Programme Area 25: Capacity building and Institutional Cooperation between Beneficiary State and Norwegian Public Institutions, Local and Regional Authorities

Project to strengthen anti-corruption and anti-money laundering systems in the Czech Republic

Concept Paper:
Possible functions of a Whistleblowers Centre in the Czech Republic

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ECCU-ACAMOL-CZ-TP3/2015

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Disclaimer:

This technical paper has been prepared with funding from the Norwegian Grants, by a team of experts selected from the Council of Europe and the Czech FIU. The opinions presented in this technical paper are those of the experts and do not reflect the official position of the Council of Europe or the donors.

Abbreviations:

ALAC	Advocacy Legal Advice Centre
ECHR	European Convention on Human Rights
ECtHR	The European Court of Human Rights
ETS No 173	Criminal Law Convention on Corruption
ETS No 174	Civil Law Convention on Corruption
GAP	Government Accountability Project
GRECO	Group of States against Corruption
OSC	Office of the Special Counsel (USA)
PACE	Parliamentary Assembly of the Council of Europe
PCaW	Public Concern at Work
POGO	Project on Government Oversight
SEC	Securities and Exchange Commission
TI	Transparency International
WBPA	Whistleblower Protection Act

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1 EXECUTIVE SUMMARY AND BACKGROUND

Whistleblowing has been included as a key element in strengthening systems to prevent, detect and prosecute corruption, but it is also increasingly recognised that any effective framework for combating corruption and protecting whistleblowers in particular must fit within a wider democratic and human rights framework. So while whistleblower protection is part of the Council of Europe's Programme of Action Against Corruption, and specific provisions are included in the Council of Europe Criminal Law Convention on Corruption (ETS No. 173) and the Council of Europe Civil Law Convention on Corruption (ETS No. 174), it is also been included within reports and legal instruments focused on the protecting human rights and promoting democratic accountability. Since 2008, in particular, the Parliamentary Assembly's Committee on Legal Affairs and Human Rights[1] has focused on the importance of protecting individuals, with special regard for whistleblowers, who contribute to public debate by disclosing information as a matter of access to information, good corporate governance, and to reveal abuses of human rights and illegality. In the same period, the European Court of Human Rights has made a number of significant rulings strengthening the protection of whistleblowers under Article 10[2].

In April 2014, the Council of Europe adopted a Recommendation on the Protection of Whistleblowers (CM/Rec(2014)7)[3]. This legal instrument sets the main principles that member States should follow when establishing a normative, institutional and judicial framework for the protection of whistleblowers and situates whistleblowing clearly within a human rights and democratic accountability paradigm. This includes protecting whistleblowers who raise concerns about suspected corruption or money laundering, but also those who report or disclose information related to suspected violations of law and human rights, risks to public health, safety and to the environment.

Thus it is important that the Czech Government considers the potential establishment of a Whistleblower Centre in the broader context of protecting the public interest which includes protecting those who report corruption or financial irregularities but not exclusively.

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[1] PACE Recommendation 1950 (2011) on the protection of journalist sources; PACE Resolution 1729 and Recommendation 1916 (2010) on the protection of "whistle-blowers"

[2] The ECtHR has held that "Article 10 of the Convention applies when the relations between employer and employee are governed by public law but also can applies to relations governed by private law [...] and that "member States have a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals" (Fuentes Bobo v. Spain, no. 39293/98, § 38, 29 February 2000).

[3] CM/REC(2014)7, available at www.coe.int

This paper reviews some of the most relevant European and international experience, with a focus on the UK and the Netherlands, and recommends that the current advisory group on whistleblowing is put on an official legal standing and becomes an Official Working Group on Whistleblowing that focuses first on developing serious proposals for legal reform, including strengthening the institutional mechanisms for receiving, assessing and addressing disclosures of wrongdoing and other public interest information and second, remains constituted in some form for monitoring and evaluating the legal, policy and institutional framework for whistleblowing. This Report also recommends the formation of a Commission to determine and implement free, specialised legal advice for whistleblowers in the Czech Republic, which could take the form of a Whistleblowers Centre

2 INTRODUCTION

This concept paper on the possible functions of a "Whistleblowers Centre in the Czech Republic" has been prepared within the context of the project to strengthen anti-corruption and anti-money laundering systems of the Czech Republic (ACAMOL-CZ).

The aim of the paper is to explore the various functions and powers that a Whistleblowers Centre might have and in doing so, highlight what already exists in the Czech Republic and set out some European and international examples, in order to help inform the process for reform.

This paper is divided into three key thematic areas that impact on the potential functions of a Whistleblower Centre:

1. Effective internal and external channels for disclosing information about wrongdoing or harm to the public interest
2. Direct support to individual whistleblowers
3. Monitoring and Evaluation

The paper then reviews the Czech context - legal and institutional framework - and makes some Recommendations highlighting the key elements that must be taken into account when considering what form a Whistleblowers Centre might take and what other elements must be strengthened to support the work of such a Centre.

The paper has been prepared by Anna Myers, an expert on the law and practice of whistleblowing, former GRECO evaluator, with support from Petr Leyer, Head of the Advocacy and Legal Advice Centre, Transparency International Czech. The authors have also consulted with Lenka Frankova of Oživení, the only other organisation in the Czech Republic currently providing regular free confidential advice to whistleblowers and with officials at the Office of the Government, Czech Republic.

Key words

"institution" - means any employing institution as well as government agency or regulatory body, inspection or oversight body;
"employing institution" - meaning any public sector or private sector organisation for whom individuals work or have a working relationship (i.e. consultancy, contract, internship, etc.);
"whistleblower" - any person who reports or discloses information on a threat or harm to the public interest that they come across in the context of their work-based

relationship, whether it be in the public or private sector (as defined by the Council of Europe Recommendation on the Protection of Whistleblowers (CM/Rec(2014)7)).

3 KEY ELEMENTS OF SUPPORT TO WHISTLEBLOWING

3.1 Institutional support

There are a number of legal principles and institutional powers that can directly and indirectly protect whistleblowers. It must not be overlooked that institutional support for whistleblowing – i.e. the institution where the individual works and the institution that would be legally responsible[4] for any wrongdoing or harm that results if a problem is not addressed - is the first line of defence for any individual looking to raise a concern. However, experience in Europe shows that in order for internal whistleblowing to work well, it typically has to be accompanied by strong access to information laws, and laws to protect the media (see for example in Sweden). In most European countries there are calls for stronger protection in law for those who disclose public interest information internally and externally, including in the public domain.

It is also widely accepted that it is in the interests of institutions - legally and morally - to receive information about actual or potential problems that could undermine its service, cause harm to the public, or be against the law. Yet despite the obvious self-interest in handling whistleblowing properly, many institutions fail to do so.

In a recent study of whistleblower cases in the Czech Republic and four other countries, including Poland, Slovakia, Hungary, and Estonia, it was found that the poor levels of institutional support led individuals to seek other means to report harmful, unethical, or illegal conduct[5]. While Slovakia has taken important steps towards providing specific legal protection to those who report internally[6], this only goes part way towards developing a comprehensive framework for protecting whistleblowers including clear and legally protected channels for disclosing a much broader range of public interest information outside of the employing institution as set out in the Council of Europe Recommendation (see Principle 14). Interestingly, the Slovakian law requires all employers (public bodies and private enterprises) with more than 50 employees to set up internal whistleblowing systems or arrangements in compliance with the new law.

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[4] The employing institution and the institution or persons who would be held legally accountable for any wrongdoing or harm will not always be the one and same. The latter would also include a regulatory body that was notified of an issue but did not investigate or take action to address it.

[5] Frankova, L and L. Petrokova (2014) About Us With Us: Protection of whistleblowers in the Czech context and in comparison with other countries. Oživení: Czech Republic

[6] Act on Measures relating to the Reporting of Anti-social Activities and on Amendments of Certain Laws (whistleblowing regulation), 2014. The new law came into force on the 1 January 2015 and aims to provide workplace protection for those who report information about "anti-social" behaviour internally to their employers, and, with respect to more serious matters (categories relate primarily to criminal offences), externally to the appropriate authorities. In certain circumstances individuals may be rewarded by the Slovak Ministry of Justice (up to approximately EUR 19,000) for their actions.

In Serbia, the new law to protect whistleblowers will come into force in June 2015[7]. This law covers all sectors including those working in the military, intelligence, and the judiciary. It also provides protection for internal, regulatory and wider disclosures (i.e. in the public domain) in limited circumstances[8]. As of yet there is no English translation of the law available so it not possible to fully analyse the substance of the law. The reason for a 6 month delay between the law's adoption in Parliament and its coming into force was to allow time for the judiciary to be briefed on the new protections and for employers to prepare for the changes.

3.2 Effective mechanisms to receive and investigate reports/disclosures of harmful, unethical or illegal conduct

The fact there is often so little support at the institutional level – to receive and investigate reports and ensure the individual who reports the information is treated fairly - forces people to either stay silent or seek other ways to report concerns and to defend themselves against professional attack. In too many cases, individuals are driven to take lawsuits, a costly and difficult process, to prove the wrongdoing or harm their disclosure revealed, and do so publicly in an effort to disprove the attacks against them. At the same time, many of those whose stories end up in the media report that the media attention on the wrongdoing and their maltreatment was the only reason a process was started to address the substance of the concern[9] they originally raised.

This perception has also been found in American studies. One study showed that 44% of those who reported directly to a competent authority or to the media thought that their organization had changed its practices as a result. The same study showed that only 27% of those who reported suspected wrongdoing to their employer thought anything changed as a result[10]. Another report suggested reporting wrongdoing directly to a regulator or to the media is more effective because it prompted the organization to properly investigate the matter and take other remedial actions[11]

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[7] Republic of Serbia, Whistleblowers Protection Act (Official Gazette of the Republic of Serbia no. 128/2014) [Zakon o zaštiti uzbunjivača] ("WBPA").The WBPA entered into force on 4 December 2014 and is applicable from 4 June 2015.

[8] The circumstances under which a wider disclosure is protected include where there is a direct threat (i) to life, (ii) public health, (iii) safety, and (iv) the environment, (v) as well as, the prevention of large scale damage, and (vi) direct threat regarding the destruction of evidence. For more info click here

[9] Supra, note 4, at page 6.

[10] See Rothschild, J., & Miethe, T. D. (1999). "Whistleblower Disclosures and Management Retaliation" Work and Occupations, 26(1), 107-128.).

[11] See Dworkin, T. M., & Baucus, M. S. (1998). "Internal vs. External Whistleblower: A Comparison of Whistleblowing Processes.". Journal of Business Ethics, 17(12), 1281-1298.

Notwithstanding the fact that in a democracy individuals should be protected under the right to freedom of expression to disclose public interest information (see ECHR jurisprudence and the Council of Europe Recommendation Principle 12), the vast majority of whistleblowers only do so as a last resort having exhausted all other internal and appropriate regulatory channels. A recent report reviewing all tribunal judgements (i.e. cases which were not settled or withdrawn prior to judgement) under the UK's whistleblowing law between 2011 and 2013 reveals that even in a system where individuals are protected in their employment if they report a concern to an outside authority, or to the media in some circumstances, the vast majority only ever raised their concern internally. In 9 out of every 10 judgement reviewed, the claimant never raised their concern outside their employing institution, only 2% raised it first with an external authority (legally recognised by the law as an appropriate external channel[12]), and only 1% ended up raising their concern with the media after raising it internally or with an external authority first.

Media reports can be effective in getting otherwise reluctant institutions to act (by way of public pressure) but they are also the most difficult way for employers and the authorities to learn of a problem; not least because it may be too late to avoid the damage or harm that the whistleblower was seeking to warn against and because, at a late stage, it can be more difficult to properly investigate and hold those responsible to account. Media disclosures can also send institutions into "crisis" management which can divert their attention from the substance of the whistleblowing concern towards a public relations exercise in reputational damage control and in efforts to discredit the whistleblower. Then it is often only through increased public pressure and media exposure that the substantive issues are addressed. Failing to deal professionally and accountably with the substantive issues from the outset can further erode public confidence in the authorities (public and private) to act in the best interest of the community - citizens and consumers.

Thus, rather than focusing efforts on preventing a whistleblower from disclosing information in the public domain, it makes more sense for institutions to make it more effective and safer for whistleblowers to report such information to them. This means ensuring that the information is properly assessed and fully investigated wherever possible, that there are effective and alternative channels to report suspected wrongdoing or harm, and that the individuals who use those channels are fully and legally protected for doing so.

In the Czech Republic, as has been shown in other countries in Europe, a key factor in the harm that is ultimately caused to a) the public interest and b) the individual whistleblower, is the lack of objective, early assessment of the substance of the

[12] Under the UK law, there are over 50 "prescribed persons" listed including regulatory bodies in health, environmental protection, financial regulation etc., as well as ombudspersons, and categories of individual such as MPs and local authority councillors

whistleblower's report and the appropriate follow-up to prevent, reduce the harm or illegality revealed in the information provided or to pursue those responsible. While most individuals report their concerns internally no matter what the law states, and should be encouraged to do so, any obligation by law to do so runs counter to the wider accountability that whistleblowing laws are meant to serve. Such rules are particularly counterproductive if the misconduct or negligence is at the most senior levels of the employing institution. This is why there must be safe alternative channels outside the employing institution to disclose such information.

Thus, there are a number of key institutional issues that the Czech government could reasonably address within the context of this project.

1) Review the role and powers of supervisory or regulatory agencies in the public and private sectors (e.g. National Audit Office, financial sector regulators like the Office for the Protection of Competition, environmental protection agency, etc.} to ensure that they are equipped to:
   a) receive information directly from a variety of sources including whistleblowers;
   b) act on that information professionally and independently;
   c) protect sources of information including whistleblowers, maintaining guarantees of confidentiality as to their identity[13].

2) Ensure or strengthen the role of the Ombudsman or similar institutions to intervene to prevent or confirm retaliation and impose a remedy. Ombudsman offices can also receive reports on behalf of whistleblowers and convey them to the appropriate institution or law enforcement agency (see New Zealand Ombudsman Office[14]).

3) Consider establishing an institution which handles whistleblowing and can oversee investigations in other institutions (see examples of US Office of Special Counsel with respect to the federal public sector and New Zealand Ombudsman below. See also Dutch proposal explored more fully later in this paper).

[13] The new Serbian law protects the identity of the whistleblower - by obliging all those persons authorised to receive information from whistleblowers to protect the whistleblower's personal data and any data that may disclose the whistleblower's identity. This obligation extends to each and every person who may come into possession of the whistleblower's personal data. See note 7.

[14] See New Zealand (2000) Protected Disclosures Act available at www.legislation.govt.nz

Example 1: The Office of Special Counsel (USA)

The OSC has the authority to investigate and prosecute violations of the rules protecting federal workers against retaliation for whistleblowing (under the Whistleblower Protection Act). It also plays a key oversight role in reviewing government investigations of potential misconduct. Based on a complaint by a whistleblower, the Office may require an agency to investigate the alleged wrongdoing, even if it is reluctant to do so. Whistleblowers are invited by the Office of Special Counsel to comment on the quality of the agency investigation and corrective actions prescribed - based on the view that whistleblowers themselves are most often experts in their own right on the subject matter of their concerns. The Office also maintains a dialogue with the investigating agency to make sure that the actions taken are reasonable and that they address the concerns raised by the whistleblowers.

Example 2: Ombudsman's Office (New Zealand)

In New Zealand, the reports of wrongdoing and complaints of retaliation are handled by separate bodies. Protected disclosures may be made to competent authorities including the New Zealand Ombudsman's Office but the application of the anti-victimisation provisions of the Human Rights Act 1993 is overseen by the Human Rights Commission. This may serve the New Zealand system well not least because the provisions of the Human Rights Act governed by the Commission were extended to whistleblowers when the new law came into effect. It also reduces the risk of perceived bias against a whistleblower because the assessment of their claim of retaliation is clearly separated from and therefore not influenced by the investigation into the report of suspected malpractice, particularly if no wrongdoing is found.

3.2.1 Private sector specifically

In many countries it is easier - legally and politically - to implement procedures or laws to facilitate and protect whistleblowers within the public sector. It is crucial however that protection covers all sectors as the activities of companies can and do have a serious impact on the public interest; the livelihoods and well-being of citizens and communities[15].

However, one of the challenges is determining whether it is possible or sensible to impose a duty on private sector employers to investigate internal reports of unethical or suspected illegal or negligent conduct and how such duties can be enforced. It is clear from the Slovakian and Serbian laws that a duty to implement a

[15] Consider issues of food safety in Europe, environmental protection, financial integrity, etc.

procedure is possible, but this is not quite the same as imposing a duty to investigate and this is a policy and legal issue in many countries.

One of the ways to prompt private sector employers to take their internal whistleblowing arrangements seriously is to make the legal protection for whistleblowers who report directly to inspection or regulatory authorities very strong. This, it could be argued, is the approach taken by the UK's Public Interest Disclosure Act 1998 which covers all those working in the public and private sectors - and provides that a disclosure to a regulator or supervisory body (whether made directly or after raising it internally) is protected if:

1) the information reported falls within the definition of public interest information; and
2) it was information that the worker "reasonably believed" a) fell within the remit of the authority b) was substantially true.

It should be noted that:

- **"protection"** is not prejudged or determined at the time of the disclosure. The UK law gives the right to any worker to take a claim16 against their employer to remedy any unfair treatment that resulted from having made a public interest disclosure. This includes claims for interim relief (e.g. getting their job back quickly if they were dismissed) or for compensation for unfair treatment (e.g. failure to promote, removal of responsibilities, harassment, etc.,) or for unfair dismissal. The tribunal focuses on any alleged unfair treatment of a whistleblower for making a "protected" disclosure but does not, itself, deal substantively with the whistleblowing concern.
- **"reasonable belief"** does not mean that the worker has to be correct - they can be mistaken as to the substance or seriousness of their concern so long as the tribunal finds that at the time, the worker had the belief that it was a matter of public interest (as broadly defined in the law) and that it was reasonable for someone in their position to have such a belief

Along with protection in law for whistleblowers, there are other examples of ways in which national legal or regulatory systems "encourage" employing institutions to act responsibly with respect to the information their staff or those working with them provide to them and to the individual who reports such information.

[16] Claims are made to an Employment Tribunal which is intended to be informal and encourage parties to represent themselves although employers often hire lawyers. The tribunal panel which hears claims is usually chaired by a lawyer along with two other members - representing employers and unions respectively. Appeals can be made to an Employment Appeal Tribunal and to a court on matters of law.

Examples from Europe and elsewhere include, in no particular order:

a) making it a requirement on the company's audit committee to review and report annually on internal whistleblowing arrangements (see Corporate Governance Code, UK[17]) or imposing a duty on listed companies to protect whistleblowers (see Netherlands Corporate Governance Code)[18].
b) putting the burden of proof on companies to show they had adequate procedures as a defence to regulatory or criminal action (see UK Bribery Act 2010 which introduced a new strict liability criminal offence on companies who "fail to prevent bribery." The only defence is for a company to prove they had adequate procedures in place to prevent bribery, including whistleblowing arrangements - and the burden of proof lies on the company[19]).
c) providing a monetary award to whistleblowers (see the US Securities and Exchange Commission. Under Dodd-Frank Act, the SEC provides any individual who reports new information that leads to an enforcement action with a percentage of the fines levied against the company[20]. The SEC will take into account evidence of retaliation against a whistleblower in its decision as to the level of the award[21].
d) imposing a duty on regulatory bodies to report annually on their whistleblowing activities (see UK where the government has just finished a consultation[22] to inform proposed regulations in this area).

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[17] The UK Corporate Governance Code applies to all companies listed on the London Stock Exchange. It requires each company to disclose how they have complied with the code, and explain where they have not done so in their Annual Reports - under what the code refers to as 'comply or explain". Section C.3.5 of the Code states that "the audit committee should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The audit committee's objective should be to ensure that arrangements are in place for the proportionate and independent investigation of such matters and for appropriate follow-up action."

[18] Principle II.1.7, *Dutch corporate governance code*, available at http://commissiecorporategovernance.nl

[19] United Kingdom (2010) Bribery Act 2010 (c.23). See also page 22 , Bribery Act 2010: *Guidance To Help Commercial Organisations Prevent Bribery*

[20] The US Congress directed the Securities and Exchange Commission ("SEC") to establish a whistleblower program as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Under the program, an individual who provides the SEC with original information leading to an enforcement action that results in over $1 million in monetary sanctions is eligible to receive an award of 10% to 30% of the amount collected.

[21] On 28 April 2015, the SEC announced that taking into account the suffering of the whistleblower, it was awarding the maximum whistleblower award payment of 30 percent of amounts collected in connection with *In the Matter of Paradigm Capital Management, Inc. and Candace King Weir, File No. 3-15930* (June 16, 2014). This is the SEC's first retaliation case.

[22] For more information click here or visit *https://www.gov.uk/government/consultations/*

3.2.2 Access to independent, confidential advice

One of the key ways to ensure the wrongdoing or risk of harm that is reported by whistleblowers is properly addressed (i.e. in the interests of Czech citizens and tax payers) is to ensure that individuals can seek independent and confidential advice at an early stage.

Main forms of assistance identified and provided (mainly by non-governmental bodies) are:

- Independent, confidential advice (legally privileged or protected by law) (see detailed examples in this report)
- Representation and advocacy (including litigation) support (see for example the Government Accountability Project in the USA[23])
- Counselling and moral support (see for example the Whistleblowers-Netzwerk, Germany[24])

Providing access to confidential advice within a legally privileged relationship or protected by professional secrecy and by law is important because it ensures that an individual can be open, and can seek full and independent advice as to:

1) The nature of concern (the substance and seriousness)
2) Who to raise it with
3) Legal and practical implications and protections available.

Such advice can be provided by lawyers and trade unions. However, evidence and experience shows that it is not always enough to provide access to any lawyer or trade union. In its 2013 Annual Report, the Dutch Advice Centre for Whistleblowers (Adviespunt Klokkenluiders) states that it has found that in some whistleblowing cases legal advisors (lawyers in private practice, legal counsel at legal assistance providers or union legal counsel) were insufficiently aware of the special position applying to whistleblowers[25]. In its latest review of tribunal judgements in whistleblowing cases, Public Concern at Work has pointed out errors in law that were not challenged by individual legal representatives (or because the individual represented themselves and were not aware of the error)[26]. Therefore it is vital that there are dedicated advisers who have the expertise and experience to properly advise whistleblowers.

[23] To visit the Government Accountability Project website click here
[24] To visit the Whistleblowers-Netzwerk website click here
[25] Adviespunt Klokkenluiders (2014) *Courage when it counts. Annual Report 2013. Amsterdam.* Page 5.
[26] Public Concern at Work (2015) *Is the law protecting whistleblowers? A review of PIDA claims 2011-2013.* United Kingdom

While independent confidential advice is one of the most obvious ways to directly support whistleblowers and protect the public interest, it is also the one that is most often overlooked by governments. There is only one government funded legal advice centre in Europe that is wholly dedicated to advising whistleblowers and this is the Adviespunt Klokkenluiders (Whistleblowers Advice Centre) - see more below. In most countries, it falls primarily to non-profit and non-governmental bodies to provide advice and support to whistleblowers and there is no consistent provision across Europe.

The longest established organisation in Europe in this field is Public Concern at Work, a non-governmental, charitable organisation that has been running for 23 years. It was the organisation that campaigned for a law to protect public interest whistleblowing in the UK and was closely involved in settling the detail of the Public Interest Disclosure Act, 1998. The charity advised individuals before the law came into force and continues to do so, it also continues to monitor whether and how the legal and institutional framework in the UK hinders or supports whistleblowing. The charity receives no grant-in-aid funding from the government. It was originally set up with support from charitable foundations and still receives individual donations and occasional project grants. The charity has been self-funding since 2004 by charging employers for its expertise including briefing senior management on the law and practice of whistleblowing, training designated contacts on receiving and handling whistleblowing concerns, and independently reviewing internal whistleblowing arrangements[27].

Example 3: Public Concern at Work (UK - non-governmental organisation)[28]

By the end of the 1980s, public confidence in the ability of British institutions - whether private or public - to deliver their services safely had suffered. The British public was shocked when it was revealed that children in care had been abused over a 13-year period by those employed to protect them; that serious lapses in safety standards had been common prior to the explosion on a north sea oil rig that killed 167 men; and that a top UK insurance company could collapse leaving behind £34 million in unpaid debts. In 1990 the Public Interest Research Centre (PIRC) published the findings of a research project it had conducted into self-regulation and whistleblowing in UK companies. The report was the seed from which the first serious civil society initiative to address whistleblowing in the UK grew.

As originally conceived, a new organisation could advise individuals, help employers, conduct research and promote good practice. In 1990 a steering

[27] In recent years, the charity has been operating at a deficit.

[28] Revised and updated from Myers, A. and E. Oakley (2004) The UK; Public Concern at Work in in Dehn, G. and R. Calland (eds). *Whistleblowing Around the World, Law, Culture and Practice*. South Africa: ODAC, PCaW, The British Council.

committee was set up and consulted widely with British business and professional organisations, corporate executives, lawyers, individual whistleblowers and public interest groups in Britain and the United States. This exercise revealed great interest in the issues of organisational accountability and whistleblowing, and support for an independent body to address it.

The new body, called Public Concern at Work, was officially launched in October 1993. It obtained charitable status, incorporated as a limited company and sought designation from the Law Society of England and Wales and the Bar Council as a legal advice centre.

Briefly, the aim of the charity is to protect society by encouraging workplace whistleblowing mote individual responsibility and organisational accountability and it strives to meet that aim through three core activities. These are:

- advising individuals with whistleblowing dilemmas at work;
- supporting organisations with their whistleblowing arrangements;
- informing public policy and seeking legislative change.

The Public Interest Disclosure Act passed in 1998 and proved a key milestone in the work of PCaW. The law declared whistleblowing a legitimate activity and offered legal protection to those in the workplace who speak up on behalf of others. However, as it was introduced to Parliament by a private member rather than as part of the Government programme, it passed with little government publicity. It meant as well that it fell to the charity - which had been closely involved in drafting the new law and consulting on it - to monitor it in practice which it continues to do. Most recently PCaW launched an independent Whistleblowing Commission[29] to review how the law is working in practice and in particular, the way in which regulatory bodies or authorities deal with whistleblowing concerns.

PCaW is a small organisation with fewer than 15 core staff and a number of volunteers, most are lawyers or legally trained. PCaW has advised over 18,000 whistleblowers since 1993 and has worked with countless employers in all sectors to help them understand why it is in their best interests to listen to their staff and to implement safe and effective whistleblowing arrangements. It has also informed policy in health and social care, safety at work, audit, education and financial services, amongst others and worked with many of the main regulators to improve the whistleblowing support and protection they offer and promote in their respective sectors.

Providing high quality early advice to individuals remains a priority for the

[29] PCaW Whistleblowing Commission, available at www.pcaw.org.uk

organisation. By advising whistleblowers how they can best raise a concern and by focusing on how to do so responsibly - either to those in charge or, where necessary, outside the organisation - the aim is to minimise the risk that the messenger will suffer and maximise the chance that any serious concern will be properly and promptly addressed. The aim is to ensure that individuals can make an informed decision about what they want to do with the information they have, knowing the risks and opportunities before them. The lawyer-client relationship ensures that callers can speak freely and openly about their concern and discuss the differences or conflicts between the public interest and their own, if there are any.

The Dutch government looked to Public Concern at Work when it was considering what type of support to provide whistleblowers prior to setting up the Advice Centre for Whistleblowers. The distinction between the Dutch government-funded centre and other government agencies or authorities generally throughout Europe which provide information and guidance to whistleblowers is that the Advice Centre for Whistleblowers advice has its own legal status. This means that, in principle, advice is given under statutory rules of confidentiality and individuals are not breaching any rules of confidentiality or loyalty to their employer nor making a disclosure by discussing the substance of their concern, subject to certain exceptions such as national security and other duties of professional secrecy (see Principles 6 and 28, CoE Recommendation and Article 9 of the Irish Protected Disclosures Act, 2014[30]).

Currently there is no single comprehensive law to protect whistleblowers in the Netherlands, but since 2001 the Netherlands has introduced a series of measures, including legal protections, to support whistleblowing. It also has a strong tradition of Ombudsman and of self-regulation. In the private sector, for example, the Stichting van de Arbeid (founded in 1945) brings together the largest unions and employer foundations to develop good practices and rules. In 2010 it developed a Code of Practice on whistleblowing.

Statement on Dealing with Suspected Malpractices in Companies

The Ministry of Social Affairs and Employment in the Netherlands commissioned a study and found that both employers and employees wanted a code of conduct to help them put in place the necessary reporting arrangements. The Labour Foundation was asked to work on such a project and the result is a Statement on

[30] See also Irish Protected Disclosure Act, 2014 Article 9: Disclosure to legal adviser. "A disclosure is made in the manner specified in this section if it is made by the worker in the course of obtaining legal advice (including advice relating to the operation of this Act) from a barrister, solicitor, trade union official or official of an excepted body (within the meaning of section 6 of the Trade Union Act 1941).

Dealing with Suspected Malpractices in Companies (3 March 2010, updated August 2012)[31].

Excerpt from the Introduction:
The Labour Foundation is happy to comply with this request. In its view, it is important to lay down conditions enabling employees to bring any malpractice within their companies to light without putting themselves at risk, giving their employers an opportunity to rectify it. Not only is this safer for the employees involved, but it is also in the interests of companies since management should be made aware of suspected malpractice as soon as possible so that it can take steps against them. In addition, it may be possible to resolve the situation before the employee is forced to resort to whistleblowing [i.e. outside the company.] The Foundation's statement is intended as an initial step towards creating company or industry-level guidelines for reporting suspected malpractice.

Page 11:
If reporting malpractice externally, the employee should approach the most relevant external party. He or she should consider how effectively that party can intervene and rectify or help to rectify the malpractice. The employee should also attempt to limit the loss or damage suffered by his or her employer as a result of such intervention. In other words, when an employee decides to report malpractice outside the company, he or she should first approach the competent authorities and not the media.

The more serious the malpractice is, the more certain population groups are at risk and/or the more the malpractice persists despite repeated reports, the more justified the employee is in contacting the media. It will clearly not be easy for the whistleblower to argue plausibly that he or she was forced to call in the media to rectify the malpractice or prevent its recurrence.

Most recently the Dutch Government (along with other stakeholders) took the innovative step of establishing an advice centre that is consistently resourced and has a team of legal advisors dedicated to this work.

[31] Stichting Van de Arbeid (2010.) *Statement on Dealing with Suspected Malpractices in Companies. Publication no.1/10, 3 March 2010*, (translation updated August 2012). Available at: http://www.stvda.nl/en/home.aspx

Example 4: Adviespunt Klokkenluiders - Advice Centre for Whistleblowers (Netherlands - impartial government-funded body)

While there is no single comprehensive national law in the Netherlands protecting whistleblowers in all sectors, there are regulations in local and central government, the police and defence. In order to assist and facilitate potential whistleblowers in making reports of malpractice or wrongdoing, the Dutch Government and social partners (including employer and employee representative organizations) decided that advice and support free of charge was needed for potential whistleblowers.

The Advice Centre is incorporated and funded by the Ministry of Interior Relations and the Ministry for Social Affairs and Employment but is independent of them. It consists of a three-member committee – representing the private sector, the public sector and the trade unions – and a small staff team including a director, three senior legal counsel, a part-time communication consultant, an office secretary and an administrative assistant[32]. It reports annually to the Ministers of the two funding departments, the Senate and the House of Representatives as well as to the employers' and employees' representatives.

Its official tasks are[33] :

a) to provide information and advice on and offer support with possible follow-up steps to anyone who suspects wrongdoing that affects the public interest in:
   - a business or organisation where he works or has worked; or
   - any other business or organisation if he has obtained knowledge of the possible wrongdoing through his work;
b) to identify from the information available to it by virtue of its task as described in paragraph a) trends and patterns that cannot be traced back to an individual and to communicate its findings to the relevant organisations;
c) to provide general information about dealing with possible wrongdoing.

The 'Adviespunt Klokkenluiders' (Advice Centre for Whistleblowers) was opened in October 2012 and was evaluated in mid-2014. The evaluation found that the Advice Centre had obtained a strong position in the field and a law to ensure its continued existence was recommended.

The annual budget for 2013 was € 850,000.

[32] Hannah de Jong, Director of Adviespunt Klokkenluiderswww.adviespuntklokkenluiders.nl
[33] Set out in a Temporary Decree Dated 27 September 2011

Breakdown of contacts and level of advice:
In 2013, the Centre received 435 new contacts; 324 people asked advice on a specific issue; 111 people had a simple request for information or were looking for someone to listen or a platform to draw attention to specific matters affecting society; the Centre provided advice and intensive support in 61 whistleblowing cases.

Of the 435 contacts, 40% worked in the public sector, 23% in the semi-public sector and 26% in the private sector. The other 11% of cases were categorised as "other"- were citizens or workers raising general issues not related to their work. The Centre also received calls from 21 employer organisations seeking advice; in such instances the Centre can only provide general information.

Research:
In 2013 the Centre focused on researching whistleblowing policies in a number of sectors as it was clear through the advice work that the differences in internal whistleblowing policies were striking, even within the same sector. The research focused on the secondary vocational education sector as well as in healthcare and local councils. The objective in 2014 was to discuss the findings with the parties' concerned and present proposals to improve the policies.

Based on the work it has done so far, and detailed in its 2013 Annual Report, the Advice Centre for Whistleblowers drew the following conclusions:

- advice is most effective when it is sought at the earliest stage, preferably before reporting or disclosing information
- some clients do not feel able to raise their concerns due to worries about the significant costs involved in possible legal proceedings
- individuals frequently ask about the Centre's duty of secrecy and the confidential nature of the advice they provide,
- in some cases, the Centre advised clients to contact the appropriate regulator but the contact was unsatisfactory. The Centre has contacted a number of regulators directly in individual cases and come to arrangements with others on how to work together to handle whistleblowing disclosures properly

The Advice Centre also made the following recommendations:

- a new comprehensive law protecting against unfair treatment (including dismissal) for whistleblowers in all sectors (public, semi-public and private) should be adopted
- statutory provisions permanently establishing an advisory body for whistleblowers should make provision for legal aid assistance (i.e. financially aided) for whistleblowers with respect to employment law issues and possible litigation

- given that the relationship between the advisor and client is a confidential one and the matters discussed and documents exchanged must be completely confidential, a more extensive duty of secrecy is required - meaning statutory privilege, such as that applying to lawyers, notaries and doctors
- the government should investigate whether regulators give sufficient consideration to the special position of whistleblowers

Finally, there has been a long debate about whether a "House of Whistleblowers" should be implemented in the Netherlands and a draft law "Act on the House of Whistleblowers" is currently being debated, having been first proposed in 2011. The proposal would combine the investigation of wrongdoing or risk of harm to the public interest (i.e. the substance of reports from whistleblowers) as well as advising and assisting whistleblowers. In so doing, the law would include new rules on the protection of whistleblowers.

While clarity in law and practice is important for ensuring public interest disclosures are made and properly addressed, it can be argued that combining investigations of reports of wrongdoing and complaints of retaliation (i.e. tailored to issues) with advising and assisting whistleblower (i.e. tailored to individuals) may a create a perception of bias or lack of impartiality in one aspect or the other of a single case. There is also a risk of creating a bottle-neck where, if not properly resourced, the organisation is overloaded.

While serious questions have arisen in the past with respect to the impartiality of Special Counsel (OSC) in the US, for example, the work of the current Office of the Special Counsel has been well received and can be seen as a good example of a body designed to support the proper investigation of reports of wrongdoing and complaints of retaliation, although only as it relates to the federal public sector. While the OSC provides information and guidance, it does not give independent legal advice to whistleblowers. So while a summary of the proposals in the draft Dutch law are set out below, it is not clear that the draft law will be adopted at all or in the form proposed. What the draft Dutch proposal does provide, in the context of this paper, is a summary of a number of functions that need to be addressed within the Czech institutional framework.

Draft law on the establishment of a "House for Whistleblowers" - Netherlands, 2015

The draft law would establish an independent government agency which would have two separate divisions: one for investigating wrongdoing and the other for assisting employees in disclosure proceedings.

The draft law includes new rules to protect whistleblowers and imposes a duty on

all employers with 50 or more staff to implement a whistleblowing procedure:

- Employees who blow the whistle are protected from detriment (e.g. failure to promote, reduction in responsibility or salary, etc.) and from unfair dismissal
- The protection is automatic so long as the employee had "reasonable grounds" "acted in good faith" and made the disclosure according to the law
- Employees are expected to disclose any information of wrongdoing related to their employment to their employer unless to so do would be a) futile, e.g. the management of the company is implicated in the wrongdoing or b) the circumstance were such that an immediate disclosure was reasonable or necessary, e.g. the public interest in the disclosure outweighs interest in maintaining business confidentiality

Advising and assisting whistleblowers (employees).

- This means advising individual on what information "qualifies" as wrongdoing as defined by the law and who they should report it to;
- The draft law currently defines wrongdoing as "an act or omission that puts the public interest at risk" and sets out a broad list including inter alia, information that indicates a threat to public health or individual safety, the environment or the proper functioning of public services or institutions, or companies.

Investigations:

- Can investigate wrongdoing or a complaint of unfair treatment/retaliation taken against an employee as a result of a public interest disclosure
- The division can start an investigation on its own initiative
- This division can publish "general recommendations" to employers on how to handle disclosures of wrongdoing
- Investigations will result in a report including: a) an analysis of the wrongdoing; b) the probable cause and consequences of the wrongdoing; c) where applicable, recommendations to the employer
- Any recommendations made to an employer as a result of an investigation must be responded to by the employer within a reasonable time: stating what action they have taken to fulfil the recommendation or providing a reasoned explanation for why not.
- It is not clear what the consequences for non-compliance will be. Currently there it is not proposed to give the House any power to impose penalties. Employers must respond within a reasonable time on action taken as a result of any specific recommendations made as a result of an investigation[34].

[34] See Norton Rose Fulbright webinar March 2015, available at www.nortonrosefulbright.com

3.3 Monitoring, review, evaluation,

It can be helpful as part of raising awareness of the law and monitoring its effectiveness over time to have a lead body - whether it is a function of a "Whistleblower Centre" or not, to gather and publish statistics of cases and relevant information on how the law is working in practice and any consultations or reforms, as well as to conduct or commission research and public surveys.

However, there are few, if any, examples of this type of work falling within the remit of a single government body or independent agency. In most countries, this is a shared but ad hoc exercise. In the UK, for example, the whistleblower law is part of the legal framework governing employment relations, and in terms of its technical operation the law falls within the remit of the Department of Business, Innovations and Skills. There is no obligation on the Government to review the law and thus far it has only engaged in periodic reviews of certain aspects of the law without any regular assessment or monitoring of its effectiveness.

PCaW, for example, is the only UK organisation to conduct a full review of legal judgements; they use this to provide legal guidance and to highlight how the law is being interpreted by the courts. The charity also regularly commissions polls to gauge public awareness of and attitudes towards whistleblowing[35]. Most recently, the attention on whistleblowing in the UK has been in the financial and health sectors (due to scandals) and regulators and government departments have conducted focused evaluations and consultation on how the whistleblowing law affects disclosures in those fields[36].

In the US, the OSC, the SEC and non-governmental organisations such as the Government Accountability Project (GAP) and the Project on Government Oversight (POGO), among others, regularly review and monitor the law and practice of whistleblowing and provide guidance on their websites. They also occasionally collaborate to provide training or guidance For example, in 2014, the Department of Justice's Office of the Inspector General collaborated with GAP and POGO to deliver training to the government-wide Whistleblower Ombudsmen (WBO) Working Group, including how to work effectively with whistleblowers and best-practices for WBO websites[37].

[35] See for example http://www.pcaw.org.uk/whistleblowing-commission-sources-yougov-survey

[36] See for example see: *Freedom to Speak Up Review*: an independent review into creating an open and honest culture of reporting in the NHS and the resulting Report (2015).

[37] See *Government accountability project* – available at www.whistleblower.org

4 OVERVIEW OF CZECH LAW AND PRACTICE

4.1 Legal framework

There is currently no law that directly and comprehensively addresses whistleblower protection in the Czech Republic nor has whistleblowing been addressed clearly in self-regulation or sector-specific arrangements (as in the Belgian or Dutch public sector for example). There are a number of good resources[38] that set out and analyse existing provisions that offer partial protection to whistleblowers and which are found in the Labour Code, the Administrative Procedure Code and the Criminal Code. For the most part, these are general provisions to ensure fair treatment of employees, or setting out the right or the duty to report wrongdoing. While the Administrative Procedure Code, under s.42 does provide for making a "complaint" or a report anonymously within the workplace, it does not set out alternative reporting channels or any corresponding protections mechanisms. In the case of the Criminal Code, the Czech Republic like many other jurisdictions in Europe, defines a duty to report crimes, including corruption, but does not set out what to do if the information is indicative of a crime but not necessarily evidence that would be admissible in a judicial sense.

The exception to these general provisions has been a regulation of the Czech National Bank[39] which required financial institutions to introduce a reporting mechanism (outside standard management systems) for potential or actual regulatory or legal breaches and to ensure that those who use such mechanisms are protected in their employment and under data protection. However, a new EP directive 575/2013, 26 June 2013 has replaced this requirement and as of March 2014 new rules apply.

The other exception is a provision in the new Civil Service Act 2014[40] - which, while important, is limited in the sense that it only covers those individuals working in the civil service. Currently the Ministry of the Interior is preparing the regulations to implement the provisions[41] with respect to protecting civil servants who report wrongdoing. The regulation is set to come into force on the 1st July 2015.

[38] Frankova, L and L. Petrokova (2014) About Us With Us: Protection of whistleblowers in the Czech context and in comparison with other countries. Oživení: Czech Republic; TI CZ (2013) Country Report: Czech Republic.

[39] No. 123/2007 Coll. on the rules of prudent economic behaviour of banks, savings banks, loan associations and trades or securities, Section 34 (2).

[40] Act No. 234/2014 Coll.

[41] The Government is preparing a Regulation providing measures related to reporting of suspicions of committing offences to implement the provision of the new Civil Service Act.

As set out in this paper, there are a number of issues that are relevant to strengthening the protection of whistleblowers in the Czech Republic. A stronger legal framework has already been identified as a necessary reform. The Council of Europe Recommendation on the Protection of Whistleblowers and its Explanatory Memorandum should be very helpful in this regard. Attached at **Appendix 1** is a grid that was used by experts to help analyse the Serbia law when it was in draft form. However, the fact that the Serbian Ministry of Justice formally set up a multi-stakeholder working group to draft the new law - the group included whistleblowers (one judge and one police officer) - was an important part of helping to ensure the new law addressed the real challenges facing individual in that country.

4.2 Government Project and Working Group on Whistleblowing

The Czech Government, under the auspices of the Government Office, has dedicated time and resources to the issue of whistleblowing in the context of a joint project focused on strengthening anti-corruption and anti-money laundering systems in the Czech Republic[42]. In December 2014, the Government Office hosted a workshop on the protection of whistleblowers with experts from the Czech Republic, including representatives from TI Czech, NFPK, and Oživení, as well as regional and international experts from Slovakia, Spain and United Kingdom.

Briefly, whistleblower protection fits within the anti-corruption agenda of the Czech Republic. The Governmental Anti-Corruption Policy is the fundamental strategic document in this field and whistleblowing protection is part of the 2015 Action Plan. The Government Anti-Corruption Committee was established by law in June 2014 to coordinate the strategy and advise the Government. Currently, the Minister for Human Rights, Equal Opportunities and Legislation Mr. Jiří Dienstbier, is the President of the Anti-Corruption Committee. The work of the Committee is supported by the Office of the Government and in particular, its Department to Combat Corruption. Any recommendations made by the Working Group on whistleblowing, for example, will be submitted to the Anti-Corruption Committee for approval prior to being submitted to the Government.

The Department to Combat Corruption has, as part of its remit, to address whistleblowing, as well as other anti-corruption measures such as the rules regulating lobbying, conflicts of interest, and codes of ethics for parliamentarians, etc. Thus, the Working Group on whistleblowing is organised under the auspices of the Office of the Government and its Department to Combat Corruption.

[42] This is a joint project implemented by the Council of Europe with the Czech Authorities funded by the Norway Grants Financial Mechanism.

In January 2015, the Government convened the first meeting of the advisory group on whistleblowing. The Working Group on whistleblowing is composed of 14 members: 7 from relevant Ministries, 2 from relevant independent agencies (the Ombudsman and the Information Commissioner), 1 from the Confederation of Unions, 3 from specialised civil society organisations 1 legal academic and a member of the police from the Czech Republic (UOKFK).
The Group has been tasked with a number of activities including:

- Conducting a survey among civil servants on the issue of reporting corruption
- Preparing an e-learning course on reporting corruption
- Analysing the potential for establishing a centre for whistleblowers
- Summarising and publishing information and experience gained during the project
- Determining a mechanism for reporting corruption in administrative / public service authorities
- Submitting draft legal alternatives to protect whistleblowers

A recommendation[43] (available in Czech language only) for a comprehensive Czech legal framework in light of the Council of Europe Recommendation and other international guidance on best practice principles as they relate to the protection of whistleblowers was developed voluntarily for the Working Group on Whistleblowing by one of its members, Oživení. Oživení is a not-for-profit body which works to advise and protect whistleblowers in the Czech Republic and who like TI CZ and a representative from Nadační fond proti korupci, was invited to be part of the Working Group.

4.3 Public perception

There are many challenges facing whistleblowers including the public perception that disclosing information in the public interest is disloyal or an act of betrayal. Such perceptions were neatly summed up by Pieter Omtzigt, Rapporteur for the PACE Committee on Legal Affairs and Human Rights, in his 2009 report on the protection of whistleblowers which led to the adoption of the CoE Recommendation in 2014:

> *Whistle-blowers are not traitors, but people with courage who prefer to take action against abuses they come across rather than taking the easy route and remaining silent. To pass this message across Europe will be the most important contribution this report can make. It requires tackling deeply engrained cultural attitudes which date back to social and political circumstances, such as dictatorship and/or foreign domination, under which distrust towards "informers" of the despised authorities was only normal. Maybe the long-standing absence of such circumstances has helped the*

[43] The *document* is available at: http://www.bezkorupce.cz

United States and the United Kingdom to develop a much more whistle-blower-friendly climate than most countries in Europe[44].

The aim of facilitating whistleblowing and protecting whistleblowers is to ensure good governance and institutional accountability by promoting good citizenship in the workplace; by making it safe and acceptable to report or disclose information about possible wrongdoing or actions that could lead to harm or illegality. The view of whistleblowers as "informers" or "troublemakers" was expressed during the debate on a draft bill on the protection of whistleblowers that was rejected by the Czech Senate in 2013[45]. This underlines the importance of ensuring there are effective alternative channels for making disclosures (e.g. to independent as well as state bodies, and in the public domain) and for providing strong protections in law that help ensure that disclosures can be made openly or confidentially rather than anonymously or not at all. It also underlines the importance of raising public awareness and highlighting when and how individuals have acted in the interests of others, sometimes forsaking their own welfare to do so.

4.4 Advice and Advocacy

There are currently two non-governmental bodies that provide free independent legal advice to whistleblowers. One is the TI CZ Advocacy and Legal Advice Centre which was established in 2005 and the other is the legal counselling services provided by Oživení which was founded in 1997. There are also two other organisations that support whistleblowing. One is WB os. which is an on-line portal to support those working the public sector who want to report waste and misuse of public resources (www.wbos.cz). The website contains a lot of information to guide individuals in deciding whether or not to disclose such information and whether to do so via the WB os. Another is the Nadační fond proti korupci (Anticorruption Endowment Fund - www.nfpk.cz) that provides small grants for research or activities geared at identifying and combatting corruption in the public and private sectors, as well as providing legal aid in individual cases, and awards Courage Prizes to citizens who speak out against corruption. Its advocacy work, along with the work of the other organisations described here, has raised awareness of whistleblowing in the Czech Republic as an act of civic courage.

Both Oživení and TI CZ have dedicated legal teams that have developed specific technical and legal expertise in advising Czech citizens and whistleblowers on the law and practice of reporting suspected corruption and wrongdoing. The funding for each organisation depends on a combination of individual donations, charitable foundation funding (typically associated with project work), and support from the Czech Government; there is no stable source of funding specifically to provide long-

[44] Resolution 1729 and Recommendation 1916 (2010) on the protection of "whistle-blowers".
[45] As *reported* by WSJ

term independent and specialist whistleblowing advice. Thus while this whistleblowing work is a priority for both of these organisations whose missions are to reduce the risk of corruption, strengthen democracy and improve and protect the welfare and well-being of Czech citizens, the funding for legal advice services remains precarious.

Between 2007 and 2010, the Ministry of the Interior funded TI CZ to operate a 199 Anti-Corruption Hotline. It was run by Oživení in 2011. Despite the positive response to the hotline and the successful provision of independent legal services,[46] the difficulty in distinguishing the specialised nature of the advice required for a reporting/whistleblowing line, and general legal services under public procurement rules led to the service being abandoned altogether.

Transparency International Czech Republic - TI CZ

TI CZ has been operating its Advocacy Legal Advice Centre (ALAC) since late 2005. ALAC provides free-of-charge legal assistance to any who has witnessed corrupt practices and want to report or disclosure the information (including whistleblowers). The ALAC offers three levels of legal service: basic legal advice (information and guidance on relevant legislation and relevant authorities to whom the client may turn, i.e. signposting), extended legal advice/casework (on corruption related issues, including legal analysis, providing legal opinions, preparing applications), and strategic litigation. In circumstances where the client fears retaliation, the ALAC can act on its own accord.

Approximately 15% of ALAC clients are whistleblowers (e.g. in a work-based relationship). Among the whistleblowers, TI CZ identifies two categories: the first are those who are seeking information or guidance of where to report possible irregularities or who lack faith in the standard complaint mechanisms (these do not tend to experience any retaliation, and the second are those who have experienced unfair or retaliatory treatment as a result of reporting their concerns and who are seeking legal assistance or direct representation to defend themselves.

<u>2014 Statistics</u>
In 2014 the TI CZ ALAC:

- received 536 new contacts
- of these, 48 developed into cases involving extended legal advice.
- In approximately 75% of cases, TI CZ has acted on its own accord, thus protecting the individual client from any criticism. Some cases are wholly initiated by TI - identified by its own "watchdog unit."

[46] See p. 14, TI CZ (2014) *A lighthouse in a sea of corruption: the Advocacy and Legal Advice Centre of TI Czech Republic, Introduction of services and selected areas of activity*

- 29 of the 536 initial contacts were identified as whistleblowers.
- TI organised 11 public debates
- TI lodged 8 criminal complaints

Other activities related to the protection of whistleblowers

- 2009 – TI CZ "Blowing the Whistle Harder" project included a brochure analysing legislation in the Czech Republic, campaigning to raise awareness, meetings with public officials, and a survey
- In 2012, TI CZ authored a country report on the state of whistleblower protection in the Czech Republic as part of a wider EU-funded project to Transparency International Project.47 This report details the current legal framework and the various provisions that relate directly or indirectly to facilitating reporting or protecting whistleblowers, and identifies gaps and weaknesses.
- 2012 - 2013 – TI CZ organised and delivered several workshops for civil servants (in cooperation with Friedrich Ebert Stiftung) to raise awareness about what whistleblowing is and how civil servants should and can act when faced with a concern about wrongdoing or corruption.
- 2014 – TI CZ published a brochure "Whistleblowing is not Snitching" – describing the experiences of whistleblowers (e.g. describing from real cases the problems faced by whistleblowers) and setting out "ten commandments" for whistleblowers on what to do if they want to make a report.

TI-CZ's deputy is a member of the working committee for whistleblowing under the auspices of the Chairman of the Government Council for coordinating the fight against corruption, where continues in efforts to support a comprehensive legislative solution.

Oživení (Czech Republic)

Oživení provides a free legal counselling service for issues related to whistleblowing that can be reached by phone, by mail etc. This legal counselling office is often the first point of contact for whistleblowers. Consultations with the office help them learn what could be their next steps, offering specific help in resolving the case, reporting it to relevant authorities, contacting the media etc.

Oživení is currently also working on a new tool that will be launched in the first half of the 2015 as the first of its kind in the Czech Republic: the GlobaLeaks platform, enabling whistleblowers to submit their report through a secure web interface that guarantees anonymity and makes the process of resolving the case more transparent.

[47] Transparency International (2013) *Whistleblowing in Europe: Legal Protections for Whistleblowers in the* EU. Berlin.

2014 statistics

As part of its advisory services, in 2014, Oživení:

- helped 318 citizens by providing basic legal and anti-corruption consultations
- provided extended legal counselling in 165 cases
- filed 14 complaints for violations of the Public Contracts Act at the Office for the Protection of Competition
- filed 10 complaints with the police of suspicions of criminal conduct - namely offences to do with violating duties in managing entrusted property, creditor favouritism, causing bankruptcy, and obstructing the preparation and implementation of elections and referenda
- organised three trainings for public officials of local governments on the prevention of corruption in public contracts
- monitored municipal elections and, based on the findings, filed a police complaint

Other activities related to the protection of whistleblowers

- In 2012, Oživení published a paper detailing the Czech legal provisions for whisleblowers together with the international comparison.
- In 2014, Oživení published a paper detailing the experiences of whistleblowers in the Czech Republic and four other countries, including Poland, Slovakia, Hungary and Estonia. Based on qualitative research into 40 whistleblower cases.
- In 2015, Oživení published detailed recommendations for comprehensive legal framework in CR based on newly released recommendations, mainly the Council of Europe Recommendation on the Protection of Whistleblowers (CM/Rec(2014)7).
- In 2015 Oživení will launch a GlobaLeaks platform for anonymous and confidential reporting.
- In September 2015 Oživení will organize an international conference: Whisteblowing the way to protect the financial interest of EU supported by OLAF.

Oživení´s deputy is a member of the working committee for whistleblowing under the auspices of the Chairman of the Government Council for coordinating the fight against corruption, where continues in efforts to support a comprehensive legislative solution.

Oživení designs and provide training programmes for representatives of the public and private sector focusing on how to set up internal reporting mechanisms (help lines, open lines) within an organisation to ensure that the reports have a preventive effect.

5 RECOMMENDATIONS

This paper has set out and reviewed three core aspects of facilitating whistleblowing and protecting whistleblowers - receiving and investigating reports, direct support to whistleblowers, monitoring and evaluation – highlighting examples of the experience of law and practice in other countries. There is already an existing body of expertise and knowledge within the Czech Republic about what is working and what is not when it comes to handling whistleblowing reports and protecting whistleblowers. Solid work has been done to analyse the current legal framework, to identify the strengths and weaknesses of the current system through the lens of actual experience, and to compare this experience to the situation in other jurisdictions. However, it is also fairly clear that public and institutional awareness of whistleblowing as a matter of good governance and democratic accountability remains fairly low.

The Czech Government has made whistleblower protection one of its four key priorities in combatting corruption and has taken important steps to develop a plan of action. The Government is in a strong position, with the support of other stakeholders within the country and cooperation with the Council of Europe, to make sensible reforms to the system and make a real difference ensuring that whistleblowing is a practical and effective mechanism to protect the public interest.

The challenge, as always, is to determine which reforms are needed first and ensuring that any changes made are tailored to the Czech system and properly embedded/implemented. Below we have set out a number of recommendations based on the current state of play in the country and focusing on action that would take advantage of the strong foundations that already exist and capturing the momentum of the various projects that are currently underway. These have been organised along the three core aspects: a) legal reform b) direct support and advice to whistleblowers and c) monitoring and evaluation.

5.1 Legal Reform and Institutional Framework

The Government has formed a Working Group on Whistleblowing under the auspices of the Government Office. The working group currently has a broad mandate to review and survey various aspects of a legal and institutional framework for strengthening the protection of whistleblowers in the country. It would, however, make sense for the Czech Government to take advantage of the current momentum, expertise and good will in the country to give the working group a clearer mandate to focus specifically on the legal framework for protecting public interest whistleblowing. Further, as the working group is currently an advisory group, it would be beneficial for it to be constituted by law, giving it the legal status necessary to properly examine the current state of play with regards to the legal

framework, to seek the information it needs from all relevant sources (e.g. government etc.) and develop concrete proposals to fill any gaps in the system. Legal status would provide it with the tools it would need to do its work fully and harness the opportunities and expertise that already exists in the country.

Recommendation 1: A Working Group on Whistleblowing should be formally constituted (i.e. by law) with a clear mandate to: a) focus on developing the legal framework to protect whistleblowers; and b) make recommendations to strengthen the mechanisms for receiving and investigating information about wrongdoing and corruption. Such a formally constituted group would have to have a timetable for making substantive recommendations to Parliament and the relevant Ministries; to properly consult with key stakeholders on the mechanisms for receiving and investigating information about wrongdoing or corruption and to draft a new law or legal provisions to protect whistleblowers.

I. Rationale for Official Working Group / Committee and Recommended Tasks

The two key tasks for the Official Working Group / Committee as outlined above are the substantive areas that have been identified by observers and experts inside and outside the country and which need concerted effort and attention to turn into a reality.

Comprehensive legal protection for whistleblowers in line with international standards should be introduced as part of the legislation on whistleblowers which is adopted by the Czech authorities. This should include clear and legally protected mechanisms for receiving, assessing and addressing disclosures of wrongdoing, including:

a. Reviewing the role and powers of supervisory or regulatory agencies in the public and private sectors (e.g. National Audit Office, financial sector regulators like the Office for the Protection of Competition, environmental protection agency, etc.} to ensure that they are equipped to:
   i. receive information directly from a variety of sources including whistleblowers
   ii. act on that information professionally and independently
   iii. protect sources including whistleblowers, including guarantees of confidentiality as to their identity.

b. Strengthening the role of the Ombudsman or similar institutions to intervene to prevent or confirm retaliation and impose a remedy. Ombudsman offices can also receive reports on behalf of whistleblowers and convey them to the appropriate institution or law enforcement agency (see New Zealand Ombudsman Office).

c. Consider establishing an institution which handles whistleblowing and can oversee investigations in other institutions (see also US Office of Special Counsel with respect to the federal public sector and New Zealand Ombudsman below. See also Dutch draft law on a "House of Whistleblowers" set out earlier in this paper).

The Government prepared a draft law on the protection of whistleblowers as an amendment to the Anti-Discrimination Law and a comprehensive private member's bill on the protection of whistleblowers was also presented to Parliament. While both proposals were rejected by the Parliament (in the latter instance, by the Senate) in 2013, it is clear that the legal and institutional framework for facilitating and handling whistleblower reports and protecting those individuals who do so needs to be strengthened and that the issue has not gone away. Setting up an a Working Group by law, as recommended above, will build on the momentum of these earlier efforts, as well as incorporate international standards, as well as new research and experience, much of which the Czech Government should be commended for supporting.

The successful operation of any whistleblower law depends on public awareness of its substance and its aims. That awareness can begin with an official Working Group with a representative membership (along the lines of the current working group) and clear mandate in law to put forward legislative proposals for debate and discussion. This will demonstrate that the policy is not simply imposed on the public by the Government, and that the opinions and actions of citizens do count. If citizens have the opposite impression, no whistleblowing system would work.

The other option would be to give the current working group a stronger mandate by ensuring it is established across more than one Ministry. For example, a combined mandate from the Ministries of Justice, Social Affairs, Interior and the Government Anti-Corruption Committee would ensure that it has access to and was consulted by all the major relevant government departments.

When reviewing the duties of various bodies in the Czech system (oversight, regulatory, inspection, etc.) the Working Group will need to take into account whether or what systems these bodies have to handle such information sensitively and professionally (in light of protecting the interests of whistleblowers and the interests of innocent third parties) as well as duties to monitoring trends in the information received and publishing such information (see also further recommendations on monitoring and evaluation below).

II. Composition of Official Working Group / Committee

The current composition of the Working Group on whistleblowing is a good basis for an official Working Group though it should be reviewed to ensure those involved have relevant expertise wherever possible and that all key stakeholders are represented - including representatives from employers in the private sector, one or two respected whistleblowers, jurists, academics and the main specialist NGOs that are already represented. It is clear from the experience both within the Czech Republic and elsewhere that the independence and status of a body tasked with addressing whistleblowing is important to the success of its mandate.

A very good example of this approach is found in the working group set up by the Serbian Ministry of Justice to draft the new Serbian law on the protection of whistleblowers. That Group included or consulted with all of the above and included two whistleblowers (a judge and a member of the police) and two international experts. By the time a draft law was presented to the Serbian parliament for debate and approval in November 2014, many of the difficult issues had been fully examined and openly debated. Even if not all experts are represented on the Working Group itself, it is important to that Group is able to consult with key Ministries and oversight bodies such as the State Audit, prosecution or inspection bodies and well as the wider public.

An official Working Group will mean that there is no distinction between members as to the information they can access in order to fulfil their mission.

5.2 Direct Support to Whistleblowers

While this is the main focus of this paper, it is difficult to separate this from the fact that whistleblowers need legal protection - hence the first recommendation focused on strengthening the law and provisions to strengthen the mechanisms for receiving, assessing and investigating information about possible wrongdoing, ethical failures or corruption in the Czech Republic.

The Czech Government has already been a leader with respect to funding independent specialist advice to whistleblowers in relation to its 199 anti-corruption hotline and it's grant-making for advice services. The issue is whether or not independent specialist advice can be put on a more stable footing, to expand its remit beyond corruption to other public interest protections, and how to do so in the most effective way.

Recommendation 2: The Czech Government should consider setting up a separate unique Commission whose task will be to ensure that free independent specialist legal advice is available to Czech citizens who come across risk of harm to the public interest whether they work in the private or public sector. Providing independent, fully confidential specialist legal advice is the most important function of a Whistleblowers Centre. Further, this will ensure that the advice service for whistleblowers that was formerly supported by the Ministry of Interior can continue and the budget can be shared across more than one Ministry.

The importance of access to confidential advice cannot be underestimated. Such advice helps to ensure that information about wrongdoing or harm to the public interest gets to the right place at the right time. Importantly, such support can help protect the public purse in a myriad of ways, including identifying and stopping corruption and avoiding or minimising serious damage that can cost the public purse millions. The example from the Netherlands of the Adviespunt Klokkenluiders, provides a strong example for the Czech Republic. This should be examined in detail, with particular attention paid to how its structure, mandate, powers and funding ensures its independence.

Ideally, there should be a minimum of four Commissioners representing the private sector, the public sector, unions and the legal community. The Commission should report to Parliament and its first task, in a specified time-frame, should be to recommend how to assure long term access to free, independent, confidential and specialised whistleblowing legal services for Czech citizens.

I. Rationale for a Commission to Support Whistleblowers and Recommended Tasks

It is important that the various aspects of supporting whistleblowing and individual whistleblowers are understood and handled appropriately. Access to independent advice is important whatever legal, normative or institutional framework exists and can only be provided without conflict or the perception of bias if it is addressed on its own merits, outside of the institutional framework for receiving disclosures of information, assessing their substance, investigating wrongdoing and prosecuting wrongdoers.

In determining how best to ensure long term access to free independent advice, it is recommended that the Commission take into account or consider:

1) Providing such access via existing specialised legal services, such as already provided by TI CZ and Oživení independently (and Nadační fond proti korupci, in some cases), or via a dedicated centre, or in some other way. The advantages of using existing services or seeking their involvement are that:

a. it builds on the specialist expertise that has already developed and is available (i.e. any new service will be up and running very quickly if done in this way);
b. it builds on the public trust and confidence that already exists with respect to these independent organisations
c. involves a modest increase to funds Government already spends on supporting such services.

2) Consider whether such a free advice service on how to disclose or report wrongdoing could be delivered in part via an electronic tool that provides secure and confidential access

3) Consider how best to fund the service perhaps ensuring funding from more than one relevant Ministry (ie the Ministry of the Interior, the Office of the Government, etc) as in the Dutch example.

Other relevant areas/elements that the Commission could or should address include:

- Information and guidance more widely available
- Ensuring confidentiality for advice is guaranteed by law (i.e. professional secrecy)
- Legal aid in complicated cases, including litigation
- How to support in other ways including counselling and moral support (see for example the Whistleblowers-Netzwerk, Germany).

II. Composition of Commission to Support Whistleblowers

It is recommended, as stated above, that the Czech Authorities review more closely the Dutch example in which a Commission of three - representing the private sector, the public sector and the trade unions – were tasked, among other things, to "provide information and advice to, and offer support with possible follow-up steps, anyone who suspects wrongdoing that affects the public interest that he or she comes across during the course of his or her work." Such tasks should also be included in the mandate of a similarly composed Commission to Support Whistleblowers. It should be more focused (taking account of the lessons learned in the Netherlands) on ensuring long term free access to independent specialist legal advice to anyone who suspects wrongdoing that affects the public interest. The Commission should also report on its recommendation to the Senate and the House of Representatives as well as to the employers' and employees' representatives.

Whatever proposals are made to ensure the long term provision of confidential legal advice - whether through the creation of a Whistleblowers Centre or in a more decentralised form via existing advice services (i.e. TI-CZ and Oživení) - the

oversight structure should report annually to the above parties, as well to the Ministers of any funding departments.

5.3 Awareness, Monitoring and Evaluation

As stated in the section above on Legal Reform the formation of an Official Working Group focused on concrete actions that require full and broad public consultation will, in and of itself, be a vehicle for raising awareness and building public confidence in the measures taken.

Recommendation 3: The Official Working Group evolves into a Monitoring and Evaluation Committee (with an official status) once its work on legal and institutional reform is complete.

I. Rationale for a Monitoring and Evaluation Committee and Recommended Tasks:

Monitoring and evaluation of the law, its implementation, as well as the institutional mechanisms for receiving and handling reports falls most easily within the remit of the Government and the relevant Ministries who can access or demand the relevant information. However, the work of the Official Working Group lends itself to evolving into a smaller representative Committee that could meet regularly, perhaps every two years, to review various key aspects of the current framework including the information provided to it by the various institutions responsible for the different aspects of the law and to commission research into areas where more information is needed. Such a Monitoring and Evaluation Committee could make recommendations to Parliament on any legal reforms needed to improve the system. Such a Committee would also provide continuity to the work already done and could also be responsible for periodic Government campaigns - perhaps by sector - on promoting citizen engagement and institutional accountability.

II. Composition of Official Working Group / Committee (Monitoring and Evaluation)

While the composition of the Official Working Group / Committee may need to be reviewed in light of an ongoing remit to monitor and evaluate the legal and institutional framework for whistleblowing - a broad range that includes key stakeholders such as specialised civil society representatives, academics, jurists, private sector employers as well as unions remains important. It is recommended that the starting point is the current Working Group as set out in Recommendation 1.

6 CONCLUSION

In its Government Anti-Corruption Strategy for the years 2015 to 2017 and The Anti-Corruption Action Plan for 2015[48], the Czech Government highlights the legal protection of whistleblowers as one of its four priorities of the fight against corruption, thus established the Working Group for Whistleblowing[49] under the auspices of the President of the Government's Anti-Corruption Committee (please see section 4.2 above) .

Provisions for whistleblower protection – i.e. government regulations on whistleblower protection - are currently being prepared by the Ministry of the Interior with respect to the Act on the Service of Public Servants and while important work; this regulation will not cover those working in the semi-public or private sectors. This will come into force on the 1st July 2015. As whistleblower protection is one of the Government priorities, it would seem a very opportune time to ensure that the legal framework is as comprehensive as possible and that there is a clear plan as to how those working in all sectors can be protected in the Czech Republic. There are however, other important elements which make whistleblowing effective and will encourage Czech citizens to engage more proactively in democratic life of the nation. This includes providing access to independent and confidential advice and building on the momentum that already exists to combat corruption and protect the public interest.

The recommendations set out in this Report are designed to support the Czech Government in its efforts to protect whistleblowers as a democratic accountability mechanism and to enhance its commendable efforts to prevent and detect corruption. It has already laid a strong foundation on which to build an effective legal, normative and institutional framework to protect public interest whistleblowers - as recommended by the Council of Europe - and lead the way in Europe.

[48] *Corruption Action Plan 2015-2017*, available at: http://www.korupce.cz/

[49] For more detailed information click here

7 APPENDIX 1: EVALUATION CRITERIA BASED ON THE COUNCIL OF EUROPE PRINCIPLES[50]

Number	Council of Europe Principles - short description
Definitions	Definition of 'whistleblower'
	Definition of 'public interest report or disclosure'
	Definition of 'reporting'
	Definition of 'disclosure'
1	National framework should establish rules to protect rights and interest of whistleblowers
2	Scope of 'public interest'
3	Wide understanding of working relationships
4	Covers individuals whose work-based relationship has ended as well as those in pre-contractual negotiation stage
5	Rules applying to information relating to national security in keeping with European Court of Human Rights jurisprudence
6	Without prejudice to rules for the protection of legal and other professional privilege
7	Comprehensive and coherent approach to facilitating whistleblowing
8	Restrictions and exceptions should be no more than necessary
9	Ensure effective mechanisms for acting on public interest reports and disclosures
10	Protection and remedies under rules of general law for those prejudiced by whistleblowing are retained
11	Employers cannot call on legal or contractual obligations to prevent or penalise someone from making a public interest disclosure
12	Measures foster an environment that encourages disclosure in an open manner
13	Clear channels for reporting are in place
14	Tiers for reporting include wider public accountability, such as media
15	Encouragement for employers to put in place internal procedures
16	Workers to be consulted on internal procedures
17	Internal reporting and disclosures to regulatory bodies to be encouraged as general rule
18	Reporting persons entitled to confidentiality
19	Reports should be promptly investigated
20	Reporting persons should be informed of action taken
21	Protection should be against retaliation of any form

[50] *Expert opinion on the Serbian draft law on protection of whistleblowers*, available at: www.coe.int/pacs

22	Protection retained even where reporting person reasonably but mistakenly believed that a specific malpractice was occurring.
23	Entitlement to raise the fact that disclosure was made in accordance with national framework
24	By-passing internal arrangements may be taken into consideration when deciding on remedies
25	Burden of proof in claims for victimisation or reprisal on employer
26	Interim relief should be available
27	National framework should be promoted widely
28	Confidential advice should be available (preferably free of charge)
29	Periodic assessments of the effectiveness of the national framework