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Whistleblowing: what is it, how does it change and what do experts say

Experts' Opinion

Some clarifications on Whistleblowing

Rocco Contini

Manager Grant Thornton FAS

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In fact, the new regulation, by entirely repealing paragraphs 2-ter and 2-quater and completely reformulating paragraph 2-bis of art. 6 of Legislative Decree no. 231/2001, has also profoundly affected the administrative liability of entities: in fact, following the reform, the reporting channels already used within the MOG 231 will no longer be considered compliant and will have to be modified in line with the provisions of Legislative Decree no. 24/2023.
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Focus on

The importance of Whistleblowing

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The new regulation on Whistleblowing introduced by Legislative Decree dated 10 March 2023 no. 24, which implements EU Directive 2019/1937, brings to the attention of public and private entities numerous new elements compared to the previous legislation dated 2017, including an innovative management of the internal reporting channel.
In fact, art. 5 of the Legislative Decree prescribes that the management of the internal channel must be entrusted alternatively to a dedicated independent internal person or office with specifically trained personnel, or to an external autonomous subject with specifically trained personnel. But what fulfilments does the management of the aforementioned channel...

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So-called whistleblowing was introduced for the first time in Italy in 2012 by the so-called Severino law in relation to the public sector only and was subsequently partially extended to the private sector by Law 179/2017.

On these bases and following the introduction of EU obligations deriving from directive (EU) n. 2019/1937, on 15 March, Italy implemented a comprehensive reform of the institute, promulgating legislative decree n. 24 dated 10 March 2023, concerning "protection of persons who report violations of the European Union law and [...] of domestic regulatory provisions".

In fact, in order to promote legality, the aim is to further encourage reporting through:

- the widening of the number of subjects who are allowed to make a report: while the legislation was previously almost only aimed at employees and close collaborators, now, any person who has any working relationship with the entity is considered as a potential whistleblower (for example: employees, consultants, subcontractors, interns; candidates in the recruiting phase);
- the extension of the objective scope of application of the regulation to all of the most relevant sectors that are of interest of the EU law (e.g.: transport, procurement, environment, GDPR, consumer law, product conformity, competition, etc.)
- the introduction of measures aimed at preventing so-called «retaliations» (economic or employment consequences of an economic or employment nature, such as: job loss, demotion, ostracism, termination of contracts, etc.);
- the exemption from civil, administrative or criminal liability in relation to the disclosure of information (for the violation, for example, of the provisions on certain types of secrets, such as industrial secrets).

The provisions under Legislative Decree no. 24/2023 will enter into force according to two deadlines: 15 July 2023 for "private entities" having more than 249 employees and for all companies, regardless of their size, which have implemented an Organization, Management and Control Model, pursuant to Legislative Decree no. 231/01; and 17 December 2023 for "private entities" which have employed more than 49 and less than 250 employees in the last year.

The subjects concerned by the regulations are «public entities» (including: public service concessionaires, publicly controlled companies and in-house companies, even if listed) and, as regards «private subjects», companies which:

1. employed an average number of subordinate workers higher than 49 in the previous year;
2. regardless of the number of workers employed: (i) are subject to the application of the European Union acts referred to under parts I.B and II of the annex to Legislative Decree no. 24/2023 (regulations mostly concerning financial markets, prevention of money laundering and of financing to terrorism); (ii) have adopted an organisation, management and control model pursuant to Legislative Decree no. 231/2001.

All these subjects are required to implement, after consulting the trade union representatives, an internal reporting channel which:

- guarantees the confidentiality – also by means of encryption – of the entire content of the report (including all related documents) and, in particular, of the identity of the "reporter" and of the other "involved persons";
- is managed by a dedicated person, office and/or external subject, having the proper autonomy and specific training, who must be able to: i) issue, within seven days of receipt, a notification of receipt of the report; ii) maintain communications with the whistleblower and, if necessary, request for integrations; iii) guarantee, from an investigation and management perspective, a "diligent follow-up" to reports; iv) provide «feedback» to the whistleblower within three months; v) provide clear information on the channel, procedures and prerequisites for making internal and external reports, also by displaying them in the workplace and publishing them on the website; vi) keep the report for the time necessary to process it and, in any case, no later than five years from the date of notification of the final outcome of the reporting procedure;
- allows the reporting to be made both in written and oral form, as well as, upon request of the reporting party, through a direct meeting;

- in the event of oral and/or face-to-face reports, after obtaining the whistleblower's consent, guarantees the recording on a suitable device and/or written minutes of the conversation and, in the latter case, granting the whistleblower with the possibility to amend and/or modify the minutes, as well as to confirm their content by signing them;
- guarantees the person involved and/or in any case mentioned in the report with the possibility of exercising their right of defense if they expressly request it.

The general supervision on the compliance with the regulation is entrusted to ANAC (Italian anti-corruption authority), which also has the right to impose fines ranging from €10,000 to €50,000 if it ascertains that:

- retaliation has been committed or the report has been obstructed or an attempt has been made to obstruct it or the confidentiality obligation has been violated;
- no reporting channels have been set up, no procedures for making and managing reports have been adopted or they are not compliant.

Furthermore, the incompleteness of the internal reporting channel, the inability of the same to guarantee an effective follow-up to the report or the presence of well-founded reasons that suggest that retaliation will be suffered allow the whistleblower to make an external report directly to ANAC: if even in this case no response is given within the provided terms or there are well-founded reasons suggesting a risk to the public interest or retaliation, the whistleblower may publicly disclose information, without incurring any type of civil, administrative and/or criminal liability, even where the information is covered by secrecy.

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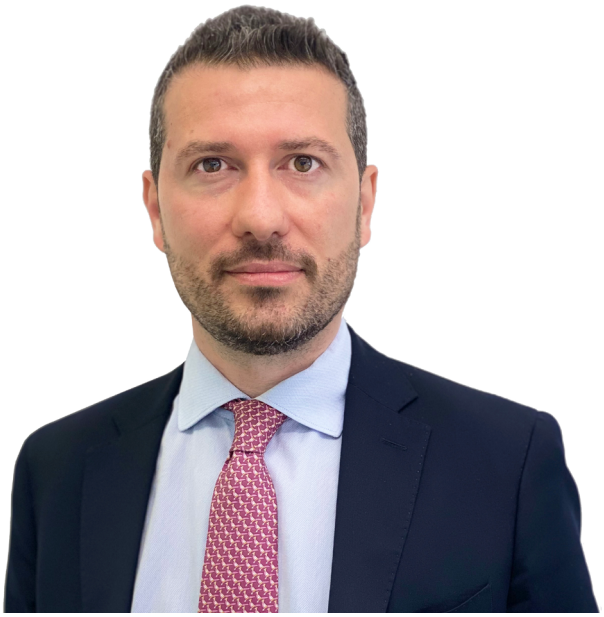

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In fact, the new regulation, by entirely repealing paragraphs 2-ter and 2-quater and completely reformulating paragraph 2-bis of art. 6 of Legislative Decree no. 231/2001, has also profoundly affected the administrative liability of entities: in fact, following the reform, the reporting channels already used within the MOG 231 will no longer be considered compliant and will have to be modified in line with the provisions of Legislative Decree no. 24/2023.

Moreover, the previous regulations allowed the company to have a certain flexibility in terms of means and organizational tools used for the implementation of the reporting channels.

In a nutshell, these channels were required to allow employees and close collaborators to report violations being relevant pursuant to Legislative Decree no. 231/2001, while guaranteeing the confidentiality of the whistleblowers and their protection from possible retaliation; then, the disciplinary system was required to punish those who carried out retaliation and/or made false reports with willful misconduct or gross negligence.

Based on the above, the application practice had led companies, especially smaller ones or those having more limited resources, to implement mailboxes was often managed directly by the Supervisory Board.

In such a context, the reform introduced has revolutionized the entire pre-existing system, providing for a series of innovations whose real scope will probably be fully understood only after the issue, by 30 June 2023, of the ANAC Guidelines and the consolidation of new operating practices.

In fact, with regard to the object of the reports - "what" can be reported - the reform brings about some significant changes, namely:

- companies that employed less than 50 workers in the previous year are only required to activate an internal reporting channel that only concerns violations of MOG 231;
- companies with more than 49 workers will have to provide for a reporting channel that also addresses violations of EU law (with a consequent extension of the objective scope);
- companies that must be considered as public entities and/or that provide public services - and have a MOG 231 -, regardless of the number of employees, will have to provide a reporting channel which, in addition to the previous ones, also concerns administrative, accounting, civil or criminal offenses that harm the public interest or the integrity of the administration.

The use of the e-mail box as a reporting channel also deserves further consideration: given that it is not expressly prohibited, it certainly no longer represents a tool that, alone, can be considered sufficient, functional or even suitable: in fact, one of the central aspects of the reform is that the reporting channel is no longer a tool through which reports can be made, but rather a real instrumental and procedural apparatus, which impacts the entire organization.

In fact, this channel should:

- be managed by a dedicated person, office or external subject, having adequate autonomy and specific training;
- allow reports to be made in written, oral or face-to-face form; ensure the adequate documentation or recording of oral or face-to-face reports; store data in compliance with the GDPR; encrypt data, documents or information relating to reports, tracing and compartmentalizing the related access data, etc.

Therefore, since a mailbox cannot be used alone, it is only uneconomical compared to the platforms or suites that are available on the market today, capable of supporting all the necessary tools in a single product.

Lastly, the reform provides for the need to extend the scope of application of the corporate disciplinary system, providing for penalties against those who:

- have committed retaliation, obstructed or attempted to obstruct a report, violated the confidentiality obligation;

- have not set up the reporting channels or adopted the procedures required for making and managing reports, or have adopted procedures that do not comply with those set by law or has not carried out the verification and analysis of the reports received;
- have made a false report with willful misconduct or gross negligence.

However, the decision to extend the application of administrative and disciplinary sanctions also to the cases of bad management of the channel and/or of the reports seems fraught with consequences, at least under two aspects.

Firstly, from an organizational point of view, it appears to involve the need to:

- guarantee the channel's internal managers adequate tools and resources for the purpose, so that they can be fully autonomous and, subsequently, personally liable for any inadequate management;
- provide contractual remedies suitable for punishing any breaches by external managers, as well as indemnities in relation to the liability (also due to a tort) which the company could face in the event of irregularities found.

Secondly, from a systematic point of view, it would seem to place the SB in a quite delicate position: in fact, on the one hand, Legislative Decree no. 24/2023 provides that the reporting channels are an integral part of the MOG 231, thus forcing the SB to supervise the management of the same within the scope of its activities; on the other hand, however, if the SB were entrusted with more than the mere supervision of the channel, they would have an organizational and management responsibility which is not suitable for a body which, pursuant to Legislative Decree no. 231/2001, is characterized by its independence from the company administration. Moreover, the SB would govern a part of the activities which they would also have the obligation to supervise, thus entering into a conflict of interest with respect to its own function.

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In fact, art. 5 of the Legislative Decree prescribes that the management of the internal channel must be entrusted alternatively to a dedicated independent internal person or office with specifically trained personnel, or to an external autonomous subject with specifically trained personnel.

But what fulfilments does the management of the aforementioned channel exactly involve?

First of all, whoever manages such channel will have the responsibility to notify the whistleblower of the receipt of the report, within the term of seven days from the date of receipt.

The manager of the reporting channel will also have to maintain the communications with the whistleblower and possibly request for integrations where necessary.

The manager of the reporting channel will also have the responsibility to follow up on the reports received and provide with feedback within a time frame specifically defined by the Legislative Decree, i.e., three months from the date of notification of receipt or, lacking such notice, within three months from the end of the seven-day term after the presentation of the report.

Lastly, clear information on the channel, procedures and conditions for making internal reports must be made available at the workplace and on the organisation's website.

Beyond what is indicated in art. 5, it should be noted that the specifically trained personnel responsible for managing the channel must also be ready to comply with the provisions regarding the processing of personal data. Therefore, personal data that are clearly not useful for processing the report should not be collected (or immediately deleted if they are accidentally collected). At the same time, the confidentiality of the reporting person must be guaranteed, also through encryption tools, and the documentation relating to the report must not be kept for a period of time exceeding five years starting from the communication of the final outcome of the specific procedure.

It should be noted that the legislation provides for the possibility of sharing the internal channel and its relative management but only for municipalities other than provincial capitals and private subjects who employed an average number of subordinate workers under permanent or fixed-term contracts not exceeding two hundred and forty-nine in the last year.

Art. 5 of the Legislative Decree also provides for the possibility to outsource the management of the internal channel. The choice of the Legislator to provide for specific and rigorous fulfilments – mentioned above – for the correct management of the channel leads, as a logical consequence, to an increase in the organizational and management costs for the recipients of the new legislation.

Therefore, the possibility to outsource the management of the internal channel could play an important role in relieving organizations from the operational phase of receiving reports as well as from the compliance with the additional obligations provided.

The external person in charge will therefore be able to guarantee a timely management of the reports by following the methods and times required by the Legislative Decree under analysis, accurately observe the provisions on the correct processing of personal data, as well as contribute to creating trust in the subjects involved, having the maximum operational autonomy as required by law.

This last aspect, which is essential to avoid the risk of conflict of interest with potential economic and reputational consequences for organisations, requires a clarification of what is meant by "autonomous subject" in relation to the possibility of outsourcing the internal channel.

In this sense, it must be understood as an independent subject with respect to the operational functions of the organization, therefore unrelated to any hierarchical dependence on the same.

Given the above, a peculiar aspect of the regulation is that it is focused on the protection of reports concerning crimes – meant as violations of rules - of public interest.

This element automatically makes it possible to distinguish this reporting system from other and different systems aimed at protecting people reporting offenses that are not of public interest.

Consider, for example, the reports concerning violations of the organization and management model (MOG) pursuant to Legislative Decree no. 231/2001: it is no coincidence that the Whistleblowing discipline does not allow external reports to be made for such offenses, when relating to companies with less than 50 employees.

Given the above analysis, it is important to underline that the entry into force of Legislative Decree no. 24/2023 will not repeal - and therefore will leave open - other reporting systems concerning specific sectors. In the specific case, this is the system for reporting offenses falling within anti-corruption and public contracts under Legislative Decree no. 50/2016 and subsequent amendments. With this regard, since 6 June 2022, the “Modulo Unico Informatizzato di Segnalazione” (single computerized reporting form) has been the exclusive reporting channel to ANAC.

The same applies to the reporting of suspicious transactions for anti-money laundering purposes. In this sense, the Whistleblowing legislation does not affect the reporting system provided under Legislative Decree no. 231/2007.


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