

FOCUS

Whistleblowing in the Italian Criminal Justice System: the private sector



WHISTLEBLOWING IN THE ITALIAN CRIMINAL JUSTICE SYSTEM:

THE PRIVATE SECTOR

Law no. 179/2017 (hereafter “**Whistleblowing Law**”) introduced, for the first time, a specific protection for the whistleblower in the private sector. Public employees were already covered by the reform introduced by Law no. 190/2012. The need for the protection of the whistleblower as a device to counteract white collar crimes has become notorious even at a comparative level.

Often, whistleblowers could face retaliation from their employers, leading to dismissal, as well as legal challenges or attacks on their reputation. Moreover, in some cases they may also fear the possible criminal law consequences deriving from the whistleblowing itself.

Still in reference to a criminal law point of view, the risks attached to this activity are evident, as it could be abused by potentially ill-intentioned informers. For this reason, along with implementing a system which encourages legitimate reporting and safeguarding of the whistleblower, it is imperative to limit the risk of false or ungrounded reports. Furthermore, attention must also be given to instituting a regime which protects the rights of the accused and his or her reputation.

Lastly, it is useful to take into consideration if there are any potential criminal repercussions, connected to the company and its decision to report (or not) the results of the whistleblowing activity.

1. WHICH PROTECTIONS ARE OFFERED TO THE WHISTLEBLOWER?

The Whistleblowing Law integrated the contents of Legislative Decree no. 231/2001 (hereafter “**Law 231**”), that provides for the vicarious liability of corporate entities. Particularly, it is now requested that the compliance programmes include at least one channel which allows managers and employees to report – in protection of the integrity of the company – unlawful activities, as per Law 231, or violations of the compliance.

The report shall be grounded on precise and consistent elements of fact, which the whistleblower came to know by reason of his or

her duties. Therefore, reports based on rumours or hearsay must be avoided.

The compliance programmes must contain an express ban on acts of direct or indirect retaliation or discrimination towards the whistleblower for any reason connected, directly or indirectly, to the contents of the report.

2. IS THERE A DUTY TO REPORT A WRONGDOING WHICH TOOK PLACE INSIDE AN ORGANIZATION WHEN ONE OF ITS MEMBERS DISCOVERS IT?

In order to understand whether or not there is an obligation to report, it is necessary to

distinguish between those who hold a position from which is deriving a duty to act and those who do not.

First of all, a holder of a duty to act is the person (i) whose duty is recognized by a formal source of law and (ii) who has the legal powers to prevent the event. These people have a duty to report because they are in charge of monitoring the situation in order to prevent the commission of these wrongful actions. As a matter of fact, Article 40, par. 2 of the Italian Criminal Code states that "Not to hinder an event which one is obliged by the law to hinder, is equivalent to causing it".

It is important to highlight that – according to Article 6 of Law 231 – the employee may be held liable only if there is an *ad hoc* (civil or criminal or administrative) law or a specific arrangement which explicitly provides for a duty to act and he or she has failed to take the action. However, the identification of the duty to act is not always easy. For example, it is interesting to note how Italian case law considers that there is a duty to act on the *de facto* director in the event the *de jure* director commits a criminal offence.

With regard to those who do not hold a duty to act, since there is no such duty to prevent wrongdoings in the workplace, the relevant obligation to report is absent.

If criminal proceedings originate against another employee or even the employer, the employee who was aware of the wrongdoings in the workplace and – legitimately – decided not to report will not be able to continue to take advantage of this benefit.

Especially, when the employee is called to testify, he or she may commit:

- (i) perjury, pursuant to Article 371 of the Italian Criminal Code, if the employee is reluctant to

testify. The provision requests the *mens rea* requirement, meaning the witness must have knowledge and awareness he or she is not giving the necessary information to the judicial authorities.

- (ii) aiding and abetting, pursuant to Article 378 of the Italian Criminal Code, when the employee gives false information in order to aid the offender to elude the investigations of the authorities or to escape their searches.

Moreover, according to Italian case law, in the relevant case the exemption provided for by Article 384 of the Italian Criminal Code – which applies to who committed the fact having been forced by an inevitable harm – cannot be invoked (unless the fact is a direct consequence of the criminal offence). As a matter of fact, the Whistleblowing Law states that employees are protected from dismissal, disciplinary action or any form of discrimination/retaliation as a consequence of having filed a whistleblowing report.

3. HOW TO MAKE A WHISTLEBLOWER REPORT? DO CONFIDENTIALITY PROVISIONS PREVENT EMPLOYEES FROM BLOWING THE WHISTLE ENFORCEABLE?

The whistleblower must in any case report wrongdoings:

- (i) to the extent and within the limits provided by the relevant law (Article 6, par. 2-*bis*, Law 231);
- (ii) respecting the company's internal policies on whistleblowing by using the channels made available by the company's compliance program.

As a matter of fact, compliance programmes shall now provide – pursuant to the Italian legislation on whistleblowing – for more than one internal channel. Furthermore, at least one

of the channels has to be implemented through IT systems in order to protect the whistleblower's identity.

Usually, internal policies also provide detailed rules aimed at regulating the ways to carry out the reporting.

According to Article 3, par. 1, of the Whistleblowing Law, in the event the report is made by the whistleblower within the manner described above, in reason of the relevant interests protected by whistleblowing activity, the disclosure of information subject to the obligation of secrecy – set forth in Article 326, 622 and 623 of the Italian Criminal Code and Article 2105 of the Italian Civil Code – is expressly allowed.

Therefore, whistleblowers can disclose information covered by their duty of confidentiality since whistleblowing represents a protected form of freedom of expression (when specific legal requirements are met).

In other words, the Whistleblowing Law provides for a just cause for the disclosure of confidential information in the exercise of a right (the right of the whistleblower to report potential violations of Law 231 or the compliance programmes adopted by his or her company).

However, the relevant specific protection provided by the law has two exceptions: (i) one of an objective nature; (ii) the other one of a subjective nature.

With reference to the objective exclusion of protection, Article 3, par. 3, of the domestic law on whistleblowing states that excessive disclosure with respect to the purpose of eliminating the unlawful act, and specifically, disclosure outside of the channel of communication shall be a breach of the relative obligation of confidentiality.

This provision is interpreted as meaning that the whistleblower: (a) must not have a personal interest in the report (eventually, if he or she does they must indicate it); (b) has to report pursuant to the policies and using the channels provided for by the company.

Therefore, the whistleblower must never communicate outside the communication channel specifically set up for the purpose of whistleblowing.

Concerning the subjective exclusion of protection, Article 3, par. 2, Law no. 179/2017 states that the professionals (*e.g.*, lawyers, legal advisors) who became aware of the confidential information as a result of a relationship of professional advice or legal assistance to the entity or the employee concerned cannot enjoy the above-mentioned protection provided by the law.

4. WHICH OFFENCES MAY BE COMMITTED IN MAKING A WHISTLEBLOWING REPORT?

Whistleblowers, while reporting alleged unlawful behaviour or conduct may commit two different kind of crimes: (i) those related to the contents of the report (for whistleblowers themselves who make malicious or grossly negligent reports that prove to be unfounded, see questions no. 5 and 6); (ii) those with reference to the modes.

With regard to this latter scenario, criminal responsibilities arise whenever the whistleblower: (a) engages in illegal activities in order to collect the evidences to be included in the report; or (b) files the report in an unlawful way.

Concerning the first hypothesis, the relevant legislation does not authorize the whistleblower in any way to carry out investigations with the purpose to report wrongdoings in the

workplace and Italian case law has traditionally confirmed that. Therefore, in this event the whistleblower may expose him or herself to criminal liability for criminal offences such as abusive exercise of a profession (Article 348 Italian Criminal Code); unlawful interference in private life (Article 615-*bis* Italian Criminal Code); abusive access to an information system (Article 615-*ter* Italian Criminal Code); violation of correspondence (Article 616 Italian Criminal Code); illicit knowledge of communications or telephone conversations (Article 617 Italian Criminal Code). In a significant decision (no. 35792/2018), the Italian Supreme Court considered that the whistleblower committed the crime of abusive access to computer systems by entering it with the passwords of another employee in order to conduct an investigation which resulted in whistleblowing against a colleague.

Secondly, criminal liability may arise when employees blow the whistle outside the requirements provided for by law:

- by reporting beyond the limits set out in Article 6 of Law 231 (for example, when whistleblowers do not comply with Article 6, par. 2-*bis*, of Law 231 which states that complaints must be grounded on “accurate and consistent elements of fact”);
- by filing the report outside of the dedicated channels;
- in a case of subjective exclusion according to Article 3, par. 2, of Whistleblowing Law.

5. WHAT IF THE REPORT CONTAINS FALSE ALLEGATIONS?

With reference to the criminal liability which can arise based on the contents of the report, firstly the whistleblower may be punished for

the criminal offense of calumny, pursuant to Article 368 of the Italian Criminal Code.

In particular, criminal responsibility may arise when the whistleblower misleads the Supervisory Body or another body with the power to report to the judicial authority, through a false report made with malice, so that the latter is induced to report the false accusation to the judicial authority.

The subject of the false statement must be a crime, comprehensive of all the essential elements (*actus reus* and *mens rea*). The object of the blame, as long as it is abstractly referable to a criminal figure, can indifferently be real or imaginary. If it actually occurred, what matters is that the subject to which it is abstractly attributed is not responsible for it. The slanderous attribution of the offense can also take place implicitly if it is carried out in such a way as to allow the accused person to be identified without equivocation.

In order to consider calumny committed, malice is required, and simple neglect is not enough. It is not necessary for the whistleblower to pursue the aim of actually having the innocent convicted, or, in any case, to harm him. According to Italian case law, the risk of the opening of a criminal case and the awareness of the person’s innocence is sufficient to consider calumny committed by the whistleblower.

Instead, it seems unlikely that the whistleblower can be held responsible according to Article 368, par. 2 of the Italian Criminal Code, unless he or she has altered or counterfeit documents in order to corroborate the accusation.

6. IS IT POSSIBLE TO CHARGE A WHISTLEBLOWER WITH SLANDER?

According to Article 595 of the Italian Criminal Code, anyone who, communicating with two or

more people, offends the reputation of others, is punished with imprisonment for up to one year or a fine of up to € 1,032.

The absence of the offended person and the communication, even if not contextual, to several people - at least two - are essential elements for considering this crime to be configured. With regard to the *mens rea* element, it is requested that the guilty party has carried out the offensive conduct with conscience and will, accompanied by the awareness of the harmful outcome. Furthermore, possible malice is considered in the hypothesis of acceptance of the risk of the offense.

In order to understand if it is possible to charge an employee blowing the whistle for slander, it is necessary to distinguish between the whistleblower who is telling the truth from the whistleblower who is not.

Firstly, concerning the former case, Article 596 of the Italian Criminal Code prohibits the so-called *exceptio veritatis*, i.e. the defence from a defamation accusation which is based on the fact that the content of the declaration is true. However, the *exceptio veritatis* rule has lost a very large part of its normative meaning following the entry into force of the Constitution due to the provision of the principle of the free expression of thought. Article 21 of the Italian Constitution largely exceeds the narrow limits within which this clause was envisaged applying to all situations in which the attribution to the offended person of a specific fact has public interest or social relevance, including the hypothesis of generic slander for which the exercise of the right to report is considered.

This means that, in order to protect the whistleblower who reports a true fact, the exercise of a legitimate right of criticism -

recognized and protected by law pursuant to Article 51 of the Italian Criminal Code - seems to take place. This interpretation is consistent with the provision of Article 3 of Whistleblowing Law.

Secondly, in the scenario in which the whistleblower reports something false, a further distinction must be made, whether the reporting is carried out with or without malice. As a matter of fact, criminal liability could only arise with reference to the case of filing a report with malice.

7. WHAT COULD HAPPEN TO A WHISTLEBLOWER IN A CRIMINAL TRIAL?

The whistleblower has a right to anonymity which is only relative (in terms of confidentiality on his personal information) and limited (valid only during the proceedings disciplinary, but not in criminal proceedings).

In criminal proceedings, the right of defence of the person accused prevails over the right to confidentiality of the whistleblower: the latter can then be called in court to declare content of his or her report.

According to Italian case law, Article 329 of the Italian Code of Criminal Procedure applies to whistleblowing (no. 9047/18). The mentioned provision states that investigative acts (such as the report mentioning the name of the whistleblower) are covered by secrecy until the accused is entitled to have knowledge of them or until the conclusion of the preliminary investigation.

In ascertaining the wrongdoing reported by the whistleblower, the relevant criminal procedure principles shall apply.

Firstly, pursuant to Article 111 of the Constitution, in the Italian legal system the

defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence.

As confirmed by the Italian Supreme Court, a right to privacy is not recognized on behalf of the whistleblower for criminal proceedings, in which the right of defence of the accused person prevails.

Therefore, the whistleblower who files a report may potentially become a witness in a criminal trial (i) losing the right to anonymity; (ii) with the obligation to appear in Court and to answer under oath on the facts learn from direct sources.

The above-mentioned principles do not apply only in the case provided for by Article 111, par. 5, of the Italian Constitution which states that the formation of evidence does not occur in an adversary proceeding with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven illicit conduct.

Therefore, in the cases mentioned in Article 111, par. 5, of the Constitution, the content of the report (or of the summary information gathered by the Prosecutor or the criminal police from the whistleblower) could be used in the criminal proceedings.

8. IS IT MANDATORY FOR THE COMPANY TO SHARE THE INFORMATION GATHERED WITH THE PUBLIC AUTHORITY?

There is no duty to share the whistleblower reporting with the Prosecution Service or with law enforcement authorities. However – except for (i) the correspondence between lawyer and client; (ii) the documents composed by the

lawyer (such as legal opinions) and (iii) those collected during the internal investigation carried out pursuant to the relevant provisions of the Code of Criminal Procedure – the Public Prosecutor has the possibility to order, by reasoned decree, the seizure of the *corpus delicti* and of material items related to the offence necessary for ascertaining the facts of the case.

9. WHAT EFFECTS MAY ARISE FROM COOPERATION (OR – ON THE CONTRARY – LACK OF COOPERATION) WITH PUBLIC AUTHORITIES?

It must be clear that, if the company voluntarily discloses and reports to the public authorities a misconduct of its employee or executive (self-reporting), Law 231 does not contemplate any limitation to the investigation activity and to the possibility for the Prosecutor to file the request for committal to trial.

Nonetheless, any conduct of cooperation, even if it does not allow the Public Prosecutor to drop the case, could lead to several procedural rewards.

Firstly, a reduction of the financial penalties could be granted according to Article 12 of Law 231 if, before the first-instance court hearing begins: (a) the entity has completely refunded the damage and has either eliminated the damaging or dangerous consequences of the crime or taken effective steps in this direction; and (b) the entity has adopted and put into practice a compliance model to prevent crimes of the type in question.

Secondly, a voluntary cooperation could be taken into consideration by the judge, as partial proof of the repairing of the consequences of a crime. In particular, according to Article 17 of Law 231, disqualification sanctions are not applied if the following conditions exist before

the first-instance court hearing begins: (a) the company has completely refunded the damage and has either eliminated the damaging or dangerous consequences of the crime or taken effective steps in this direction; (b) the company has eliminated the organizational deficiencies that allowed the crime to be committed by adopting and implementing compliance models suitable for preventing crimes of the type in question; (c) the company has set available for confiscation the profit derived from the offence.

In the case of lack of cooperation, no negative consequences are provided for by law. After all,

the company under investigation – or at trial – assumes the same position as the defendant, and therefore the privilege against self-incrimination (or right to silence) is granted.

Nevertheless, the attitude shown by the company could lead to greater reputational risk and could be taken into consideration by the Prosecutor in a request for precautionary measures against the corporation or employees/executives.

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