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Malta

Whistleblowing in Malta: a note on recent developments, proposals and missed opportunities

"Further legislation which, unfortunately, we have never as yet considered seriously, is that on the lines of the so-called 'whistleblowing' procedures."[1]

A famous whistleblowing case of some years ago had a distinct Maltese flavour. This was the notorious case concerning a well-known multinational pharmaceutical firm. A Maltese citizen, Stanley Adams, a senior executive with this multinational company, discovered that his employers were engaging in price-fixing and other breaches of the competition laws. He revealed details of this illegal activity to the E.U. competition authorities in Brussels. For his pains, he was hounded and investigated, ending up in a Swiss jail for the unauthorised disclosure of business secrets. He later won some damages. Adams wrote a book about his experiences, a clear indictment of a system where business and the State apparatus can conspire "to send whistleblowers to jail to punish them for whistleblowing".[2]

Malta is a small island state, a former British colony currently on the road to accession to E.U. membership, possibly within a couple of years. Its legal system is one of an increasingly hybrid character. Whereas its private law is largely consolidated in a civil code on the continental pattern, its public law and institutions broadly follow the British model.

This note analyses the current state of play, arguing that there have been various missed opportunities where the legislator failed to take the bold steps necessary to protect whistleblowers. Despite being specific to the Maltese situation due to reasons of space, the analysis draws out a number of issues relevant to other developing countries.

At the time of writing,[3] the laws of Malta are undergoing substantial changes in many important areas. Much of the new legislation seeks to bring Maltese law into line with the European *acquis*. There is no E.U. directive on whistleblowing as such, although the European Commission has lately started taking some steps to introduce internal reporting procedures and safeguards.

The object of this brief note is to show that in Malta there have been no matching developments in whistleblowing regulation, which remains largely absent from Maltese law except in very limited and precise instances.

One missed opportunity lies in the field of consumer law. In late 2000, amendments to the Consumer Affairs Act 1994 introduced the first ever rules on product liability. A separate new law on product safety came into force in March 2001. These laws seek to prevent the production and circulation of unsafe products which may cause serious harm to persons and property. By and large, the new laws have faithfully transposed the relevant E.U. directives. While the directives on product safety and liability do not raise the whistleblowing issue, they do not appear to prohibit Member States from adopting provisions should they wish to.

It would not be entirely appropriate to include whistleblowing rules within a product liability law, since this largely concerns private law. The opposite, however, seems to be true of product safety law, where whistleblowing would fit perfectly. Like the directive which inspired it, the Product Safety Act is largely of an administrative nature and accordingly constituted the ideal opportunity for introducing a proper workable whistleblowing provision. It is a law crying out for such a provision in view of the serious consumer health concerns it seeks to address.

It has been unsuccessfully argued that it would have been fairly easy for the product safety law to specifically protect such disclosures and to designate the Director for Consumer Affairs (responsible for administering the product safety law) and the Director for Market Surveillance (responsible for

devising strategies for monitoring the market against unsafe products) as the authorities which may receive disclosures.

Whistleblowing is also absent from competition law. Amendments to the Competition Act of 1994 have just been adopted by Parliament. Again largely based on European law, this Act had prohibited cartels, abuse of dominant positions, price fixing and other restrictive agreements and practices, and provides harsh penalties. Recent amendments have attempted to strengthen the enforcement powers established in the Act, but regrettably no attempt was made to incorporate whistleblowing safeguards.

In late 2000, the government published a White Paper proposing a number of substantial amendments and reforms to the Criminal Code. The White Paper demonstrates a new thrust against corruption as well as the introduction of corporate liability in certain situations. Indeed, the White Paper proposes to expand the definition of corruption and to make any companies involved more directly liable to criminal prosecution. Corporate criminal liability has so far been practically unheard of in Maltese legislation, so this could have represented a useful novelty.

Remarkably, the White Paper makes no reference to the benefits of whistleblowing procedures. The White Paper ignores the reality that a successful fight against serious corporate wrongdoing invariably requires access to relevant inside information from within the companies or institutions suspected of operating outside the law.

Maltese law does contain some scattered instances of what may be termed *mandatory* whistleblowing, where particular office holders are effectively required to blow the whistle on a client. This peculiar but minor form of whistleblowing has now developed, starting with the Co-operative Societies Act of 1978. The laws regulating investment services,[4] banks,[5] financial institutions[6] and insurance business[7] all now contain provisions requiring the auditors of a regulated entity to report any financial irregularity or illegality they might discover during the course of their audit work. The legal duty of professional secrecy would be set aside to the extent necessary to make the disclosure, and failure to disclose to the regulatory authorities may carry criminal and administrative consequences for the auditors. But there is no protection for employees.

A major obstacle to Maltese would-be whistleblowers is represented by the Professional Secrecy Act of 1994 and section 257 of the Criminal Code. These punish the unauthorised disclosure of professional or business secrets with severe criminal sanctions. In 1999, a small amendment was effected to section 257 which exempted from liability members of designated professions or regulated businesses (including accountants, investment services and insurance operators, but not legal practitioners or priests) who, on discovering that a client has committed a serious drug-related or a money-laundering offence, report the fact to the public authorities. It is unclear why this otherwise sensible exemption was limited to disclosures relating to drug and money-laundering offences, and was not extended to other serious offences such as fraud, corruption and injury to the public health.

Some whistleblowing rules introduced in other jurisdictions are often located within employment legislation. This perhaps serves to highlight the often determining role played by ordinary employees and their concern with job security in this context. The U.K. Public Interest Disclosure Act 1998 is one case in point. Generally, one major risk to be weighed by any employee contemplating blowing the whistle on wrongdoing at his workplace is that his action may amount to a breach of this contractual duty. Broadly, every employer owes a duty of loyalty to his employer. A breach may lead to various possible sanctions including dismissal and a suit for civil damages.

In Malta, during the past 10 years or so, successive ministers responsible for labour matters have repeatedly promised that the two main employment laws, namely, the Conditions of Employment (Regulation) Act of 1952 and the Industrial Relations Act of 1972, were to be updated and substantially revised. Latest press reports predict a draft Bill will be published shortly. Sadly, the proposals being drafted have been shrouded in secrecy, but the minister involved has been publicly promising new rules on sexual harassment and equal pay for women and similar matters. No evidence is available that whistleblowing was ever raised for discussion. Are we about to witness yet another missed opportunity?

In this current state of play of Maltese law, a proposal to exploit the imminent employment legislation quickly comes to mind. This may be summarised in the form of two propositions:

(1) the law should require employers generally to treat their employees fairly and to ensure that employees are not placed in serious moral conflict situations in the workplace;

(2) the new employment laws should protect employees who in good faith disclose to a designated public authority serious illegal activity committed by their employers or indeed by fellow employees at their workplace. The protection could include a prohibition, backed by adequate sanctions, against any form of retaliatory or discriminatory treatment, including dismissal, demotion or other direct or indirect punishment. The law would list the authorities to whom an employee could safely disclose his concerns. It would also lay down an uncomplicated grievance reporting procedure. These safeguards should apply both to employees in the private sector and—perhaps more importantly—to employees in the public sector.

As part of employment law, these rules would be of general application, but still insufficient to cover cases where the whistleblower is not an employee. Complementary amendments would also have to be made to the Professional Secrecy Act of 1994.

Within a culture where transparency is more an exception than a rule, it should perhaps not be surprising that, in the Maltese experience, whistleblowers have generally not been well treated and have been considered at best a nuisance, at worst a threat. This is not a situation unique to this small island. But in the highly charged and polarised Maltese political situation, where every vote counts at every local council and general election, governments tend to avoid handing new opportunities to the opposition to embarrass them. Recent developments show that there is no evidence of any official willingness or policy to introduce new whistleblowing provisions, whether in particular areas of the law or in legislation of more general application. One may therefore safely predict that Maltese law will not in the near future be taking the bold steps required for developing a comprehensive and coherent regulatory framework for whistleblowing.

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