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Marek Jakubiec
Faculty of Law and Administration
Jagiellonian University
e-mail: marek.jakubiec@uj.edu.pl
ORCID: 0000-0002-2749-2370

NUDGE THEORY AND LEGAL PROTECTION OF WHISTLEBLOWERS[1]

Abstract. The issue of whistleblower protection has been gaining more attention in recent years, especially after the passing of Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons who report breaches of Union law. However, there is a fundamental question as to whether the regulations are sufficient to provide real protection for whistleblowers in organizations. In this regard, it seems crucial that the various actors (legislators, managers, employees) work together to create an appropriate social environment. In this context, it is worth considering the use of knowledge of human decision-making processes, with particular emphasis on the possibility of modifying choice architecture and influencing decisions without imposing specific solutions. Nudging can be used in the "foreground" of legal regulation, by adjusting the social environment in such a way that legal regulation can work effectively. The paper provides an introduction to the application of nudge theory in the context of legal protection of whistleblowers.

Keywords: nudge theory, whistleblowing, ethics of nudging, effectiveness of legal regulation.

1. Introduction: a troublesome whistleblowing

The passing of Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019 on the protection of persons who report breaches of Union law, concerning the protection of persons often referred to as *whistleblowers*, is seen in the literature as a step to regulate the system of reporting irregularities in organizations (see e.g. Ożóg, Baran 2021).

Whistleblower is, according to a general definition, "an employee who brings wrongdoing by an employer or by other employees to the attention of a government or law enforcement agency"[2]. According to Culiberg and Mihelic, who draw on the various definitions provided in the literature,

whistleblowing can defined as "a disclosure made by a person with privileged access to an organization's data or information about a wrongdoing, which implicates the organization" (Culiberg, Mihelic 2017). The aim of disclosure is to eliminate the irregularities (idem).

The primary problem that European legislator – and national legislators – face is the protection of whistleblowers, who may be exposed to negative reactions from employers or other employees (Johnson 2003). Without real protection, whistleblowing will not wield influence on the activities of various organizations, even if the regulations adopted meet the highest standards of good legislation. Regardless of how far legal safeguards for whistleblowers go, the problems associated with whistleblowing are – and are likely to remain – a significant difficulty from the perspective of those who would like to report irregularities. There are many reasons for this, one of the fundamental ones being the social environment, which is often unprepared to function in such a *modus operandi*.

As Dungan et al. (2015) noted:

> From one perspective, whistleblowing is the ultimate act of justice, serving to right a wrong. From another perspective, whistleblowing is the ultimate breach, a grave betrayal.

It's hard to disagree with this diagnosis: there is inevitably a significant tension associated with whistleblowing, of both ethical and psychological nature (and both in the individual sense – reporting of irregularities can trigger distress and negative emotions in individuals, and in the more general, social sense – the social evaluation of such actions is far from unequivocal, see idem.)

Although European societies are very different in terms of attitudes toward whistleblowing (particularly significant differences in this regard are found between Scandinavia and Central and Eastern Europe, due to different historical and cultural backgrounds), in many cases, including – it seems – Poland, we are dealing with a culture in which this type of action can be evaluated negatively and associated with denunciation (see Hüttl, Léderer 2013). This is largely due to historical conditions. In the countries where trust in institutions is weaker, a diminished willingness to report wrongdoing is observed; the same is true also for positive evaluation of reporting. There are also societies in which whistleblowing is not at all associated with denunciation, but rather with concern for the well-being of a company or institution (see Cheng et al. 2015).

The trust and its level in society as a whole seems to be a fundamental issue in the context of whistlebowing, which impacts the level of trust in

organizations (see Brown et al. 2014; Cassematis, Wortley 2012; Lewis 2011). An employee who does not trust his employer and team will not report irregularities, even if in her/his opinion they threaten the well-being of the company or institution. However, it is worth noting that the importance of trust is not at all obvious. Somewhat paradoxically, trust in organizations can also block the actions of whistleblowers. Hence, at least two possibilities exist: either there is no trust, so there is no reporting (because of fear of consequences); or there is a sense of trust that makes people reluctant to report wrongdoing, because of the relationships built with colleagues and the trust they feel in them. Thus, simply building trust within a team is not enough to support whistleblowers' initiatives – fundamentally intended to serve the common good.

Significantly, empirical research conducted in the last decade reveals various aspects of this phenomenon, which triggers a strong axiological conflict (see Sustein 2015). As the authors of one such study note, the key tension is between the realization of two values – honesty and loyalty (to the employer, but also to colleagues):

> The ethical ambiguity surrounding whistleblowing, and the negative outcomes that whistleblowers often face raises the question: what leads people to blow the whistle in the first place? Research we conducted sheds some initial light on this question by suggesting that whistleblowing represents a tradeoff between two fundamental moral values – fairness and loyalty. Relying on moral foundations theory, which identifies five basic moral values – harm, fairness, loyalty, authority, and purity – that people take into account when deciding whether a behavior is right or wrong, we proposed that fairness and loyalty are brought into direct conflict by situations that allow for the possibility of whistleblowing (...). The tradeoff that people make between fairness and loyalty represents a fundamental factor driving the decision of whether or not to blow the whistle. Nevertheless, other factors, both internal and external to the potential whistleblower, have been documented as well. Notably, many of these factors, discussed below, are related to the tradeoff between fairness and loyalty (Dungan et al. 2015).

The protection of employees provided by the law may provide incentives and facilitate the decision to give primacy to the value of fairness, but it does not change the social environment, the specific shape of which is important for rational decision-making – rational not in the instrumental sense, but in the ecological sense (see Todd, Gigerenzer 2012). Of course, the law has an impact on decision-making or perceptions of certain behaviors, but this impact is significant over a certain time horizon. Thus, one can make the assumption that legal regulations are not – and probably will not be for

a long time, if ever, a sufficient basis for the operation of a reliable and efficient whistleblowing system.

However, if we agree with the European legislator that legal protection of whistleblowers is necessary, then other tools are indispensable, in addition to "hard" regulation, to facilitate people's decision-making that is optimal from the perspective of the goals of regulation. In this regard, it seems reasonable to consider the legitimacy of such changes in the social environment that will facilitate the achievement of goals indicated by the legislator with regard to whistleblowing. In this context, the nudge theory (Thaler, Sustein 2008) and the concept of ecological rationality (Smith 2003; Todd, Gigerenzer 2012) may prove to be an interesting point of reference – and, quite surprisingly, that has so far gone virtually unnoticed in the legal literature. In this paper, the focus will be on nudge theory (which does not change the fact that the considerations presented here are part of the research on ecological rationality in law).

Nudging, which uses knowledge of human cognitive processes to modify choice architecture and influence human decisions without imposing specific solutions (Thaler, Sustein 2008), can be used as a tool to operate in the "foreground" of legal regulation, by adjusting the social environment in such a way that legal regulation can work effectively. As Sustein notes, "nudges are interventions that steer people in particular directions but that also allow them to go their own way" (Sustein 2015). In the context of this paper, the direction is a way towards reporting irregularities, through targeting basic, partly conscious (and unconscious) cognitive processes.

Of course, considering the application of nudge theory knowledge does not imply an uncritical acceptance of the theory, which raises some questions and is subject to debate, like any theory developed within the cognitive sciences (see e.g. Maier et al. 2022; Mertens et al. 2022; Szaszi et al. 2022). This does not mean, however, that this theory cannot be a point of reference for considerations of legal regulation (on the problem of the status of scientific knowledge in the context of jurisprudence, see e.g. Jakubiec 2022).

The challenge for whistleblower regulation is the shape of social environment, not just the content of legal regulation. In this text, I want to signal that from the perspective of the operation of various organizations, and especially from the perspective of protecting whistleblowers, it is the modification of this environment that is a condition for the effectiveness of regulations. The focus here will be mainly on the nudges aimed at employees.

As for the relationship between nudging and regulation, it is worth noting that nudging does not create any obligation, by its nature, while legal regulation simply applies. On the one hand, one can argue that the

introduction of nudges at the level of legal regulations is not possible, as nudges – by definition – are not mandatory, unlike legal regulations (and the introduction of "mandatory nudging" would make us deal not with nudges, but simply with obligations grounded in legal norms). Hence, the modification of social environment is the task primarily for the management teams, that should prepare the organization to operate within a specific legal framework. On the other hand, one can identify legal regulations that are nudges, e.g. the regulation of the default mode of consent for transplantation or entry into Polish Employee Capital Plans, i.e. the inaction of citizen causes the effect expected by the legislator). Thus, the relation between nudging and legal regulation is complex: it may seem that nudging is in contrast to legal regulation, because of the nature of nudges and legal norms, but it is also possible to nudge people through legal norms (as not all legal norms express commands and prohibitions, of course).

In the next section, I will indicate what nudge theory is and what research program it originated from. However, it is worth pointing out right now that nudging is still a relatively little-known tool in the legal literature (see Alemanno, Simony 2015; Santos Silva 2022), even though, as Cserne (2015) noted, "empirical research on human behaviour has become increasingly relevant in both public policy debates and legal reforms". What's more, nudging is often analyzed in the context of the dangers it poses, particularly in the area of consumer-business relations and considerations of the relationship between nudging and manipulation (see Wilkinson 2013; Kemmerer et al. 2015; Rosa 2022; Sustein 2015).

This is especially true for entrepreneurs, including financial institutions and technology companies, who abuse their position stemming from information asymmetry and use a variety of techniques to influence a consumer's decision that is favorable to themselves (see Yeung et al. 2017; Weiyi Cai 2020). These techniques raise a number of ethical questions, and their use is of concern to institutions protecting consumer interests. For these reasons, it is pointed out that nudging is influencing people's actions without their awareness, a kind of manipulation and "working 'in the dark'" (Ivanković, Engelen 2019). There are also analyses of the ethical aspects of nudging (see Kuyer, Gordijn 2023). I will return to these studies below, reflecting on the ethical side of using nudging to strengthen the effectiveness of whistleblowing regulations. However, this is not the only side of nudging worth noting in a broadly understood legal context.

According to the proposal outlined below, research on nudging can become a source of knowledge for developing incentives in social environment that encourages employees to report whistleblowing. These incentives are

to be of a benign nature, influencing the perception of certain phenomena and thus modifying beliefs, consequently influencing decisions. Thus, it is worth considering whether nudge theory can be applied to facilitate the achievement of goals set by the legislator, modifying the social and legal environment.

Why nudge theory? Franco, Moniz-Lopes and Samaio (2021) point out the following examples of nudging familiar to most people: "One of the most common examples of this kind are nudges that exploit people's natural tendency toward inertia – like default rules used in pension plans (when organizations automatically enroll employees in their company's retirement savings program but allow them to opt out) and organ donation" (Franco et al. 2021). They rightly note the basic principles of this mechanism: "In any case, the success of nudges resides in the fact that they are adapted to current normal life complexity. 'Make it simple' is often the showcase for nudges. Usually nudges work because they make people's lives simpler and reduce burdens and friction and this is something of immense value in our overcrowded lives" (Ibid.).

In the context of whistleblowing, the key point is that entrepreneurs who shy away from whistleblowing may not see that building a transparent, efficient team is in their best interest. By taking advantage of nudging in the workplace they may be acting in their own interests. If these initial observations are accurate, then quite perversely, it may turn out that the weaknesses of the human mind – susceptibility to simplifications, heuristics, the default mode of operation in the so-called System 1 in Kahneman and Tversky's terminology, etc. – can be exploited to improve the results of human actions by making the law more effective. Perhaps, then, this weakness is only apparent.

The purpose of this paper is to show that nudge theory (and the concept of ecological rationality) can be relevant from perspective of legal effectiveness in the context of regulations protecting whistleblowers. This will make it possible to argue indirectly for the thesis that the importance of cognitive legal studies, i.e. research at the intersection of law and cognitive science, significantly exceeds theoretical and philosophical reflection, since the areas of interaction between law and cognitive science indicated below have a strong practical dimension.

Due to the focus on non-legal (extra-normative) factors, but relevant to the effectiveness of legal regulations, I will not analyze the current legal regulations for the protection of whistleblowers, in particular the directive indicated at the beginning, or the legal acts for its implementation (and the problem of transposition delays). My point here is that regard-

less of the assessment of the regulations, for the functioning of whistleblowers protection, as well as the process of reporting irregularities itself, some additional tools are necessary, not necessarily resulting directly from the regulations, but serving to increase their effectiveness. For this reason, important questions about nudging as a tool for shaping citizen behavior by the state, which acts implicitly or even subversively in this context (Engelman 2017, after: Franco 2021), will not be central here. It is also worth mentioning that, as the considerations presented here are somewhat new, the aim is to signal the issues in the first place, so this text can be regarded as a modest contribution to the discussion and much broader research.

2. Dual process theories and nudging

Let's start with a brief overview of the nudge theory which serve as a point of reference in this text. In the most general terms, the concept of nudging originated from a research program devoted to decision-making. This research program primarily gave rise to the famous two systems theory of Kahneman and Tversky (Tversky, Kahneman 1974, Kahneman 2011). There is no space here to discuss it in detail, which, moreover, would be pointless given the multitude of studies on this concept, including in a legal context (Guthrie et al. 2001; Bystranowski et al. 2021). Thus, I will only draw attention to the most relevant issue from the perspective of the considerations presented here: the picture of the human mind – and, by extension, of human decision-making processes – that emerges from the contemporary cognitive science is not a completed work, but is more like a collage of different images because of the variety of research programs. This does not, however, change the fact that the heterogenous, contemporary "idea of mind" is significantly different from the colloquial picture of the mind, grounded in outdated psychological and philosophical theories. This is significant because the law is based on a folk conceptual scheme and the associated folk worldview. These, in turn, tend to be based on a traditional view of decision-making processes, which, from a modern perspective, seems inadequate. The literature has pointed out a number of areas in which the descriptive assumptions underlying legal norms from a modern perspective seem inadequate. This applies, for example, to the issue of statements of intent (see Brożek et al. 2019; Brożek 2021).

Although the issue of whistleblowing does not involve declarations of will in the same sense as in the contact law, we can, of course, speak here

of *will expression* in the broadest sense. Undoubtedly, we are also dealing here with the making of a decision and its expression, which does not mean, however, that this process is carried out in a calculated, cool manner. Rather, it is affectively motivated, as with most decisions, and if there is rationalization, it occurs *ex post* (see e.g. Haidt 2001).

What emerges from Kahneman and Tversky's research is a picture of a mind that functions in two modes: first and second or, more figuratively, fast and slow. Mode one, which is the default (meaning we all use it most of the time) is based on simplified models of inference, called heuristics. Heuristics, although they are based on the analysis of selected factors and do not meet the standards of classical rationality, allow us to function quite efficiently in the world. They facilitate decision-making, saving intellectual resources (Kahneman 2011; Gigerenzer, Engel 2006).

However, it turns out that while making our lives easier, heuristics create many pitfalls. Using heurstics, we are taxed for many errors and unfavorable tendencies, even if we make complex decisions and the whole process is formalized, as is the case with decisions made in legal procedures. This is perfectly demonstrated by research on the impact of heuristics on judicial decisions (see review in meta-analysis by Bystranowski et al. 2021).

The results of the empirical research reveal that the human mind operates in a simplistic way, and switching to a second, reflective mode is not easy, and even when acting in a "slow" mode we are susceptible to extrinsic factors in decision-making. As research on anchoring shows, a skilled lawyer, properly formulating arguments, can influence the decision-making processes of judges beyond their awareness (see Englich et al. 2006). Judges are just human beings who are susceptible to this kind of trap. For example, giving (saying) the number X outside the context of the amount of compensation increases the probability that the judge will adjudicate higher compensation than if the number 0.1 X (ten times smaller) is given (see idem.).

Knowledge of the above-described mechanisms of the functioning of the human mind can be used in two ways: influencing decisions in a way that will aim to benefit the one who exerts influence – this type of action is judged negatively; however, it can also be used to achieve the goals of regulation – and here the ethical evaluation will depend on the nature of the action and the goals to be achieved.

A tool that can be used to achieve the goals of the legislator is nudging. As mentioned above, nudging is usually associated with those uses of it that are evaluated negatively, although attention is also paid to its role in the context of regulatory effectiveness (Franco et al. 2020). Like the use

of knowledge about anchoring, which makes it possible to influence people's actions, nudging can lead to both positive and negative effects, and consequently it can be seen as a threat as well as a tool to achieve goals deemed desirable by the legislator. Considering the second aspect of nudging, one can distinguish between action within the framework of legal regulation, as in the above-cited case of pension plans (the case of Polish Employee Capital Plans), as well as action in the foreground of regulation – allowing the regulations in question to function by encouraging (through the soft law or even "hard" legal regulation, which is – however – troublesome) the performance of certain actions in cases where this raises public resistance or ethical concerns. The latter case involves whistleblowing.

At this point it is appropriate to briefly outline what nudging is and what its significance may be. Nudging is a concept that was developed in the context of behavioral economics and choice theory by Thaler and Sustain, who outlined their understanding of the tool in a famous 2008 book. One of the most frequently cited definitions is as follows:

> A nudge, as we will use the term, is any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting fruit at eye level counts as a nudge. Banning junk food does not. (Thaler, Sustein 2008).

It is worth pointing out that nudging implies influencing people's decisions in a way that is as unintrusive as possible (hence the frequent description of nudging-inspired policies as *liberal paternalism*). The concept of nudging builds on the achievements of Kahneman and Tversky, as it draws on knowledge of the pitfalls we can easily fall into. However, the idea is not so much to avoid these pitfalls, but to use them appropriately; that is, to shape the environment in such a way as to make certain choices easier, more acceptable or less questionable. Signaling irregularities is a good example of a socially difficult and conflictual situation. It is therefore worth using knowledge of the nudging mechanism to shape the environment in a way that makes it easier to undertake activities and strengthens the protection of those who choose to do so.

But does this mean that the decisions we make, laden with heuristics, or made under the influence of nudges, are irrational? Undoubtedly, taking into account factors that, in light of some influential philosophical concepts, could be considered irrational (emotions, unconscious influence of the environment) could lead to such a conclusion. However, such a perception of

rationality, which is also present in the traditional view of methods of legal reasoning (see Stelmach, Brozek 2006), closes us off to gaining a broader perspective of how the mind works. There is no doubt, however, that every decision has a significant unconscious component, as most of our thought processes take place unconsciously. Therefore, if we are unaware that our actions have been influenced by a factor that we are not aware of, this will not reduce the level of rationality of our decisions. Instead, it may make them more rational in an ecological sense.

3. Efficacy of whistleblowing regulation and nudging

From the perspective of the effectiveness of whistleblowing regulation, it is important that nudging can be used to act in the forefront of legal regulation which is a relatively little-known in the literature on whistlebowing.

How can nudging be used to encourage employees to report wrongdoing? This is, of course, a broad issue that calls for in-depth analysis. Below a few suggestions for making regulations more effective will be presented, formulated on the basis of studies of nudging in other contexts and in analyses of the effectiveness of procedures governing whistleblowing (see in particular Thaler, Sustein 2008).

First, the very fact that whistleblowing can be reported and the ways in which it can be safely done can be classified as soft nudging (as it affects the change in the choice architecture). At the same time, of course, this is a prerequisite for a functioning whistleblowing system. Information should be made widely available and reach all employees, and should portray whistleblowing in a positive light, as an action for the good of the organization (see Rachagan, Kuppusamy 2013; Onyango 2021). In addition, the method of reporting should be as intuitive and simple as possible to encourage employees, as well as tailored to their preferences (for this reason, it is optimal to use a variety of reporting methods, including through information systems that employees have access to; see studies described in Howley, Ocean 2022; Vera-Munoz 2005). Of course, it can be argued that this is nothing new and that no scientific theory is needed to ground such actions. However, it is worth noting that this is nudging that can be described as basic.

Second, in constructing the form, care should be taken to form of expression (in terms of wording and layout) in such a way as to encourage submission. It is possible to use some well-known techniques, i.e. highlighting different options with different colors, with colors that most people as-

sociate with something positive (e.g. green) should be used for selecting the "submit" option rather than the "withdraw" option. Report should be the default option when someone opens the form. These are very simple techniques that have been used in marketing actions for years, and can have a positive effect here as well. This type of technique can help mitigate the risk of value conflicts among employees.

Thirdly, information should primarily cover the issue of whistleblower protection. As indicated above, the issue of trust is crucial in this context. If the employer cares about the functioning of the whistleblowing system, it should not only inform about this possibility, but also about the security measures provided for those who choose to send a report. Graphic design should take into account the highlighting of information on the issue of safety.

It is also possible to use a system of incentives (positive reinforcement) in the event that, after an investigation, it turns out that the notification saved the company or institution from losses (financial, social, etc., see Teichmann, Falker 2020). If adopted, the information should also be available – and should be presented as key information. Finally, information on this topic should also be included in any employment contract signed with new employees.

Fourth, the information must be sent periodically, which is in line with nudge theory's assumptions on modifying choice architecture (Thaler, Sustein 2008; Sasaki et al. 2021; for recent research on the temporal aspect of nudges see Rookhuijzen et al. 2021). Building trust in the context of whistleblowing requires time and constant messaging on the issue. An alternative is to include information in office spaces, such as posters or informational flyers. In their graphic design, consideration should be given to the selection of an appropriate graphic design, which emphasizes in a non-verbal way the positive aspect of whistleblowing.

What is worth emphasizing, there can be no question of coercion or strong pressure exerted for a specific purpose (Thaler, Sustein 2008). The freedom of decision lies with the individuals involved, while due to the desire to ensure the effectiveness of the law, the social environment is modified in a way that directs the preferred (by the legislator or employer) courses of action, so that certain behavioral modifications can occur (due to a change in the architecture of choice). Hence the previously cited, often present in the literature, designation of policies inspired by nudge theory as liberal paternalism.

The above proposals, preliminary in nature and indicating only selected possibilities for action, based on nudge theory, should be analyzed from

the ethical perspective – it is worth considering the validity of nudging in the context of the ethical problems associated with it, reported in the literature. For example, Kuyer and Gordijn identified the ethical problems regarding autonomy, welfare, long-term adverse effects, and democracy and deliberation (Kuyer, Gordijn 2023). Of course, the concerns mainly relate to the use of nudges for profit-making activities, where the room for abuse is wide (especially in areas where there is strong asymmetry of information in the market). Undoubtedly, however, the use of nudges in other contexts can also raise important questions. To this end, it is worth briefly examining the ethical problems identified by the authors of the above-cited text, with emphasis on the issues of autonomy, welfare and long term adverse effects (infantilization, mistrust).

First, autonomy. Nudging affects the choice architecture, without imposing a specific choice. Undoubtedly, however, through this influence, it limits decision-making autonomy, prompting decisions in a certain direction. However, it is worth remembering that the number of factors that influence our decisions is large – and we are not aware of most of them. Our autonomy is thus violated permanently – and it is not actually clear what it is supposed to mean. As Kuyer and Goldin noted, "nudges are criticized for violating autonomy as agency because they target shallow cognitive processes – the fast, automatic, and intuitive type 1 processes – to alter people's behavior (Saghai, 2013). In this way, it is argued, nudges fail to treat people as reasoning subjects and so diminish control and agency" (Kuyer, Goldin 2023). Intentionally making changes in the environment so that decisions made quickly, based on simplified inference models (heuristics) are as expected, can indeed be evaluated negatively – but this evaluation will vary depending on the goals the nudger intends to achieve. When we talk about reducing the scale of negative and dangerous phenomena that whistleblowing is supposed to do, possible violations of autonomy do not seem ethically reprehensible.

The second issue mentioned by the authors is welfare, which has to do with seeking to increase the level of optimality of people's decisions:

> The issue of welfare is concerned with the proposition that nudges improve welfare. This is mostly in accordance with or in response to Thaler and Sunstein (2008), who argue governments should nudge citizens to ensure they make welfare-optimal decisions" (ibid.).

Of course, welfare can be understood in many ways, and regardless of academic definitions each person has their own individual understanding of the concept. It can be assumed that in the context of whistleblowing, the

use of nudges designed to encourage whistleblowing promotes the construction of welfare in the organization and, more generally, in society. Therefore, in this context, it is difficult to find ethical problems related to this issue.

Of greater concern, however, may be long term adverse effects, which "only become apparent over longer periods of time when people have encountered multiple instances of nudges." (ibid.). In this context, two main risks are pointed out: infantilization and mistrust (ibid.). There is no doubt that prolonged exposure to nudging can negatively affect decision-making abilities and make people count on the "environment" to influence their decision that is made quickly and easily, without engaging the slow (reflective) system. In the case at hand, however, this risk is not present: even facilitating whistleblowing, the whistleblowing itself is only the initial stage of the entire procedure. More problematic – but not in terms of the long-term effectiveness of regulation, but of nudging itself – is the issue of mistrust. People who come into contact with nudging may lose trust in employers, as they will feel manipulated or restricted in their decision-making freedom. Ultimately, this can reduce the effectiveness of nudging and negatively affect whistleblowing processes. However, assessing how real this threat is requires long-term research.

Another problem is related to the issue of transparency especially in the context of lawmaking and applying the law. Franco et al. (2020) point out that "nudges are also particularly problematic at the legal level. Specifically, nudging seems to be able to interfere with human dignity, autonomy, and more broadly with fundamental rights" (Franco et al. 2020). This is because nudging, as a rule, takes place unconsciously. In the case discussed here, transparency seems to be an element to be noticed, but nevertheless not a key one.

First of all, in the case of nudges aimed at employees (potential whistleblowers) it is only partly possible to speak of legislative nudging. The key is the adjustment of the social environment, which is the task of the organization's management.

Secondly, given the goals of whistleblowing and the formalization of the entire procedure, the decision to report will only start the procedure, and does not in itself constitute a source of obligations or significant legal consequences (as is the previously mentioned cases of the default mode of consent for transplantation or entry into capital plans).

Proposals to increase the effectiveness of whistleblowing are also in line with the principle of proportionality, which is often problematic in the context of nudging (Franco et al. 2020). As the authors point out, "nudges can

be seen as contrary to the principle of proportionality, especially if they induce individuals to act in a way that is contrary to fundamental rights and freedoms." However, it seems that in the case analyzed here there are no such difficulties.

Whistleblowing regulation is a good example of legal norms whose effectiveness depends to a very high degree on the public's preparation for the new legal rules. As mentioned in the introduction, the issue of trust is particularly problematic in this context. The second fundamental factor is the general attitude to reporting negative phenomena and the general organizational culture.

Although legal regulations influence social relations and citizens' beliefs, this is rarely a quick and sustained process. Legislators forget that the law operates in a specific environment, and without creating the right environment, it is difficult to ensure the effectiveness of implemented solutions. Meanwhile – referring to Kelsen, one of the most important theorists of the last century, who emphasized the distinctiveness of the normative sphere – a law that is not effective is dead and is actually not a law (Kelsen 1945). In this regard, can nudging prove helpful in achieving the goals intended by the legislator? This, of course, will depend on many factors. Let's try here to outline the possibilities for various actors, first and foremost: the legislator, the employer (internal regulator) and the employees.

First of all, the possibilities for the legislator to act in this regard are limited. Forcing the formation of the socio-institutional environment through the law is difficult and may raise legitimate questions. The legislator, by creation of the regulatory environment, indirectly influences the shape of the entire legal environment. I have previously mentioned the problematic relationship between nudges and legal norms due to the nature of nudges.

Secondly, internal regulations and the environment inside a given organization are crucial. To enable the whistleblowing system to work properly these internal rules must comply with legal regulations and must not be fictitious regulations. Accordingly, it is necessary to formulate the provisions of relevant regulations or orders in such a way as to ensure an efficient whistleblower monitoring system, as well as to provide an adequate level of protection for whistleblowers.

Third, it is necessary to influence the organizational culture and build an appropriate legal environment. Environment is not just regulation. It's about creating an environment that actually enables and encourages whistleblowing in a spirit of trust, and this is the task of those who shape the organizational culture.

It seems little controversial to say that the biggest challenge to creating an efficient whistleblowing system is to accomplish the last of these tasks. As it seems, this will not be possible without using knowledge of the mechanisms that influence people's actions. And it's not about manipulation or forcing certain behaviors. Rather, if we want whistleblower protection regulations not to remain a sham, we need to act in a way that realistically facilitates employees' actions. When the social environment is tailored to their needs, the chances of them not feeling apprehensive about whistleblowing will increase significantly. Nor will they then feel a conflict of values: if the environment "nudges" them toward reporting, it will be easier to accept that this is an action for the good of the organization and is not a sign of disloyalty (which is pointed out as one of the main ethical obstacles, see Dungan et al. 2015). Quite the contrary.

However, it seems that as long as legislators, but first and foremost employers and managers do not take the above issues into account, the conditions for the smooth operation of the system will not be met. To the detriment of workers, legislators and, consequently, society as a whole.

NOTES

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[2] See: https://www.merriam-webster.com/dictionary/whistleblower.

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