WHISTLEBLOWING LEGISLATION – EARLY INDICATIONS ON HOW LAW 179/2017 WILL WORK

Some months have now passed since Italy introduced whistleblowing legislation in the shape of Law 179 of 30 November 2017. Many issues remain unresolved, but public sector employers have the benefit of a little case law from the Supreme Court's Criminal Division, and private sector employers can look to a report that Italy's employers' association Confindustria has provided to assist enterprises.

THE NEW LEGISLATION

Law 179/2017 (the "**New Act**") states that it sets out "provisions for the protection of persons reporting offences or irregularities of which they learnt in the course of a private or public sector relationship".

The legislation amends article 54-*bis* of the Consolidated Legislation on the Civil Service (Legislative Decree 165/2001), and, with respect to the private sector, article 6 of Legislative Decree 231/2001.

The legislation's focus is on ensuring that the whistleblower's identity remains confidential, and on prohibiting retaliation for whistleblowing actions. Whistleblowers do however remain subject to various punitive measures where they act wilfully, or with gross negligence, in making an unfounded report.

PRIVATE SECTOR

Article 2 of the New Act makes changes to the rules governing responsibilities that private sector entities have in connection with preventing the commission of criminal offences. It does so by adding three new parts to article 6 of Legislative Decree 231/2001.

The changes effectively require entities to revise any internal systems and controls (the so-called "Manual 231") they have put in place to prevent the

Key issues

- Within the private sector, the New Act applies only to those companies that have set up internal systems and controls under Legislative Decree 231/2001;
- Within the public sector, the new rules apply to all public employees, all employees of private companies and institutions that are subject to public control, and to employees and consultants of businesses that supply goods and services and execute works for general government;
- Dedicated communications channels must be in place, and must ensure that the whistleblower's identity remains confidential;
- Retaliatory measures against the whistleblower are void;
- The employer would carry the burden of proving that any disciplinary measures, dismissals and other organisational measures with an adverse impact upon the whistleblower were based on grounds that had nothing to do with the reports they made.

commission of certain criminal offences. The New Act specifies that Manual 231 must now provide for:

- one or more channels that enable directors and employees, ensuring that their identity remains confidential, to act by way of safeguard to the company's integrity in presenting particularised reports of unlawful conduct relevant to Legislative Decree 231/2001, based upon precise and consistent factual evidence, or of breaches of the Manual 231 itself, where they have become so aware by reason of the duties they have performed; and
- at least one other reporting channel, with information technology equally capable of ensuring that the whistleblower's identity remains confidential.

Additionally,

- acts of retaliation or discrimination against the whistleblower, for reasons directly or indirectly linked to the reporting, are prohibited; and such acts may be reported to the national labour inspectorate, either by the whistleblower or by a trade union identified by the whistleblower;
- in a complete reversal of the usual burden of proof, in the event of any dispute relating to disciplinary measures, demotion or reductions in employment duties, dismissals, transfers, or other organisational measures that directly or indirectly adversely affect the whistleblower's employment conditions, it is for the employer to show that those measures were based on grounds that had nothing to do with the whistleblowing.
- the disciplinary system set forth in the Manual 231 must provide for sanctions against:
  - any person who breaches the measures protecting the whistleblower; and
  - any whistleblower who acts wilfully, or with gross negligence, in making a report that turns out to be unfounded.

Scope of application

The New Act does not lay down rules of general application for private-sector employment (and similar) relationships. Its provisions regard only those entities that have put in place a Manual 231.

The interplay between the New Act (with its references to reports of unlawful conduct relevant to Legislative Decree 231/2001) and the legislation on entities' vicarious liability for offences committed by directors and employees raises the issue of whether the New Act only covers whistleblowing of unlawful conduct that constitutes one or more of the offences listed in the Legislative Decree 231/2001 in circumstances in which the offence was committed in the interest or to the benefit of the entity (which is the scope of application of the Legislative Decree 231/2001).

The legislation would appear to be drafted this way, but businesses may decide to include other kinds of reporting within their whistleblowing systems.

Data protection

The reporting system must also take into account the legislation on data protection (as Italy's data protection authority said as long ago as 2009). This is especially important in light of the General Data Protection Regulation (GDPR), which becomes enforceable throughout the EU on 25 May 2018.

Beyond express consent to processing from the data subject, it may be that the processing be held lawful where it is necessary either: in order to comply with a legal obligation (under article 6(1)(c) GDPR) or for the purposes of the legitimate interests pursued by the data controller (under article 6(1)(f) GDPR). That would however require the assumption that the New Act considered the importance of those legitimate interests against other competing interests, and concluded that they should prevail. Accountability is one of the key concerns permeating the GDPR, and given its importance, it may be that individual data controllers will have to be able to show that they really did make that evaluation between competing interests.

There is also a potential conflict between the need to protect the whistleblower's identity and the right of access, as data subject, of the person against whom the report is made (the "reported person"). That conflict however would appear to be resolved by deeming that in this case there is a restriction of the right of access to protect interests that deserve to be safeguarded (which article 23 GDPR allows).

Confindustria's report

In January 2018, Confindustria provided a report on the whistleblowing legislation that provided some useful indicators to those the legislation addresses within the private sector.

Confindustria's principal interest – which it articulated also during its engagement in the legislative process – was to ensure balance between the interests of the whistleblower and those of the reported person.

One aspect on which Confindustria focused particularly was the confidentiality of the whistleblower's identity, on which it said that:

- for the whistleblower's identity to remain confidential presupposes that the identity is revealed by the whistleblower to the entity, which is quite different from anonymity. A whistleblower can only receive adequate protection, it argued, when they are identifiable; and
- Manual 231 may make provision for anonymous whistleblowing, but such reporting would, however, make establishing whether or not a report was well-founded more complicated, and that would be all the more reason for the entity to require the inclusion of specific particulars and appropriate documentation.

We would add that a reporting system may require a whistleblower not to discuss their report until the entity has provided its feedback on the result of that report. Otherwise, whistleblowers could undermine the safeguards protecting their own identity and the company may be unable to protect them.

A second important aspect on which the guidelines provide useful insights regards the question of to whom reports should be made, which is a matter that must be clearly laid out in the Manual 231.

- A business must identify those who will potentially receive reports in light of the nature of the business, its size, the structure of any group to which it belongs, and any features peculiar to its sector.
- One potential recipient would be the supervisory board, which acts independently, and would thus provide greater protection for the whistleblower. Even if it is not the only body or individual involved, it appears advisable that the supervisory board have a role as part of its duties to oversee the functioning of Manual 231.
- The recipient of reports could be an external organisation, company or individual with the appropriate expertise and professional standing. Such a person could for the purposes of article 3(2) of the New Act invoke a professional duty of confidentiality in dealing with inquiries into and evaluations of reported facts. That would ensure the recipient was able to carry out their duties without fear of incurring responsibility for contributing to or facilitating the commission of an offence.
- Other possible recipients could be the head of the compliance department, a committee of individuals belonging to various departments, or, in small- and medium-sized enterprises, if there are no reasonable alternatives, the employer.

Finally, Confindustria points out how the New Act has quite properly and appropriately avoided getting into the nitty-gritty of how reports should be handled, leaving it up to businesses to choose what information technology they think best suited. These might include platforms managed by specialist, independent, third parties and the use of dedicated email addresses.

PUBLIC SECTOR

Article 1 of the New Act amends article 54-*bis* of Legislative Decree 165/2001, which already provided for some safeguards for public employees who reported unlawful conduct of which they had learnt through their employment. The article also applies to employees of private sector entities that are subject to public control, and those working within and assisting businesses that supplied goods or services in the execution of works for general government.

The New Act lays down more detailed provisions, including:

- in any disciplinary procedure, the whistleblower's identity may be revealed only where the key allegation in that procedure is based entirely or in part upon their report, and knowledge of the whistleblower's identity is essential to the ability of the reported person to defend themselves, without prejudice to the whistleblower having consented to disclosure of their identity. In criminal proceedings, article 329 of the Code of Criminal Procedure applies (see next paragraph);
- the New Act's safeguards are not assured where the whistleblower has been found either criminally liable for offences of slander or libel, or otherwise for offences committed in the whistleblowing; or civilly liable for having acted wilfully or with gross negligence, in the whistleblowing.

The Supreme Court's decision on safeguarding confidentiality

Italy's Supreme Court has ruled that the identity of a whistleblowing public employee may be revealed, including in disciplinary procedures, when it has been obtained from the credentials that were used to make the report, where the whistleblower used an internal email address. However, this requires that the allegation made in the disciplinary procedure be based entirely or partially on the report, and that knowledge of that identity be absolutely indispensable to the defendant mounting a proper defence.

Where the report is used in criminal proceedings, there is no scope for anonymity (meaning secrecy as to the whistleblower's identity), as Law 179/2017 expressly states, "under criminal proceedings, the whistleblower's identity may be kept secret in the manner, and subject to the limitations, set forth in article 329 of the Code of Civil Procedure" (Supreme Court, Sixth Criminal Division, Judgment No. 9407/2018).

CHANGES TO DUTIES OF PROFESSIONAL AND WORKPLACE SECRECY

Article 3 of the New Act amends the statutory treatment of duties of professional secrecy, in both the public and the private sector. It provides that:

- pursuit of the interest in the integrity of administration both public and private, and the prevention and combating of misuse of assets, each constitutes a fair ground for disclosing information otherwise covered by administrative secrecy or professional confidentiality (under articles 326 or 622 of the Criminal Code), by scientific or industrial secrecy (under article 623 of the Criminal Code) or by employees' duties of loyalty and fidelity (under article 2105 of the Civil Code);
- secrecy obligations will nonetheless be considered breached where disclosures are made in a manner that goes beyond the objective of eliminating the offence, or outside the communication channels that are specifically put in place; and
- no fair ground for disclosure will be available where an individual with a professional duty of confidentiality learns the information as a result of a professional or advisory relationship with the entity, business, or individual affected.

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