

Developments on whistleblowers' protection in Romania:

The newly-adopted law, primary immediate reactions and practical considerations

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On 29 June, the Chamber of Deputies, as the decision-making parliamentary chamber, adopted the law on the protection of whistleblowers in Romania. In its approval process, this law, which was originally intended to transpose into national law as EU Directive 2019/1937 (also known as the "Whistleblowing Directive"), has undergone several changes over the last two years. The Chamber of Deputies is the decision-making chamber and, as a result, the adopted law has been sent to the Romanian President for promulgation. The President can also send the law back to Parliament for amendments, should he consider doing so – and requests in this respect have already been made.

In light of the latest changes introduced on 28 June 2022, there have been many reactions aimed at bringing attention to the less protective measures for persons who understand "bring to light" breaches of internal rules and regulations of a company.

1. Recently adopted law for transposing the Whistleblowing Directive and several critical reactions

As most of the EU jurisdictions, during the last week of June Romania approved a national law to implement the Whistleblowing Directive, namely last week on 29 June. The approved law has been sent to the Romanian President for promulgation and publication, so it is not yet in force.

As in other jurisdictions, in Romania too the role of the whistleblower is appreciated in a wider compliant culture. Again, as in other jurisdictions, the judicial sector (e.g. probably prosecution offices in particular) recognises such a role too, given that, for example, whistleblowers may help reveal breaches of law in the activities of companies (whether State-owned or privately owned), fraud may be pursued by authorities, who will also aim to right prejudices caused through wrongdoings, etc.. As in other jurisdictions, criminal investigation authorities "rely" on legislation that protects and encourages a person to reveal the perpetration of a crime or a breach of internal rules and regulations. If the legislation does not protect such persons or does not provide sufficient and clear "channels" for the information to be swiftly and confidentially reported, then a person might choose to not report his or her suspicions and to "turn a blind eye". Several views have drawn attention to the fact that the latest changes in the law adopted on 29 June dilute some of the Whistleblowing Directive's essential goals and so no longer offer enough protection or clear means of expressing themselves for whistleblowers.

As a result, among other reactions, the Chief Prosecutor of the European Public Prosecutor's Office, Ms. Laura Codruta Kovesi, also reacted as well at the end of the week, signalling the negative effect of some of the latest changes included in the Romanian law. For example, it was mentioned that, *"the provisions could have a demobilising effect, discouraging potential whistleblowers in Romania and negatively affecting the level of fraud"*

detection in the EU". The concerns of the Chief Prosecutor of the European Public Prosecutor's Office regarding some amendments of the whistleblowers' law are serious, adding that she is considering the possibility of requesting the European Commission to activate the mechanism that makes EU funds conditional to Romania's way of transposing the Whistleblowing Directive. Romania would not be the first country for which the European Public Prosecutor's Office has asked the Commission to activate the mechanism for making EU funds conditional. This has already happened with Slovenia or Poland.

Furthermore, locally, more than 20 NGOs have criticised the current Governing coalition of selectively transposing the Whistleblowing Directive. Civil society representatives say they will refer the matter to the local Ombudsman and also inform the relevant European bodies, arguing that the current Governing coalition *"does not want to protect whistleblowers - people who, by revealing violations of the law, contribute to preventing and fighting corruption"*. Moreover, they also claim that, *inter alia*, *"the mechanisms for protecting whistleblowers are weakened [] and Romania risks entering infringement proceedings for selective transposition of the European Directive on the matter"*. Representatives of these NGOs also mentioned that recommendations and amendments proposed by civil society on increasing the level of protection of whistleblowers, repeatedly submitted to members of the Chamber of Deputies, were not even presented or discussed in the parliamentary process last week.

2. Brief considerations on the main practical matters arising from some of the recently-approved provisions

Going forward and for advanced planning and a better understanding of the recent reactions, here we briefly summarise the main points of higher practical interest arising from the recently-adopted local legal provisions:

- The law almost eliminates the possibility of anonymous reporting, although it is clear that legal protection afforded to anonymous reports can improve the chances of reporting and discovering breaches in a timely manner. As the Whistleblowing Directive makes clear, the way in which mandatory registration of anonymous reports is regulated remains a decision for each Member State. Thus, according to the current adopted provisions, if the whistleblower's report is sent anonymously, then the receiving authority has the right to disregard such a report, without further analysing it and/or requesting further information from the sender.
- With regard to deviations from the Whistleblowing Directive, the draft local law broadens the extent of the Whistleblowing Directive with regard to reportable infringements. It is true that the Whistleblowing Directive has left the possibility for Member States to increase protection under national law, but the approach of the legislator appears somewhat broad. Thus, the extent is extended to any breach of the law, to any rules of professional conduct or ethics. This is not exactly good news for companies in certain instances, for example, it can lead to numerous reports on any subject, all of which will have to be recorded and investigated.
- Whistleblowers have the right to publicly disclose information on violations of the law **only after** three months **and only if** they have reported the situation internally in advance. Such prerequisites conditioning a report appear quite impractical.
- Whistleblower reports must be destroyed after two years.
- Companies with fewer than 50 employees in the energy, capital markets, investment funds, insurance, voluntary pensions, etc. sectors are exempted from establishing or maintaining internal reporting channels and procedures for internal reporting and subsequent action. This rather high threshold for exemptions appears to be further evidence of the dilution criticised in recent reactions.
- The relevant applicable fine was reduced by two thirds (from RON 30,000 to RON 10,000) for retaliatory measures taken against the individual whistleblower if it is ascertained that retaliatory measures were taken against the relevant person at least twice for the same report. This too may be seen as another element of lowering protection for whistleblowers.

- The register that will contain the evidence of the reports shall be kept electronically. This is a step forward as the old legislation mentioned the possibility of having this register kept in both a hard-copy written form and in an electronic form.
- The whistleblower in the public interest making a report or public disclosure of information concerning violations of law does not infringe the legal provisions or contractual terms relating to the disclosure of information and shall not be held liable for the reporting or public disclosure of such information, provided that it has made a public report or disclosure within the terms of the law and had reasonable grounds to believe that such reporting or disclosure was necessary for disclosing a violation of the law.

In view of the quite intense criticisms after the law was adopted by the Chamber of Deputies, it can be concluded that several of the concerns that were expressed appear well-founded and the arguments that the law could have been approved in a better format appear legitimate too. At the same time, with no protection provisions prior and referring to the final purpose of such provisions, namely to create the legal framework to identify and remedy internal infringements in a timely manner, the adoption of the law last week can be seen as a step forward, at least from a time perspective. Nevertheless, having in mind the several forms of criticisms expressed or of requests to the Romanian President for the law not to be promulgated, it remains to be seen whether this will be the final version to be published and brought into force, or if amendments to address some of the criticism are expected.

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