

**ZEC 2018**

# **DEVELOPING A 'SPEAK-UP' CULTURE: HOW TO PROTECT AND ENCOURAGE WHISTLEBLOWERS?**

**ZAGREB ETHICS AND COMPLIANCE CONFERENCE 2018 - JUNE 13, 2018**

*Arnaldo Bernardi, Associate, Hughes Hubbard & Reed LLP*

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- II. The Italian 2017 Whistleblowers Protection Act
- III. Protection and Incentives Afforded by Other Jurisdictions
- IV. Enhancing Whistleblower Protection
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# I. Introduction

# Italian Anti-Corruption Legislation Applicable to Corporations

- Under Italian law, private companies are **not required** to prevent corruption
- Where certain crimes are committed in the interest of a corporation by its directors or employees, both the individuals and the **corporation may be held liable** for these crimes
  - Under **Law 231/2001**, liability can only arise from the commission of specific crimes, including corruption, crimes committed by criminal organizations, and circulating false company information
  - No liability arises when crimes are committed exclusively in the interest of natural persons or third parties
- Corporations may **avoid liability** provided that, prior to the commission of the crime, they, *inter alia*:
  - Adopted and implemented a **compliance program** (*Modello 231*); and
  - Assigned to an internal body (***Organismo di Vigilanza***) independent powers to supervise the implementation of the organizational model

# Italian Anti-Corruption Legislation Applicable to Corporations (continued)

- Under Law 231/2001, **compliance programs** must include, among other things:
  - An **assessment** on the risk of commission of the crimes enumerated in Law 231/2001;
  - **Measures** aimed at both (i) ensuring that the company's operations are carried out in compliance with all applicable laws, and (ii) detecting and resolving potential misconduct;
  - A **duty to inform** the *Organismo di Vigilanza* of any facts and situations potentially giving rise to liability; and
  - **Disciplinary sanctions** for failing to respect the measures indicated in the compliance program
- Companies may model their compliance programs according to guidelines issued by trade unions or industry associations, provided that these are approved by the Italian Ministry of Justice

# Italian Anti-Corruption Legislation Applicable to Public Entities

- Law 190/2012 (“[Anti-Corruption Law](#)”) implemented the 2003 U.N. Convention against Corruption and Articles 20-21 of the Criminal Law Convention on Corruption
- The Anti-Corruption Law requires public administrations and entities to implement [measures to prevent corruption and bribery](#), including:
  - The adoption of a three-year anti-corruption plan; and
  - The appointment of a compliance officer
- The Anti-Corruption Law also established a dedicated anti-corruption authority ([Autorità Nazionale Anticorruzione](#), “ANAC”), in charge of:
  - Adopting a national anti-corruption plan;
  - Supervising the application of anti-corruption measures by public administrations; and
  - Supervising the award and execution of public contracts

# Whistleblower Protection in Italy prior to November 2017

- The Anti-Corruption Law provides that **public sector** employees could not be dismissed, sanctioned, discriminated against, or face retaliation for reporting illegal practices to their managers, public prosecutors or the Court of Auditors
  - Moreover, public administrations must adopt specific measures to protect whistleblowers within their organization and keep their identity confidential
  - Law 114/2014 granted ANAC the power to receive whistleblower alerts
- No protection for whistleblowers in the **private sector**, except for:
  - Banks (EU Directive 2013/36);
  - Entities and individuals subject to the IV EU AML Directive (2015/849); and
  - Financial intermediaries and insurance companies (EU Directive 2016/1034)

## **II. The Italian 2017 Whistleblowers Protection Act**



# The Need for a Whistleblowers Protection Act

- The Anti-Corruption Law was deemed **inadequate** to properly protect whistleblowers
- Private sector whistleblowers received **no protection**
- Bad **public perception** of whistleblowing
  - Culturally and historically sensitive
  - Strong sense of duty to employers
  - Inconsistency of court rulings on whistleblower retaliation cases
- **Pressure** from civil society and international organizations

# Approval Process of Law 179/2017

- In January 2016, the Parliament's [Chamber of Deputies](#) adopted a draft bill to introduce whistleblower protection into Law 231/2011
  - The Parliament's second chamber failed to discuss it in a timely manner
- In July 2016, Transparency International Italia launched a public campaign ([#volidigiustizia](#)) to move the approval process forward
- In September 2017, Transparency International Italia launched a second campaign ([#fuorilavoce](#)) and met with the President of the Senate
  - The campaign raised more than [69,000 signatures](#)
- On October 18, 2017, the [Senate](#) approved the draft bill, with amendments
- Law 179/2017 was published in the Official Gazette on December 14, 2017, and entered into force on [December 29, 2017](#)

# Law 179/2017 Provisions Applicable to the Public Sector

- With regard to the **public sector**, Law 179/2017 provides that:
  - Employers cannot adopt **retaliatory measures** against employees reporting illegal practices to the internal anti-corruption officer, the ANAC or the judiciary
    - Forbidden retaliatory measures include termination, professional transfers and demotions
  - When faced with an employee's claim of retaliation, employers have the **burden of proving** that the measures taken against the whistleblower were motivated by reasons other than the whistleblowing
  - ANAC has the power to **sanction** noncompliance with the above provisions with a fine ranging from 5,000 to 30,000 Euros
    - ANAC may also sanction compliance officers that fail to follow up on the alert with a fine ranging from 10,000 to 50,000 Euros
- These protections apply not only to public entities and state-owned companies, but also to **private companies** providing goods and services to public sector or state-owned entities

# Law 179/2017 Provisions Applicable to the Private Sector

- Law 179/2017 amended Law 231/2001 to require **private companies** having adopted corporate compliance programs to include in these programs:
  - At least **two channels** for employees to internally report illegal practices without disclosing their identity;
  - A prohibition on adopting **retaliatory measures** (including termination, professional transfers and demotions) against whistleblowers;
  - When faced with an employee's claim of retaliation, employers have the **burden of proving** that the measures taken against the whistleblower were adopted for reasons other than the whistleblowing; *and*
  - **Sanctions** to both (i) discourage violations of the rules protecting whistleblowers and (ii) discipline employees making intentionally false or grossly negligent reports
- Compliance programs should specify:
  - To whom the alerts should be **addressed**; and
  - Whether **third parties** have the right to send alerts

# Limitations and Open Issues

- Unclear what companies should be deemed “companies providing goods and services to public sector or state-owned entities”
  - Public administrations will likely require private companies participating in public tenders to demonstrate that they have adopted compliance programs under Law 231/2001 and made them compliant with the Law 179/2017 requirements
- Companies are **not required** to adopt compliance programs under Law 231/2001
  - Whistleblowers reporting misconduct within companies that have not adopted such compliance programs do not benefit from any protections
- Law 179/2017 does not introduce any **incentives for whistleblowers**
  - Whistleblowers must also bear the legal fees and costs of the litigation originating from the whistleblowing
- Employees are **not obliged** to report potential misconduct

# Status of Implementation of Law 179/2017

- **ANAC** has set forth an on-line platform for reporting potential misconduct within the public sector
  - The platform is open to **both (i)** public employees, and **(ii)** employees of private companies providing goods and services to such public sector or state-owned entities
- Similar platforms have been established by:
  - The **Bank of Italy**, for employees of banks and other financial institutions; and
  - The **CONSOB** (*i.e.*, The Italian Companies and Stock Exchange Commission), for employees of the entities subject to its supervision
- **AGI**, an Italian news agency, has also established a platform for reporting organized crime-related behavior
- A **May 2018** survey by an Italian consumer protection organization indicated that most companies are still non-compliant with the requirements under Law 179/2017

# **III. Protection and Incentives Afforded by Other Jurisdictions**

# Protection and Incentives Afforded by Other Jurisdictions

- **France** (Loi Sapin II)
  - Those responsible for receiving alerts must guarantee the **confidentiality** of the whistleblower's identity and of the information received
  - Whistleblowers may not be subjected to **retaliatory measures**
  - Partial reversal of the **burden of proof**
  - No active incentives (except for cases of tax fraud)
- **United Kingdom** (1998 Public Interest Disclosure Act)
  - Those responsible for receiving alerts must guarantee the **confidentiality** of the whistleblower's identity
  - Whistleblowers may not be subjected to **retaliatory measures**
  - Employers have the **burden of proving** that they had fair grounds for taking retaliatory measures
  - No active incentives



# Protection and Incentives Afforded by Other Jurisdictions (continued)

## ■ United States

- Employees may **not be retaliated** against for exercising a right provided by one of the laws affording whistleblower protection
- Those responsible for receiving alerts must guarantee the **confidentiality** of the whistleblower's identity
- Whistleblowers can receive **financial incentives** in the form of a percentage of the amount recovered at the outset of the enforcement action that resulted from the alert
  - The percentage range varies and is established by statute
  - For SEC and FCPA disclosures, the range is **10-30%** when the monetary sanctions exceed 1 million USD
  - As of July 2017, **158 million USD** had been awarded to 46 whistleblowers who provided the SEC with useful information leading to successful enforcement actions

# **IV. Enhancing Whistleblower Protection**

# Enhancing Whistleblower Protection

- Financial incentives
  - The U.K. Financial Conduct Authority and Bank of England Prudential Regulation Authority found that financial incentives:
    - Are unlikely to increase the number or quality of the disclosures received from whistleblowers
    - Benefit only those whistleblowers whose information leads directly to successful enforcement action resulting in the imposition of fines
    - Generate significant fees for both whistleblowers and firms
    - Could undermine the introduction and maintenance by firms of effective internal whistleblowing mechanisms
  - Might affect corporate culture through excessive or frivolous denunciations of other employees to regulators

# Enhancing Whistleblower Protection (continued)

- Establish a **whistleblower protection fund**
  - Could cover the legal fees and costs of litigations arising from whistleblowing
  - Would likely need a complex and costly governance structure
- Putting the **burden of proof** on the employer if an employee claims retaliation following a whistleblower alert
- Regulators could publish **annual reports** about the disclosures they received and the actions they took in response to the reports
  - This could encourage individuals to feel comfortable reporting misconduct to the authorities

# Enhancing Whistleblower Protection (continued)

- **Companies** should adopt and implement **policies** for reporting illegal or unethical practices (regardless of whether there is a legal obligation to do so), that should:
  - Include **multiple mechanisms** for reporting violations, including
    - Hotlines
    - Dedicated email addresses
    - External reporting channels
  - Be **clear and easily accessible** to all employees and third parties
  - Explain **how** reports will be investigated
  - Identify **who** will be in charge of investigating the alerts
  - Explain the **protections** provided to whistleblowers and the further support that the company will provide

# Enhancing Whistleblower Protection (continued)

- Companies should **publicize** their commitment and provide **trainings** on their internal whistleblowing systems
  - Employees should **frequently** hear about the policy (*e.g.*, newsletters)
  - Management should often talk about its **commitment** to ethical behavior
  - Employees must understand that whistleblowing does not have to be a dramatic revelation of serious misconduct
    - Reports could concern minor cases of improper conduct or suggestions for improvement of the existing policies or procedures
- Companies should ensure the **confidentiality** of the identity of the whistleblowers and of the information received
  - Employees must feel that they can bring alerts in a safe and supportive environment
  - Consider providing an **anonymous suggestion box** and establishing in-person meetings with those authorized to receive/follow up on whistleblowing reports to reduce the ‘paper trail’

# Enhancing Whistleblower Protection (continued)

- Companies should also:
  - Dedicate **competent personnel and adequate resources** to the treatment of alerts; and
  - Establish a **secure centralized platform** to collect and store all alerts
- Companies could also establish **periodic surveys** or feedback systems, where employees are:
  - Asked about their work and their perception of how their work is going; and
  - Offered an opportunity to raise any issues
- Companies could create a system of **rewarding employees** for speaking up and reporting potential misconduct
  - Might affect corporate culture

# V. Closing Remarks



# Closing Remarks

- Whistleblowers are **key** to uncovering unlawful activities and preventing corporate misconduct
  - According to the 2017 Eurobarometer on Corruption, **81%** of the individuals experiencing or witnessing corruption indicated that they **have not reported it**
  - Only **47%** of the respondents knew **where** to report a case of corruption
- Lacking full regulatory protection for whistleblowers, companies have to **take the lead**
  - It is preferable for companies to **retain control** over and treat whistleblowing reports internally, rather than to have an external authority investigate
- Measures to incentivize whistleblowers must be **tailored** to the company's structure and operations
  - **Trainings** and awareness sessions are crucial

# Closing Remarks (continued)

- On April 23, 2018, the [EU Commission](#) proposed a [Directive](#) on whistleblowers protection (COM/2018/218)
  - The proposal covers whistleblowers reporting “[breaches of EU law](#),” including public procurement, AML, and competition rules (Article 1)
  - The proposal requires (i) public entities, as well as (ii) companies with more than 50 employees or an annual turnover of over 10 million EUR, to establish [internal whistleblower reporting mechanisms and procedures](#)
  - Whistleblowers will be protected against dismissal, demotion and other forms of retaliation
  - The proposed regulation would also require member states to establish dedicated reporting channels to [public authorities](#)
  - National authorities would be required to [inform citizens](#) and provide [trainings to public authorities](#) on how to deal with whistleblowers

**Thank you very much for your attention!**

**Questions ?**