WHISTLE-BLOWING: FIRST STEPS TAKEN TOWARDS LEGAL SAFEGUARDS IN ITALY.

The systems for protecting employees who report unlawful behaviour in their company, which until now have been regulated by sector based legislative measures, are now subject to a more generalised draft law.

The draft law requires all bodies subject to Law 231/2001 - on the vicarious administrative liability of legal persons or associations arising from an offence - to include in the system and control models appropriate measures to protect the identity of the employee reporting the wrongdoing.

Employers should put in place whistle-blowing procedures also because they are effective tools for the prevention of disloyal behaviour by employees.

WHAT IS WHISTLE-BLOWING?

Whistle-blowing refers to systems of organisation, regulation and management of procedures aimed at incentivising and protecting employees who report wrongdoing in the workplace.

Currently, in Italy, except for specific sectors, every undertaking may decide whether to adopt whistle-blowing procedures. In the majority of cases there are no specific guidelines, and an employee faces three possible decisions:

- make an internal report to an internal body deemed suitable;
- report the matter to the public prosecution service; or
- as is often the case, stay silent.

THE INTERNATIONAL LEGAL CONTEXT

Internationally, the protection of whistle-blowers was addressed in specific contexts. The following international agreements apply:

- **the Civil Law Convention on Corruption issued by the Council of Europe on 4 November 1999**, ratified in Italy by Law no. 112/2012, which requires member states to introduce mechanisms for the

Main aspects

In order to be effective, a whistle-blowing procedure must clearly establish:

- Whom it concerns;
- What are the standards of behaviour that the organisation expects from employees;
- What types of irregularity can be reported;
- What must be the characteristics of the report;
- Through what channels can the report be made;
- What actions can the organisation take after the report has been made;
- What safeguards are there for both the person making the report and the person in respect of whom the report was made;
- What are the consequences of the abuse and instrumental use of whistle-blowing

adequate protection of employees who, in good faith, report corruption;

- **the United Nations Convention against Corruption of 31 October 2003**, ratified in Italy by Law no. 116/2009, which requires that signatory states provide for mechanisms to protect persons who report corruption; and
- the "***Recommendation of the Council on Guidelines for managing conflict of interest in the public service"* **of the OECD of 28 May 2003**, which includes general principles for favouring the adoption by member states of whistle-blowing procedures which provide, on the one hand, for the protection of the persons making the report from any retaliation and, on the other, rules for preventing any abuse of the reporting mechanisms.

In contrast to Italy, where the incorporation of these international principles has been quite slow and fragmented, in most foreign countries whistle-blowing rules have been subject to ad hoc legislation and measures implemented by central authorities and individual administrations. Efforts have focused on two main areas:

- reporting systems; and
- protection measures.

THE ITALIAN STATUTORY FRAMEWORK

In Italy, there are only a few sector based legislative measures which expressly regulate whistle-blowing. Specifically, they are:

- **Law 165/2001 (Consolidated Law on Employment in the Public Sector)**, as last amended by the Law of 114/2014, which provides for the protection of employees in the public sector who report or discuss wrongdoing of which they have become aware during their employment relationship (art. 54 bis);
- **Law 385/1993 (Consolidated Banking Law)**, as last amended by Law 72/2015, which requires that **banks** adopt specific procedures for reports from personnel - both internally and externally - of actions or events which may constitute a breach of the laws governing the activities undertaken. These procedures must provide for specific, autonomous, independent channels for reporting, in addition to mechanisms suitable for ensuring the confidentiality of the personal data of the person making the report and the body in respect of which the report is made, and protecting the person making the report from retaliation (art. 52 bis);
- **Law 58/1998 (Consolidated Financial Intermediation Law),** as last amended by Law 72/2015, which provides that **intermediaries and the parent company** adopt reporting procedures with the same characteristics as those governed by the Consolidated Banking Law (art. 8 bis);
- **Law 231/2007 (Anti-money laundering laws)**, as last amended by Law 90/2017, which provides for the preparation of an internal system for reporting breaches (art. 48);

- **Regulation (EU) 596/2014 (regulation on market abuse),** which requires that companies which perform activities concerning **financial services** put in place internal procedures for reporting breaches (art. 32;
- The **Implementing Directive (EU) 2015/2392** of the Commission relating to the aforementioned Regulation (EU) no. 596/2014, concerns the reporting of actual or potential breaches of the regulations to the competent authorities.

Other sources of law provide, however, for disclosure obligations which operate independently of the existence of whistle-blowing procedures. These include:

- **Law 231/2001** on the vicarious administrative liability of legal persons or associations arising from an offence. The law imposes upon those concerned by the model under Law 231/2001 *"disclosure obligations towards the body appointed to oversee the operation of and compliance with the models"*;
- **Law 81/2008** (**Consolidated Law on Workplace Health and Safety**), which requires workers to report in a timely manner irregularities in equipment, substances, materials and devices.

Currently under consideration by the Committee of the Senate is the draft law 2208 of 3 February 2016 concerning *"Provisions on the protection of persons reporting offences or irregularities of which they become aware within a public or private employment relationship"*.

The draft law, in addition to providing for amendments to the aforementioned art. 54 bis of the Consolidated Law on Employment in the Public Sector, introduces **safeguards for employees or independent contractors who report wrongdoing in the private sector**.

Art 2 of the draft law provides for amendments to Law 231/2001, and lays down that the system and control models suitable for preventing breaches offences must contain measures for the protection of the identity of the employee reporting the wrongdoing, and set out sanctions for persons who breach confidentiality obligations and/or perform acts of retaliation or discrimination against the employee making the report. The provision also prohibits discriminatory measures against whistle-blowers. The whistle-blower or trade union organization representing him may report any such discrimination to the Labour Inspectorate. The discrimination against the person making the report is null and void (including any retaliatory measures, such as dismissal, change of duties and any other measure having negative effects). It will be incumbent upon the employer to demonstrate that any such measures are based on reasons extraneous to the report.

It is obvious that the draft law seeks to put in place the first general protection of whistle-blowing.

At present, the draft law merely makes whistle-blowing procedures obligatory for the undertakings and reports of the wrongdoing incumbent on whoever holds managerial functions at the body, whoever is subject to their supervision, and whoever works with the body for any reason.

The draft law does not however provide measures to incentivise the use of the measure. The draft law thereby distinguishes itself from foreign legislation

(and US law in particular), which includes the rewards, and high rewards at that, payable to the persons making the report so as to attain a higher level of effectiveness.

WHAT IS TO BE DONE?

The standards laid down by the international and national legislation constitute a point of reference for the whistle-blowing procedures and – including prior to the issue of the draft law – can be taken into consideration in order to re-examine the suitability of the models for the prevention of such offences

Every organisation should establish a system of whistle-blowing to align with the standards and, above all, to promote effectively a company culture characterised by proper behaviour and preventing wrongdoing which can have serious consequences for the company

The whistle-blowing procedure is an effective instrument for pursuing such purposes, setting forth clear rules and processes useful for both the person making the report and the employer, which include:

- a specific, independent and autonomous channel for the reporting;
- the identification of the management process and the person in charge of the overall system;
- the protection of the person making the report against retaliation and, in any case, unfair behaviour arising from having made the report;
- the guarantee of the confidentiality of the personal data of the person supposedly responsible for the breach, subject to the rules governing the investigations or the proceedings brought before the judicial authority in relation to the facts reported.

To be particularly useful, the procedure must be adequately publicised, above all through training sessions, following verification that the content has been understood.

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