

GANADO Advocates

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**RECENT ISSUES IN WHISTLEBLOWING WITH SPECIAL REFERENCE
TO THE BANKING SECTOR: 2013 TO 2018**

WHISTLEBLOWING LAW IN MALTA

- **The Protection of Whistleblowers Act 2013**
- **Act No VIII, Chapter 527 of the Laws of Malta**
- **In force since 15 September 2013**
- **A good law or a disappointment?**
- **Does it protect whistleblowers (wbs) or does it confuse them further?**

ACT NO VIII of 2013 – general comments

- The danger is that the law was clearly not drafted to reflect the position and the concerns of a prospective wb. A prospective wb cannot be certain and re-assured from the outset that he will receive legal protection.
- This decision may be determined by others later ... too late for him to change his mind and retract. They may decide that the matter disclosed was not serious enough or that the company involved fell outside the parameters of legal protection ... or that he should have gone to somebody else.
- Too many reasons and excuses are available to the authorities to exclude wb protection. After making his risky disclosures, somebody might decide that he is not a legally recognized whistle-blower after all. An authority may even push back a disclosure and send it elsewhere without asking for the informant's prior approval.

ACT NO VIII – general comments

- **It is incorrect that whistle-blowers invariably need to be registered with the Attorney General, although that could help**
- **One would like to assume that newspapers and opinion makers are in favour of whistle-blowers**
- **WB is a concession allowed by the State under onerous conditions; a concession with conditions and which does not apply to most small companies and to various other categories**
- **Even in whistleblowing we discover that tiresome and tricky “terms and conditions apply.”**

ACT NO VIII – general comments

- **The law gives little effective support or encouragement to whistleblowers. In places it seems to be discouraging and warning them.**
- **The law only tolerates whistleblowing and goes only a short distance to protect it.**
- **It does not actively and systematically encourage, support or facilitate it; instead it raises obstacles, warnings and conditions.**
- **No local NGO specializing in whistleblowing issues**

WHISTLEBLOWING- A COMPARATIVE STUDY

**Recent book compared position in 23 jurisdictions, including Malta
Chapter on Malta:**

“It will take a very courageous man to brave the legal niceties and pitfalls of Act No VIII of 2013. This flawed law still distrusts whistleblowers and is reluctant to extend the full protection of the law to them. Today, whistleblowing in Malta remains a dangerous, risky, unrewarded and thankless vocation.”

(Springer International 2015: Thusing' / Forst editors)

MALTA - A BIT OF HISTORY: PRE-2013

- **The Nationalist government had a pretty superficial and dim view of whistleblowing and dragged its feet.**
- **Leading spokesmen have been heard confusing it with presidential pardons, the work of journalists and with witnesses who are made to give evidence under oath in court proceedings.**
- **Also rejected the need for a whistleblowing law, because an Ombudsman and the Commission against Corruption are already in place.**

SOME HOME TRUTHS ON WHISTLEBLOWING

- **Whistleblowers remain to uncover serious crimes often because nobody else can or nobody else wants to**
- **Whistleblowing is a life-changing decision and is not and should never be taken lightly**
- **True whistleblowing is made voluntarily and not with a view to receiving a reward**
- **Whistleblowers are not there to be pitied or tolerated**
- **Whistleblowing is the indirect product of criminality, abuse and secrecy**
- **In a society which enjoys good governance, legality, transparency and accountability should not – at least theoretically – need whistleblowers**

SOME MORE HOME TRUTHS

- **Whistleblowers help fill the gap in knowledge where the ordinary law and the public agencies have not managed to reach.**
- **Whistleblowers support and supplement the work done by investigation and enforcement agencies.**
- **Whistleblowers are very different from criminals enjoying presidential pardons, witnesses in court proceedings and journalists.**
- **Whistleblowers come in even more useful when the other normal lawful mechanisms fail to perform.**
- **Pity the country that needs whistleblowers.**

SUPPORT YOUR LOCAL WHISTLEBLOWER?

- **Do local authorities and Banks support and promote whistleblowing?**
- **Do industry players offer adequate information to wbs on their websites?**
- **Nothing on FIAU website**
- **Nothing on PILATUS Bank website**
- **And the MFSA?**

MALTA'S OWN MFSA

- **MFSA - a reluctant and negative approach to whistleblowing symbolized by an unfriendly application form which prospective wbs, seen perhaps as a nuisance, are mandatorily required to fill.**
- **MFSA webpage is disappointing, scares away any prospective whistle-blower with its tone, explicit warnings, conditions, forms and requirements.**
- **Detailed information, including personal data, and loads of other information and explanations have to be disclosed by means of a mandatory on-line questionnaire.**
- **Anonymous reports are summarily discarded.**

European Central Bank :

“Whistleblowers” act in the greater good

8 September 2015

“The ECB is committed to tough but fair banking supervision. Ensuring that all supervised banks and banking supervisors are fully adhering to their obligations under EU law is an essential part of this task. However, on occasion, these obligations are not followed and, in some cases, deliberate action is taken to conceal wrongdoing. “Whistleblowers” who inform the ECB of possible malpractice serve the public interest and act in the greater good when they report their suspicions.”

BANKS AND WHISTLEBLOWING

- **Every year we face new scandals involving banks. Some of the biggest names are in the list of shame involving billions in theft and fraud, consumer losses but also in the payment of fines and compensation.**
- **Some bankers face prison terms or are already in jail.**
- **So perhaps the irony is that banks and similar institutions have helped to give rise to the whistleblowing phenomenon.**
- **This issue once again calls into question the difficult issue of transparency and the legitimate and illegitimate use of secrecy and confidentiality.**

RECENT BANKING SCANDALS 2012 – 2018

- Royal Bank of Scotland
- Barclays
- HSBC
- Lloyds Banking Group
- Standard Chartered
- Tesco Bank
- Allied Irish Banks
- Credit Suisse
- UBS
- BNP Paribas
- Bank of America
- Citigroup
- Wells Fargo
- JP Morgan
- Banco Espirito Santo (Spain)
- Commonwealth Bank (Australia)

(These banks have had to pay billions in fines and compensation)

UK: ALL-PARTY PARLIAMENTARY GROUP ON FAIR BUSINESS DEALING

Lord Cromwell (co-chair) - Conference on Conduct in Banking held in November 2017

“What actually happens to whistleblowers in our system is that they become unemployable, they have their lives thrashed, and they are persecuted in the most intimidatory way...

In America, if you are a genuine whistleblower, and an eye-watering fine is imposed on the institution, you get a share of that – and you are going to need it”.

[Both the Bank of England and FCA have good usable sections addressed to wbs]

BARCLAYS – 2017

Barclay's chief executive, Jes Staley, was found to have tried to track down and unmask the identity of an internal whistleblower at the bank.

He was investigated and he got trashed.

He was also reported to the FCA whose rules require that whistleblowers be protected and that whistleblowing should be encouraged. FCA might order his dismissal - decision is still awaited

**See: "Barclays whistleblower case sparks calls for greater protection"
theguardian 11 April 2017**

ITALY

- Passed a new Whistleblowing law in November 2017.
- Has been criticized of failing whistleblowers on at least four grounds:
 1. for not establishing a fund to support them with their legal and court fees
 2. for not given 100% protection to their identity
 3. for giving them only partial protection in the private sector
 4. for using English / foreign wording and concepts
- Commentators have described the new law as a further step towards “legalita’ ”, the fight against corruption and the “costruzione di un’ Italia migliore” as now “i cittadini potranno segnalare fatti di corruzione avendo meno paura delle conseguenze”.
- The passage of this law had been dragging on since 2010.
- Italy has had its own fair share of recent banking scandals.

IRELAND

TRANSPARENCY INTERNATIONAL IRELAND

“Whistleblowing is acknowledged as one of the most effective ways of stopping wrongdoing. For example, many of the cases of corruption, fraud, and sexual abuse of children that we know about have been exposed by workers who reported these issues to their employers, regulators or the press. In fact, it is believed that more cases of fraud and corruption are exposed by whistleblowers than any actor – including the police or the media.”

Accessed on 29 November 2017

(The Transparency International Ireland Report also refers to Eugene McErlean who formerly occupied the post of head of group audit with Allied Irish Banks. Mr McErlean is today considered a prominent whistleblower having reported overcharging and other wrongdoing at the bank, which he claims were ignored by the Financial Regulator.)

RECENTLY, JULIUS BAER AND THE POST

- One of the most recent and dramatic whistleblowing stories.
- See special feature in the Economist December 2017 pp 68-70
- Recent Spielberg film The Post dealing with the disclosure of the Pentagon Papers which recorded the disastrous war in Vietnam.
- Two well-known whistleblowers Daniel Ellsberg and Andrew Snowden: a great interview in The Guardian 17 January 2018

BRADLEY BIRKENFELD

- **Worked for UBS in Switzerland**
- **Leaked Swiss Bank offshore secrets regarding US citizens to the US Inland Revenue Service**
- **A contradictory response: he was sent to jail at the behest of one government agency (DOJ) for his own misconduct as a banker and was handsomely rewarded by another agency (IRS) for assisting in recovering millions in unpaid taxes from tax-evading US millionaires**
- **Became the highest rewarded whistleblower in history (\$75 million)**
- **Wrote a book, Lucifer's Banker, 2016**

THE USA – CONSUMER FINANCIAL PROTECTION BUREAU

- **Facilitates the disclosure by employees and former employees of wrong-doing by banks and other firms subject to CFPB jurisdiction**
- **Provides a user-friendly, safe and practical way of making contact, even anonymously**
- **Email: whistleblower@cfpb.gov**

THE USA –

WELLS FARGO DESERVES AN OSCAR

- **In 2015 it was considered as the “world’s most valuable bank”; the “king of cross selling”**
- **Huge scandal which included the opening of multiple accounts and foisting bank services on customers who did not need and often knew nothing about them. Since 2012, Bank forced its employees to go out and do whatever it takes and sell at least eight bank accounts or other banking retail services per customer. Many fake accounts were also opened.**
- **Disgruntled employees and whistleblowers were punished and usually fired in an extensive ruthless pattern of retaliation.**
- **Wells Fargo has so far paid about \$300 million in fines and compensation.**

USA: Fortune magazine, 26 January 2017

Jeff Bukhari

“Wells Fargo CEO Tim Sloan admitted last week that there is evidence to suggest that some employees may have faced retaliation for calling the company’s ethics hotline and reporting objectionable behaviour. The bank had hired a third party to investigate instances over the past five years where an employee was fired within 12 months of calling the hotline. Often, lateness or some other trivial reason would be concocted to justify terminating a worker, according to a report in CNNMoney. The Bank is now expanding the investigation, looking at the penalties some employees faced for whistleblowing that fell short of termination.”

The bank has lost its professional respect, the trust of the public and its reputation for fair dealing and integrity.

See Financial Times Special Report – The Whistleblowers, 9 November 2017

And for those who ask: why did the wb do it?

- **The question should probably be reversed.**
- **Do not to ask why the whistle-blower blew the whistle, but ask why so many others, possibly his own colleagues and others, including senior officials, did not.**
- **Where were the others – what were they thinking; where were they hiding and why did they perhaps look the other way?**

THE REAL STORY

- It is the bad conduct of banks and other big organizations which is the real story; they have created whistleblowing and made it necessary.
- Whistleblowing is NOT the real big story.
- It is about the wrongdoing, the scandals and the variety of fraudulent activity, misappropriation, deceit, forgery, and corruption that happen rather too regularly – and which the State and we need to find out and know more about.
- The whistleblower enters the scene to assist the state and sometimes the institution itself, irrespective of other legal consequences.
- The real story is the scandal and the wrongdoing in high places – the wb is usually merely the story- teller and is almost a diversion from the main plot.

TO CONCLUDE:

some recent titles and headings from the UK and US

“UK banks and scandals: a match made in heaven”

“World’s biggest banks face GBP 264bn for poor conduct”

“Comm Bank scandal: what happens when too much power is placed in too few hands”

“3 more scandals that will have you saying: WTF Wells Fargo”

“More Wells Fargo workers allege retaliation for whistleblowing”

“HSBC Holdings agrees to pay more than \$100 million to resolve fraud charges”

“Have heavy penalties deterred big banks from committing financial crime?”

“Banking whistleblowers being gagged and hunted down”

“Have banks learnt their lesson?”