CORRUPTION OFFENCES IN THE HUNGARIAN CRIMINAL LAW, AND AN ANTI-CORRUPTION TOOL: WHISTLEBLOWING

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Abstrakt

Korupčné priestupky v maďarskom trestnom práve sú upravené v 27. kapitole Trestného zákona z roku 2012. Nový trestný zákon zjednodušil štruktúru trestných činov, a preto upravuje zločiny proti čistote verejného života a medzinárodného verejného života v tej istej kapitole – pretože trestný čin a sankcie sú rovnaké. Oznamovanie ako moderná forma činnosti v oblasti dodržiavania súladu a základ pre interné vyšetrovanie môže byť relevantným nástrojom boja proti korupčným trestným činom, pretože je už zrejmé, že zaobchádzanie s takýmito aktivitami v rámci tradičného vnútroštátneho zločineckého rámca (vyšetrovacie orgány, trestné stíhanie, trestný súd) sa stáva čoraz menej upokojujúcim. Informátor môže byť definovaný ako organizačný alebo inštitucionálny „zasvätený", ktorý odhaľuje priestupky v rámci alebo touto organizáciou, alebo inštitúciou niekomu inému, s úmyslom alebo účinkom, že by sa potom mali podniknúť kroky na ich riešenie. Táto štúdia ponúka stručný prehľad korupčných trestných činov a oznamovania z pohľadu príslušných maďarských právnych predpisov s niektorými návrhmi k ďalšiemu výskumu.

Kľúčové slová: úplatkárstvo, dodržiavanie, korupcia, *whistleblowing*

Abstract

Corruption Offences in the Hungarian Criminal Law are regulated in the 27th Chapter of the Criminal Code from 2012. The new Criminal Code simplified the structure of the criminal offences, so that it regulates crimes against the purity of public life and international public life in the same chapter, since the criminal act and sanctions are the same regarding these crimes. Whistleblowing as a modern form of compliance activites and a basis for internal investigations can be a relevant tool for combatting corporate wrongdoings (such as fraud or corruption offences), because it is already evident that the handling of such activities within the traditional national criminal framework (investigative

authority, prosecution, criminal court) is becoming a less and less reassuring prospect. Whistleblower can be described as an organizational or institutional 'insider' who reveals wrongdoing within or by that organization or institution, to someone else, with the intention or effect that action should then be taken to address it. Accordingly this study offers a brief overview of corruption offences and whistleblowing particularly under the relevant Hungarian legislation with some proposals for further research.

Keywords: bribery, compliance, corruption, whistleblowing

Corruption Offences in the Hungarian Criminal Law

The expression 'corruption' came from the latin 'corrumpo'. It is a term usually used by the criminology, but ordinary language too. Since the recent Criminal Code is in force in Hungary, we also use this expression in the substanstive criminal law, because the name of the Chapter including bribery and other akin crimes is now called 'Corruption Offences'. In most common sense we can define corruption as an abuse of entrusted power for private gain. Another short definition says, that corruption is: Wrongdoing on the part of an authority or powerful party through means that are illegitimate, immoral, or incompatible with ethical standards. It's also an interdisciplinary issue, because it can be observed for instance by criminology, criminal statistics or – and that's why I'm here today – in the point of view of substantive criminal law.[1]

In Hungary, in the last twenty years a considerable number of international instruments were adopted to oblige states to criminalize certain forms of corruptive behaviour. The corruption offences in the recent Hungarian Criminal Code are regulated in the 27th Chapter of the Code. We know nine corruption offences:

a) bribery (Article 290),
b) accepting bribery (Article 291),
c) bribery of public officials (Article 293),
d) accepting bribery as public official (Article 294),
e) bribery in court or administrative proceedings (Article 295),

[1] See KEREZSI, Klára – INZELT, Éva – LÉVAY, Miklós. Korrupciós bűncselekmények a büntető igazságszolgáltatás tükrében. Milyen cselekményeket rejtenek a jogerősen elítéltek aktái? In VÓKÓ, György (editor). *Kriminológiai Tanulmányok* 51. Budapest : Országos Kriminológiai Intézet, 2014, p. 26.

f) accepting bribery in court or administrative proceedings (Article 296),
g) buying of influence (Article 298),
h) influence peddling (Article 299),
i) failure to report corruption (Article 299/A).

Although we have to mention, that the last one, 'failure to report corruption' is not an independent, but an accessorial kind of offence. It's a pity, but we don't have enough place to analyse all these crimes in details, that's why I decided to introduce only the most common features of Corruption Offences in Hungary.[2]

First of all we have to mention, that the regulation is conform with the European and international standards.[3] All required forms of the passive corruption in economy and in public officials are punishable. The new Criminal Code simplified the structure of the criminal offences, so that it regulates crimes against the purity of public life and international public life in the same chapter, since the criminal act and sanctions are the same regarding these crimes. The legally protected object of these crimes is the purity of public life (and international public life) and the purity of economic and social relations.[4] The object of the committed crime is the so-called unlawful advantage, which can be financial, personal or even moral. All corruption offences have an „active" and a „passive" side. If we would like to compose it simply: active is who pays and passive is who's paid, although it does not mean, that the „passive" side cannot request the unlawful advantage at the first place. This kind of regulation has a serious dogmatical relevance: both the active and the passive sides are direct perpetrators, thus their criminal liablity is independent of each other.

[2] For an overview on the Hungarian regulation see HOLLÁN, Miklós. *Korrupciós bűncselekmények az új büntetőkódexben.* Budapest : HVG-ORAC, 2014.

[3] For instance: Protocol to the Convention on the Protection of the European Communities' financial interests (27 September 1996); Criminal Law Convention on Corruption (adopted on 27 November 1999 in the framework of Council of Europe); Resolution (97) 24 of the Committee of Members of the Council of Europe: Twenty Guiding Principles for the Fight against Corruption; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; The Reports on Group of States against Corruption (GRECO – 1999); Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 6 June 2011 – Fighting corruption in the EU [COM (2011) 308].

[4] According to the Explanatory Memorandum of the recent Criminal Code.

All the corruption offences are so-called immaterial criminal offences, which means that they are completed in that case too, if the perpetrator doesn't give, only promises unlawful adventure. That is why an attempt at corruption crimes is almost impossible. The corruption offences are intentionally committed criminal offences, so as a main rule, they cannot be committed by negligence. Although we have to mention, that there in an exception: according to the Article 293, paragraph 5, for a criminal offence, imprisonment of up to two years shall be punishable by the head of an economic entity, an inspector or an authorized person performing an activity for the enterprise or for an enterprise, if the offence specified in paragraph 4 could not have been committed without his/her negligence.

In general, the Hungarian Criminal Code obliges judges to impose rather severe sanctions, especially for the „passive" side of corruption: In most severe cases – if there is a concrete misconduct or breach of obligation related to the act – the punishment can add up to ten years of imprisonment. Confiscation as a preventive measure shall be imposed when the bribed person gets the advantage during a corruption crime from the active briber.[5]

According to the criminal statistics, 1,105 cases in 2013, 3,268 cases in 2014, 761 cases in 2015 and finally 984 cases in 2016 has became known by the police.[6] In 2014, as you see, the number of corruption offences was extremely high, but only one singular crime series (commited by a criminal organization) caused the increase, in 2015 the number decreased again.

Now I would like to introduce some criminological aspects of corruption in Hungary: a) First and foremost there is a very high latency, for the reason probably, that these crimes are „good for both parties". b) Criminal law only can deal with petty corrupction, e.g. if a speedster gives 6,000 HUF – about 20 EUR – to the policeman to let him go. c) Unlawful advantage mostly means cash in Hungary.[7] d) The most common corruption offence is usually bribery in public officials, and most of the registered corruption cases come from the public sphere. The reason for that situation is that the Act XXXIV of 1994 on the Police regulates the so-called 'reliability test' wherein policemen are tested if

5 BKv 78. (Opinion of the Penal Board of Supreme Court).

6 Hungarian Prosecutor General's Reports to Parliament, 2016. Available at: http://ugyeszseg.hu/pdf/ogy_besz/ogy_beszamolo_2016_eng.pdf

7 KEREZSI, Klára – INZELT, Éva – LÉVAY, Miklós, ref. 1, p. 47.

they accept the offered unlawful advantage or not. e) Encouraging whistleblowers can be a possible solution combating corruption offences.

Whistleblowing as an anti-corruption tool

Corruption offences and many other kind of offences, for example: fraud are often committed in connection with a company or public institution. In this case we can call them 'corporate wrongdoings'. We also have to mention, that in these kind of cases criminal proceedings is very rare. This does not mean that such forms of conduct occur only sporadically. However, investigating and proving these crimes is unusually difficult, and, as such, latency in this area is especially high.[8] It is already evident that the handling of such activities within the traditional national criminal framework (investigative authority, prosecution, criminal court) is becoming a less and less reassuring prospect. To prevent, uncover, and handle such deeds, corporate compliance activities offer an effective solution in the most general sense. A very often cited subcategory of compliance known as whistleblowing, or in other words, 'public interest discloser'.

The phenomenon of whistleblowing cannot be reduced to a single and exact concept. Instead, it is only possible to grasp some of its specific characteristics.[9] In 2014, a cross-continental group of researchers released the International Handbook on Whistleblowing Research. It defines a whistleblower as a member of an institution or company who engages in the "disclosure of illegal, immoral, or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action".[10] However, this general definition, according to many, could require further categorization.

For instance, Daniel Westman delineated three subcategories: active, passive, and embryonic whistleblowing. Active whistleblowing refers to individuals who make an actual disclosure, while passive covers employees who refuse to carry out their employer's orders when they believe these to be illegal. Embryonic whistleblowing can be both active and passive, though the individual is removed from his or her position prior to disclosure due to a lack of trust.[11]

8 BROWN, A. J. et al. (editors). *International Handbook on Whistleblowing Research.* Cheltenham : Edward Elgar Publishing, 2014, p. 33.

9 SCHIRMER, Günter – COLIVER, Sandra. Resolution 2060 on Improving the Protection of Whistle-blowers. In *International Legal Materials*, 2015, vol. 54, no. 6, p. 1131.

10 BROWN, A.J., ref. 8, p. 33.

11 WESTMAN, Daniel P. *Whistleblowing: The Law of Retaliatory Discharge* Washington DC : The Bureau of National Affairs, 1991, p. 19-20.

Robert Vaughn distinguishes between legal and illegal, or in other words, direct and indirect whistleblowing.[12] The basis of this differentiation is whether the addressee of the disclosure has a right to initiate proceedings or sanction. An example of a situation where this is not the case occurs when whistleblowing is conducted through the media.[13]

Amanda Leiter divides whistleblowing into hard and soft variants. Under the second category she includes employee declarations which do not conflict with any company rules, legal or moral, though, according to the discloser's position, they refer to arbitrary or reckless activities.[14]

Finally, the most commonly used categorization fits whistleblowing into internal and external forms. The former contains the case of when the disclosure takes place within one of the company's internal forums. The external whistleblower, however, divulges to an entity independent from the company. We can also speak of a mixed whistleblowing system if the announcer can turn to both internal and external forums.[15]

The cradle of (modern) whistleblowing is undoubtedly the United States. Not only is it true that America has the most extensive body of regulation relating to the field as well as the most comprehensive academic coverage,[16] but it was here that whistleblowing went through its greatest transformations, often as a result of historical circumstances. Initially, the whistleblower was viewed as a "spy" or "informer," and his or her disclosure was more likely to be considered treacherous than benevolent.[17] With the passage of time, the term turned increasingly neutral, while the literature started to depict the whistleblower as a simple "informant."[18] Lately, in no small part thanks to the corporate scandals

12 VAUGHN, Robert G. *The Successes and Failures of Whistleblower Laws* Cheltenham : Elgar Publishing, 2012, p. 11.

13 FISHER, James et al. Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries. In *Dickinson Journal of International Law*, 2000, vol. 19, no. 3, p. 128.

14 LEITER, Amanda C. Soft Whistleblowing. In *Georgia Law Review*, 2014, vol. 48, no. 2, p. 436.

15 ALDER, James N. – DANIELS, Mark. Managing the Whistleblowing Employee. In *The Labour Lawyer*, 1992, vol. 8, no. 1, p. 27., KOHN, Stephen M. *Concepts and Procedures in Whistleblower Law*. Wesport : Quorum Books, 2001, p. 23.

16 Beyond a legal analysis, the issue is also examined from an ethical perspective by RICH, Michael L. Lessons of Disloyality in the World of Criminal Informants. In *American Criminal Law Review*, 2012, vol. 49, no. 3, pp. 1498-1507.

17 LOBEL, Orly. Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems. In *South Texas Law Review*, 2012, vol. 54, no. 1, p. 40.

18 PAPANDREA, Mary-Rose. Leaker Traitor Whistleblower Spy: National Security Leaks and the

effected by such disclosures, the whistleblower grew into an object of public admiration. As Yale professor Jonathan Macey mentions in one of his writings, TIME Magazine, referring to those who provided effective aid to the authorities in locating certain terrorists after the 9/11 attacks, declared 2002 the Year of the Whistleblower.[19]

The construction of a rather modern federal whistleblowing regime was initiated in the 1970s mainly due to the Watergate scandal, which brought down President Richard Nixon.[20] Following the Enron and Worldcom scandals, a new milestone was reached with the Sarbanes-Oxley Act of 2002 (SOX). On the theoretical level, this law viewed whistleblowing as an essential element of responsible corporate management. In the vein of this conceptualization, it intended to strengthen whistleblower protections, encouraged anonymous announcements, prescribed criminal law sanctions against those persecuting disclosers, and clarified the lawful channels for disclosure. Nonetheless, it was the target of much criticism focusing on the high financial cost of its implementation and its discriminatory character in relation to smaller and foreign companies.[21]

The Dodd-Frank Wall Street Reform and Consumer Protection Act (commonly referred to as the Dodd-Frank Act), which amended the SOX Act, was passed in 2010 following the 2007 start and 2008 global deepening of the Great Recession and the election of Barack Obama. A relevant innovation in this legislation allowed the whistleblower to receive 10 – 30 % of the fine with which the employer was struck. This created financial incentives for would-be whistleblowers. At the same time, as immediately noted by academia, this measure could have greatly increased the number of opportunistic employees who made unsupported claims.[22] Partly due to this feature, the Obama era saw a spike in whistleblowers sanctioned for unlawful disclosures.[23]

First Amendment. In *Boston University Law Review*, 2014, vol. 94, no. 2, p. 483.

19 MACEY, Jonathan. Getting the Word Out about Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading. In *Michigan Law Review*, 2007, vol. 105, no. 8, p. 1901.

20 TILY, Stephen Coleman. National Security Whistleblowing vs. Dodd-Frank Whistleblowing: Finding a Balance and a Mechanism to Encourage National Security Whistleblowers. In *Brooklyn Law Review*, 2015, vol. 80, no. 3, p. 1196.

21 DWORKIN, Terry Morehead. SOX and Whistleblowing. In *Michigan Law Review*, 2007, vol. 105, no. 8, p. 1758.

22 KING, Meghan Elizabeth. Blowing the Whistle on the Dodd-Frank Amendments: the Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes-Oxley. In *American Criminal Law Review*, 2011, vol. 48., no. 3, p. 1463.

23 ZENOR, Meghan Jason. Damming the Leaks: Balancing National Security Whistleblowing and

In 2010, two controversial events occurred relating to the broader concept of whistleblowing. The first was the case of Chelsea (formerly Bradley) Manning. Manning leaked more than 700,000 classified documents to the operators of the Wikileaks website and was consequently sentenced to 35 years of imprisonment in 2013. However, President Obama, in one of his last official acts, pardoned her in January 2017 and discounted her sentence by 29 years. The second affair was that of former NSA and CIA officer Edward Snowden, who revealed classified information on American intelligence agencies and subsequently fled to Russia.

The Council of Europe began planning whistleblowing recommendations in 2010. As a part of this effort, a commission explored the subject, chiefly by reviewing US regulations. Based on the commission's report – which gave a concrete definition of whistleblowing – the Committee of Ministers passed Recommendation CM/Rec(2014)7. This document called for the creation of relevant regulations within member states, and it noted that these regulations should give due consideration to human rights. After this, especially due to the previously-mentioned Snowden affair, events started to speed up. Two reports were completed in January and May 2015, respectively, to facilitate safeguards for whistleblowers. These recommended setting up whistleblowing regimes in both the public and private sectors, the establishment of independent authorities to monitor these regimes, and taking steps to ensure the protection of whistleblowers who are exposed to domestic persecution.[24]

Examining the relevant Hungarian rules, it becomes evident that its roots reach back to the middle of the socialist period – to the time of the communist era. Then, after a brief legislative detour, the legislative initiatives of the most recent period opened a fundamentally new chapter in the story of reporting abuses.

The first appearance of these was a legislation in effect from 1977 until Hungary's 2004 EU accession: Act I of 1977 on Public Interest Disclosures, Recommendations, and Complaints. It first of all defined the public interest disclosure and it also must be highlighted that this law already emphasized the protection of the discloser, and, as such, allowed anonymous reports. If, however, it became clear that the discloser acted in bad faith, his or her identity had to be revealed.

the Public Interest. In *Lincoln Memorial University Law Review*, 2015, vol. 3, no. 3, pp. 89-90.

[24] SCHIRMER, Günter – COLIVER, Sandra, ref. 9, p. 1131.

The next stop was Act CLXIII of 2009 on the Protection of Fair Procedure and Related Amendments. This was not at all akin to the previous regulation, but, as the relevant parliamentary memorandum states, it utilized certain solutions from the US. It mentioned for instance expressis verbis the whistleblowing phenomenon. The law prescribed fine for offenders. There was also sanction for a person making an unfounded claim and the law also intended to establish a Public Procurement and Advocacy Authority,[25] but after the regime changed in 2010 finally it never materialized.

The current legal environment was created by Act CLXV of 2013 on Complaints and Public Interest Disclosures („the complaint law"), which came into force on 1 January 2014. This law can be described as one enabling disclosures in both the state and private sectors.

According to the definition in § 1(3), a disclosure „calls attention to a circumstance the remedying or discontinuation of which is in the interest of the community or the whole society. A public interest disclosure may also contain a proposal." The public interest disclosure must be evaluated within thirty days. This code introduced the institution of discloser protection lawyer. The goal of this legal institution is for „the principal to engage the discloser protection lawyer within a tripartite legal relationship to receive in its name disclosures relating to the principal either from its employees or external partners".[26] A similarly novel solution is the creation of whistleblowing systems. which is briefly an anonymous reporting system within the company for the employees to report corporate wrongdoings. If there is a suspicion of a criminal offence based on the employees report, a so-called internal investigation can be made. If the internal investigation conducted as a result of whistleblowing yields suspicions of a crime, the question arises whether the company has a duty to make a criminal complaint. The complaint law states the criminal complaint in these cases is mandatory for the company.

Conclusion and Recommandations

Finally, these are my recommandations for the future's legislation and practice. My position is that the proposition, which states that at least some companies must be legally required to set up and run whistleblowing systems, needs

[25] According to the preamble of the Act to increase efficiency in combating corruption.

[26] According to the Explanatory Memorandum of the Act.

to be considered and debated carefully. It is possible that a threshold could be established based on revenue or the number of employees, and the establishment of a system could be mandated once this threshold is reached.

It is also worth considering making certain benefits conditional on the establishment of control systems, such as tax breaks (e.g. on corporate and dividend tax) or more lenient legal consequences if a wrongdoing done for the company's benefit (or in its name) is uncovered.

It seems unavoidable to have to contemplate the popularization of disclosure and best practices from the United States or Western Europe. The best-constructed whistleblowing system will remain ineffective if it is not used by the employees.

Finally, my stance is that the key to all problems arising in connection with whistleblowing systems is the individual. Therefore, it is useful for increasing awareness and developing conscious employee behaviors to have annually recurring and mandatory training sessions, as these can provide up-to-date information on the current legal environment and continuously-changing corporate mechanisms. It could be a powerful weapon for combatting corruption offences.

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