THE CZECH REPUBLIC AND WHISTLEBLOWING[1]

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Abstract: *In the Czech Republic, there is no comprehensive special whistleblowing legislation. If the notification is made within industrial relations, more precisely within private-law relations, then protection of whistleblowers as well as the ones who are notified, provides direct support especially the legislation on protection of personal data and indirectly also the constitutional foundations of the Czech legal order. The Supreme Court of the Czech Republic and the Constitutional Court of the Czech Republic have commented, in the context of the principle of employee loyalty, on a practice which could be described as whistleblowing in the area of employment. The courts have in principle confirmed that even without an explicit legal basis it is possible in the legal order of the Czech Republic to found necessary normative basis for this practice.*

Keywords: *whistleblowing, whistleblower, labour law, industrial relations, employee loyalty, Constitutional Court of the Czech Republic*

1. THE CONCEPT OF WHISTLEBLOWING IN THE CZECH LEGAL SYSTEM

We can view the issue of whistleblowing from different perspectives and in different breadth. In general (in a wider sense) this institution has an impact on (almost) all areas of law. Besides labour law and commercial law it is necessary to perceive its aspects in particular in the area of criminal law, constitutional, and civil law. Essential, is further the relation to personal data protection and bound to the transnational sources in the area of human rights and fundamental freedoms protection, etc.

In the legal order of the Czech Republic, there is not yet included a comprehensive regulation of whistleblowing, including the area of labour law. In the reality of everyday life, it is nevertheless possible to identify situations that can be subsumed under the general perception of whistleblowing, and in the Czech Republic these are seen through general regulations of the above-indicated areas of law.

Substantial influence on whistleblowing has been on (as a result of its cross-sectional character) especially legislation aimed at personal data protection in the form of the Act No. 101/2000 Coll., personal data protection and amendment of certain laws in the Czech Republic.

The term whistleblowing is, in the Czech Republic, only directly mentioned in the Decree of the Czech National Bank No. 123/2007 Coll., on the rules on prudential undertakings of banks, credit cooperatives, and securities dealers; in this regulation this concept designates a mechanism of communication of major fears of employees regarding the

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functionality and effectiveness of the control system outside the normal flow of information. The concept of whistleblowing was supplemented into the mentioned Decree only with effect from 1 January 2011, and with no change in provisions laying down procedures in question. It was in fact a technical rather than substantive amendment of the relevant provision and this change was not directly legislatively justified. The decree thus can not be seen as a transparent regulation of whistleblowing, it is still rather a rare occurrence of this term in the Czech legal order. The concept of whistleblowing alone (without translation into Czech) has begun in the local legal environment to appear and began to be discussed about five years ago, following the practices of multinational corporations, which, as a result of application of legislation especially of the United States (especially of SOX), have started to implement also in the Czech Republic internal reporting systems for notification of malicious acts with a partial overlap towards external service providers[2]. These systems were (by their nature) associated with the procession of personal data and their transnational transfer.

Practical experience with sophisticated notification systems, as a result of this, have acquired vicariously also some public authorities of the Czech Republic especially the Office for Personal Data Protection.

From a terminological point of view it must be said that, as regards the concept of whistleblowing (neither in the wider nor in the narrower sense) there is no consensus so far in the Czech Republic even within the professional community. The professional community has begun a serious debate over this issue in the last two years[3].

2. THE EXISTING LEGISLATIVE PROPOSALS FOR REGULATION OF WHISTLEBLOWING IN THE CZECH REPUBLIC

Stimuli which has opened professional debate over the issue of whistleblowing can be designated, as among others, two legislative proposals, "laws on whistleblowing" (debates over them culminated in particular in the first half of 2013), neither one of which has not been adopted.

The cause of their failure can be seen in the fact that the two proposals were essentially observed as primarily political aims. Both the formulation of legislative intent of the bill and drafting the paragraph text was not preceded by a professional discussion, which should have answered questions that naturally arise from the principle of subsidiarity of the law and subsidiarity in the law, and which actually are only a result of the development of the test that measures the goals and means.

These are the questions:

(a) What will we understand under the concept of whistleblowing? How widely will we perceive it (what all will be part of it and what is its aim)?

[2] Compare for example PICHRT, J.; MORÁVEK, J. Právo pro podnikání a zaměstnání. *Whistleblowing.* 2009, č. 7–8, pp. 19–25.

[3] Compare PICHRT, J. (ed.). *Whistleblowing.* Praha: Wolters Kluwer ČR, 2013.

(b) Whether it is (in the context of potential benefits and consequences) suitable to strive to achieve the objective through the law and whether the legal description of this institution is the least invasive legal instrument to achieve the pursued objective.

(c) If yes, whether it is necessary to (among other things following the principle of legal certainty, etc.) to create special legislation regulating the institute, or whether there is sufficient existing legislation which as a result of its generality (and with contribution of legal principles and rules) allows the judicial power in this respect, to complete the law and cover social relations, on which the special regulation should fall.

The government proposal

In November 2012, the Czech government approved the outline of a bill to protect notifiers of criminal offenses (whistleblowing). The Proposal was submitted by the former Deputy Prime Minister, Chairman of the Legislative Council of the Government and the President of the Government Committee for the coordination of the fight against corruption Karolina Peak. Mrs. Peak in connection with the submitted proposal, said: *"The government today approved the outline of a bill to protect notifiers of criminal offenses (whistleblowing). Now I have to prepare an articulated version, which will consist of an amendment of the Anti-discrimination Act. An employee who meets in his work with the offense, particularly corruption, should in future be protected against dismissal. The articulated version will contain a list of offenses to which notification will relate the protection and also possibilities to defence of those who have been wrongly accused."*

From the cited (in particular see underlined text) are evident the main points of the original intent, which can simultaneously be considered weaknesses and deficiencies of the proposed conception, when:

– the proposed regulation dealt only with notifications to authorities active in criminal proceedings (i.e. basically just develop some techniques that have been possible even without its adoption)
– the proposal did not consistently solve the protection of whistleblowers nor the one who was notified (data protection disregarded the proposal)
– the issue of internal investigation organs at the employer was not solved
– whistleblower protection was limited to the creation of the new discriminatory reason

The aim of the proposal was in essence to constitute whistleblowing as a new discriminatory criterion, which was to be incorporated into the Act No. 198/2009 Coll., Antidiscrimination Act.

This tendency, which did not correspond to the resolution of the Parliamentary Assembly of the Council of Europe No. 1729, however, proved to be unsystematic and lifeless. Largely, among other things, because by its implementation the conception of the Antidiscrimination Act would be disruptive when besides discriminatory reasons (race, ethnicity, nationality, gender, sexual orientation, age, disability, religion, belief and world view) characterized with constancy and (mostly - with some reservations regarding religion, faith and belief) independence from a subjective choice, was ranked a reason temporary and completely dependent on the will, more precisely caused by the conduct of

the "individual protected" by the Act. It is obvious that the individual is not born a whistleblower, and that he/she becomes a whistleblower[4].

As a result of the fall of the government the proposal was not even heard in the Parliament of the Czech Republic.

Proposal of a Group of Senators

The second legislative proposal in this area was in July 2013. A proposal of an *act on some measures to increase the level of protection of whistleblowers, conduct that is not consistent with the public interest, and amendment of other laws*, was submitted by group of Senators.

Contrary to the government's proposal, a more challenging journey towards the adoption of a separate legal regulation was chosen that would regulate the issue of whistleblowing. Even this proposal, however, did not fully conform to the resolution of the Parliamentary Assembly of the Council of Europe No. 1729.

Senate debating print, *"returned to the proposer for completion"* after hearing, whereas the debate showed a large degree of non-sophistication of the proposal in the submitted form. An example is a partial immunity of a whistleblower regarding the crime of defamation, the merits of which is that the offender intentionally communicates false information about another person in order to damaged him/her significantly.

3. WHISTLEBLOWING, INDUSTRIAL RELATIONS AND JUDICIAL DECISIONS

The realization of whistleblowing in industrial relations, especially if it is whistleblowing in the broader sense including also notification to the public authorities, is closely linked to the issue of employee loyalty to the employer. Positive expression of this principle can be found in Section 1 of the Labour Code, which, among others, indicates that among the basic principles of industrial relations falls proper work performance by employee in accordance with the legitimate interests of the employer.

The Supreme Court of the Czech Republic and the Constitutional Court of the Czech Republic have commented, in the context of the principle of employee loyalty, on a practice which could be described as whistleblowing in the area of employment. They have in principle confirmed that even without an explicit legal basis it is possible in the legal order of the Czech Republic to found a necessary normative basis for this practice.

The Constitutional Court in the case file No. III. ÚS 298/12 set aside the judgment of the Regional Court in Brno and the judgment of the Supreme Court which confirmed this judgment. This was the case where the Regional Court in Brno (in the year 2009) changed the judgment of the District Court in Břeclav, when it concluded that both of the plaintiffs (complainants in proceedings before Constitutional Court of the Czech Republic) violated labour discipline in a particularly gross manner when as employees of the employer operating a wastewater treatment plant informed in 2001, to the supervisory authorities concerned about violations of legal regulations while operating the wastewater treatment

[4] Compare PICHRT, J. Několik poznámek k whistleblowingu, loajalitě zaměstnance a k legislativním návrhům. In: PICHRT, J. (ed.). *Whistleblowing.* Praha: Wolters Kluwer ČR, 2013, pp. 11–19.

plant in the letter entitled "The disastrous state of wastewater treatment plant" (among others they pointed out that the water purifier was in a state not corresponding standards). The court concluded that the employer acted in accordance with labour legislation when he terminated the employment relationships of the employees immediately.

As a result of the defence of the employees concerned was the matter after the appeal and the appellate review submitted to the Constitutional Court of the Czech Republic. The Constitutional Court of the Czech Republic in the case file No. III. ÚS 298/12 (among others) said: *"The private-law demand for contractual compliance, the principle of pacta sunt servanda, more precisely contractual freedom and taken obligation of an employee to be loyal to his/her employer, can not a priori exclude other significant public interest, the interest in that employees also can turn to state authorities in situations when from the employer's side there is a serious threat to significant social interests, such as protection of health of citizens, environmental protection, or protection of the purity of water, or even when there is a breach of these public goods. The agreement between the employee and the employer can not interfere with public relations, interfere with the interest of society in ensuring that every citizen in a democratic legal state could assist the state in identifying deficiencies and, if necessary, to draw attention to the deficiencies."*

Furthermore, the Constitutional Court stated the need to evaluate and compare in the relevant contentious matter, the public interest in protecting the environment and public health on the one hand with the interest on contractual compliance and loyalty to the employer on the other hand. The general courts failed to meet this need when in the judged case they *"…considered only one page, the interest in compliance with contracts, employee loyalty towards the employer and concluded that the employee must not break the loyalty by that he will „snitch" on his/her employer, which they assessed as a gross breach of work discipline. But general courts have not paid sufficient attention to the fact, whether in this particular case, the employees' attempt to show the deficiencies and protect important social values does not justify their actions. General courts therefore in the judged case had to carefully weigh and consider which interest, whether public or private, is predominant."*

4. CONCLUDING REMARKS

The issue of whistleblowing is in the Czech Republic relatively actual and not only in the area of industrial relations. There are number of reasons. As a main reason may be designated on the one hand the above outlined unsuccessful legislative proposals seeking for a specific legal regulation of an Institute of Whistleblowing in the Czech Republic, worldwide growth of interest in this phenomenon, but also the fact that whistleblowing (with its conceptual fuzziness and non-inveteracy) represents in the Czech Republic, an ideal political slogan, under which can be subsumed or connected therewith many things, for example also permanent attempt of governments of the Czech Republic to take a position on the fight against corruption.

Besides the just mentioned efforts there also is a very practical and factual reason (speaking for the adoption of relevant legislation) which is the fact that some international corporations are already applying and implementing this practice in relation to their obligations ensuing for them indirectly from SOX. This fact then forces the professional public to deal with the issues concerning practices that are known as whistleblowing. Oppo-

nents of the adoption of specific legislation point to the fact that also without it the Constitutional Court was able to find in a particular case the proper constraints of employee loyalty to an employer in relation to the protection of the public interest.

In professional literature and other sources, however, has not been and is not in the Czech Republic paid adequate attention to whistleblowing. The exceptions are a few studies of non-profit organizations and the Parliamentary Institute, several articles in professional journals and currently this prepared collective monograph[5], which came from a conference on the subject, which took place at the Law Faculty of Charles University in Prague in September 2013. In the future, however, may be expected developing of the professional debate.

As regards the assessment of legislative legal framework of whistleblowing in the Czech Republic, it can be in conclusion summarized what has already been indicated. In the Czech Republic, there is no comprehensive special whistleblowing legislation. If the notification is made within industrial relations, more precisely within private-law relations, then protection of whistleblowers as well as the ones who are notified, provides direct support especially legislation on protection of personal data and indirectly also the constitutional foundations of the Czech legal order (see the above-cited decision of the Constitutional Court in relation to the limits of application of the principle of loyalty in industrial relations).

Legislation on protection of personal data, which is based on the EU Directive 95/46/EC, has a cross-cutting nature and provides protection to the whistleblowers as well as the ones who are notified, also in cases of notifications outside industrial relations (regardless of whether it is done in private-law or in public-law relations). In some cases, as for example in civil and criminal proceedings, specific legal regulations include additional special rules, typically in the context of criminal proceedings there is a special protection given to the accused, but also the victim (in both cases, it may be the whistleblower as well as the one who is notified).

In private-law relationships this is essential if there is collecting and processing of data without the consent of the person concerned (whistleblower or the one who is notified), that data can be processed and therefore whistleblowing in this direction realized only if it is to protect the rights and interests protected by law of administrator, receiver, or other persons concerned. Admissibility of processing is therefore tied to the successful implementation of the proportionality test[6].

Existing, although general legislation, allows, while maintaining in particular the personal data protection and protection of personal rights, realization of an elaborate system of whistleblowing, which also could be utilized by external service providers; a system that is based on the rules laid down in the internal regulations and that allows, if necessary, also anonymous submissions, as well as allows to set channels towards public authorities or to media.

As regards the standard components of a whistleblowing system protective measures of deficiencies may be found in existing legislation, perhaps especially in the sense that

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[5] PICHRT, J. (ed.) *Whistleblowing*. Praha: Wolters Kluwer ČR, 2013.

[6] Compare MORÁVEK, J. O whistleblowingu, jeho legitimitě a problémech mezinárodních přenosů osobních údajů. In: PICHRT, J. (ed.). *Whistleblowing*. Praha: Wolters Kluwer ČR, 2013, pp. 187–202.

there are missing special protective measures in relation to the one who is notified. To him protection is provided only in relation to the principle of non-enforcement of the law contrary to good morals and the prohibition of bullying and discrimination. Similarly, it is with direct motivational resources when there is not in any way determined any direct right to compensation or the like. Question of granting this now depends solely on the employer.

The report can be concluded with the fact that in the future there can be, among others from the above mentioned reasons, expected legislative proposals which will aim to regulate whistleblowing. Following the advanced professional debate and previous experience, these should certainly be better proposals than the previous legislative attempts.