

March 16, 2023

Whistleblowing

The legislative decree

On March 9, 2023, Italy implemented the EU Whistleblowing Directive (the “**Directive**”), adopting the legislative decree no. 24/2023 (the “**Decree**”), published in the Italian Official Gazette on March 15, 2023.

The Decree applies to:

1. all legal entities of the public sector; and
2. all legal entities of the private sector that:
 - a) employ more than 50 employees through open-ended or fixed-term employment contracts;
 - b) employ fewer than 50 employees and voluntarily adopt the Organization Model as per D.lgs. 231/2001 (“**MOG**”);
 - c) employ fewer than 50 employees and are active in the European regulated sectors (e.g. financial markets, credits).

The Decree will be effective: (i) in general, starting from July 15, 2023, and (ii) with reference to companies employing an average of less than 249 employees, starting from December 17, 2023 (the legal entities which already adopt the MOG, will continue to be subject to the existing obligations regarding whistleblowing procedures until that date).

Subjects and objects of whistleblowing

It is extended the category of subjects who have the power to file a report: employees, self-employees, volunteers, interns, stakeholders and other persons with administrative, management, control or supervision function (the “**Whistleblowers**”).

Whistleblowers can report actual or potential breaches of European Union and Italian legislation referred to the sectors listed in the Decree and, limited legal entities of the public sector also general breaches of Italian legislation and, limited to the legal entities which adopted the MOG also breaches relating to Legislative Decree 231/2001. Grievance or interpersonal grievance shall not constitute a reporting matter.

The new regulations therefore require not only the introduction of whistleblowing procedures for new obligated entities, but also the review of existing procedures in those entities that have adopted them pursuant to Law No. 179/2017.

The Internal Channel

According to the Decree, the legal entities of the public and private sector need to establish, after informing trade unions, an internal reporting channel which shall grant confidentiality (the “**Internal Channel**”).

In particular, they should (i) set up a whistleblowing procedure (ii) implement the Internal Channel compliant with the Decree’s provisions (iii) train personnel.

The Internal Channel shall be impartial and guarantee confidentiality of: the identity of the Whistleblower, the identity of the person involved, the content of the report and the relevant documentation (also through encryption tools). The confidentiality is to be guaranteed also during any disciplinary or criminal proceedings.

The Internal Channel is managed by an **autonomous** person or office with properly skilled personnel.

According to the Decree, it is possible for legal entities of the private sector that employ less than 249 employees (average in the last year) to share the Internal Channel.

The Internal Channel operators shall, once received a report (written, oral or anonymous):

1. send to the reporting person a notice of receipt of the report within 7 days from the receipt of the report;
2. carry out an in-depth investigation on the report;
3. give feedback to the Whistleblowers within 3 months from the notice of receipt.

In any case, the Internal Channel operators shall provide the Whistleblowers with clear information on the Internal Channel, the procedure and the conditions on reporting, also by creating dedicated section of their website.

The External Channel

It is guaranteed to Whistleblowers also an external reporting channel managed by Italian Anti-Corruption Authority – ANAC – (the “**External Channel**”), regardless the number of employees employed by the legal entities of the public and private sector. The reporting procedure is similar to the one provided for the Internal Channel and ANAC will adopt practical guidelines within three months of the Decree's enactment (however, the channel is already active¹).

Whistleblowers can report to the External Channel if:

- their workplace does not provide for the Internal Channel;
- they filed a report through the Internal Channel, but the report did not have any effect;
- they have justified reason to assume that report through the Internal Channel will not be effective or will be retaliatory;
- in case of imminent or manifest danger to the public interest.

The Decree provides also for the possibility for Whistleblowers, as a residual option, to file public reports through press or electronic media or methods of diffusion that can reach a large number of people.

The protection and the sanctions

Any form of retaliation or of discrimination against the Whistleblowers is prohibited. Non-renewal of the employment contract, working time variation or demotion of the Whistleblower or early termination or cancellation of the supply agreement are considered retaliation and, in such case, the burden of proof is shifts.

In addition, the Decree provides for redrafting of Article 4 of Law 604/1966, including among the **reasons for nullity of dismissal** the case concerning the reporting of misconduct of which the employee has become aware due to the employment relationship.

Administrative sanctions will apply if (i) retaliatory acts are committed against the reporting persons (EUR 10,000/50,000), and/or (ii) whistleblowing channels and procedures are not established (EUR 10,000/50,000). In addition, there are sanctions for false reports (EUR 500/2,500) (the “**Sanctioned Violations**”).

In disciplinary proceedings, the identity of the Whistleblower cannot be revealed unless it is essential to the defence of the person accused and the Whistleblower has given express consent to disclosure.

In case of criminal/civil liability of the Whistleblowers for defamation and slander, the protection is not granted, and a disciplinary sanction will apply to the reporting person if an employee.

Furthermore, the legal entities which adopt the MOG, shall provide in the disciplinary system adopted pursuant to Legislative Decree 231/2001, sanctions against those who are held responsible for the Sanctioned Violations.

¹ “Segnalazioni all’Autorità Anticorruzione, scattano le nuove modalità digitali”, article available at the following [link](#)

However, it is appropriate to extend this provision to the disciplinary codes of all legal entities subject to the Decree.

Waivers and settlements involving the rights and protections of the Decree must be executed in accordance with the form and terms set forth in Article 2113, fourth paragraph, of the Italian Civil Code (waivers and transactions concerning any remuneration or compensation rights of the employee).

The protection of personal data of Whistleblowers

The Decree expressly refers to the principles on the protection of personal data, both related to the Whistleblower and the reported person, principles that shall be properly observed legal entities of the public and private sector which adopt, as "data controllers", reporting systems in accordance with the applicable law (EU Regulation 679/2016, the "GDPR", and Legislative Decree 196/2003, the "Privacy Code"). By way of example, data controllers intending to collect and process personal data for the purpose of receiving and processing reports should avoid the acquisition of excessive and irrelevant information, inform Whistleblowers and persons involved in the reports regarding the modalities and purposes of the processing, adopt adequate security measures to prevent so-called "data breaches" and procedures to ensure that the persons involved in the reports can exercise their rights under the GDPR concerning their personal data (where applicable, e.g. right of access, rectification, erasure, object, etc.). In this regard, it should be noted that on 11 January last, the "*Garante per la Protezione dei Dati Personali*" (i.e. Italian Data Protection Authority), expressed positive opinion on the Decree, further stressing the need for the personal data relating to the reports to be adequately protected in accordance with the criteria set out in the GDPR and the Privacy Code, including through the performance of so-called 'Data Protection Impact Assessments'.

Finally, entities of the public and private sector shall provide relevant subjects with privacy notice, including through the specific whistleblowing procedures.

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