The quest for labour rights and social justice

Work in a changing world

Part I edited by Marco Mocella and Elena Sychenko
Part II edited by Valentina Aniballi, Martina Bassotti and Anna Casalino

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Labour Law
IN NATIONAL, INTEGRATED AND TRANSNATIONAL LEGALS SYSTEMS

Book series founded by Giuseppe Pera
Edited by Franco Liso, Luca Nogler and Silvana Sciarra

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The process of integration, triggered by globalisation of financial and capital markets, has led labour law to rethink its values and its legal foundations. The increasing integration between national and supranational legal systems, on the one hand, and the emergence of new transnational relations, on the other, needs to be identified, understood and regulated through binding and non-binding legal instruments.

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The Directive (EU) 2019/1937 and its transposition in Italy

Stefano Maria Corso[1]

1. Introduction

The will to involve workers in the activity of contrasting actions that compromise correct administration, affect competition, hinder economic development finds specific precedents in common and civil law countries, particularly concerning workers in large corporations (both national and multinational) and public administrations[2].

In this perspective, whistleblowing developed through a series of legislative measures aimed at ensuring protection against retaliation for workers reporting breaches detected during the performance of their duties[3].

This is aimed at achieving public interests and preventing (and repressing) illicit acts but provides, as mandatory, this initiative only in cases of particularly serious crimes and/or with regard to specific subjects (*i.e.* "*being a worker does not make mandatory what for everyone else is a faculty*")[4].

[1] University of Milan (Italy).

[2] For an international and Italian perspective, see Calland, Dehn (2004); Callahan, Dworkin, Lewis (2004, p. 879); Vaughn (2015); Apaza-Chang (2017); Pizzuti (2019, p. 191); Corso (2020, p. 51). From the German perspective, before the Directive, Krause (2016, p. 163) and Gerdemann (2018, p. 366).

[3] Applicable only to the public sector was the first legislation approved in 2012 (*i.e*. Law n. 190/2012, entitled "Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione"). See Corso (2013, p. 713) and Liguori (2015, p. 157). This was followed by the ANAC Regulation, on supervisory activities and inspections, on 9 December 2014. See Montanari (2015).

[4] An "obligation to report crimes" is provided for judicial police (Article 347 of the Code of Criminal Procedure), for public officials (limited to the "crime of which s/he has become aware in the exercise or because of her/his functions": Article 331 of the Criminal Code) and for public servants (limited to the "crime of which s/he has become aware in the exercise or

Over time, the list of reportable activities has increased, including not only criminal and administrative offences, but also conducts against internal regulations, codes of ethics and also standards of corporate behavior, in addition to simple organizational dysfunctions and risk situations (Callahan, Dworkin, Fort, Schipani, 2002, p. 177; Vandekerckhove, 2006, pp. 182-183).

With these premises the Directive (EU) 2019/1937, on the protection of persons who report breaches of Union law, was approved on 23 October 2019 and this was an opportunity to revisit – also in Italy – the previously approved legislation on whistleblowing[5].

It followed, after long reflection, Legislative Decree 10 March 2023 n. 24 which entirely repealed the previous Italian legislation, adapting and transposing – sometimes uncritically – the principles of the Directive (Degoli, 2023, p. 373; Allamprese, Tonelli, 2023, p. 447).

2. Whistleblowing legislation: a unitary discipline

The correct application of environmental, anti-corruption and financial reporting regulations is one of the cornerstone of European regulation and, more in general, the correct behavior of top managers and the protection of whistleblowers have been extensively confirmed as a necessary condition for correct governance, both in private and public sector (Boscati, 2020, p. 521).

While the existence of different rules for each sector can legitimately be foreseen, a unitary discipline applies to public and private employers and the specific identification of workers in the organizational chart is considered the best tool to facilitate the detection of any irregularities that may exist, assisting the Government in its efforts to prevent and contrast illicit acts.

The benefit of whistleblowing is justified by the interest in maximum transparency and the best protection of the integrity of the company/public body and its organization (including workers).

As already emerged in the case-law of the Court of Strasbourg[6], this

because of the service": Article 362 of the Criminal Code). For other subjects (workers or not) the report is always optional (with a very few exceptions: Articles 333 paragraph 1 of the Code of Criminal Procedure and 364 of the Code of Criminal Procedure). Special provisions are provided for in the field of health and safety (Article 20, par. 2, letter e, Legislative Decree n. 81 of 9 April 2008) and in the public sector (Article 8 of Presidential Decree n. 62 of 16 April 2013, but the latter provision should be considered implicitly repealed due to the subsequent whistleblowing regulation). See: Corso (2020, p. 44); Piovesana (2019, p. 301).

[5] See Manacorda (2018, p. 185); Corso (2020a, p. 600); Vitaletti (2020, p. 447).

[6] Exemplifying the non-univocal way in which the so-called "public interest" has been

concept of public interest therefore excludes disputes, claims or requests linked to an interest of a personal nature.

This is another concept that perhaps requires further consideration. In first place, a worker may apply to obtain the protection of whistleblowing legislation if she/he reasonably believed that the information on the violations reported was true (in any case falling within the objective scope indicated)[7] and if the channels and procedures afforded were respected (Article 16, par. 1 legislative decree n. 24/2023). In second place, it should be emphasized that the reasons that led workers to report or disclose publicly are irrelevant for the purposes of protecting them (so being privately interested in the report and in its possible consequences is permitted…) (Article 16 par. 2 legislative decree n. 24/2023).

Last but not least, this perspective (which I support) does not conflict with a second possible exclusion from the relevance of the whistleblowing regulation, i.e. that of small private entities ("*average of at least 50 workers employed in the last year*" – or even less, if there is EU relevance) because the lower number of workers in a company allows the implementation of tools to protect legality that are more efficient and less expensive than the management of reporting channels[8].

Less acceptable, however, is to subordinate the application of the legislation to the lesser organizational complexity of an entity because this produces a dissuasive effect on self-organization (see "*a model referred to in Legislative Decree 231/2001 are adopted*") (Article 2 par. 1 lett. q legislative decree n. 24/2023).

3. Public interest and labour perspective in the Italian legislation

It is interesting to note that EU Directive is aimed at workers and not at private individuals in general (so that the exceptional nature of employment relationship regarding whistleblowing is confirmed) (Article 3 par. 3 legislative decree n. 24/2023).

This is the main reason that justifies and supports the specific labour law regulation of whistleblowing legislation. Among many examples, the issue

considered, see ECHR 21 October 2014, Matuz v. Hungary (par. 37); 13 January 2015, Rubins v. Latvia (par. 83-85) and 13 September 2018, Big Brother Watch et al. v. United Kingdom (par. 487 and 492).

[7] Regarding reports based on *rumors*, see ECHR 16 February 2016, Soares de Melo v. Portugal.

[8] See "recital" n. 48 of the Directive (EU) 2019/1937.

of retaliation no longer concerns the relationship between employer and worker in a bi-univocal way but takes on a broader meaning (previously not clarified in previous legislation): regulator introduces specific protection against retaliatory acts carried out directly by colleagues and this extensive application is confirmed even during the selection process and after the end of the employment relationship (Article 3 par. 4 legislative decree n. 24/2023)[9].

Directive also provides for a definition of "worker" which is as generic as possible in order to cover the whole range of persons connected in a broad sense to private and public employers and their organizations.

This choice, aimed at giving greater certainty and effectiveness to the legislation, sometimes tends to forget the rationale of the legislation focused on labour law. This is the case of shareholders, equated to workers, but regarding whom the meaning of the application of the legislation (confirmed in the transposition: see Article 3 par. 3 lett. h legislative decree n. 24/2023) is not clear.

With regard to the content of whistleblowing following which the worker may be considered deserving of protection, the regulator provides for two directions, on one hand indicating the general characteristics of the circumstances (and "acts") that may be reported and on the other "evaluating the public interest" of the same on a case by case basis.

From this perspective, the idea of strictly limiting the matters subject to reporting (and protection) appears impractical: today the list is extremely long, presents many interpretative doubts in terms of conduct and is reasonably unknowable by the workers (who are presumed not to have special skills in law, including European law) (see Article 2 par. 1 lett. a, n. 1-6 and the Annexes).

After this, particular care is dedicated to the concept of "information", because only if workers are fully aware of the contraindications and have knowledge about the whistleblowing criteria, they can overcome any qualms about reporting and make an "*informed decision*" (Massari, 2018, p. 991).

From this point of view, the central role of management, along with "*an adequate risk assessment that takes into account the nature of the activity*", represents nothing new for the discipline but, in light of the new legislation, it is better specified.

Following a report, at least these activities must be carried out: informing the reporting person about the receipt of the report (within seven days); maintaining discussions with the reporting person (additions are permitted if

[9] For a comparison with British legislation see Lewis, Bowers QC, Fodder, Mitchell (2017, p. 268).

necessary); diligently following up on reports received[10]; providing feedback to the report (within three months) and making clear information available on the channel, on the procedures and on the conditions for making internal/external reports (Article 5 legislative decree n. 24/2023). It is necessary to consult the representatives or trade union organizations referred to in Article 51 of legislative decree n. 81 of 2015 and management must be entrusted to an independent (internal or external) office, with dedicated and specifically trained staff[11].

Reporting channels must guarantee the confidentiality of the identity of the reporting person[12], of the person involved[13] and of the person mentioned in the oral or written report, as well as of the content of the report and the related documentation (so-called "extension of confidentiality") (Article 4 legislative decree n. 24/2023).

The identity of the reporting person and any other information from which such identity can be deduced, directly or indirectly, cannot be revealed – without the express consent of the reporting person – to people other than those competent to receive or follow up on the reports[14].

Strong protection in disciplinary proceedings is confirmed ("express consent rule" pursuant to Article 12 par. 5 legislative decree n. 24/2023) while important limits (and of which workers must be informed!) remain for criminal proceedings (with the protection of confidentiality limited to the secrecy of the investigations pursuant to Article 329 Criminal procedure code) and accounting process because, closed the investigation phase, the right to defense and cross-examination always "prevail"[15].

In any cases, however, all kind of retaliation or discrimination is prohibited: protected persons (reporting and non-reporting) who have been

[10] On the previous legislation, Fiata (2018, par. 7, in particolar, note 40).

[11] With regard to the 2017 legislation, Gabriele (2019, p. 215) and, even before, Borelli, Hohnerlein (2015, pp. 180-181). Public administrations, which are required to appoint the so-called "RPCT" (the so-called "Responsible for corruption prevention and transparency"), entrust the latter with the management of the internal reporting channel, even if management is shared between different administrations.

[12] Particular attention must be paid to the difference between confidentiality and anonymity (with the limits to its use).

[13] Regarding the protection of the accused worker and the right to be heard, both the EU Directive and the Italian legislator have not explored the issue in depth and the reform can be considered a missed opportunity.

[14] In Italy, the anonymous reporting is not prohibited but is not subject to regulation (and specific protection) under whistleblowing legislation (in which the identity of the whistleblower is only "confidential"). See Corso (2020, p. 295).

[15] With regard to Article 3, Legislative Decree n. 179/2017, see Ghera, Valente (2021, p. 250).

fired due to the reporting have the right to be reinstated in their jobs (pursuant to Article 18 of law 20 May 1970, n. 300 or Article 2 of legislative decree 4 March 2015, n. 23, due to the specific regulations applicable to the worker) (see Article 19 par. 3 legislative decree n. 24/2023).

The judicial authority requested shall adopt all measures, including temporary ones, necessary: to ensure protection of the subjective legal situation involved, including compensation for damages, reintegration into the workplace, etc and to cease retaliatory conducts.

4. Protective measures and violations

The protection of the person who reports breaches puts special emphasis on the protective measures to be implemented by the employer through a "reorganization of the structure" of the company/public body along the guidelines provided by law.

From an organizational perspective, it is up to the employer to identify one or more channels to be used by potential whistleblowers – while protecting their integrity – to report unlawful conducts relevant and based on consistent factual elements or violations of the supervisory and internal control system, which they have become aware of in the performance of their duties.

The traditional channel, represented by the employee reporting any fact to his/her direct supervisor, is manifestly inefficient and almost impossible to pursue in the case in which the person to be reported for any unlawful conduct is in fact the supervisor, as the whistleblower would find himself/herself in the unpleasant situation of reporting an offence or irregularity to the person responsible for it.

Both companies and public administrations are in a position to remedy this, either by implementing specific procedures to allow reports to be made in line with the regulator's guidelines or by amending their supervisory and internal control system (and accordingly adapting their disciplinary codes).

In an effort to adapt their internal organization to comply with the law, employers are called upon to organize their companies in such a way as to contrast the specific offenses envisaged by law and/or identified by the organization with the ultimate goal of preventing the occurrence of offences or, at least, limiting their effects, also in relation to the degree of responsibility attributable to the employees[16].

[16] On the previous legislation, Riccio (2017, p. 141).

5. Internal, external or public reporting channels

Another aspect to consider (which is critical especially for companies) refers to the limits to so-called "external reports" or "public disclosures", because there is often a conflict between the public interest in whistleblowing and the company's interest involved in the "internal management" of critical issues that have emerged as a result of its organization. As matter of fact, any in-house solution would mean accepting that the report is managed by and under the control of the employer; while any external action, where the procedures and the results cannot be controlled by the company, would result in the lack of trust that the company can regulate the matter and act to prevent unlawful and irregular events from occurring.

Companies are more interested in favoring internal reporting as much as possible is evident also from the fact that whistleblowers' protection does not provide for rewards or incentives of any kind by law.

The EU Directive provides, with equal effect (but not exactly with equal consequences), for internal reporting channels (Articles 7-9 Directive EU 2019/1937), external reporting channels (Articles 10-14 Directive EU 2019/1937) and public disclosures (Article 15 Directive EU 2019/1937), and always provides that the reports must be followed up (*i.e*. giving the possibility to the whistleblower to follow the process) regardless of the communication channel chosen.

However, the Directive fails to indicate any real order of priority between the reporting channels (internal, external or public), even if the provision of "adequate information" on the use of internal channels is accompanied by the "encouraged" use of the internal channels before reporting through external reporting channels (Article 7 par. 2 Directive EU 2019/1937).

According to Recital n. 47, "*reporting persons should be encouraged to first use internal reporting channels and report to their employer*", thus assuming that such channels exist and are operating and that "*where reporting persons believe that the breach can be effectively addressed within the relevant organization, and that there is no risk of retaliation*".

In other words, according to EU legislation, it is not possible to design a strict hierarchy for the criteria to be used by whistleblowers in reporting illegal conducts and this is why it is difficult for the company to prevent or limit potential damages.

On the contrary, Italian legislation introduces a real "*up to ladder approach*"[17], which is more protective for employers and based on a logic of prevention (rather than repression).

[17] OECD (2016), *Committing to Effective Whistleblower Protection*, Paris, pp. 151-152.

If there is no internal whistleblowing procedure that provides guarantees in terms of confidentiality and protection from retaliatory measures, the worker is obviously free to choose the recipient of his/her report/disclosure as s/he sees fit.

Conversely, Italian legislation imposes internal reporting channels as the preferred route to be taken first, while external reporting channels come second and must be considered in the presence of specific circumstances such as the lack of follow-up within a reasonable period, the lack or non-compulsory use of the internal reporting channels (this is the case of non-employees or other persons in contact with the organization involved in the reporting) and the existence of contraindications to the use of the internal communication channels (see Articles 6 and 15 legislative decree n. 24/2023).

In other words, external reporting (nowadays, only to the ANAC) and public disclosures are legitimate but only under certain conditions (and essentially following an internal report), thereby establishing a further profile of "loyalty" imposed on workers which in any case cannot be understood as a limit to "recourse to jurisdiction" (constitutionally protected).

6. Discussion and conclusion

In conclusion, the disclosure towards subjects other than the employer assumes, as an additional demonstration of the divergence of interest between the parties, distrust towards the employer's self-corrective ability and prevention and its ontological unsuitability to pursue objectives other than profit optimization. In this respect, based on an approach that is common to Anglo-Saxon legal systems, the role of an employee and of whistleblowing must be exactly construed from a public communication perspective. Whistleblowing is therefore to be considered "for external use", because it is encouraged and protected by law precisely so that the knowledge acquired by any employee can be spread outside to reach the Authorities. Side effects to this approach are the legitimacy of the exercise – even if harsh and critical – of the right to freedom of expression, the emphasis on the profiles of "general interest" and of legal truthfulness more than those regarding "contractual" good faith[18]; the non-necessity of any "up to ladder" principle and the fewer criticalities encountered when involving the media.

This was also the approach of the Italian legislation but after the Directive the perspective partially changed: whistleblowing is also starting to be considered as an "internal" tool of self-regulation for the organization,

[18] See Article 16 Legislative Decree n. 24/2023 and, even before, Avio (2017, p. 664).

for conflict settlement, or as a "collaborative" remedy to informative asymmetries, first and foremost between an employer and its employees.

For this reason, legislation often seems to follow a middle of the road orientation in balancing the interests at stake without, however, resolving the underlying question about what systemic meaning should be attributed to whistleblowing, thus deferring any interpretation to the analysis of the situation on a case by case basis.

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