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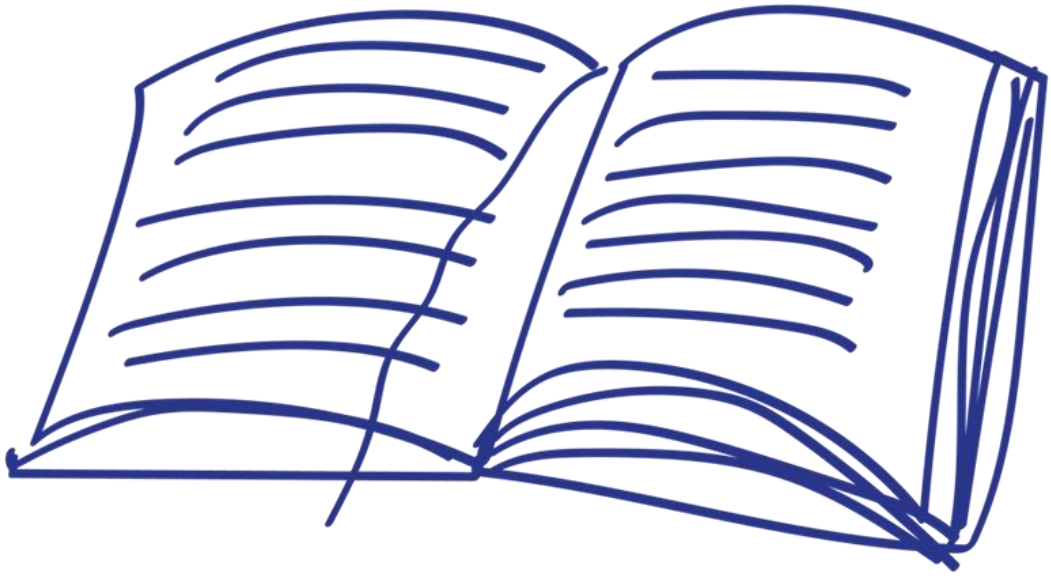

The transposition of the Whistleblowing directive

The Italian Legislative Decree 10 March 2023, n. 24

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1. Introduction

After a long and troubled legislative process(1), the national legal system, with the approval of the Council of Ministers, has finally transposed Directive (EU) 2019/1937 (hereinafter "**Directive**") on the protection of persons who report breaches of Union law, by adopting Legislative Decree 10 March 2023, n. 24 (hereafter "**Decree"**(2), published in the Official Gazette on March 15, 2023.

The regulatory action, which goes beyond the mere transposition of the *acquis communautaire* and the fulfillment of the obligations imposed by the Directive to set a minimum standard of protection for whistleblowers within the strategic sectors for EU policies(3), has its core point in the protection of people who report violations of provisions not only of European law (in compliance with the provisions of the Directive), but also of national legislation that are harmful to the public interest or to the integrity of the Public Administration or private entities, of which the whistleblower has become aware in his working context.

All of this by being fully aware that the legal institute analyzed represents a general safeguard which is functional to strengthen the principles of transparency and responsibility and to prevent the commission of unlawful behavior in any working scenario.

In order to achieve said objective in compliance with supranational regulations, the legislator has superseded the previous regulatory framework outlined by Law 30 November 2017, n. 179, – thanks to which provisions on the subject of protection of whistleblowers, significantly differentiated between the public sector and the private(4) sector were adopted for the first time - by leveling out the public and private discipline and, as far as the private sector is concerned, by broadly envisaging the compulsory nature of the establishment of reporting channels even regardless of the adoption of the Organization, Management and Control Model pursuant to Legislative Decree 8 June 2001, n. 231 (hereinafter "**Decree 231**").

Compared to the previous regulatory frameworks, the profiles of innovation introduced by the Decree can be summarized as follows:

- audience extension of the recipients of organizational and protection obligations, as well as reporting subjects;
- extension of potentially illegal conducts deemed worthy of reporting;
- introduction of an external reporting channel entrusted to the ANAC (National Anti-corruption Authority), which is also entrusted with a guaranty and supervisory role that includes the possibility exercise a disciplinary power;
- applicability of the protection measures for whistleblower even in the event of public disclosure of the violations;
- strengthening of the protection of whistleblowers through the development of effective protection measures against the retaliatory risk;
- strict regulation on the confidentiality of the reporting person's identity, of the procedural methods of reports' management and preservation of the documentation related to them.

1. Pending which the European Commission had, moreover, launched an infringement procedure against eight Member States, including Italy.
2. With this provision, the Government exercised the legislative delegation conferred by means of the 2021 European Delegation Law.
3. The operational scope of the Directive is limited to violations of the Euro-unit legislation in a range of sectors expressly indicated in the annex to the regulatory text such as, for example: public procurement, financial services, product and transport safety, environment, food, public health, privacy, network and information systems security, competition.
4. Consistently, art. 54-bis of Legislative Decree 30 March 2001 n. 165, art. 6, paragraphs 2-ter and 2-quater, of Decree 231 and art. 3 of Law 30 November 2017, n. 179 were revoked as well.

Pending which the European Commission had, moreover, launched an infringement procedure against eight Member States, including Italy.

2. Material scope

As already stated, by defining the application scope of the newly minting provisions – which goes beyond the scope prefigured by the Directive – the Decree adopts a broad notion of violation, including behaviors, acts or omissions harmful not only to Union law, but also to the national legislation, as long as they prove to be jeopardizing for the public interest, the integrity of the Public Administration or private entities.

More specifically, the provision, with a strong effort of typification, identifies the following "mandatory categories of violation:

a) administrative, accounting, civil and criminal offenses of any nature, other than the cases listed below;
b) relevant unlawful conducts pursuant to Decree 231 (i.e.: concrete cases that integrate the details of the predicate-crimes related to the administrative liability of legal entities) and violations of the Organizational, Management and Control Models (such as, for instance, the non-compliance with the conduct principles and their control measures), other than the cases listed below(5);
c) offenses that fall within the scope of application of European Union or national acts duly cataloged in the Decree's Annex or in the internal legislation that implements the European acts stated in Annex I of the Directive, related to the following sectors: public procurement; financial services, products and markets and the prevention of money laundering and terrorist financing; product safety and compliance; transport safety; environmental Protection; radiation protection and nuclear safety; food and feed safety and animal health and welfare; public health; consumer protection; protection of privacy and protection of personal data and security of networks and information systems;
d) acts or omissions that are harmful to the financial interests of the European Union protected pursuant to art. 325 TFEU;
e) acts or omissions concerning the internal market pursuant to art. 26, par. 2, TFEU, including violations of the Euro-unit rules on competition and state aid, as well as corporate taxes;
f) any conduct which is likely to frustrate the objects or purposes of the provisions envisaged by EU acts in the sectors identified under letters c), d) and e).

On the contrary, the following cases are expressly excluded from the scope of the new regulation:

- disputes, claims or requests related to a personal interest of the reporting party or the person who has filed a complaint to the Judicial or Accounting Authorities that pertain exclusively to their individual employment or public employment relationships, or to relationships with hierarchically superordinate figures;
- reports of violations already regulated *on a mandatory basis* by Union acts individually identified in Part II of the annex to the Decree or those which constitute the implementation of Union law, as established by Part II of the Directive's annex;
- matters of national security and defense which tend to remain in the exclusive competence of the national legislator, as the protection of classified information, forensic and medical professional secrecy and the resolutions of judicial bodies.

5. Provision that is in continuity with the dictates of current art. 6, para. 2-bis, of Decree 231.

In addition, it must be noted that the legislative *novum* does not impact the application of criminal procedure provisions, of those related to the autonomy and independence of the judiciary, the functions and attributions of the CSM (Italian Judiciary Superior Committee), as well as domestic legislation concerning the exercise of the right of workers to consult their representatives and trade unions, protection against unlawful conducts resulting from such consultations, the autonomy of the social partners and their right to enter into collective agreements, as well as the repression of anti-union conducts.

3. Personal scope

Thus, identified what constitutes a violation worthy of attention for the legislator – the reporting of which requires compliance with the protection measures for the benefit of the whistleblower –, it is now necessary to dwell on one hand, on the identification of the entities that are required to comply with the legislation and on the other, on the identification of the individuals entitled to report and, for this reason, recipients of the guarantees envisaged by the Decree.

Regarding the first issue, the subjects of the public sector are of particular importance, namely: Public Administrations, the independent guarantee, supervision or regulation Administrative Authorities, the public economic bodies, the bodies governed by public law, the public service concessionaires, publicly controlled companies and in-house companies.

Subject of the public sector	**Violations subject to reporting/complaint relevant pursuant to art. 3, para. 1, of the Decree**
Without distinction any body considered by the Decree: Public Administrations, the independent guarantee, supervision or regulation Administrative Authorities, the public economic bodies, the bodies governed by public law, the public service concessionaires, publicly controlled companies and in-house companies.	Internal or external reports, public disclosures, reports to the Judicial or Accounting Authorities of information on the following violations: a) administrative, accounting, civil and criminal offenses of any nature, other than those under point c), d), e), f); b) relevant unlawful conducts pursuant to Decree 231 or violations of the Organizational, Management and Control Models; c) offenses that fall within the scope of application of European Union or national acts duly cataloged in the Decree's Annex or in the internal legislation that implements the European acts stated in Annex I of the Directive; d) acts or omissions that are harmful to the financial interests of the European Union protected pursuant to art. 325 TFEU; e) acts or omissions concerning the internal market pursuant to art. 26, par. 2, TFEU, including violations of the Euro-unit rules on competition and state aid, as well as corporate taxes; f) any conduct which is likely to frustrate the objects or purposes of the provisions envisaged by EU acts in the sectors identified under letters c), d) and e).

With regards, on the other hand, to the **private sector**, the following individuals are those burdened with the establishment of reporting channels and the protection of *whistleblowers*:

- individuals who have employed an average of at least 50 employees in the last year with permanent or fixed-term employment contracts;
- individuals operating within the scope of application of the Union acts referred to in parts I.B and II) of the annex to the Decree (i.e. services, products and financial markets, money laundering prevention and prevention of terrorism, environmental protection and transport safety), regardless of whether or not they have reached the average of 50 employees in the last year;
- lastly, and residually, individuals who, even if they have not reached the average of 50 employees in the last year, have already adopted an Organizational, Management and Control Model pursuant to Decree 231.

In this sense, it is easy to observe how the choice pursued by the domestic legislator ends up attracting into the scope of the whistleblowing system almost the majority of legal entities that operate with private-law instruments in the competitive market.

Private sector individual	**Violations subject to reporting/complaint relevant pursuant to art. 3, para. 1, of the Decree**
Individuals who have employed an average of at least 50 employees in the last year	Internal or external reports, public disclosures, reports to the Judicial or Accounting Authorities of information on the following violations: a) offenses that fall within the scope of application of European Union or national acts duly cataloged in the Decree's Annex or in the internal legislation that implements the European acts stated in Annex I of the Directive; b) acts or omissions that are harmful to the financial interests of the European Union protected pursuant to art. 325 TFEU; c) acts or omissions concerning the internal market pursuant to art. 26, par. 2, TFEU, including violations of the Euro-unit rules on competition and state aid, as well as corporate taxes; any conduct which is likely to frustrate the objects or purposes of the provisions envisaged by EU acts in the sectors identified under the previous points.
Individuals operating within the scope of application of the Union acts referred to in parts I.B and II) of the annex to the Decree regardless of whether or not they have reached the average of 50 employees in the last year	*as above*
Individuals who, even if they have not reached the average of 50 employees in the last year, have already adopted an Organizational, Management and Control Model pursuant to Decree 231	Internal or external reports, public disclosures, reports to the Judicial or Accounting Authorities of information relevant unlawful conducts pursuant to Decree 231 or violations of the Organizational, Management and Control Models.

Individuals who have adopted the Organizational, Management and Control Model and who have reached an average of at least 50 employees in the last year	Internal or external reports, public disclosures, reports to the Judicial or Accounting Authorities of information on the following violations: a) relevant unlawful conducts pursuant to Decree 231 or violations of the Organizational, Management and Control Models; b) offenses that fall within the scope of application of European Union or national acts duly cataloged in the Decree's Annex or in the internal legislation that implements the European acts stated in Annex I of the Directive; c) acts or omissions that are harmful to the financial interests of the European Union protected pursuant to art. 325 TFEU; d) acts or omissions concerning the internal market pursuant to art. 26, par. 2, TFEU, including violations of the Euro-unit rules on competition and state aid, as well as corporate taxes e) any conduct which is likely to frustrate the objects or purposes of the provisions envisaged by EU acts in the sectors identified under the previous points.

Moving on to the other issue, it is necessary to observe that the Decree identifies as individual entitled to report any worker of the public and private sector, regardless of the legal and contractual framework of their service, so that self-employed workers, collaborators, freelancers, consultants, volunteers and trainees, as well as the shareholders of the legal entity and the people who hold administrative, management, control, supervisory or representation functions within it are further included(6).

But not only. The real innovation lays in the fact that the protection provided directly for those mentioned above further applies to other figures, in particular:

- the facilitators (ie: those who assist the worker in the reporting process);
- people who operate in the same working context as the whistleblower or the person who filed a complaint or made a public disclosure and those who are linked to them by a stable emotional or emotional bond within the fourth degree;
- colleagues who work in the same context as the whistleblower and have a regular and present relationship with him;
- the entities owned by the reporting person or for which he works, as well as the entities that operate in the same professional context as him.

6. In this regard, the Decree points out that the protection further applies if the reporting or complaint to the judicial or accounting authorities or the public disclosure of information takes place: *(i)* even before the legal relationship between the entity and the reporting party has begun, if the information on the violations was acquired during the selection process or in other pre-contractual phases; *(ii)* during the trial period; *(iii)* after the termination of the employment relationship, provided that the information on the violations has been acquired during the same.

- colleagues who work in the same context as the whistleblower and have a regular and present relationship with him;
- the entities owned by the reporting person or for which he works, as well as the entities that operate in the same professional context as him.

4. Reporting channel

From the overall examination of the Decree, it can be asserted that in the near future whistleblowers will have two "institutional" channels available to convey their reports: a channel which is **internal** to the entity and an **external** one which sees ANAC as the primary recipient.

4.1. In order to activate **the internal reporting channel**, the subjects of both the public and private sectors are mandatorily required, after having heard the representatives or trade union organizations, to implement tools for the transmission/reception of reports that guarantee, also by using cryptography, the confidentiality **(i)** of the identity of the reporting person, **(ii)** of the person involved, **(iii)** in any case of the person mentioned in the report, **(iv)** of the content of the report and **(v)** of the related documentation.

The management of such channel has to be entrusted to a person, or to an independent internal office with specifically trained personnel or rather to an external individual who proves to be as equally independent and equipped with the resources that are necessary to be employed in the process.

However, if there is a public sector individual who has to comply with the regulations on corruption prevention and transparency, the appointed body must be identified, by law, in the **RPCT** (Responsible for corruption prevention and transparency), and mandatorily appointed pursuant to art. 1, paragraph 7, Law of November 6, 2012, n. 190 ("Legge Severino").

From a purely procedural point of view, the new legislation has further established that reports can be made in **written form**, also by the use of IT procedures, **verbally** through telephone lines or voice messaging systems or, if the reporting person requests it, through a direct meeting set within a reasonable time.

Furthermore, attention must be given to the specific organizational duties placed within the management trustees of the endogenous channel who, among other things, are called to:

- issue to the reporting party a receipt notice of the report within seven days from the date of reception(7);
- speak with the whistleblower and ask the latter for implementations, where necessary;
- diligently follow up on the reports received, putting in place the most appropriate preliminary activities;
- **provide a response to each individual report within three months of the issue of the receipt notice or, in the absence of such notice, within three months from the expiration of the seven days term from the report's submission**;
- make clear information available on the channel, regarding the procedures and the conditions necessary for making internal and external reports. This information must be displayed and made easily visible at workplace or on the institutional website (if existing), as well as accessible to people who, while not always present at workplace, maintain a legal relationship with the individual entity;

- provide for the conservation of the documentation related to the reports according to the methods and deadlines set out in detail by art. 14 of the Decree.

4.2. In addition to the internal channel a further unprecedented possibility is introduced for whistleblowers, which is to **directly transmit reports to the ANAC**, through a channel specifically set up by the Authority, if one of the following conditions occurs:

- in the specific working context of the whistleblower, the use of the internal channel is not mandatory or it is not active nor it has been designed according to the requirements of the Decree;
- the whistleblower has already made an internal report, but it has not been followed up;
- the whistleblower has reasonable grounds to believe that, should he make an internal report, it would not be followed up effectively or could be exposed to a risk of retaliation;
- the violation reported may reasonably cause an imminent or obvious danger to the public interest.

4.3. However, the channels until now examined do not complete the horizon of the possible violations that may arise at workplace.

As a matter of fact, the Decree goes as far as to regulate, on a subsidiary basis, **public disclosure** as a further method of "reporting", providing that the same can be made under certain conditions (to which it is dependent the right of the whistleblower to benefit from the protective measures), and in particular: **(i)** that an internal and external or directly external report has been ritually made in the past, without any result; **(ii)** that the whistleblower has not made the report by the use of "ordinary" channels, believing that the alleged violation represents an imminent or obvious danger to the public interest; or again **(iii)** that the whistleblower reasonably fears that the external reporting could generate the risk of retaliation or remain ineffective in consideration of the specific case's circumstances.

5. Confidentiality protection

As it is known, the protection of the identity's confidentiality of all persons involved in the report and the related content (still) plays a key role in the architecture of the whistleblowing system.

Thus, the Decree establishes a general confidentiality obligation by virtue of which the information related to the violations cannot be used beyond what is necessary to follow up on them.

By narrowing the visual angle on the scope of the whistleblower, it is solid the prohibition of revealing his identity and any other information from which it could be, directly or indirectly, inferred to individuals other than those competent to receive or follow up on the reports, without the express consent of the author.

Still in terms of safeguarding the whistleblower's identity, specific provisions are imposed that are calibrated on certain procedural contexts, which can be summarized as follows:

Criminal Proceedings	The identity of the whistleblower is covered by secrecy under the conditions and within the limits established by art. 329 Italian Criminal Procedural Code.
Court of Auditors Proceedings	The identity of the whistleblower cannot be disclosed until the investigation phase is closed.

7.It should be noted that, if the internal report is presented to a different subject, the latter must take care to transmit it to the competent body within seven days of its receipt.

Disciplinary Proceedings	The identity of the whistleblower cannot be disclosed where the disciplinary action is based on separate and additional investigations with respect to the report, even if consequent to the same. However, if the dispute is based, in whole or in part, on the report and knowledge of the identity of the whistleblower is essential for the defense of the accused, the report will be usable for the purposes of the disciplinary proceedings only with the express consent of the whistleblower to reveal his/her identity.

It must be noted that the same guarantees are further recognized to the individuals involved and to those mentioned in the reports for the entire duration of the proceedings initiated after their reception.

In any case, the reports are dodged out of the scope of the administrative institutes access to documents and civic access.

6. Whistleblowers' protection measures

The in-depth analysis of the **protection offered to whistleblowers** constitutes an essential reference point for the regulatory system. Said protection is expressly related to the occurrence of the following conditions:

- at the time of complaint or report to the Judicial or Accounting Authority or even the public disclosure Authority, the reporting/complaining person had reasonable grounds to believe that the information on the communicated, publicly disclosed or reported violations were true and fell within the material scope of application of the Decree;
- the report or public disclosure was made in compliance with the procedures set out in the new legislation.

The protective measures provided by the legislator are further applied for anonymous reports, complaints or public disclosure, if the author has been subsequently identified and has suffered retaliation, as well as in cases of reports presented to the institutions, entities and to the competent bodies of the European Union.

On the other hand, these measures are intended to fail it is ascertained that the whistleblower is criminally liable of for the crimes of defamation or calumny or, in any case, for other crimes related the report's filing or if he is liable on a civil law basis for the same reasons, in cases of willful misconduct or gross negligence.

On closer inspection, the main guarantee's tool outlined by the legislator takes the form of **the prohibition of any form of retaliation against the whistleblower** which finds its completion in the provision of **the nullity of any act of a retaliatory nature**, accompanied by the provision of reinstatement at workplace in case of termination.

In addition, the Decree provides, in matters of judicial proceedings concerning retaliatory conducts, acts or omissions, a reversal of the burden of proof, presuming that the same had been done as a result of the report or disclosure.

The effect is a reversal of the burden of proof on the subject who has committed them. The same applies to claims for damages brought by the whistleblower who complains that he has suffered damage as a result of his report.

Support measures are then ensured in favor of the reporting person by the entities of the Third Sector included in a special list that will be established by ANAC; these measures are namely information, forms of assistance and consultations free of charge regarding the reporting methods and the protection from retaliation offered by national and European law, the rights of the person involved, as well as the methods and conditions of access to legal aid provided by domestic and European Union law.

To complete the picture, there is a further possibility for whistleblowers to communicate the retaliations they believe they have suffered or will suffer to ANAC which will immediately informs the Department of Public Administration (for matters involving the public sector) and the National Labor Inspectorate (for matters involving the private sector).

7. Disciplinary profiles

To ensure the effectiveness of the new regulatory system, the national legislator has provided for a specific disciplinary system entrusting ANAC with the task of supervising the correct establishment of the reporting channels, the legitimate recourse to them, the protection of the whistleblowers and, therefore, to sanction all conducts that differs from the regulatory obligations.

Administrative sanction	**Type of offence sanctioned**
From Euro 10.000 to 50.000	The Authority ascertains that: – retaliations were committed; – the report was obstructed or tried to be obstructed; the confidentiality obligations has been violated.
From Euro 10.000 to 50.000	The Authority ascertains that: – no reporting channels were established; – no specific procedures regarding the management of reports were adopted or the adoption was not in compliance with the law; no verification and analysis activity of the received reports was carried out.
From Euro 500 to 2.500	The Authority ascertains that the whistleblower has reported with fraud or gross negligence unless he has been convicted, even in the first degree, for the crimes of defamation or calumny or in any case for the same crimes committed by reporting to the judicial or accounting authorities.

The same goal is met by the provision whereby the private sector individuals who have already adopted an Organizational, Management and Control Model must provide **in the disciplinary system,** adopted pursuant to article 6, paragraph 2, lett. e) of Decree 231, disciplinary sanctions against those who are responsible for the offenses described in the table above(8).

8. Effectiveness of the Decree's provisions

The provisions contained in the Decree - which has entered into force on March 30, 2023 - will have effect from **July 15, 2023**, except for the private sector individuals who have employed, in the last year, an average of employees, with permanent or fixed-term contracts, up to 249 units, for which the obligation to establish the internal reporting channel takes effect from **December 17, 2023**.

8. In this regard, it should be noted that the version of paragraph 2-bis of art. 6 of Decree 231, as amended by the provision under examination, establishes that «**The models referred to in paragraph 1, letter a), provide, pursuant to the legislative decree implementing directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019, the internal reporting channels, the prohibition of retaliation and the disciplinary system, adopted pursuant to paragraph 2, letter e)**".

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