RECOMMENDATIONS FOR A LEGISLATIVE PROPOSAL OF COMPLEX WHISTLEBLOWER PROTECTION IN THE CZECH REPUBLIC

oživení

RECOMMENDATIONS FOR A LEGISLATIVE PROPOSAL OF COMPLEX WHISTLEBLOWER PROTECTION IN THE CZECH REPUBLIC

Mgr. Lenka Franková Author

JUDr. Jakub Morávek, Ph.D. Expert analysis

www.bezkorupce.cz
2015

oživení

Donors

Supported with a grant from Iceland, Liechtenstein and Norway under EEA grants

fond pro NNO | NROS | nadace partnerství | ICELAND LIECHTENSTEIN NORWAY eea grants

Co-funded by the Prevention of and Fight against Crime Programme of the European Union

FOND OTAKARA MOTEJLA

Table of Contents

Introduction

A number of analyses carried out by anti-corruption NGOs (e.g. Transparency International Czech Republic, Oživení) as well as state bodies (the Government Office of the Czech Republic and its Department for Coordinating the Fight Against Corruption) and international organizations (OECD, the Council of Europe) highlight a specific issue in the legislative aspect of public administration, namely the lack of a coherent legal framework protecting whistleblowers, i.e. persons who report unethical behaviour, typically in their job.

Member States of the EU have been repeatedly encouraged to introduce whistleblower protection, most recently in March 2015 when the European Parliament adopted a resolution in which it appealed on Member States to support whistleblower protection laws, because, as it claims, to ensure public control over national governments as well as institutions of the EU and their operation, good legislation protecting whistleblowers and guaranteeing access to information and transparency in lobbying is required.

In 2014, some European countries started protecting whistleblowers, e.g. Ireland, France, Serbia, Hungary, Bosnia and Herzegovina and last but not least, the neighbouring Slovakia.

In the Czech Republic, which does not have a complex legal framework in this area, the introduction of a legislative basis for whistleblower protection has been set as one of the priorities of the current government. Chapter 9.7 of its programme statement (Reconstruction of the State and Anti-Corruption Measures) commits among other things to the adoption of a legislative solution for reporting cases of corruption and protecting those who do so. The area of whistleblower protection is also one of the four priorities of the fight against corruption[1].

The Ministry of Interior is also currently working on a draft Government Regulation on the rules for protecting state employees who report their suspicion of illegal behaviour of their superior or another state employee, another employee or a person in a civil servant status based on another legal regulation (Government Regulation). The duty to submit the draft Government Regulation arises from Section 205 of Act No. 234/2014 Coll., on service of public servants. The Regulation should come into effect on 1 July 2015.

This document is therefore written in response to the current unfavourable situation of whistleblowers in the Czech Republic and the stated will of the Government; its primary aim is to present recommendations for future legislative proposals.

The author of the document works with the Oživení non-profit organisation which has recently published an analysis on whistleblower protection in the Czech Republic in comparison with other countries, which focused on the legal means currently available to whistleblowers in detail[2], and the About Us With Us analysis[3] which examined the issue through 40 interviews with whistleblowers about their personal experience in the Czech Republic, Slovakia, Poland, Hungary and Estonia (hereinafter the “Analysis”).
This document is consequently based on the previous analyses to some extent, discussing specific legislative recommendations for whistleblower protection in the Czech Republic in more detail.

The main factor in the creation of this document and the formulation of recommendations was the opinion of experts rather than concerns about implementability.

[1] Action Plan for the Fight against Corruption in 2015. Available at: www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2015-2017/Akcni-plan-boje-s-korupci-na-rok-2015.pdf
[2] Available at: www.bezkorupce.cz/wp-content/uploads/2013/08/ochrana-oznamovatelu-whistlebloweru-analyza-oziveni.pdf
[3] Available at: www.bezkorupce.cz/wp-content/uploads/2014/04/WB_CZE-FINAL_REVISED.pdf

Background

Whistleblowing is the active reporting of a specific unethical action occurring (typically) in the workplace. Employees (and other persons – see Personal scope) are usually among the first to know about unethical behaviour and may draw attention to it. In this situation, however, employees are facing many dilemmas, in particular whether to breach loyalty and confidentiality with a colleague, supervisor or employer and threaten their position, or whether to put public interest first.
This means that whistleblowing is one of the most important tools leading to disclosure and prevention of fraudulent activities and corruption in public administration and private companies, which may ultimately save a considerable amount of public money, protect the safety of the population or even save lives.

The contribution of whistleblowers to the uncovering and prevention of corruption is clear. In the survey of economic crime led by PricewaterhouseCoopers Global, 23% of respondents who came in contact with major economic criminal activities in their companies stated that this behaviour was detected thanks to a whistleblowing system (anonymous line, helplines etc.) or through reporting within the organisation (PWC 2014[4]). A survey conducted by KMPG shows that from the 596 analysed cases of economic crime, 19% were uncovered by whistleblowers (KPMG 2014[5]).
The Czech Republic has also had several cases in which whistleblowing led to identification of criminal activities and their punishment[6].

In the Czech Republic, there is currently no law that would address whistleblowing comprehensively. The term itself is not to be found in the Czech legal system. Whistleblower protection is partially addressed by specific sections of the Labour Code, the Criminal Code and some other laws.
Even though in theory, these legal mechanisms are not entirely ineffective, they can hardly provide a sense of security to potential whistleblowers. Even though the Labour Code guarantees fair treatment of employees, it does not in effect provide any protection. Employees have to defend themselves through courts. The criminal code on the other hand defines a duty to report criminal actions, including those related to corruption, but does not provide any protection related to the defending of public interest. The Administrative Procedure Code makes it possible to submit reports anonymously, but does not offer any corresponding protection mechanisms. The role of the ombudsperson is also limited, as the ombudsperson may investigate individual cases, but his or her conclusions are only recommendations that are not binding. For more information about the legal situation, see: www.bezkorupce.cz/wp-content/uploads/2013/08/ochrana-oznamovatelu-whistlebloweru-analyza-oziveni.pdf

Forty interviews with whistleblowers from the V4 countries and Estonia presented in the Analysis show that whistleblower protection is inadequate both in terms of applicable law and the utilisation of various options in practice, but more importantly also in terms of the real needs of whistleblowers.
Submitting their report leads to dramatic changes in their personal and working lives. In all cases but one, the whistleblowers had to face various forms of retaliation. One half of whistleblowers lost their job as a consequence. In more than one third of cases, there were attempts to justify these retaliatory measures by law[7].

[4] www.pwc.com/gx/en/economic-crime-survey/
[5] www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/global-profi les-of-the-fraudster/Documents/global-profiles-of-the-fraudster.pdf
[6] E.g. http://www.ceskatelevize.cz/zpravodajstvibrno/zpravy/216661-byvaly-tajemnik-krejcir-byl-odsouzen-k-rocnimu-vezeni/. Two key witnesses – Jiří Ludvík, cultural event promoter and elected representative of the city of Znojmo (no party affiliation), and Renata Horáková, civil servant at the City Office, have decided to speak. It was them who drew the attention of detectives to the suspicious behaviour of the city secretary. Other whistleblowers in cases followed by the Czech public in the media include Libor Michálek, Ondřej Závodský, Jiří Chytil and others.
[7] For more information, see: www.bezkorupce.cz/wp-content/uploads/2014/04/WB_CZE-FINAL_REVISED.pdf

Formulation of the recommendations

The proposed recommendations are based on the laws of other countries and in particular the following documents:

- Recommendation of the Council of Europe CM/Rec(2014)7 (Council of Europe, April 2014);
- Whistleblower Protection Laws in G20 Countries (Blueprint for Free Speech, The University of Melbourne, Griffith University, Transparency International Australia, September 2014);
- International Best Practices for Whistleblower Policies (Government Accountability Project, March 2013);
- G20 Anti-Corruption Action Plan (OECD, 2011);
- Alternative to Silence (Transparency International, 2009).

The proposal is also based on the following principles derived from the sources listed above, current analyses in the field as well as the personal experience of the Authors and the conclusions of the Analysis:

1. The legal framework should affect a broad spectrum of whistleblowers reporting activities that threaten or damage public interest.
2. The legal framework should introduce a broad definition of whistleblowers.
3. Whistleblowers must have the option to make their report to external entities (not as part of internal mechanisms) named by law.
4. Whistleblowers must not be limited in their options to disclose information only to external entities.
5. Whistleblowers must have the option to choose whether to make their report anonymously, under their own name of confidentially.
6. The legal framework should include the requirements for internal disclosure mechanisms.
7. Reports made by whistleblowers must be properly investigated within a defined time limit and the whistleblower must have the option to be informed about the progress of the investigation and its results.
8. The provided protection should cover both reports made in good faith and erroneous reports, but not reports that are knowingly false.
9. Whistleblowers must be protected against a broad spectrum of various forms of retaliation.
10. The legal framework should include possible remedies/compensation for retaliation.
11. The legal framework should contain sanctions against those who are retaliating.
12. There should be a public administration body created/appointed to assess the state of whistleblower protection and provide counselling and education.
13. The legal framework should also include protection for the person against whom a report is made.

According to a recommendation of the Council of Europe, it is desirable to have not only a legislative, but also institutional and judicial framework of whistleblower protection.

The newly adopted rules can have both a legal or non-legal form. The current recommendations do not necessarily have to be adopted in a single act, but it needs to be mentioned that if the rules are spread across multiple laws, it is even more important and difficult to ensure that they are comprehensive and functional across the entire system.

Examples of laws from abroad are provided separately in each section, as the individual legal systems found in other countries can often be considered best practice only in specific areas. The examples were selected as a combination of best practices and potential sources of inspiration, particularly because of their compatibility with the Czech legal system.

The Analysis of whistleblower experience mentioned above, which represents a relatively new source of information, was used to support and provide justification for the proposed recommendations.

I. Material scope

Recommendation:

The legislative proposal (hereinafter the "Proposal") should apply to reports made in public interest. Acting in public interest should be understood to mean at least reporting on violations of rights and freedoms and threats to public health, safety and the environment. The Proposal should apply to any reports of illegal or harmful behaviour damaging or threatening life, health, freedom, safety and other rightful interests of public administration bodies, taxpayers or employers, members of legal persons or customers of private companies.

The recommended list of wrongdoings the reporting of which should be protected includes in particular criminal activities, violations of legal duties, corruption, abuse of the powers of an official, threats to public health, safety or the environment, mismanagement of public property, conflict of interest, fraud, unauthorised use of public support funds etc.

The Proposal should protect reports concerning the activities listed above or threats of such activities occurring.

Justification:

In the context of whistleblower protection, the definition of wrongdoings that damage or threaten public interest should be conceived very broadly, particularly in terms of the intensity of such wrongdoings. The reason is that it is very difficult to predict all potential types of behaviour that the law should apply to.

A significant proportion of activities being reported do not cross the threshold for being classified as an offence, administrative offence or crime, but rather start as violations of internal rules and seemingly harmless unethical behaviours. Current experience shows that whistleblowers often see flaws in the system that may for example lead to wastage of public funds or non-transparent decision-making (a typical example being a systemic conflict of interest). It is therefore necessary to capture this behaviour as early as possible in order to prevent crime.

Another supporting argument can be found in the definitions of whistleblowing which are generally quite broad, such as the definition used in the Resolution of the Parliamentary Assembly of the Council of Europe No. 1729 which also targets serious harmful or illegal behaviours ranging from disturbing the functioning of society to engaging in corruption in public administration or damaging the environment.

International comparison:

Australia (Public Interest Disclosure Act 2013, Corporations Act 2001, Banking Act 1959, Life Insurance Act 1995, Superannuation Industry (Supervision) Act 1993, Insurance Act 1973)

In Australia, the lawmakers have defined 38 different types of wrongdoings, classified by the presence of shared elements into seven categories:

- Misconduct for material gain
- Conflict of interest
- Improper or unprofessional behaviour
- Defective administration
- Waste or mismanagement of resources
- Perverting justice or accountability
- Personnel or workplace grievances

Japan (Whistleblower Protection Act, 2004)

The act concerns behaviours related to the protection of interests such as the lives of individuals, the interests of consumers, protection of the environment, protection of fair economic competition, property and other interests or threats to those interests.

South Africa (Protected Disclosures Act, 2000; Companies Act, 2008)
The definition of material scope is similar as in British law, as it concerns past, current or planned wrongdoings related to criminal activities, failure to comply with a legal duty, judicial error, protecting health and safety of persons, protecting the environment, violating non-discriminatory provisions, non-equal treatment or deliberate covering up of such behaviours.

Canada (Public Servants Disclosure Protection Act (PSDPA), 2007)
In the PSDPA, wrongdoings and behaviours being reported are divided into the following areas: contravention of any Act of Parliament or of the legislature of a province, misuse of public funds or a public asset, corruption, active or passive behaviour that creates a substantial danger to the life, health or safety of persons or to the environment, a serious breach of the code of conduct of an organization.

Korea (Act on the Protection of Public Interest Whistleblowers, 2011)
The act applies to actions threatening public interest, here defined as threats to the health and safety of persons, the environment, consumer interests and competitiveness. It includes the violation of criminal, administrative and other regulations specifically listed in the act (180 legal regulations in total). Disclosure made in public interest can also inform of a risk that public interest will be threatened.

Norway (Act on the Working Environment, Working Hours and Employment Protection)
In Norway, protection applies to reports on suspected abuse of power or improper behaviour of the officers of an organization. The reports can therefore include not only information on criminal activities, but also for example reports of a harmful working environment, violation of safety rules or suspicions of discrimination, harassment, unjust termination of employment or violation of ethical principles.

Romania (Act on the Protection of Civil Servants, Employees of Public Institutions and Other Organisations Who Notify of Violations of the Law, 2004)
Romania has chosen to define the scope of the respective act very broadly, as protected disclosure under this framework is any disclosure of information made in good faith that concerns violations of the law, a professional code or a code of ethics, the principles of good management of public affairs, efficiency, frugality or transparency. The act gives equal treatment to crimes, offences and disciplinary misconduct.

Slovakia (Act on Certain Measures Related to the Reporting of Anti-Social Activities, 2015)
In Slovakia, the law operates with the term "anti-social activities" which are wrongdoings of an employer that have negative effects on society. The act itself however does not provide a definition of the term, leaving it to employers to do so. The act differentiates between crime, i.e. criminal activities, and other anti-social activities, such as offences or administrative offences; yet another type of anti-social activities are behaviours that are not offences or administrative offences but have a negative effect on society.

USA (Whistleblower Protection Act, 1989; Whistleblower Protection Enhancement Act, Sarbanes – Oxley Act, 2002)
Protection applies to the disclosure of information on witnessed violations of the law or significant cases of mismanagement or wastage of resources, misuse of powers or significant and specific risks to public health and safety.

United Kingdom (Public Interest Disclosure Act, 1998)
Disclosure of wrongdoings means voluntary disclosure of information by a state employee containing facts which can reasonably lead to a belief that there has been, is or may be a case of misuse of public funds, threat to health and safety of persons, damage to the environment or attempts to cover, hinder or thwart the investigation of unacceptable behaviour.

Examples of best practice: United Kingdom, Korea, Norway, Japan, UN Secretariat Whistleblower Policy, South Africa.

II. Personal scope

Recommendation:

The future Proposal should apply to all natural persons working in the public or private sector, including members of security forces and persons who are within the scope of the Act on the Service of Public Servants, regardless of the form of their legal relationship and regardless of whether their work is paid or not.

The Proposal should also apply to natural persons who are not yet or no longer employed – for example if the information concerning threats to or violations of public interest were gained by the whistleblower during a recruitment procedure.

A "whistleblower" should be any person who in good faith reports unethical behaviour related to the performance of work, including besides employees or public servants also the following types of entities:

- consultants
- suppliers
- interns
- volunteers
- temporary workers
- former employees
- potential employees / applicants
- external consultants and experts
- persons close to the whistleblower

Protection should also be provided to persons who are wrongly identified as whistleblowers and persons who provide supporting information related to the whistleblower's report. The protection should also apply to persons close to the whistleblower.

Disclosure of information about unethical behaviour is made in good faith if the whistleblower could in the given circumstances reasonably expect this information to be true. It is necessary to require from those who act in good faith to make an adequate effort to determine all relevant facts. Good faith is presumed until proven otherwise. On the other hand, it is necessary to introduce sanctions for knowingly false reports.

Justification:

The private and public sectors are very closely interlinked in various ways and there is no meaningful reason to run a dividing line between them. To ensure that whistleblowing is effective and beneficial, the law must apply to persons who have access to information and activities of their employer, including any wrongdoings.

States usually consider corruption and financial risks in the public sector to be the most problematic aspects. Such approach is however short-sighted, neglecting to understand that a healthy and flexible economy is to a great extent influenced by proper management of private companies. Wrongdoings in the public sector are just as undesirable and unacceptable and may just as strongly threaten public interest including its most sensitive aspects, i.e. the safety, life and health of persons. The definitions of whistleblowing and international recommendations imply that it may be highly inefficient to provide whistleblower protection exclusively to persons in a specific sector.

For the purposes of public interest protection, it is necessary to also protect individuals who are in any form of working relationship with an organisation, i.e. carrying out any work activities for it. The deciding factor is access to information which may lead to the identification of potential risks at a very early stage. This applies to temporary or part-time workers as well as e.g. volunteers.

At the same time, it is desirable to also protect persons related to the whistleblower, including family members, as even they can be facing the threat of retaliation.

In 13% of cases discussed in the Analysis, termination of employment also affected the whistleblowers' co-workers or sympathisers.

International comparison:

Ireland (Protected Disclosures Act, 2014)
The act protects workers (explicitly using this term rather than "employees") in the private or public sector who disclose information that falls within the scope of protection.

Japan (Whistleblower Protection Act, 2004)
The protection applies to workers in the private or public sector who have made a disclosure in public interest.

Canada (Public Servants Disclosure Protection Act (PSDPA), 2007)
The PSDPA does not protect only whistleblowers (employees of federal ministries and authorities) but also persons outside the public sector (e.g. external suppliers).

Korea (Act on the Protection of Public Interest Whistleblowers, 2011)
A whistleblower is any person in the public or private sector who discloses information in public interest.

Norway (Act on the Working Environment, Working Hours and Employment Protection)
The act protects all employees in both the public and private sector.

Romania (Act on the Protection of Civil Servants, Employees of Public Institutions and Other Organisations Who Notify of Violations of the Law, 2004)
Whistleblowers are described alongside the definition of protected disclosure as persons working in a public administration body, public institution or other accounting unit of the state.

Slovakia (Act on Certain Measures Related to the Reporting of Anti-Social Activities, 2015)
The act governs protection of persons who are in an employment relationship (including besides employees and state employees also public servants, such as members of the police, firefighters, customs officers or professional soldiers). Besides the whistleblowers themselves, the protection also applies to persons close to them who are in an employment relationship with the same employer.

Slovenia (Integrity and Corruption Prevention Act, 2010)
All employees in either the public or private sector may inform the Commission for Preventing Corruption (hereinafter the "Commission") about cases of corruption in their workplace.

USA (Whistleblower Protection Act, Whistleblower Protection Enhancement Act, Sarbanes – Oxley Act)
Protection of federal employees also applies to current and former government employees and applicants. Regarding employees in the private sector, companies must provide protection to whistleblowers who draw attention to inconsistencies in financial reports.

United Kingdom (Public Interest Disclosure Act, 1998)
The law applies to employees of the public and private sector. It further applies to suppliers, interns, volunteers, agency employees, police officers and others.

Examples of best practice: Korea, USA, Japan

III. Channels for reporting and the handling process

Recommendation:
The Proposal should establish and clearly define a system of channels for internal and external disclosure made outside the workplace alongside the process of how such channels may be used by public administration bodies as well as the private sector, meeting the following standards:

- Transparent and clear

The Proposal should establish a multi-level structure of channels with various tools for disclosure.
The channels should make it possible to submit reports within the given organisation, to corresponding state bodies and to the public or third parties, e.g. the media, non-profit organisations, trade unions, Members of Parliament etc.

The Proposal should motivate employers to establish internal disclosure mechanisms. It is generally recommended to consult the actual mechanics of the disclosure and investigation process in the workplace with the employees themselves in advance. Disclosure tools should include for example open and counselling lines, web portals, a complaints department, an internal or external ombudsperson etc.
Whistleblowers should however also have the option to directly contact external channels, particularly in cases of significant threats to public interest.
It is absolutely essential to define clear and understandable rules and methods for making reports and submitting them, available to anyone who decides to do so.

- Ensuring confidentiality and anonymity of disclosure (in accordance with the whistleblower's wishes)

We also recommend clearly defining the conditions under which whistleblowers will have the right to remain anonymous; this should also include establishing the duty for administrative bodies who investigate the case to keep all information that could be used to identify the whistleblower separate from the rest of the file and introducing the whistleblowers' right to use a fake name to protect their anonymity. In this case, the real identity of the whistleblower can only be disclosed with their prior written consent (for further information, see Chapter 4, Confidentiality of disclosure).

We recommend setting up the disclosure system in a way that respects the principles of data protection with regard to the person against whom the report is made. In this context, it is crucial to find the right balance between the right to privacy and the interests that are being defended by the disclosure.

- Ensuring immediate and thorough investigation

"Immediate" here means that the relevant measures should be adopted as soon as possible, particularly with regard to the source of information and the scope of the potential threat or damage to public interest.

Whistleblowers should be seen as active participants in the whole process of reporting and investigating unethical behaviour. They should have the right to be informed about the progress of the investigation and its results as well as to receive a copy of the reached decision; whistleblowers should also have the right to join the investigation e.g. by suggesting evidence. These rights should apply to anonymous whistleblowers as well.

- Introducing enforceable and timely mechanisms that prevent retaliation against whistleblowers

It is necessary to appoint an entity responsible for accepting and investigating reports with a certain degree of independence.

An expedient solution is the creation of an external body (or public institution) that would be verifying reports in cases where submitting them internally within an organisation is impractical or impossible.

Internal mechanisms should include an option to submit a report outside the current hierarchical structure in the workplace.

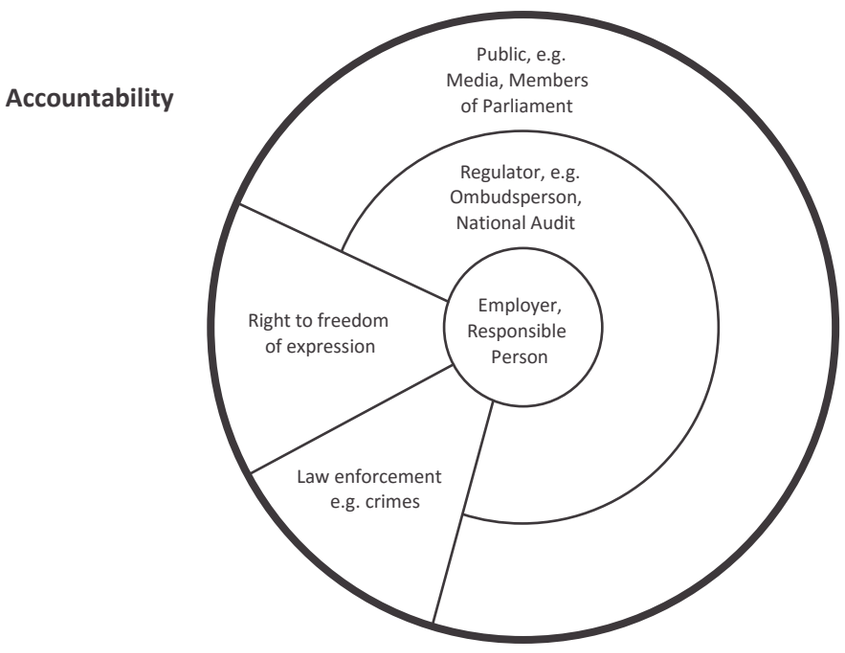
There should be the option to intervene in cases when a claim is not being properly investigated or is not investigated without undue delay. There should be appropriate enforcement mechanisms for such cases, e.g. sanctions, a monitoring body etc.
We recommend establishing an institution that would be responsible for investigating such cases or at least act as coordinator of the work of various institutions and cooperate with the whistleblower during the investigation.

We recommend establishing a special disclosure mechanism for cases involving the security of the state or classified information, to ensure that whistleblowers in these cases cannot be punished for breaching confidentiality and for unauthorised disclosure of classified information to an unauthorised person.

In cases of suspicion of an offence, administrative offence or crime, we recommend establishing a duty of an appointed person to forward the corresponding report to the police and other authorities or administrative bodies.
The disclosure procedure must comply with the principles of personal data protection with regard to both the person making the report and the person that the report is made against.
In the public sector, these standards should be introduced by the Proposal; the private sector should be strongly motivated by law to adopt such measures.

Justification:
Whistleblowers must know where, how and under what conditions to make their report. The Analysis showed that the current state is confusing and it is not uncommon that the same case is investigated by multiple institutions in an uncoordinated fashion and in parallel, which is very inefficient.

It is necessary to provide multiple options for disclosing information so that whistleblowers can choose the channel that is best for the current situation. The use of any of the disclosure mechanisms should be a choice freely made by the whistleblower and the option to turn to external entities should not be tied to any previous attempts to use internal channels. If the whistleblower has reasons to believe that the internal mechanism is failing or could fail, they should have the option to skip this first step and contact external entities directly. Of course this skipping of one level should not lead to any sanctions against the whistleblower.



Source: Recommendation of the Council of Europe CM/Rec(2014)7 (Council of Europe, April 2014)
The shown 3-level system of disclosure channels is believed to effectively cover all options of disclosure. The chart is based on an identification of the entity and this entity's relationship to the issue in terms of responsibility. In most

cases, the person closest to the issue is naturally the whistleblower, but all the channels are connected to give the whistleblower the option to choose the most suitable method. Assigning priorities to the individual channels is very difficult and could lead to problems in implementation.
Even though internal disclosure is often emphasised, this should not diminish whistleblower protection. In other words, the recommendation to support internal mechanisms corresponds to the principles of good and transparent management of public affairs and responsible management of private companies. With regard to whistleblower protection, the options of internal and external disclosure together form an inseparable, equally important system that may help with a timely and effective reduction of risks threatening public interest. The vast majority of whistleblowers that we talked to first tried to make their disclosure in the workplace.
Because internal mechanisms can be a very efficient tool, it is crucial to help employers understand the value and benefits of a correctly set up system of internal disclosure. These benefits are clear from many international surveys pointing at a significant percentage of cases of unethical behaviour identified through internal disclosure mechanisms. It needs to be emphasised that efficient disclosure rules can prevent damage to the reputation of an organization.

Internal disclosure mechanisms should be easily available to all employees. The communication channel may be an anonymous telephone line, a web form, e-mail or a physical mailbox as well as personal contact.

In the case of external disclosure, it is necessary to consider the criteria specified by the Grand Chamber of the European Court of Human Rights in the case Guja v. Moldova, number 14277/04, which refer to Article 10 of the European Convention of Human Rights and Fundamental Freedoms (even though the criteria have proven controversial). The decision of the court implies the following criteria for external disclosure:

(a) Loyalty and discretion. The loyalty and discretion principle dictates that employees should first use internal tools and only as a last resort turn to the broader public.

(b) Public interest. The assumption applied in this aspect is that in a democratic state and under the rule of law, executive powers should be subject to control not only from the law and judicial power, but also the media and public opinion. Public interest in a specific piece of information may overrule the legal obligation to maintain confidentiality.

(c) Authenticity and substantiation of the information being disclosed. The assumption is that freedom of speech comes with certain obligations/responsibilities in verifying the truthfulness and reliability/trustworthiness of the information that the whistleblower is basing their actions on.

(d) Caused damage. This criterion considers the scope of damage caused to the public authority or employer in general. With regard to the nature and content of the information, it must be decided whether this damage is more significant than public interest.

(e) Motivation of the whistleblower. The whistleblower’s honesty is an essential factor.

(f) Character and severity of the sanction that was (or was likely to be) imposed upon the whistleblower by the employer.

The main obstacles to effective whistleblowing are a lack of trust and concerns of incompetent investigation and disinterest of the official control and investigation bodies who are not able to adequately and independently examine the case. Surveys show that the main reason why unethical behaviour is not being disclosed is that the whistleblowers do not believe that their reports would be acknowledged or investigated in any way. For example an American survey of federal employees, asking about the reasons for not disclosing information, ranks the fear of retaliation as second; the most significant factor according to the respondents was that their report did not lead to any attempts to remedy the situation.

Whistleblowers should therefore have the option to bypass their superiors, as they are often involved in the behaviour in question and the report directly concerns them. Close relationships between the persons who are being reported on and the investigation or controlling bodies, the incompetence of these bodies and the resulting futility of disclosure have been often mentioned by whistleblowers contacted for the Analysis. One option is to appoint an internal ombudsperson who is operating outside the traditional hierarchy structure but has enough power and capability to independently and objectively investigate the report.
It is also necessary to set a time limit in which the employer (appointed person) must investigate reported facts, as with passing time all evidence may become lost or be covered up by those concerned by the report.

Last but not least, the adopted measures must be enforceable through internal or external channels, particularly with regard to investigation – for example by introducing sanctions in cases when a responsible person fails to act.
The Proposal should create an environment that motivates to disclosure and in which individuals feel safe protecting public interest. This is besides other benefits also a way to reduce the number of anonymous reports.

International comparison:

Ireland (Protected Disclosures Act, 2014)

The law recognises three types of protected disclosure. The first is internal disclosure in the workplace made to the employer or a third person appointed by the employer to handle such cases, or a responsible person if the wrongdoing in question concerns the preceding two persons. For persons in the public sector, this person could be for example a minister. The second type are prescribed persons listed in a regulation of the Department of Public Expenditure and Reform. The list includes for example the Data Protection Commissioner, the Office of the Revenue Commissioners etc. The third option are the media, a legal adviser, trade unions etc.

South Africa (Protected Disclosures Act, 2000; Companies Act, 2008)

The law recognises 5 different types of disclosure – made to a legal representative, employer, minister or member of a province executive board, an appointed natural or legal person (so far, only the ombudsperson and general auditor have been named) and generally protected disclosure (e.g. in the media). Each of the options has specific rules that must be met by the employee in order for the disclosure to be protected. The justification for higher requirements for external communication channels is that in the preferred option of internal disclosure, employers can take responsibility for any errors and accept corresponding measures to remedy the situation.

Slovakia (Act on Certain Measures Related to the Reporting of Anti-Social Activities, 2015)

In terms of internal disclosure mechanisms, the Slovak act defines a duty for all public authorities and medium-sized and large companies (with 50 employees and more) to establish an internal system for handling employee reports of anti-social activities. Each employer must appoint a responsible person who will be receiving and examining the reports, answering directly to the company's top management or a public authority. The act also defines the duty to issue an internal regulation meeting requirements of the law. All employers are obliged to acknowledge and investigate each report within 90 days after its receipt. In cases when the report was not made anonymously, employers are obliged to inform the whistleblower about the way in which the case was handled. The Labour Inspectorate may issue a fine of up to EUR 20,000 to employers who fail to fulfil their duties related to the internal disclosure system.

USA (Whistleblower Protection Act, Whistleblower Protection Enhancement Act, Sarbanes – Oxley Act)

In the United States, the Office of Special Counsel has the power to investigate retaliation in the workplace against federal employees. Laws protecting whistleblowers in various sectors may also appoint entities responsible for receiving and processing reports.

United Kingdom (Public Interest Disclosure Act, 1998)

The PIDA defines three forms of protected disclosure. The first of them is internal disclosure in which an employee contacts a manager or director of the organization where he or she works; the report must be made in good faith in cases when the employee has justified reasons to suspect that an ethical violation has occurred, is occurring or may occur. The second type of disclosure is the option to contact a monitoring body (health and safety authority, tax or financial authority). In order for a whistleblower to be protected, the internal disclosure test must be passed; the

whistleblower also must have justifiable reasons to believe that the information and statements contained within are generally true.

The third type is broader disclosure in which the employee may directly contact the police, media, a Member of Parliament, non-profit organisation etc.; the whistleblower will be protected if the monitoring body disclosure test is passed, provided that this method can be considered adequate with regard to all circumstances and that the whistleblower is not seeking personal gain. The following conditions must also be met: a) the whistleblower has reasons to fear that internal disclosure or disclosure to a monitoring body could lead to personal harm; b) there is no appointed disclosure body and there is a risk that evidence may be covered up or destroyed; c) the whistleblower has already tried internal disclosure or disclosure to a monitoring body; d) there is particularly strong public interest.

Examples of best practice: United Kingdom, South Africa, Japan

IV. Confidentiality of disclosure

Recommendation:

The Proposal should include the option of confidential and anonymous disclosure. In confidential disclosure, the name of the whistleblower is known only to the person who accepted the report. This person is obliged to maintain the identity of the whistleblower confidential unless the whistleblower decides otherwise. Confidential disclosure is distinct from anonymous disclosure in which no one knows the identity of the source. It follows that the identity of the whistleblower may only be disclosed (either internally or externally) with the whistleblower's consent.

Justification:

Channels for anonymous disclosure are crucial for whistleblowers who may be closest to a potential wrongdoing and the first to learn of it (e.g. auditors etc.). Without them, state institutions or private companies would never learn about the problem. The basic idea is to minimise risks to whistleblowers with regard to potential retaliation in response to the disclosure (harm in their professional and personal life).

While it is true that anonymous reports may be more difficult to investigate, this option represents a strong motivational aspect for whistleblowers fearing retaliation. Anonymity must be maintained also in response to the current and long-standing situation of whistleblower protection in the country in which anonymity is often the only tool that whistleblowers can use to protect themselves.

According to the Analysis, 56% of respondents believe that there is no way to make a report anonymously or confidentially. Even though slightly less than one half of whistleblowers said they thought such an option existed, not all of them were certain and some doubted that anonymous reports are acknowledged, let alone investigated. More than that, the content of the report can very often identify who in an organisation has access to this particular type of information. This means that the option to make a report while maintaining confidentiality of personal information essentially does not exist.

Current analyses and experience from the field also show that whistleblowers typically will disclose their personal information and provide valuable information if they have the option to make their report anonymously. It is very common for them to first anonymously share some partial information which they wish to consult with someone; once they know that disclosing their identity guarantees their protection, they will eventually agree to do so.
It is therefore advisable to introduce the option of confidential disclosure as a second step after anonymous disclosure. This overcomes barriers in establishing contact with the whistleblower in order to obtain more information relevant to the investigation.
We consider this aspect of whistleblower protection important, because it is not unusual for the body contacted by the whistleblower to turn to the person concerned, informing them about the whistleblower and the content of the report.

International comparison:

Ireland (Protected Disclosures Act, 2014)

The Irish act recognises both anonymous and confidential disclosure.

Slovakia (Act on Certain Measures Related to the Reporting of Anti-Social Activities, 2015)

The act establishes the duty to maintain anonymity of a whistleblower.

Slovenia (Integrity and Corruption Prevention Act, 2010)

The identity of a whistleblower and the report itself must remain confidential, unless ordered otherwise by a court.

USA

American laws forbid disclosing the identity of a whistleblower without their consent, unless the Office of Special Counsel decides that the disclosure is necessary in cases of immediate threat to public health or safety, or during criminal proceedings.

In current international assessments of the G20 countries, no legal framework is considered ideal in this area with the exception of the system used in the USA.

V. Protection against retaliation

Recommendation:

Whistleblowers who disclose information in public interest should be protected against the broadest possible spectrum of retaliation, both direct and indirect (affecting e.g. also members of the whistleblower's family), including in particular:

- Employment measures: termination of employment; transfer to another job; unjustified wage reduction; transfer to another location[8]; change in working duties, responsibilities or conditions; work-related obstructions (e.g. making their job more difficult, information barriers, denying business trips, assigning inappropriate duties, banning entry into the workplace and ordering work from home, cancelling e-mail addresses, educational restrictions, mandated vacation etc.).; negative evaluation of work performance; forms of direct or indirect bossing and mobbing; all interventions representing unjustified change of workplace or position;
- Personal measures: slander; threats; damage to property; physical attacks;
- Criminal/administrative measures: criminal complaint; disciplinary proceedings.

It would be advisable to follow examples from abroad and provide a clause clarifying the term "retaliatory measure" with a list of examples. We recommend including protection against threats or attempts at retaliation. Protection should also apply to suppliers and other persons (see Personal scope) including persons close to the whistleblower.

In addition to the option of making reports confidentially and anonymously, it is necessary to explicitly forbid retaliation against whistleblowers in relation to their report, and if this is not respected, introduce a mechanism of sanctions and the right to seek remedy for material and immaterial damages by the whistleblower. This right is also to be given to whistleblowers who choose to remain anonymous but whose identity is eventually revealed.

Protection should also apply to erroneous reports, provided that the whistleblower could have reasonably expected in the given circumstances the information contained within to be true. Such disclosure should not be penalised by any sanctions. In cases where reports were knowingly false, however, the "whistleblower" should be facing all measures and sanctions made available by the legislation, because the reported person's rights need to be protected as well.

We also recommend introducing the principle of reverse onus according to which the employer must clearly and convincingly prove that any measures taken against the employee do not have a causal relationship with the report and have not been motivated by the report (even though it must be noted that this mechanism by itself cannot always guarantee a better position for whistleblowers).

Justification:

All whistleblowers should have a legal guarantee that if they decide to act in public interest and publicly disclose information about unethical behaviour, for example of their employer, they will receive effective and easily available protection.

Such protection should address not only possible legal steps (e.g. termination of employment, removal from a job position), but also informal actions such as bullying in the workplace (mobbing and bossing), assigning non-standard work tasks etc.

Retaliatory measures are unfortunately very common and varied, particularly with regard to the legal relationship between the whistleblower and the subject of the report – volunteer, employee etc. Threats or attempts at retaliation may also discourage potential whistleblowers. The current situation of whistleblowers and their protection against retaliation is alarming. Results of the Analysis show that all the surveyed whistleblowers in the

[8] Even though these retaliatory measures are limited in scope by the current Labour Code, they must not be neglected, as they clearly show the intent of such measures – protecting the position of the person against whom the report is made.

Czech Republic experienced various forms of retaliation. One half of the 40 surveyed whistleblowers lost their job as a consequence.
In one case in five, termination of employment also affected the whistleblowers' co-workers or sympathisers.
Because a very common form of retaliation involves the termination of employment or relocation to another position, it may be necessary to adopt a measure prohibiting any personnel changes involving the whistleblower until the investigation ends or to introduce a duty to provide suitable justification for any such actions taken against the whistleblower. One option would be the issuance of a preliminary measure by a court. It is unacceptable to continue with the current situation in which many whistleblowers find themselves without work after making their report and have to wait for years until courts decide that the termination of their employment was unjustified and is therefore invalid.

The reason for protecting disclosure made in error is the fact that whistleblowers often report actions before public interest is directly threatened, helping to prevent potential damage. At this stage, however, they often do not have the full picture.
The introduction of the reverse onus principle would improve the position of whistleblowers, because they often find proving their claims virtually impossible. The relationship between employee and employer is imbalanced and dismissal notices handed to whistleblowers almost always pass all formal checks, even though it is obvious that the real reason for the termination of employment was quite different.

International comparison:

Ireland (Protected Disclosures Act, 2014)

Employees who claim that their employment was terminated or who were threatened with termination of employment in consequence of their report may file a request for examination of the case by a court. Whistleblowers continue to enjoy immunity against damage compensation claims defined in civil law and protection due to the fulfilment of legal obligations in accordance with the slander act.

Slovakia (Act on Certain Measures Related to the Reporting of Anti-Social Activities, 2015)

Depending on the severity of the reported behaviour, protection is divided into two types – protection in criminal proceedings and protection in administrative offence proceedings. Employees who report severe anti-social activities that constitute a crime may apply for protection at any stage of the criminal proceedings. The decision about the protection will be made by a public prosecutor or court. Employees are protected by the Labour Inspectorate. Employers may take legal steps or issue decisions concerning their employment relationship with the employee without said employee's consent only with prior agreement of the Inspectorate.
Whistleblowers who believe that they are being retaliated against may turn to the Inspectorate; the Inspectorate may suspend any labour sanctions for a period of 14 days and if within this period the employee turns to the court with a proposal for a preliminary measure, the suspension remains valid until the court makes a legally binding decision about said proposal.
The burden of proof remains with the employer, as the Labour Inspectorate will give its consent with the proposed action only if the employer is able to prove that the action has no causal link to the whistleblower's report.

Slovenia (Integrity and Corruption Prevention Act, 2010)

The act stipulates that whistleblowers facing retaliation and unfavourable consequences have the right to request compensation of damages from the employer. If the Commission finds that the whistleblower is being affected by repressive action, the whistleblower has the right to demand such actions to be stopped.
A fine of EUR 400–1,200 may be imposed on those who disclose the identity of a whistleblower or the information concerning unethical or illegal activities; this also applies to state administration employees. More fines are defined for the application of retaliatory measures.
The Commission provides assistance to whistleblowers in identifying the causal link between the report and retaliatory measure, and if it is found, the Commission may order the employer to immediately cease and desist with all retaliatory measures. If this order is not respected and the state employee is not able to perform their current job as a consequence, the employee may request transfer to an equivalent position and inform the Commission about this request. The burden of proof is carried by the employer.

If required, the Commission is also obliged to provide protection to the whistleblower and members of the whistleblower's family in accordance with the Witness Protection Act.

USA

The rights of whistleblowers defined in federal laws can be divided into two categories, depending on whether they acknowledge the whistleblowers' right to compensation for their activities, or whether they define protection against retaliation by employers. With some exceptions (e.g. Florida, Illinois), laws adopted on the level of states focus on the latter category. Since 2002, all 50 states have been providing some form of whistleblower protection.

United Kingdom (Public Interest Disclosure Act, 1998)

Employees who have faced bullying, discrimination or termination of employment after their disclosure may turn to courts to seek compensation of damages; in these cases, there is no theoretical limit on the compensated amount, as it is derived from lost income. If the employee was only victimised but their employment was not terminated, they may also seek compensation for immaterial damage. If the employment relationship was terminated, the employee may turn to courts within seven days with a proposal for a preliminary measure that would allow them to remain employed until the investigation is finished. In such cases, the burden of proof that the termination of employment is not related to the disclosure is carried by the employer.

Examples of best practice: United Kingdom, USA

VI. System of remedies

Recommendation:

The key remedy is a legal tool for stopping retaliatory measures, for example through preliminary measures issued by courts (possibly for a specific time period). Other public administration bodies could also have the power to adopt preliminary measures to protect whistleblowers.

The Proposal should however include a system of remedies aiming to reduce or eliminate harm caused to the whistleblower as a consequence of the disclosure, including in particular compensation of material and immaterial damages, including the costs of legal representation and healthcare, or the option to return to the original work position. Suitable remedies must be assessed in the context of specific cases of retaliation. It is clear, for example, that the option to return to work will often be unrealistic.

Regardless of the form of the remedy, its objective should be to compensate to the maximum possible extent for the negative consequences of a report to the whistleblower.

Justification:

In the Analysis, one of the respondents said that becoming a whistleblower was a purely self-destructive act that inevitably leads to a loss of employment. This loss of employment not only limits further professional growth, but also causes financial problems, loss of colleagues and friends and trouble finding a new job. The act of reporting and its consequences result in social deprivation (loss of profession, social status, friends or reputation), psychological stress (threats, intimidation, bullying) as well as physical complications (health issues caused by stress).

In some jurisdictions, compensation is provided for economic losses, particularly in cases of termination of employment, and for material and immaterial damages.

The issue of rewarding whistleblowers must be considered in light of the current situation where whistleblowers are scorned by society and do not have any legal protection; for these reasons, the idea of giving them rewards may be controversial among the general public.

Ireland (Protected Disclosures Act, 2014)

The act defines the possibility of compensation for the last 5 years in cases of illegal termination of employment.

Korea (Act on the Protection of Public Interest Whistleblowers, 2011)

The act provides a financial reward to whistleblowers who uncover corruption. The reward may reach up to USD 2 million if the disclosure led to a reduction of costs or an increase of income of public bodies.

Slovakia (Act on Certain Measures Related to the Reporting of Anti-Social Activities, 2015)

The act makes it possible to reward whistleblowers for the disclosure of severe anti-social activities. The whistleblowers are not entitled to the reward and may apply for it only after a legally binding sentence against the perpetrator or if an administrative offence is proven. The Slovak Ministry of Justice may provide rewards of up to fifty times the minimum wage.

USA

In the USA, the interest in obtaining information about wrongdoings is considered to be stronger than the motive to disclose the identity of the whistleblower. For this reason, the law makes it possible to award to the whistleblower 15 to 30% of the recovered funds, understood as a compensation for the undertaken professional and personal risk.

Example of best practice: Korea

VII. Monitoring, counselling and public awareness

Recommendation:

With regard to the implementation and enforcement of legal measures, we recommend giving the following powers to a designated body:

- Monitoring of the issue (whistleblowing and investigation statistics etc.)

We recommend regularly evaluating the whole issue of whistleblowing, collecting and regularly (at least annually) publishing data and information about the enforcement of legal provisions, submitted reports and their investigation. These outputs should be published.

- Intermediary and methodological assistance

We recommend providing methodological support in the implementation of legal provisions to all affected bodies.

- Education, awareness raising and consultations for citizens

To achieve change in the currently not wholly positive perception of whistleblowers, the process of drafting legislation should run in parallel with an information campaign informing the public about the issue. A suitable form would be to involve the wider professional public in the formulation of the intent of the new legislation.

Justification:

Monitoring of the field is important to verify the efficiency and workings of the whistleblowing system and to propose improvements.

Methodological support and involvement of the public are among the key elements of implementation and with it also the enforceability of any new rules.

Due to the negative connotations of whistleblowing, it is necessary to implement in parallel with the legislative process also informational campaigns supporting awareness of whistleblowing (informing about the key role of whistleblowers in uncovering corruption, mismanagement of funds, fraud, threats to the environment and to the health of individuals etc.) and improving its perception by the public.

International comparison:

Japan (Whistleblower Protection Act, 2004)

The act specifically mentions regular evaluation of the legal protection of whistleblowers. Five years from the date of effect, the Government is obliged to examine its impact and accept necessary measures based on the results.

Canada (Public Servants Disclosure Protection Act (PSDPA), 2007)

The Commissioner has the obligation to not only submit annual reports to the Parliament, but also special reports in case of any urgent disclosures made in the public sector.

Slovakia (Act on Certain Measures Related to the Reporting of Anti-Social Activities, 2015)

The Slovak National Centre for Human Rights regularly evaluates and publishes information about whistleblowing – laws, legal decisions etc. By law, the Centre is tasked with increasing awareness about disclosure and legal protection.

Whistleblowers are entitled to free legal assistance provided by the Legal Assistance Centre. The act also specifies duties of the state in the prevention of anti-social activities and anti-corruption education. It also introduces the option of providing grants to entities that take part in education focusing on anti-corruption awareness.

USA (Whistleblower Protection Act, 1989; Whistleblower Protection Enhancement Act, Sarbanes – Oxley Act, 2002)

In the United States, there are many non-profit organisations that provide support to whistleblowers and are trying to improve their legal protection. There are also special programmes for increasing awareness and providing education, particularly in state bodies that are also involved in public procurement.

Resources

International recommendations

- Alternative to Silence (Transparency International, 2009)
- Banisar, David, "Whistleblowing: International Standards and Developments", (2009)
- Recommendation of the Council of Europe CM/Rec(2014)7 (Council of Europe, April 2014)
- G20 Anti-Corruption Action Plan (OECD, 2011)
- International Best Practices for Whistleblower Policies (Government Accountability Project, March 2013)
- Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation (OECD, 2011)
- Whistleblower Protection Laws in G20 Countries (Blueprint for Free Speech, The University of Melbourne, Griffith University, Transparency International Australia, September 2014)
- Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU (Transparency International, 2013)

Legal regulations:

- Ireland (Protected Disclosures Act, 2014)
- Japan (Whistleblower Protection Act, 2004)
- South Africa (Protected Disclosures Act, 2000; Companies Act, 2008)
- Canada (Public Servants Disclosure Protection Act (PSDPA), 2007)
- Korea (Act on the Protection of Public Interest Whistleblowers, 2011)
- Norway (Act on the Working Environment, Working Hours and Employment Protection)
- Romania (Act on the Protection of Civil Servants, Employees of Public Institutions and Other Organisations Who Notify of Violations of the Law, 2004)
- Slovakia (Act on Certain Measures Related to the Reporting of Anti-Social Activities, 2015)
- Slovenia (Integrity and Corruption Prevention Act, 2010)
- UN Convention against Corruption
- USA (Whistleblower Protection Act, 1989; Whistleblower Protection Enhancement Act, Sarbanes – Oxley Act, 2002)
- United Kingdom (Public Interest Disclosure Act, 1998)
- Act No. 141/1961 Coll., on court criminal proceedings (Criminal Procedure Code), as amended
- Act No. 200/1990 Coll., on offences, as amended
- Act No. 234/2014 Coll., on the service of public servants, as amended
- Act No. 262/2006 Coll., the Labour Code, as amended
- Act No. 349/1999 Coll., on the ombudsperson, as amended
- Act No. 40/2009 Coll., the Criminal Code, as amended
- Act No. 500/2004 Coll., the Administrative Procedure Code, as amended
- Act No. 70/2002 in the Collection of International Treaties, Criminal Law Convention on Corruption, as amended
- Act No. 99/1963 Coll., the Code of Administrative Justice, as amended

Other:

- Analysis About us with us – Protection of whistleblowers in the Czech context and in comparison with other countries (Oživení, 2014)
- OCHRANA OZNAMOVATELŮ (WHISTLEBLOWERŮ), Analýza zpracovaná pro účely vzniku nové právní úpravy v ČR (Oživení, 2011)
- Judgment of the ESLP from 12 February 2008, Guja v. Moldova, case no. 14277/04
- Stephenson, Paul and Levi, Michael, The Protection of Whistleblowers: A study on the feasibility of a legal instrument on the protection of employees who make disclosures in the public interest, prepared for the Council of Europe, 2012.


oživení