed by the hub of the body adopting the notification of laws. Symmetrical solutions should apply to this body and the Ombudsman.

There is no doubt that the addition of such powers represents a significant burden. A careful estimate of the number of full-time positions needed

to be created in the Ombudsman's Office would have to be made. Meanwhile, the proposed law did not address this issue, and the experience of previous years indicated a reduction in the amount of the budget for the Ombudsman's activities (see: Information on the activities of the Ombudsman for 2022, <https://bip.brpo.gov.pl/pl/content/rpo-informacja-roczna-2022>, accessed: December 29, 2023), so the possible assignment of competencies to the whistleblower protection body would also require determining the issue of personnel, financial and material resources. Failure to provide financial resources could consequently lead to a situation where, as a result of additional tasks from the Implementation Law, there would be difficulties in fulfilling the basic competencies of the Ombudsman as defined in the Constitution.

5. The Ombudsman or the State Labor Inspectorate as the public body receiving reports of violations of the law?

In the current draft of the implementation law, the Ombudsman no longer appears as a public body for external reports of violations of the law, and the State Labor Inspectorate has been proposed in its place (see the draft Draft law of July 12, 2023 on the protection of whistleblowers). In making this choice, the drafters argued that this body has experience in legal counseling and can therefore effectively support whistleblowers. It is also pointed out that it is an independent body, as it answers only to the Parliament (Article 2 of the Act of April 13, 2007 on the State Labor Inspectorate, Consolidated Text OJ 2022, item 1614). An additional argument in favor of the choice of this body is to be the elaborate organizational structure of this institution, consisting of District Labor Inspectorates operating in each province and the Chief Labor Inspectorate. However, the Ombudsman for Civil Rights also has field offices.

In evaluating the above request, it should be recalled that among the areas in which violations of the law are to be reported to this body are: Public procurement, services, products and financial markets, anti-money laundering and terrorist financing, product safety and compliance, transportation safety, environmental protection, radiological protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, privacy and personal data protection and information systems network security, financial interests of the treasury of the Republic of Poland, a local government unit and the European Union, violations concerning the internal market of the European Union, including public-private com-

petition and state aid rules and corporate taxation. The above-mentioned enumeration does not include labor law cases, and it is these that constitute the core area of the State Labor Inspectorate's activities. Already from this point of view, this postulate should be criticized (G. J. Leśniak, 2023).

It has also been proposed to recognize the State Labor Inspectorate as the entity to which reports are to go, in situations where whistleblowers are in doubt as to where their reports should be forwarded. The above solution raises objections, taking into account also that the catalog of public bodies accepting reports of violations of the law proposed in the latest draft of the law is to be open. It does not seem reasonable that a specialized body in a specific sphere of matters (labor law) should play just such a role. This idea was not welcomed in the public debate by both Inspectorate staff and legal practitioners (G. J. Leśniak, 2023).

The primary task of the State Labor Inspectorate is to control the legality and conditions of employment. As mentioned, the directive on whistleblowers does not include employment as a subject of protection of whistleblower reports in the minimum mandatory standard. In the labor law system, violations in this category of cases have a formed procedure for individual cases. Of course, legislators can expand the subject of reports to include labor law violations, but this is not a mandatory requirement of the directive. Therefore, it would be necessary to ensure that the basic standards of the directive are implemented first (*Inspekcja pracy nie chce być organem przyjmującym zgłoszenia sygnalistów*, (see the words of Tomasz Lisicki i the article: G. J. Leśniak, 2023).

The replacement of the Ombudsman with the State Labor Inspectorate seems to confirm that the legislator still does not have a clear vision of how to implement the directive in terms of implementing the requirement to establish a public body competent to receive reports of violations of the law. In assessing this decision, it should be considered that the State Labor Inspectorate meets the requirements of independence within the meaning of the Directive. The independence from government administration and the subordination of the State Labor Inspectorate to the Sejm of the Republic of Poland is a solution that is fully in line with both the conventions of the International Labor Organization and European Union law, although it is not a body with the same authority and level of independence as the Ombudsman. What's more the protection of whistleblowers is aimed at protecting human rights, including, above all, freedom of expression (Pietruszka, 2020), and the competencies of the State Labor Inspectorate concern the sphere of legal relations related to the provision of labor. With the above in mind, it should be considered that the Ombudsman is a body more predisposed

to act as a public body of whistleblowers than the State Labor Inspectorate because of its general competence in favor of human rights, but the earlier reservations regarding the implementation of this assumption remain valid.

6. Final conclusions

The Ombudsman could become a law reporting body within the meaning of the Whistleblower Directive, but this would require amending the Constitution and amending the Law on the Ombudsman by allowing the acceptance of reports of violations of the law from private entities. This, in turn, should be coupled with an increase in financial resources and securing personnel and material resources to ensure that the tasks envisaged by the directive can be carried out. Another solution to be chosen by the Polish legislator may be to add competencies from the directive to a body already existing in the legal system. However, it should be a body with competencies already in some subject matter relation to the areas to be protected under the directive. Perhaps, however, a much better solution would be the establishment of a new, separate body that will be competent to receive infringement notifications following the model of other European Union countries. The specifics and broad scope of whistleblower protection cases would encourage the adoption of this solution. Time will tell which solution the Polish legislator decides to implement. This choice should be made immediately given the more than two-year delay in implementing the directive into Polish law.

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