UNITED NATIONS CONVENTION AGAINST CORRUPTION

Implementation of article 33 in the Romanian legislation

1. LEGISLATION

In 2004, a specific law on whistleblower protection was passed in Romania. The Whistleblower Protection Act no. 571/2004 covers the protection of personnel who file a complaint about an infringement within public authorities, public institutions or public companies.

The scope of the act is limited to the public sector. In case of conflict with other legal provisions, the Whistleblower Protection Act has priority.

This protection is extended to both permanent and temporary staff, regardless of how they were hired or appointed, whether they are paid or not and what kind of duty they fulfil.

The Law **applies** to central and local public administration, Parliament staff, Presidential Administration staff, Government staff, autonomous administrative authorities, national companies, autonomous regies of national and local administration, state owned companies.

The Law defines the whistleblowing act as the notification made in **good faith** regarding the deed assumed to be an infringement of the law, of the professional deontology or of the principles of good administration, efficiency, effectiveness and transparency.

The Whistleblower Protection Act regulates the protection of persons who provide information and data concerning an infringement of the law or of professional or ethical standards, including corruption related crimes, such as:

- infringements of the provisions on the incompatibilities and the conflict of interests;
- the abusive use of material and human resources;
- political support in exercising the prerogatives of the office, except for the persons politically selected or appointed;
- infringements of the legal provisions regarding the public procurement and non-reimbursable financing contracts;
- infringements of the law on the access to information and decisional transparency;
- incompetence or negligence in office;
- non-objective assessments of the personnel, during the process of recruitment, selection, promotion, changing to a lower position and release from office;
- infringements of administrative procedures or establishing internal procedures without observing the law;
- issuing administrative or other types of documents serving group interests;
- the defective or fraudulent management of public and private patrimony of public authorities, public institutions and other units;
- infringements of other legal provisions imposing the observance of the principle of good administration and protecting public interest.

2. CURRENT POLICIES AND PRACTICES

Article six of the Whistleblower Protection Act provides a range of internal, external or additional disclosure channels which can be used alternatively or cumulatively.

Internally, a whistleblower can address the supervisor of the person who has violated legal provisions; the director of the public authority or institution in which the accused works, or in which the illegal practice is reported; or the disciplinary commissions or other similar organisations within the framework of the public institution in which the infringement was committed.

In addition or as an alternative to internal channels, a whistleblower may use external disclosure channels, including judicial bodies (either criminal or civil); bodies charged with ascertaining and investigating conflicts of interest or incompatibilities, and professional organisations, unions or industry organisations.

Whistleblower may also address additional disclosure channels such as parliamentary commissions, the mass media and non governmental organisations.

The Law provides **4 measures to protect the whistleblowers**:

1. The first one is to **prohibit the disciplinary/ administrative sanctioning** of the whistleblower for a notification made in good faith.

A) So, if following a notification it is ascertained that the whistleblower acted in bad faith, he/ she may be disciplinary sanctioned for that notification, as the law only protect those who act in good faith.

B) Moreover, the court may order the annulment of the disciplinary or administrative sanction applied to a whistleblower, if it was applied following a notification made in good faith.

2. The second measure is **to protect the identity data of the whistleblower**, but only for certain notifications.

The law provides two situations in which the identity of the whistleblower is protected, by hiding it:

A) The person denounced through the whistleblowing is the direct or indirect superior or that person has prerogatives to control, inspect or evaluate the whistleblower.

In this case, the law foresees that the whistleblower's identity will be mandatorily protected, by keeping it secret, and this has to be ensured by the disciplinary committee or other similar body investigating the denounced person.

B) Protecting the identity of the whistleblower who notifies a deed related to corruption offences, offences assimilated to corruption, offences connected to corruption, forgery offences and abuse in office or related to office, offences against financial interests of the European Union.

This measure is applied ex officio.

3. The third measure is to ensure an **increased publicity of the disciplinary investigation of a whistleblower**

The whistleblower may be subjected to a disciplinary or administrative sanctioning procedure for blowing the whistle.

In such a case, the law provides that, upon the request of the investigated whistleblower, the disciplinary commissions or other similar bodies within public authorities, public institutions or other units have the obligation to invite the media and a representative of the union or the professional association.

The announcement has to be made at least 3 working days prior to the meeting, subject to cancellation of the report and the disciplinary sanction imposed.

The whistleblower participates in all processes of the disciplinary commission. He or she receives assistance, has the opportunity to submit documents and other relevant proof, and may also appeal in court against the decision of the commission.

4. The forth measure is the provision, in the Law, of several **principles that govern the whistleblowers protection**

There are 8 such principles:

- the principle of legality,
- the principle of public interest supremacy,
- the principle of responsibility, according to which any person notifying violations of the law shall be obliged to support the complaint by data concerning the action committed,
- the principle of abusive non-punishment [proportionality] - In case of whistleblowing notifications, the deontological or professional norms which might prevent it shall not be enforceable;
- the principle of good administration,
- principle of good behavior,
- the principle of balance [mitigation],
- the principle of good faith.

Given the priority of the Whistleblower Protection Act over other laws, if a whistleblower has already been sanctioned through labour litigation or in a case related to the duty to report, the court may order sanctions to be annulled if they were the result of whistleblowing.

To assess this, the law provides that the court can verify whether the sanctions against the whistleblower are justified in comparison to similar cases.

The whistleblower can be compensated to a level depending on the retaliation suffered.

3. PRIVATE SECTOR

In the private sector, there are no specific regulations for whistleblowers' protection.

Several legislative measures can be used as a starting point for measures similar to the public ones, but the approach depends on company policies.

According to the study "Integrity in the business sector in Romania" made in 2011 on 631 companies from 81 various sectors, the most important integrity policy at the level of the companies is the one setting up the whistleblowers' mechanism and guaranteeing their protection.

Although the Whistleblower Protection Act is not covering the private sector, according to the same study, the Law may be used as a good example for the companies which want to develop internal integrity policies.

The study also ascertained that in the private sector, there are two opposite tendencies with regard to the implementation of mechanisms to ensure integrity:

- as regards large companies and especially multinationals, joint stock companies listed or not on the stock exchange, there is a considerable interest for the whistleblower protection mechanism in the larger context of corporate governance mechanisms,

- in exchange, medium and small companies, didn't prove a particular interest in developing internal policies regarding the whistleblowers or integrity in general.

Another conclusion of the study is that there are, however, sectors, such as the banking system, where the national regulations and recommendations at industry level imposes the economic actors the obligation to have such a whistleblowing policy, the current practice putting compliance departments in charge of implementing this policy.

4. MONITORING THE IMPLEMENTATION

The effectiveness of the Whistleblower Protection Act and policies is periodically evaluated, under the National Anticorruption Strategy covering the period 2012-2015.

Following the adoption of the Whistleblower Protection Act in 2004, all public institutions and authorities covered by it had the obligation, within 30 days of its entry into force, to amend their internal regulations in accordance with the law.

Under the National Anticorruption Strategy, each public institution and authority has the obligation to report to the Ministry of Justice, which plays the role of a Technical secretariat, on measures taken to implement various anticorruption preventive measures and evaluation indicators, the Whistleblower Protection Act being among them.

In 2013, 191 notifications under the Whistleblower Protection Act were made and 175 internal regulations were harmonised with the provisions of the law. There is a mechanism regarding the protection of the whistleblowers in more than 300 institutions.

Over 400 training sessions were organised in 2013, attended by more than 5300 persons (the majority of them being from the Ministry of Interior and Ministry of Public Finances).

45 administrative measures were adopted with a view to eliminate the causes or circumstances encouraging the breaching of rules. One ministry registered a complaint in court and another one registered a situation of reprisals at work following the notification of the whistleblower.

The courts' practice as regards the protection given to the whistleblowers is unitary.

Just to offer you a few examples of cases:

1. The Bucharest Tribunal ordered, in 2009, the reintegration of a person to the position held before being fired from a public institution, following the breach, by that entity, of the obligation to have a representative of the media when whistleblower was investigated by the disciplinary committee. Although the whistleblower expressly requested it, the institution ignored the request.

2. In another case, a person notified, in good faith, breaches of the law committed by the personnel of an office within a ministry. The whistleblower notified breaches of integrity, incompetence and negligence in office related to fraud of a contest to fill in a manager vacant position. Moreover, the whistleblowing indicated possible corruption acts, preferential or discriminating practices or treatments, abusive use of public resources etc.

The manager in question performed non-objective periodical evaluations of the whistleblower, applied successive sanctions culminating with the termination of the contract, threaten and blackmailed the whistleblower and even violated his/ her correspondence.

The court, noting that the Whistleblower Protection Act derogates from the regular law and analysing the merits of the matter, annulled all three disciplinary sanctions applied to the whistleblower and ordered the reintegration of that person to the previous position.

3. In a different case, in 2005, TI-Romania was notified by a group of persons from a specialized agency within a ministry with regard to the conduct of a deputy director-general, related to the management of the institution and the failures created.

As a result of steps taken, those persons could claim the protection offered under the Whistleblower Protection Act, and the deputy director-general was dismissed from his office by the minister.