

Providing an Alternative to Silence:

**Towards Greater Protection and Support for
Whistleblowers in the EU**

COUNTRY REPORT: CZECH REPUBLIC

This report belongs to a series of 27 national reports that assess the adequacy of whistleblower protection laws of all member states of the European Union. *Whistleblowing in Europe: Legal Protection for Whistleblowers in the EU*, published by Transparency International in November 2013, compiles the findings from these national reports. It can be accessed at www.transparency.org.

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Introduction

The aim of the presented research is to provide a concise overview of existing Czech laws and current practices pertaining to whistleblower protection in the public and private sector. The analysis is divided into four parts. The first part offers a brief introduction to the issue. The second part provides a summary of existing Czech laws that may pertain to whistleblower protection, and discusses their practical application. Here we also look at the social and cultural context of the issue and on possible obstacles. In the third part, perception of whistleblowing and political will in the Czech Republic is analysed from the perspective of aspects generally addressed in foreign legislation pertaining to whistleblower protection. We conclude by offering a number of recommendations ensuing from the analysis.

The term whistleblowing derives from the English saying “*to blow the whistle*”. This word is meant to evoke the whistleblower’s attempt to say “Attention, there’s something wrong here”. We speak of whistleblowing when current or former members of an organisation (employees) warn of unfair practices in the workplace, generally of practices endangering the public and running counter to the public interest. Whistleblowers are key individuals in the process of uncovering corruption, fraud or organised crime. As such they are highly vulnerable and may be subject to various forms of reprisal or retaliation.

Despite larger media coverage in recent years, whistleblowing remains a relatively unfamiliar topic in the Czech Republic outside the journalist/publicist group, and most people do not perceive whistleblowers as a group that needs special protection. Political will to enact (and enforce) adequate laws that would protect whistleblowers against various dangers they are facing is also lacking; current administration declared a war on corruption, but after three years, almost the sole progress is an analysis of whistleblowing and protection measures, which draws heavily upon TI CZ materials. Moreover, proposed legislation does not pay heed to recommendations contained in the analysis.

Fear of possible retaliation, combined with insufficient legal protection, sense of futility and history-based public disdain of ‘snitches’ means that although whistleblowers can be a very potent force in resolving unfair or illegal practices in both public and private sectors, a lot of potential whistleblowers choose to remain silent.

Overview of Legislation Pertaining to Whistleblowing and Whistleblower Protection

Vladan Brož, August 2012

No comprehensive legislation exists in the Czech Republic to regulate whistleblowing and whistleblower protection, although integrating whistleblower protection measures into Anti-Discrimination Act is currently in progress. The rules primarily applied in this area are the labour-law regulations and Witness Protection Act, but the protection these afford is uncertain and strictly limited to matters of employment (labour law) or criminal proceedings (Witness Protection Act). They fail to address explicit protection of those employees who call attention on the unfair or illegal employer practices.

For the sake of clarity, we have structured the assessment of whistleblower protection in the Czech Republic into two sub-chapters: (1) which laws apply to whistleblowing and whistleblowing protection and how, (2) legal obstacles to whistleblowing that exist. None of these sub-chapters comprises a full enumeration of measures, institutions or options, but only offers a basic overview.

WHISTLEBLOWERS PROTECTION IN CZECH LAW

Administrative Procedure Code

Most generally, where not otherwise stipulated by a special law (thus, in the vast majority of cases), the procedure for lodging a complaint or a motion is regulated in Act No. 500/2004 Coll., The Administrative Procedure Code. Pursuant to the provision of § 42, every administrative body is obliged to accept motions to initiate proceedings ex officio. Where the individual submitting the motion so requests, the administrative body is obliged within 30 days of to notify him/her that a proceeding has begun or that it ascertained no grounds for initiating a proceeding ex officio or that it has submitted the motion to the competent administrative body.

The lodging of a motion or complaint should not be prejudicial to the complainant and no direct or indirect actions may be taken against him/her for having lodged a motion. The

complainant is protected in these specific administrative proceedings as a person affected, e.g. he/she has the option of seeking compensation of damage, has the right to lodge a motion anonymously or to have his/her identity protected. Nonetheless, this protection fails to address any specific consequences of the whistleblower's actions on his/her employment situation, its duration or the conditions for performing work. Thus, from the perspective of whistleblower protection, the legal definition is inadequate.

Labour Code

Generally, the key employee protection provision is the definition of grounds for dismissal set forth in § 52 of Act No. 262/2006 Coll., The Labour Code (the "LC"). An employer may not arbitrarily and groundlessly terminate an employee. Further employee protection is afforded by the provision restricting changes in work location or type. Certain protection is also afforded by the provision authorising an employee to disregard an employer's instructions, where these are illegal (a similar treatment is in place for staff of territorial self-governing bodies). Refusal to follow such instructions cannot be understood as a breach of a work obligation and cannot establish an employer's right to terminate an employee.

The LC also stipulates a general employer obligation to ensure the fair treatment of all employees and explicitly prohibits discrimination of any kind whatsoever.

Pursuant to the provision of § 305 of the LC, additional employee rights may be regulated by an organisation's internal rules of procedure. Nothing prevents an organisation from formulating internal regulations addressing whistleblowing mechanisms and other whistleblower rights. Moreover, such protection may be stipulated and defined in collective agreements, in which other employee rights in employment relations, inter alia, may be regulated pursuant to the Labour Code.

Labour Inspectorates

Act No. 251/2005 Coll. on the labour inspection regulates, inter alia, other rights and obligations existing during inspections carried out within labour inspectorate or labour office powers. A whistleblower may contact labour inspectorates and labour offices with suspicions

of labour-law violations (discrimination included). The competent civil service agency is obliged to look into a complaint, but is not obliged to accede to the whistleblower's suggestions or proposals, or even to perform an investigation. If an inspection is carried out at the impetus of an employee, the inspector is obliged to conceal the identity of that employee, but this protection doesn't regulate the protection of whistleblowers who report wrongdoing, especially the duration of the employee's contract, and in practice the inspections are usually carried out after the employee has been terminated.

Civil Code and Anti-Discrimination Act

Terms pertaining to discrimination are, on the basis of an explicit statutory mandate, defined in what is known as the Anti-Discrimination Act, passed as an Act No. 198/2009 Coll. Current Anti-Discrimination Act does not explicitly provide protection to whistleblowers who alert on wrongdoing, but a new Act, which includes additional reporting mechanisms and explicit whistleblower protection, is proposed. It should protect employees against dismissal, bossing and other forms of retaliation, but protection for other whistleblowers will be still missing, as it seems.

The right to equal treatment and protection against discrimination is generally provided by the § 13 and § 16 of the Labour Code, and should employment discrimination or unfair treatment occur, the current legislation sets out the legal means of protecting personality in the provisions of § 11 et seq. of the Civil Code.

Ombudsman

Pursuant to Act No. 349/1999 Coll. on the Ombudsman, the Ombudsman protects persons against the conduct of authorities and other institutions (but not private employers) and may perform independent investigations in individual cases. In his/her complaint, the whistleblower may only seek protection of his/her personal rights and is required by law to attach a signature to the complaint and furnish his/her address. The primary consequence of anonymity would be deferral of the complaint. Nonetheless, an important right of the Ombudsman is not to be bound by whistleblower complaints, but to be able to initiate an

investigation at his/her own discretion. However, the Ombudsman does not supersede the activity of civil service agencies and cannot amend or reverse their decisions, but may only request that remedies be effected. The protection of whistleblowers is only theoretical.

Criminal Law

From the perspective of criminal law, it is likely that a whistleblower lodging a complaint will be in the position of a witness when reporting the facts comprising the basis for his/her suspicion to the competent authority. Under the Act No. 40/2009 Coll. Criminal Code provisions, a whistleblower / witness has certain statutory rights to identity protection and the provision of safe and undisturbed surroundings designed to ensure that his/her testimony is accurate and uninterrupted. However, the procedural rights of the witness are very narrow in the Czech Criminal Code, i.e. not allowing the witness to view the case file or lodge applications for remedial measures. Nor does the legislation explicitly provide for the witness to receive a copy of the protocol documenting his/her own testimony.

A whistleblower may also become an aggrieved party who has suffered damage as a result of the crime being reported and whose legal position affords him/her additional procedural rights. He/she has the right to participate in criminal proceedings, to view the case file, to sue for damages and to lodge certain applications for remedial measures. However, the Criminal Code very narrowly defines the term *aggrieved party*.

POTENTIAL WHISTLEBLOWING OBSTACLES

The Labour Code and some other legislative provisions together establish employee rights and obligations that may be mutually incongruous. For example, a member of an organisation (employee) may find that he/she has a reporting duty but, at the same, that in performing this obligation he/she may be committing a criminal or other unlawful act.

Where an employee plausibly learns that an employer's conduct answers to the facts (body) of a crime, in some cases that employee – like any other citizen – has a legal obligation to report the commission of such statutorily defined crime. Failing to do so may in itself constitute the

commission of a crime. The provision of § 367 of the Criminal Code (Act No. 40/2009 Coll.) addresses the criminal act of failure to obstruct a crime, while the provision of § 368 treats on the crime of failure to report a crime, which an employee may commit by mere virtue of inactivity.

On the other hand, in making a complaint the whistleblower may himself/herself perpetrate a crime or other unlawful act and thus be liable for damages based on the crimes of slander or false accusation.

The crime of slander is defined as the illegal conduct of a person who disseminates false information about another, which is capable of jeopardising his/her public reputation, in particular through professional injury, the violation of family relationships or causing of other serious detriment. The subject of the crime may only be an individual and it is enough for the perpetrator to have been aware that the information is false. It may always be assumed that a whistleblower is absolutely convinced of the truth of his/her assertions. Nonetheless, he/she runs the risk of being subject to the lodging of a complaint accusing him/her of the crime of slander as a retaliatory measure.

False accusation is also deemed a crime. It differs from slander in that from the whistleblower's perspective, it constitutes a deliberate reporting of facts that may form the basis for criminal prosecution by the "accused", i.e. the employer. The whistleblower's assertions might not be duly supported in the discovery process and the employer could subsequently file a complaint for suspicion of the commission of the foregoing crimes as a means of reprisal.

Perception and Political Will

Public Awareness about Whistleblowing

The public awareness about the notion of whistleblowing is regrettably low and the term whistleblowing/whistleblower is virtually unknown to the Czech public. Although related topics (e.g. fighting corruption and related crime in public sector) are widely discussed, whistleblowing is still more or less ignored. In September 2009, a public opinion survey¹ was carried out among the employees in the Czech Republic and the results show that two thirds of employees, who had observed serious misconduct in the workplace, failed to address the situation or only discussed it with their colleagues. Further analysis of the responses reveals that the employees who reacted passively, failed to address misconduct primarily due to their fear of potential problems at work or because they did not believe that their disclosure would lead to a resolution. Some 34% of these employees believe that management knew of such conduct and did not wish to address it. The dilemmas that are common to every country, such as fear of job loss, the degree of implication/co-responsibility, loyalty to employer vs. loyalty to the public or other stakeholders, negative experiences with investigative, prosecuting and adjudicating bodies (law enforcement and the courts), are also observable among the Czech employees.

In addition, local historical experience plays an important role in the low willingness to report illegal conduct. First, regimes and values have been subject to frequent change in the Czech Republic and those who attempted to take up public causes were generally swept away at each such change. The general rule of thumb is “don’t make enemies unnecessarily”. Second, all totalitarian regimes in the past (and vast majority of adult population in Czech Republic lived through at least one) have been using informants to maintain itself in the possession of power, and everybody who is perceived as an informant may be despised because of that. For many people it is hard to get rid of the subconscious feeling that anybody who reports anything (often including white-collar crimes) to state authorities causes unnecessary trouble for everybody concerned. The concept that in a democratic society whistleblowing can be a

¹ Transparency International – Czech Republic (2009): Survey mapping the perception of whistleblowing by employees in the Czech Republic, www.transparency.cz

valuable tool for curbing crime, labour code violations and many other forms of illegal or illegitimate behaviour can be hard to grasp.

Media Coverage of Whistleblowing and Interaction between the Media and Whistleblowers

A media analysis was performed in order to gain at least a partial picture of whistleblowing in the Czech Republic. The media relationship to whistleblowers was tracked in two ways: (1) the experiences that primarily investigative journalists themselves have had with whistleblowers, and (2) how the media acknowledged and referred to whistleblowers in 2008.²

Virtually without exception, the English term *whistleblower* was unknown to the contacted journalists, who had no idea that special attention is devoted to them in other countries or that their position is addressed in special legislation. On the other hand, their *sources*, i.e. persons who relay non-public and sensitive facts to them, are a vital component of the day-to-day work of the investigative journalist. These persons can invoke the journalist's right to protect his/her sources. If these individuals are acting in the public interest, they are anonymous whistleblowers. Inasmuch as the terms source and whistleblower overlap, an unclear picture exists as to who in fact is, and is not, a whistleblower.

Reporters estimate that 70-90% of their sources insist on anonymity, and do so for serious reasons such as fear of persecution, retaliatory measures and a lack of faith in investigative, prosecuting and adjudicating bodies or other authorities. Generally, editors neither recommend nor welcome anonymous sources, noting the danger of journalists being manipulated by a whistleblower. However, they do as a rule respect anonymity if a politically highly sensitive case is not involved.

Editors state they generally do not prevent the punishment of a non-anonymous whistleblower, though they do provide other examples of how a journalist may help a

² The analysis of journalists' experience with whistleblowers is based on information provided in e-mail, telephone and face-to-face interviews with editors working in Czech media. Media coverage of whistleblowing was tracked using searches for identified cases or key words in the electronic media archive of the company Newton Media. The search included 240 print and electronic titles, 5 national television stations and 7 national radio stations. The ascertained statistical data only provide us with approximate data, as some cases could involve duplication, where one case is covered by two mentions in a single publication (on the title page and inside the publication) or when the same article is published in both the print and online versions of a daily.

whistleblower, e.g. by lending enhanced credibility, offering better familiarity with the case, collaborating with non-profit organisations or facilitating contact with an attorney.

Nowadays, media familiarity with whistleblowing is rising. A search for terms “whistleblower” or “whistleblowing” yielded at least one article in most major news servers in Czech republic (2 in Reflex, 4 in Czech Press Office (ČTK), 7 in Lidové noviny, 9 in Hospodářské noviny, 10 in MF Dnes) and all articles were describing domestic situation, whereas in 2007, a search for the term “whistleblower” identified a total of 3 articles (a total of 39 since 1996), but with the exception of one case they all dealt with events abroad.

Cases of whistleblowing with favourable ending are increasing in number, too. Probably the biggest and most famous whistleblowing affair is connected with the name of Libor Michálek, former director of the State Environmental Fund, who blew the whistle on corruption at the Ministry of Environment, fraudulent tendering processes and on instruction about destroying documents that would implicate senior officials. Michálek at first attempted to initiate an investigation through regular channels, but when Prime Minister repeatedly ignored all his attempts, Michálek made the evidence public, eventually causing a resignation of the Minister of Environment. Michálek lost his job and faced a smear campaign, but he also received a remarkably wide support; now he is running for Senate, promising to fight corruption if he is elected.

Use of existing channels in the Czech Republic

Potential whistleblowers have many options of the bodies to which they may turn with complaints and notifications and each of them, as explained above, has different jurisdiction and competencies. There is no dedicated body that would receive whistleblower’s reports and/or that would investigate the case and be able to take corrective action. There are such channels in the private sector, but the existence of such bodies relies only on the will of the concrete private organization. The obligation to introduce internal whistleblowing mechanisms applies only to those private entities that are also subject to Sarbanes-Oxley Act.

A whistleblower, as any other citizen, client of the public administration or employee may turn on labour inspectorates and labour offices (the last available data from the State Labour Inspection Office for 2010 indicate that 5,543 complaints were made in total and 3,714 inspections were performed), local authorities, municipal infractions commissions, Czech law

enforcement agencies, labour offices, the courts or police, the Ombudsman (A total of 6,985 complaints were submitted to the Office of the Ombudsman in 2011, and 5,200 complaints were clarified. Moreover, 559 visitors to the Office were provided with legal advice on how to resolve their problem), media or political representatives. From the statistics published by competent agencies and institutions, we can arrive at figures providing the number of valid decisions, but not detailed case information. In order to obtain specific information about the case and whether it involved a whistleblower, it would be necessary to go through each individual case. The absence of specific regulation and notion of whistleblowing causes that such category/circumstance is not even recorded.

Reporting channels within the public sector

Government Resolution No. 270 of 2001 enjoined representatives of ministries and central public administration agencies to issue and familiarise their staff with a Code of Ethics. The resolution includes a model Code of Ethics introducing the reporting duty for an employee who learns of a loss of property or fraudulent or corrupt behaviour. An employee is to report suspicions to his/her superior or the competent investigative, prosecuting or adjudicating body, but the Code usually does not regulate any specific process of reporting. The Code also presents no special protective mechanisms for the persons who report suspicions (and could be considered as an internal whistleblowers). In late 2006, Transparency International – Czech Republic (TI CZ) conducted a survey of 26 central public administration agencies (all ministries and other authorities). TI CZ ascertained, inter alia, whether the various authorities had adopted a Code, if so, in what form and how staff were trained. All but two authorities had adopted Codes of Ethics, generally by means of internal rules of procedure. Employees are generally familiarised with the respective Code during intake training. The statistics of use of the duty to report are not available. No internal reporting mechanism was found, with the exception of anonymous telephone lines or e-mail addresses, but these do not provide protection to whistleblowers and do not have specific procedures to deal with the whistleblowers notice.

All in all, current state of whistleblower support can be described as shallow. Although war on corruption is being widely declared, so-called government anti-corruption strategy resembles a rough to-do list more than a detailed strategy. Government provides lesser

amount of money (around 5.5 million CZK in 2011, lowered to less than 4 million for 2012) for anti-corruption activities (e.g. relevant non-profit organisations), but there is very little control over this money's destination. Analysis of whistleblowing and recommended legal measures was made, but it mostly copies TI CZ materials and analysis from 2007. Whistleblower protection legislation is currently proposed, but despite analysis strong recommendation of stand-alone law, protection measures will be integrated in Anti-Discrimination Act. Anti-corruption hotline was established in 2006, but when its results did not meet expectation, it was abandoned without any replacement.

TI CZ Legal Advice Centre

TI CZ has been operating its Advocacy Legal Advice Centre (ALAC) since late 2005. Since 2005, 2 300 citizens have contacted TI CZ with requests for legal aid (824 in the year 2011 alone). Applicants in 240 cases were provided with extensive legal aid comprising long-term assistance and support (preparation of the complaint for the client, submission of complaints in the name of TI CZ, representation before government authorities). Among these cases of extended legal aid, we can identify roughly 15% cases involving whistleblowers, with two types of clients-whistleblowers. The first category involves witnesses to corruption who did not know where to turn with potential complaints of inconsistencies or who lacked faith in the standard mechanisms; they generally experienced no retaliatory measures. The second category experienced some form of harassment or recourse for their warnings and sought legal aid or direct attorney representation for their defence.

Tools employed in the private sector

The private sector uses anonymous complaint lines and other mechanisms, and whistleblower protection may be addressed in internal rules of procedure. Two surveys conducted in 2007 and 2009 ³ provide a snapshot of the situation in the private sector. According to these

³ PriceWaterhouseCoopers– Economic crime survey 2007 – available at <http://www.pwc.com/cz/en/hospodarska-kriminalita/index.jhtml> (visited on 21 September 2009), Ernst & Young – Economic fraud survey 2009 – available at http://www.ey.com/CZ/cs/Newsroom/News-releases/2009_05_Evropsky_pruzum_o_podvodech (visited on 21 May 2009).

surveys, whistleblowing policies are in place in 44% of surveyed companies and 16% of fraud cases were uncovered thanks to whistleblowers. The companies operate mostly anonymous information lines.

According to another survey executed in 2007 between the employees of multinational companies in selected European countries, including the Czech Republic,⁴ the Czech employees feel much less protected (42%) than for example employees in Great Britain (86%). These results can indicate that the private companies in the Czech Republic do not introduce effective internal whistleblowing mechanisms.

According to the surveys, the main reasons for failing to come forward is fear of retaliation and reprisal (more than 67%).

⁴ Ernst & Young (2007) – Economic Fraud Survey 2007.

Conclusion

Whistleblowing as an effective way to expose illegal or illegitimate practices in both public and private sectors is still in its infancy in Czech Republic. Although this situation is slowly changing, as seen in the course of previous two or three years, whistleblowing is still a phenomenon that interests only a limited number of people, mainly journalists and experts, instead of being a widely discussed topic (like corruption or uneconomic state budget).

A popular debate developed only after the aforementioned case of Libor Michálek in year 2010. It became apparent that the public perception of whistleblowers is slowly but surely changing; they are no longer automatically labeled as troublemakers, snitches or political opportunists. The concept of honest man, who just wants to obtain justice, is gradually becoming broadly accepted.

Two years later, the biggest weakness is indisputably represented by the lack of comprehensive legislation. Unfortunately, whistleblowing is not usually perceived as a context-independent issue; therefore, whistleblower is often seen only as an employee in need of protection against groundless termination (amply provided by Labour Code), or as a witness, adequately protected by Witness Protection Act. From these points of view, additional legislation is considered redundant, or even improper. While current laws are not entirely ineffective, patchwork protection afforded by Labour Code, Criminal Code and other laws does not inspire confidence in potential whistleblowers and can give the impression that relying on legislative protection is a game of chance.

The government, albeit fighting against corruption ostentatiously, originated only an analysis for a future legislation, and for unknown reasons, the analysis is more or less ignored. The call for a specific whistleblower protection law will be in all probability answered with an adjusted version of the Anti-Discrimination Act⁵, providing no protection whatsoever for whistleblowers outside the labour law.

5) <http://www.ceskatelevize.cz/ct24/domaci/173131-zakon-o-whistleblowingu-neni-potreba-tvrdi-pospisil/>

On the other hand, a whistleblowing center is being considered as a component of a new anti-corruption strategy for 2013-2014⁶. If coupled with adequate legislation (e.g. inspired by laws which are in effect in Great Britain⁷, Australia or Canada), it would allow Czech Republic to finally advance among states that encourage whistleblowers and protect them effectively.

At this time, a fitting step forward would be to enact a specific whistleblower protection law, which would define not only who is a whistleblower, but also his rights and obligations, means of protection and perhaps even what is considered illegal or illegitimate practice, subject to reporting⁸.

6) http://zpravy.idnes.cz/protikorupcni-linky-ministerstev-nemaji-velky-efekt-pdh-/domaci.aspx?c=A120806_132256_domaci_jj

3) <http://www.legislation.gov.uk/ukpga/1998/23/contents> Generally speaking, common law tends to be friendlier to whistleblowers than continental law; however, the often used line of reasoning states that common law institutes are not at all compatible with continental law. While straight adoption of common law statutes is not usually possible, inspiration in the form of basic measures, means and experiences is without doubt a valuable source of information for enacting functional whistleblower protection legislation.

8) As recommended in publication TI – Czech Republic 2009.