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LEGAL · TAX · ACCOUNTING
2016

Issue 02/2016

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Albania

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- Restriction of ‘the choice to contract’ on the spotlight of the Competition Authority

- **Whistle-blowing as a tool of the fight against corruption to be subject to specific rules**

Overview of the whistle-blowing legal framework

This legal initiative comes at a crucial point for Albania, where the fight against corruption is one of the main requisites for opening of EU accession negotiations. In this regard, the parliament enacted the law no. 60/2016, dated 02.06.2016 "On Whistle-blowing and Protection of Whistle-blowers", the scope of which is to prevent and to fight corruption in all levels of public and private sector, as well as to protect and encourage the persons who report actual or potential practices of corruption in their working place (whistleblowers).

Whistle-blowing of infringements may be deterred by fear of retaliation, discrimination or disclosure of personal data. Thus, it is very difficult to come forward and give information knowing that it will seriously damage your reputation, relationships, friendship and trust with other people, position and functioning within the organization. To overcome this issue, the whistle-blower needs the necessary support towards any retaliatory act that is incurred due to the report made for corruption practices in the organization. Accordingly, the new law provides for the rights of the whistle-blower such as the confidentiality right during the reporting process, anonymity of the source, and protection against retaliation.

The mechanism established by the new law is based on two pillars: (i) introduction of a legal procedure for the investigation of whistle-blowing report related to an alleged action or practice of corruption, and (ii) provision of protective measures for whistle-blowers against any retaliatory act by the organization, direct or indirect, or any threat made by the organization of a discriminatory or disciplinary nature, or in any other way that unfairly harms the interests of the whistle-blower because of the report.

Investigation of whistle-blowing

The new law provides for the obligation of any public entity with more than 80 employees, and private entity with more than 100 employees, to establish a special unit responsible for the review and investigation of a report until the end of the case and for the review of the protection request of the whistle-blower (*internal reporting*). If the organization has no relevant unit, or the relevant unit does not conduct the investigation in compliance with the law, or there are grounds to question the integrity and independency of the relevant unit, the whistle-blower can directly address the report to the High Inspectorate for the Declaration and Audit of Assets and Conflict of Interests – HIDAACI (*external reporting*). Capacity building within the relevant unit of the organization meeting the aforementioned threshold is a legal obligation; otherwise, a fine of Leke 100,000 Leke shall be imposed.

An investigation under the new law shall be conducted based on the principle of good-faith. The good-faith of the whistle-blower shall be considered as the sole and sufficient element to assess the case, i.e. the good-faith is presumed at the moment of the report and the burden of proof to challenge the report shall be on the accused person. The relevant unit or HIDAACI will initiate an investigation when two conditions are fulfilled: first, the report has been made in good-faith and, second, the whistle-blower has filed a written report in the form required by this law. In order to avoid anonymous tips from becoming common practice, which could undermine the reporting mechanism, such anonymous reporting will be accepted only in special cases under the sole discretion of the receiving unit.

The investigation procedure should be finished as soon as possible, but in any case not later than 60 days from the initiation date of the investigation, unless the circumstances require a longer term. The relevant unit or HIDAACI shall notify the whistle-blower on any measure taken due to his/her report within 30 days from the date when such measure has been taken. Also, the relevant unit or HIDAACI must reply to the whistle-blower within 30 days from his/her request for information on the case reported by the latter.

Every organization, subject to this law, and HIDAACI itself, shall adopt an internal regulation regarding the review procedure of a report investigation and confidentiality protection mechanisms according to the law.

The role of the relevant unit or HIDAACI will be limited only to review and evaluate the claims raised by the whistle-blower in connection with an alleged action or practice of corruption. If during the examination results that the report is grounded, the relevant unit or HIDAACI terminates the case and immediately notifies

the prosecution or police authorities.

If it is found that the report constitutes an administrative infringement, the relevant unit or HIDAACI will inform the competent authority. Thus, the law limits the role of the relevant unit or HIDAACI only to detect and specifically activate the competent authorities, either administrative or criminal, to review the case under the applicable law.

Protection from retaliation

The new law provides for a protection mechanism of the whistle-blower against any retaliatory act from his/her organization. The whistle-blower submits first the request for protection to the relevant unit, and in case the relevant unit does not immediately take measures (within 10 days), then the request will be submitted to HIDAACI that will proceed with the review and decide within a 10-days period.

Actions of retaliation include, but are not limited to, dismissal from work, suspension, transfer, demotion, remuneration reduction, loss of privileges, denying of promotion, removal of the right to attend trainings, bad evaluations, etc. If at the end of the investigation to the protection request results that a retaliatory act has been made towards the whistle-blower, HIDAACI will order the organization, according to the law, to take all the measures to remedy such infringement.

Organizations applying any of such actions shall be subject to a fine varying from Leke 300,000 to Leke 500,000. In case the organization does not take the necessary measures requested by HIDAACI, then the later or any interested party is entitled to address the issue to the court. Moreover, the whistle-blower is entitled to claim damage relief in court according to the Civil Code.

In conclusion, establishment of the necessary mechanisms for the investigation and review of whistle-blowing is a fundamental element of the new law and constitutes a legal obligation for the relevant unit and HIDAACI. The relevant units are obliged to submit reports every year, not later than 15th of January, to HIDAACI on the implementation of the law regarding the whistle-blowing cases received, the procedures followed for their investigation, and protection of the whistleblowers. Such reports from the relevant units will be used by the HIDAACI for its annual public report, which will include recommendations based on the whistle-blowing cases, results from such cases, public awareness and reliability scale on such mechanisms, timing and also measures taken for implementing protection mechanisms against retaliation.

Requirements applicable to personal data processed from the whistleblowing unit

In compliance with the provisions of law no. 60/2016, “On Whistle-blowing and Protection of Whistle-blowers”, the Commissioner for the Right of Information and Personal Data Protection (“Commissioner”), issued Instruction no. 44, dated 31.08.2016 “On the conditions, processing criteria and the duration of storage of personal data” (“Instruction”).

The Instruction determines the conditions, criteria and duration of storage of personal data from the whistleblowing unit of any public authority, private entity, and the High Inspectorate for the Declaration and Audit of Assets and Conflict of Interests -HIDAACI.

As mentioned above public authorities having more than 80 employees and private entities with more than 100 employees have the obligation to establish a whistleblowing unit.

Under the Instruction, public authorities and private entities having a whistle-blowing unit and HIDAACI are considered ‘controllers’ in the context of data protection law. Any personal data subject, involved in whistle-blowing or any party involved in the investigation process, enjoys the rights provided by the legal framework applicable to the protection of personal data in case of any alleged illegal processing of personal data.

The following requirements shall apply to a data controller:

- *Notification and authorization of the Commissioner*

In case the whistle-blowing unit processes ‘sensitive data’ which have a relevance for the public interest, before making the information public, the controller should request the Commissioner’s authorization.

In addition, the controllers should submit a new notification or an update of the existing notification to the Commissioner's Office before the whistle-blowing unit processes personal data.

- *Security measures of personal data and confidentiality*

Every data controller should determine in its internal regulation for personal data protection and security, appropriate organizational and technical measures which then must be implemented by the whistle-blowing unit.

Employees of the whistle-blowing unit, who become aware of the personal data during their work, must sign a confidentiality statement in order to save the secrecy and reliability of the information even after the termination of their function. Such data must not be disseminated, except for specific cases provided by the law. Breach of the confidentiality obligation constitutes a criminal offence as provided by article 122 of the Criminal Code.

- *Manual processing of personal data*

According to the Instruction, all personal data processed manually, shall be kept secured in order to prevent any illegal or incidental dissemination, destruction, and loss of such personal data whether in the working place or during their transmission.

Procuring the requested copies is possible provided that their further use can be traced until their destruction or anonymization.

- *Storage period*

Documented personal data shall be stored for a period of 60 days, corresponding to the administrative investigation period until the final decision. In case it is decided to not initiate an investigation, the documents containing personal data must be immediately destroyed. The storage period can be postponed only if supported with objective arguments; in this case, the data subject is immediately informed.

After elapsing of the storage period, the documents that do not include personal data shall be archived if it is so required by law, while the documents that include personal data shall be either destroyed or irrevocably anonymized.

- *Sanctions*

Infringements of the Instruction's requirements shall be subject to the sanctions set forth in the law no. 9887/2008 "On Personal Data Protection".

- **Securing charges to cover also intangible property**

The Albanian Parliament passed on 20th of October 2016 the Law no. 101/2016 "On Some Amendments and Additions to Law no. 8537, dated 18.10.1999 "On Securing Charges" as amended" (Securing Charges Law). The new law was published in the Official Gazette no. 207, dated 04.11.2016 and entered into force on 19.11.2016.

Until May 2013, it was possible to grant a securing charge over intangible properties.

Upon certain amendments introduced to Securing Charges Law on May 2013 (upon law no. 132/2013), "intangible properties", "instruments", "securities" and "accounts" could no longer be granted as collateral.

After many lobbying efforts, the legislator re-instates the securing charge over intangibles, by giving thus to creditors more options to choose their preferred security.

- **On additional security measures to public order**

The parliament has passed Law no. 19/2016, dated 22.9.2016 "On Additional Security Measures to Public Order", to enable cooperation between the state police and public and private entities, whose activity may constitute a bigger threat to security. The law aims the detection, prevention and suppression of any criminal activity, to protect the property, life and ensure public safety.

Purpose of the law

The object of this law is to define the categories of entities that develop activities which, due to specific circumstances and conditions, constitute a bigger threat to security, define the elements for conducting a risk assessment and placement of additional security measures.

The subjects that will commit to additional security measures will be public and private entities, after a risk assessment is carried out by the state police.

The said assessment shall refer to the nature of activity of the subject in order to identify the hazards, the environment exposure to criminal elements and the distance between the object and the police unit or residential areas.

Additional security measures

Additional security measures prescribed by the law are: a) the use of CCTV cameras, with high-resolution, infra red range that preserve images NRV / Server up to 2 months; b) the use of electronic devices high-tech identification, in safety function (detectors, control bridge, reader, GPS, etc.); c) depending on risk assessment and collaboration with the state police structures, the alarm signal to banks and state important objects in central and local halls control / information to state police; d) use of private security service.

The safety certificate

The local authority responsible for the issuance of the safety certificate is the director of state police where the entity operates. If the subject operates in more than one district than the responsible authority for the issuance of the safety certificate is the director of state police where the entity has its headquarters.

Sanctions

Fines can be applied by the responsible authorities (i.e. state police) varying from Leke 5,000 to Leke 100,000 depending on the violation.

Medical examinations and medical services at the workplace

The Council of Ministers passed decision no. 639, dated 07.09.2016 "On determining the rules and procedures of medical examinations which will be carried out according to the type of job of the employee, as well as the functioning methods of medical service at the workplace", hereinafter referred to as "DCM no. 639" or the "Decision".

The Decision provides for rules on the health control of employees at the workplace in compliance with Law on the Safety and Health at the Workplace (no. 10237/2010). Under the Decision, the employer shall:

a) hire its employees on the basis of a medical report issued by the forensic medicine department near every medical center;

b) require preliminary health control at the beginning of the employment and/or during the first three months of employment to ensure that the health of employees remains safe during exposure to professional risks;

c) require regular and periodic medical examinations for the employees according to their exposure to specific factors of the workplace risks (physical, chemical, biological and other elements at the workplace which can harm the health of employees).

During the medical examination it is evaluated the physical and mental capabilities to perform the tasks and is ensured the safety of the employee's health while exposed to specific professional risks at the workplace. The medical report issued to certify the capability of the employees to perform the required tasks has a validity period of 3 months starting from the day of its issuance. Medical examinations include the preliminary (basic) medical control, specific medical control and the individual examinations. These are carried out accordingly by the workplace doctor, doctors near the professional diseases cabinets and/or other specialized doctors.

DCM no. 639 provides in its annexes the form of the medical report which is divided in 3 parts:

i. Reference for Medical Examination filled in by the employer or authorized person with information concerning the employee sent for preliminary or periodic medical examination;

ii. Statement of Compliance regarding the medical status of the individual and the tasks performed, which is filled in by the workplace doctor at the end of each examination. This statement shows the scale of compliance, notes and special recommendations for the employer;

iii. Remedies of the Employer filled in by the employer or authorized person, pursuant to the notes and recommendations of the doctor in the compulsory medical examination.

Annex 2 of the Decision introduces the types of professional medical examinations to be carried out, respective periodicity and the doctors involved in the examination for each of the harmful factors listed therein. The list includes subcategories of the main chemical, biological, physical, psycho-emotional factors, dust and other different factors. The employees are examined according to the factors they are exposed to during work or at the workplace and doctors or specific doctors such as an oculist, dermatologist, neurologist, dentist, optometrist, gynecologist, etc are appointed at the workplace. The annex provides also the preliminary and periodic health examination to go through such as laboratory analysis, functional tests, diagnostic imagining etc.

The periodical health examinations are carried out at least once a year for enterprises of type A[1] and B and at least every 2 years for enterprises of type C and D. Health analysis and tests are provided by public/private health institutions licensed pursuant to the legislation in force. Additional professional health examinations are carried out at least once a year according to special cases described in the Decision.

If after the examination it is suspected for a professional disease, the doctor fills in the respective report provided in Annex III of the Decision and refers the employee to the Regional Cabinet of Professional Diseases of the Central Hospital "Mother Theresa" for further medical investigation. When the doctors of the Regional Cabinet for Professional Diseases confirm the professional disease, they fill in the form provided in Annex 4 and send a copy of the professional disease statement to the State Labor Inspectorate, State Health Inspectorate, employer, employee, Social Insurance Institution, Public Health Institution and health department of Military Forces.

All documents and reports filled in during the health examination at the workplace are kept pursuant to the data protection laws and health at the workplace legislation.

There is a transitory period of 1 year from the entry into force of the Decision, by which the employers must provide for the implementation of all rules and procedures defined in the Decision.

The Council of Ministers to determine *de minimis* state aid

On 31.08.2016, the Council of Ministers adopted decision no. 605 "On the determination of the maximum value, terms and procedures on granting the "*de minimis*" state aid ("Decision").

The Decision is approximated with the Commission Regulation (EU) no. 1407/2013 of 18 December 2013 "On the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid" and Commission Regulation (EU) no. 360/2012 of 25 April 2012 "On the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest".

It applies to state aid granted in the production and service sectors with the exception of aid granted to activities related to export, and aid conditioned with the use of domestic products.

[1] Refer to Decision of Council of Ministers no. 108, dated 09.02.2011 "On the abilities of the employees, persons and specialized services, responsible for the safety and health in the workplace matters" for enterprises falling under type A, B, C and D.

The state aid beneficiaries must keep distinct costs of activities subject to the *de minimis* aid.

The *de minimis* aid is allowed if all the following requirements are met:

a) the aid granted to a single undertaking does not exceed the overall amount of Leke 14 million, for a period of three fiscal years; and

b) the aid is transparent (when the gross grant equivalent (GGE) is possible to be calculated precisely before the aid granting, without the need to undertake the risk assessment on competition in accordance with the requirements and terms provided in the Decision).

The Decision provides for the method of calculation of the total *de minimis* aid amount and of the GGE as well as determines the *de minimis* aid applicable to the state aid granted for road freight transport and services of general economic interest.

In terms of procedure of approval, the forecasted state aid is notified to the state aid department at the Ministry of Economy, which verifies if the criteria for granting the aid are met and then forwards the notification to the State Aid Commission ("Commission") for review.

The notification should be submitted before the aid is granted. In any case, the notification does not suspend its payment.

The Commission will review if the above mentioned requirements are met and approve or reject the aid depending on the review process outcome. The Decision provides for the silence-consent rule ie. the state aid is considered approved if the Commission does not take a decision within 30 days from the date the notification is received.

Upon request of the grantor of the aid, the beneficiary of the state aid shall sign a statement concerning the *de minimis* aid received during the past two years and the current fiscal year.

In addition, if requested from the state aid department at the Ministry of Economy, the grantor and the beneficiary shall submit any information on the nature, purpose, amount and calculation of the grant or GGE, on any other aid received and any information in relation with the aid received or planed to be received by the same beneficiary.

The state aid department at the Ministry of Economy shall keep the register of the *de minimis* aid.

SPOT - ON

The restriction of 'the choice to contract' in the spotlight of the Competition Authority

Law no. 9121/2003 "On Protection of Competition" prohibits agreements that have as object or effect the hindering of the competition (article 4).

Article 4 of the law covers agreements that directly or indirectly fix sale or purchase prices or other trade conditions, restrict or control the production, market, technical development or investments, share markets or sources of supply, apply dissimilar conditions for same transactions with third parties, by putting them in a competitive un-favorable situation, restrict the conclusion of contracts with acceptance of additional obligations that by their nature or commercial use have no relation with the object of these contracts. However, this list is indicative and the Competition Authority assesses also other behaviors that are not specifically in that list.

In two recent cases, the Competition Authority dealt with exclusive dealing and restriction of choice to selective networks related with the upstream and the downstream market.

The first case concerned clauses inserted in a financial lease agreement whereby the lessor required from the lessee to insure the object of the lease from insurance companies pre-selected from the lessor.

The Competition Authority considered that the obligation to choose pre-approved insurance companies at un-favorable prices and other conditions and in absence of explanations provided to the lessee, not only unfairly restrict the freedom of choice of the lessee but also restricts the competition in markets related to the financial lease of cars market. In this way, according to the Authority, the insurance market structure is affected and concentrated.

Furthermore, the Authority considers that this behavior may involve exclusionary anti-competitive behaviors in the related market. For the Authority, these clauses restrict the development of a free and effective competition in both the financial lease and related (insurance) markets.

The Competition Authority observes also that similar concerns of restriction of the consumers' choice are noticed as well in other financial markets' segments, such as in the relationship banks – clients.

As a result, the Authority decided that the clause restricting the choice of the lessee among pre-approved insurance companies is to be deleted. In addition, it decided that second-tier banks, financial intermediaries and all companies licensed in the financial sector have the obligation to ensure to their clients the freedom of choice of the insurance companies in any contract by deleting exclusivity or exclusionary requirements set out on paper or otherwise.

In the other case, the Competition Authority applied the 'individual exemption test' for assessing whether the exclusivity dealing clauses having a restrictive effect on the competition can be exempted from prohibition.

The Authority examined the exclusivity clause in a vertical agreement entered into between a TV broadcaster and a broadcasting platform whereby it was agreed that the TV broadcaster had to provide its media content only to the said platform. In this case, the Authority reminded that an exclusive dealing agreement may be exempt if it is objectively justified.

Such objective justifications consist in the amelioration of the production and distribution of products, incitement of technological or economic progress at the condition that part of the benefits go to the consumers.

If you wish to know more on issues highlighted in this edition, you may approach your usual contact at our firm or the following:

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Boga & Associates

Boga & Associates, established in 1994, has emerged as one of the premier law firms in Albania, earning a reputation for providing the highest quality of legal, tax and accounting services to its clients. Boga & Associates also operates in Kosovo (Pristina) offering full range of services. Until May 2007, the firm was a member firm of KPMG International and the Senior Partner/Managing Partner, Mr. Genc Boga was also Managing Partner of KPMG Albania.

The firm maintains its commitment to quality through the skills and determination of a team of attorneys and other professionals with a wide range of skills and experience. The extensive foreign language capabilities of the team help to ensure that its international clientele have easy access to the expanding Albanian and Kosovo business environment.

With its diverse capabilities and experience, the firm acts for leading businesses in most major industries, including banks and financial institutions, as well as companies working in insurance, construction, energy and utilities, entertainment and media, mining, oil and gas, professional services, real estate, technology, telecommunications, tourism, transport, infrastructure and consumer goods sectors.