Dentons Newsletter

Update on Whistleblowing – What new obligations will be imposed on public organizations and companies and from which date?

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- **The Czech Republic has not adopted yet a law implementing the European Whistleblowing Directive. However, the Directive imposes new obligations on commercial corporations and public entities, such as the obligation to establish certain channels for whistleblowing and the obligation to ensure sufficient protection for whistleblowers.**
- **Since it has not yet been implemented in the Czech legal system, the European Whistleblowing Directive became directly effective for public entities from December 18, 2021.**
- **While the draft Whistleblower Protection Act was adopted last year, it has not yet been approved and it is possible that its wording will be amended, including the deadlines set for compliance with the following obligations: to protect whistleblowers, to prevent retaliation, to designate a competent person and to establish an internal whistleblowing system.**
- **The draft Whistleblower Protection Act also regulates the sanctions that may be imposed for breaching the abovementioned obligations. For example, if a company is found guilty of retaliation (or of failing to prevent retaliation in connection with a notification), it can be fined up to CZK 1 million or 5 percent of its net turnover for the last completed accounting period.**
- **It is important to take into account that group notification systems (existing within a group of companies) will no longer suffice.**

Introduction

The legal regulation of whistleblowing - from the English idiom “to blow the whistle on” (i.e. to sound an alarm) - in the Czech Republic is currently very marginal, even indirect[1]. The concept is perceived by the public as an obligation to report or warn about violations of legal norms or principles or to report certain illegal, unethical or even prohibited conduct in the workplace. In practice, there tends to be a rather negative attitude towards those who make such a report in the public interest. Moreover, the arrangements in place under current legislation do not offer whistleblowers sufficiently credible, confidential and accessible channels through which they can make a report to the employer or to an external authority, nor do they provide for the specialized advisory or legal support that whistleblowers often need before making a report.

Obligation to protect whistleblowers

The draft Whistleblower Protection Act (the Act) approved by the government of the Czech Republic on February 1, 2021 sets out as a company’s first obligation to provide persons in employment relationships, as well as other similar relationships (including, but not limited to, persons in statutory, management or supervisory bodies of companies, persons cooperating on the basis of supply or service contracts, self-employed persons, as well as trainees, state employees and volunteers), with appropriate protection of their rights, if those rights are violated - by the company or by another person - in connection with

[1] This includes, for example, the protection of whistleblowers from among civil servants, which has already been established under Government Regulation No.145/2015 Coll., on measures related to reporting suspected offences in the civil service. Regarding the private sector, the Czech Labor Code generally provides for the obligation of employees to prevent and avoid any harm to the employer, other employees or third parties; if this risk occurs, employees are obliged to inform their superiors. Furthermore, the Czech Criminal Code lists the offences for which there is an obligation to report, where failure to report such offences leads to criminal prosecution.

a whistleblower notification. The Act defines a whistleblower notification as the notification of an unlawful act that has the characteristics of a criminal offence or a misdemeanor or that violates the law or the relevant regulations of the European Union, which the whistleblower has become aware of in connection with work or other similar activity carried out for the company. In contrast to the European Whistleblowing Directive[2], the Act contains a broader list of areas in connection with which the whistleblower became aware of infringement, e.g., a notification in connection with the administration of a trust.

This obligation to protect the rights of whistleblowers will certainly help to strengthen their procedural position in court proceedings. As a result, in the event of litigation, the whistleblower will only be required to prove that he or she has been subjected to different treatment than another person in a comparable situation and to claim that this was due to making the notification. The company will then be required to subsequently prove that the different treatment was objectively justified by another legitimate, i.e. materially relevant, aim and that it constituted proportionate and necessary means to that legitimate aim.

On the other hand, it should be noted that the obligation to notify does not apply to the attorneys-at-law, who remain subject to the protection of legal professional privilege and the duty of confidentiality.

Obligation to prevent retaliation

The Act defines "retaliation" as an act in connection to the whistleblower's work or other similar activity that was triggered by the notification and that could cause harm to the whistleblower. Specifically, retaliation includes, for example, termination of employment, non-renewal of a fixed-term employment relationship, exemption from civil service, out-of-service assignment or termination of a civil-service relationship, termination of a legal relationship based on an agreement on working activity or work performance agreement, discrimination, reduction of an employee's salary or failure to allow professional development.

Companies are thus obliged under the Act to prevent any retaliation in connection with the notification, not only in relation to the whistleblower, but also in relation to a number of other persons, such as a person close to the whistleblower or a colleague who has provided assistance to the whistleblower. On the other hand, even this obligation has its limits, as protection from retaliation cannot be claimed by a person who is found to have knowingly made a false notification.

Obligation to establish an internal notification system

The Act further defines who is considered to be the obliged entity, requiring it to establish an internal notification system, i.e. an internal system that makes it possible for whistleblowers to file notifications. However, such obliged entity companies will be entitled to entrust a third party, such as specialist legal advisors, with the management of the internal notification system. The law also envisages that some obliged entities will be able to share their internal notification system (e.g. employers with an average of no more than 249 employees).

An obliged entity is, among other things, an employer that employed on average in the previous calendar quarter at least 25 employees, as well as all public contracting authorities under the law regulating public procurement, with the exception of municipalities with fewer than 5,000 inhabitants (this does not apply to municipalities with extended competence) or public authorities exercising competence in the administration of corporate income tax or of levies for breaches of budgetary discipline. Last but not least, the obliged entities are also employers carrying out activities in the fields of civil aviation, maritime transport, oil and gas, consumer credit, capital market business, activities of investment companies or investment funds and insurance or reinsurance.

Group notification systems will not suffice

The European Commission has commented on the obligation for companies to introduce reporting systems to the effect that centralized, "group reporting systems" within a business group are not sufficient. Many multinational companies have centralized reporting systems already in place and have reckoned that they will not be required to introduce new systems as a result. However, the European Commission has clearly rejected this in its interpretation, stating that the Directive implies that any private entity with more than 50 employees is obliged to implement an internal reporting system, regardless of whether or not it is part of a corporate group.

Centralized systems can of course be set up or used by corporate groups, but it is no longer sufficient for compliance with this obligation; therefore, each individual company must also set up its own reporting system. According to the European Commission, this should lead to more efficient reporting systems.

Sharing of resources within a group is allowed if the subsidiaries have no more than 249 employees. In such case, resources may be shared for the parent company's investigation, provided that the rule giving the whistleblower the possibility to also file a notification at the level of the subsidiary is respected. Furthermore, the whistleblower must be informed of the person or persons who will investigate the case with the parent company, as well as the ability to refuse the parent company's investigation and request that the

2 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law

notification be investigated in the subsidiary's reporting system (and it is always the subsidiary that is responsible for maintaining confidentiality of the notification as well as for providing feedback to the whistleblower and taking corrective action).

If a company has more than 249 employees, it cannot share resources at all and must have independent reporting systems in place. A centralized system in place at the parent-company level can be used to deal with notifications relating to, for example, structural issues within the group, where a higher-level solution appears to be most effective. In such case, the whistleblower should be informed and asked to agree to have the matter being dealt with within the group by the entity most competent to deal with the obligation.

Obligation to identify a "competent person"

Another obligation will be for companies to designate a natural person who is of good character, legal age and fully competent to act as the company's "competent person" and who has certain specific obligations related to notifications. Specifically, the competent person is authorized to receive and assess the reasonableness of the notification submitted through the internal notification system. Furthermore, it is envisaged that the competent person will be directly responsible to the company for proposing measures to remedy or prevent the unlawful situation following a notification. This person is bound by the obligation of confidentiality and required to act impartially in carrying out this activity. The competent person is also obliged to keep an electronic record of data related to the notifications received and to keep the notification submitted through the internal notification system for five years from the date of its receipt. Last but not least, the competent person must be trained in the handling of personal and other sensitive data in order to avoid compromising the privacy and personal data protection of whistleblowers and other persons mentioned in the notification.

How will notification through the internal notification system work?

The Act sets out in some detail how the notification mechanism will work. Under the Act, the whistleblower is entitled to submit a notification through the internal notification system, generally in writing or orally. However, the possibility to submit notifications in person is not excluded, in which case the competent person will be obliged to accept the notification within a reasonable period of time, but no later than 30 days from the whistleblower's request. The competent person must then assess the validity of the notification and inform the whistleblower in writing of the results of that assessment within 30 days of receipt of the notification. In certain cases, this period may be extended by up to 30 days, but not more than twice.

If the notification is assessed as substantiated, the competent person of the company must propose the company the measures to prevent or remedy the infringement. Should the company fail to adopt the measure proposed by the competent person, the company will be obliged to establish another appropriate measure to prevent or remedy the infringement. The company shall promptly inform the competent person of the measure taken, who will then inform the whistleblower in writing without undue delay. In the event that the notification is found to be baseless, the competent person shall, without undue delay, inform the whistleblower in writing that, on the basis of the facts set out in the notification and all the circumstances known, the company does not suspect that an infringement has been committed or that the notification is based on false information, and must further advise the whistleblower of its right to lodge a notification with a public authority.

Are there other ways to make notifications?

Yes, the law leaves the possibility to use existing mechanisms, i.e. the possibility to file a criminal complaint and an offence report with the competent authorities. In addition, the whistleblower is entitled to go outside the company's internal notification system and to make a notification directly to the Ministry of Justice, which will then itself forward the notification to the competent authorities if it suspects an offence has been committed.

What will be the penalties for breach of obligations under the Act?

With regard to supervising obliged entities' compliance with the obligations, the Act distinguishes between two types of obliged entities - those that are employers and those that are not. Offences of entities that are employers will be dealt with by the regional labor inspectorate or the State Labor Inspection Office, while entities that are not employers will be dealt with by the Ministry of Justice. If the respective inspection body finds a violation of an obligation, it shall impose a remedial measure on the obliged entity to eliminate the illegal condition and set a reasonable time limit or other necessary conditions to ensure compliance.

The Act introduces two new offences in relation to the notification. Retaliation (or failure to prevent retaliation in connection with a notification) can result in a company being fined up to CZK 1 million, or 5 percent of the net turnover achieved in the last completed accounting period. Secondly, individuals knowingly making a false notification can be fined for this offence by up to CZK 50,000.

The Czech Criminal Code also provides protection of the subject against whom the notification is directed. It already defines the crimes of defamation (Section 184)

and false accusation (Section 345). In the event that the false notification causes serious damage to the rights of person against whom the notification is directed, the offence of criminal damage to the rights of others under Section 181 of the Criminal Code can also be considered. Alternatively, an action for protection of personality can be filed against such interference.

What are the deadlines for meeting the above obligations?

The law was expected to come into force on December 17, 2021, but as it has still not been adopted, the date of its effectiveness is currently uncertain.

The Act sets March 31, 2022 as the date for implementation of the internal reporting system. It can therefore be assumed that private entities (not performing public administration) will not be obliged to implement the internal reporting system before that date.

Direct effect on public bodies

As we have already indicated in the introduction, all state authorities, municipalities, companies established by the state and local self-government units, as well as companies in which the state exercises control (public entities) must comply with the obligations imposed directly by the Directive as of December 18, 2021. These provisions are formulated with sufficient specificity so that they can be applied even without an implementing law.

According to the Methodology of the Ministry of Justice on direct applicability of the Directive[3], the following obligations are involved: (i) to establish internal notification systems and designate the competent person; (ii) to make information on the method of notification publicly available and identify the competent person, with his/her contact details, in a manner that allows remote access; (iii) to allow the whistleblower to submit the notification in writing or orally; (iv) to maintain confidentiality (anonymity) of the whistleblower throughout the notification process; (v) to ensure that only the competent person has access to the submitted notification; (vi) to ensure that a proper assessment of validity of the notification is made by the competent person; (vii) to notify the whistleblower of receipt of the notification within seven days of its submission and of the results of the assessment of the notification within three months from acknowledgement of receipt of the notification; and last but not least (viii) to take appropriate measures to remedy or prevent the unlawful situation following the submission of the notification.

Public entities must also comply with the prohibition on retaliation. Compliance with the provisions of the Directive that set out these obligations will be enforceable directly by an individual against the state in the same way as if Czech legislation had been breached.

Private law entities, on the other hand, will only be subject to these obligations when the Act comes into force.

Exception for municipalities of up to 10,000 inhabitants?

However, it should be noted that according to the Methodology, the Directive does not directly apply to municipalities with a population below 10,000. However, although the Directive stipulates that individual member states are entitled to exempt smaller municipalities from the obligations imposed by the Directive in order to protect whistleblowers, the member states may only do so by law (and therefore not by the Methodology alone).

Therefore, even these smaller municipalities should follow the Directive after the transposition period has expired, until such time the law exempting them from the obligations comes into force. We would like to add that the Ministry of Justice has forwarded the Methodology to the EU authorities in order to assess its compliance with the Directive. It is therefore possible that the above interpretation will soon be confirmed by the European Union.

Conclusion

At this time, it is not known whether the Act will be adopted in the form of the draft Act as described above, or even whether its adoption will actually occur.

However, even if no implementing law is adopted by the deadline, public entities are clearly obliged to comply with the Directive as of December 18, 2021.

Although both the Act and the Directive introduce a number of new obligations for companies, we believe that if the above procedures are eventually properly implemented and the obligations are met, companies will be able to maximally reduce the risk of whistleblowers contacting public authorities directly or even publicizing their notification, which could result in significant harm to companies. Ultimately, therefore, it could also prevent infringements in general.

We will continue to closely monitor the legislative process of the Act and will keep you informed as soon as we have any further information or practical tips.

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This newsletter is an updated version of last year's newsletter. We have highlighted the updated information in italics for easier comparison.

3 Methodology on the direct applicability of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of whistleblowers of November 4, 2021 pp. 9-10.

If you have any questions, please do not hesitate to contact us. Anytime.

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