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LABOUR LAW AND INDUSTRIAL RELATIONS

Legislative Decree No. 24/2023 transposing Directive EU 2019/1937: new rules on whistleblowing

On 10 March 2023, Italy transposed the EU Directive on Whistleblowing (Directive EU 2019/1937), adopting Legislative Decree No. 24/2023 (the "**Decree**"), published in the Official Gazette on 15 March 2023, thus introducing important innovations and obligations in our legal system for companies.

As is well known, whistleblowers are those individuals who report offences that they become aware of in a workplace environment (public or private) and who, for obvious reasons, risk suffering negative repercussions from employers as a consequence of the same.

During the last twenty years, also as a result certain cases that have become famous (such as the case of Antoine Deltour, the "Luxleaks whistleblower", who in 2014 leaked information he learned in the workplace, which led to the emergence of a round of tax avoidance involving 340 companies[1], or that of Howard Wilkinson, former head of trading at Danske Bank, which brought to light a money laundering scheme amounting to EUR 200 billion which passed through Danske Bank of Tallinn,

[1] Deltour transmitted the information and documentation in "his" possession to a French journalist, Edouard Perrin, who then reported the leak on his *media*; from Deltour's revelations, an agreement emerged between Luxembourg and several multinational companies, clients of the auditing firm for which Deltour worked, for the provision of a particularly facilitated tax regime. Deltour was prosecuted in Luxembourg and in 2014 he was given a suspended six month sentence and a EUR 1,500 fine. Nevertheless, in 2015 the European Parliament awarded him the European Citizen's Award and in 2018 his conviction was overturned.

Estonia, between 2007 and 2015; money coming from Russia and other post-Soviet Countries, which then flowed to American and European banks[2]) the issue has become increasingly more relevant and law makers, also in Italy and in Europe, have gradually introduced increasingly stringent legislation that is ever more protective in favour of whistleblowers.

Protective measures in favour of whistleblowers

The Decree introduces specific and important forms of protection in favour of whistleblowers, more specifically a protection against any retaliation by employers, with a list of a whole series of actions that are presumed to be "retaliatory" (for example, dismissal, demotion or non-promotion; non-renewal of a term contract), with the burden on the employer to demonstrate that these actions are motivated by circumstances that are completely extraneous to the report made by the whistleblower.

The Decree also provides for the reformulation of Article 4, Law No. 604/1966, including among the invalidity grounds for dismissal the case relating to the report of an offence that the employee became aware as a result of the employment.

The extension of the obligation to adopt a specific whistleblowing procedure

A further important innovation introduced by the Decree is the extension of the subjects who are obliged to adopt a specific internal procedure for the receipt and management of reports received from whistleblowers.

If, in fact, up until now this obligation was envisaged only for companies that adopted a management organisation model under Legislative Decree No. 231/01, the following are now required to adopt a specific whistleblowing procedure:

(i) all companies that have employed on average at least 50 employees with permanent job or fixed-term employment contracts in the last year;

(ii) all companies falling within the scope of the application of the rules applying to financial services, products and markets and the prevention of money laundering or terrorist financing, transport security and environmental protection, irrespective of the number of employees employed;

(iii) all companies which adopt models under Legislative Decree No. 231/2001, irrespective of the number of employees employed.

The obligation to adopt a whistleblowing procedure is not, in any case, immediate, because there is a postponement envisaged for the entry into force of the rules of the Decree, to allow companies to structure themselves and to adapt to the new obligations:

- on 15 July 2023 the Decree will enter into force for companies that have employed - during the preceding year - an average number of employees (with permanent job or fixed-term contracts) equal to or greater than 250, which therefore must have adopted the whistleblowing procedure by that date;

[2] Wilkinson noted suspicious activity and, following investigations, he discovered that accounts that were labelled "dormant" were actually carrying out transaction of millions of Euros a day and he alerted this in 2014. The bank ignored him. He resigned and the scandal became public only four years later, when Wilkinson's name was divulged in an Estonian paper against his will. Wilkinson testified in the Danish Parliament in 2018 in the context of an investigation that led to the closing of the branch in Tallinn and to the arrest of ten employees.

- by 17 December 2023 the Decree will enter into force for all companies with a lesser number of employees.

Characteristics of the whistleblowing procedure

In order to comply with the whistleblowing legislation and to avoid incurring potential fines, companies referred to above must adopt - after consulting with trade union representatives or trade union organisation referred to in Legislative Decree No. 81/2015 - a special internal reporting channel, to allow all workers to make - with full guarantee of confidentiality - any reports of offences, in addition to a specific procedure for the management of such reports.

The internal reporting channel and the related management procedure must guarantee, also through the use of encryption tools, the confidentiality of the identity of the reporting person, of the person involved and the person that is nevertheless mentioned in the report, as well and content of the report and the related documentation.

Furthermore, it is envisaged that the management of the report must be entrusted to a person or to an autonomous department with specially-trained personnel, or to an external party, this also being autonomous and with specially-trained personnel.

The reports can be made in a written form, also with the use of computers, or in an oral form. The internal reports in an oral form must be made using the telephone or vocal messaging systems, at the request of the reporting person, through an direct meeting established within a reasonable time period.

The parties, internal or external, which are entrusted with the management of the reporting channel, once a report is received, must:

1. issue the whistleblower a notice of receipt of the report within seven day of the receipt of the same;
2. maintain discussions with the reporting person, requesting, if necessary, any supplements;
3. diligently follow up on the received report;
4. provide feedback to the whistleblower within three months from the date of the notice of receipt of the report or, in the absence of such notice, within three months from the expiry of the term of seven days from the presentation of the report.

All information regarding the functioning of the internal reporting channel, the procedures and the preconditions for making the reports must be provided to workers in a clear fashion, making them easily visible in the workplaces and in any case accessible also to persons that possibly do not perform their jobs at the company's premises.

Furthermore, there is also an obligation for companies to publish this information in a special dedicated section on their websites.

The sanctioning system

In the event of a violation of the whistleblowing provisions, rather significant administrative fines are envisaged. More specifically:

(i) fine from EUR 10,000,00 to EUR 50,000.00, when it is ascertained that retaliation has been committed against the whistleblower, or that the report was obstructed, or obstruction was attempted, or the confidentiality obligation was violated;
(ii) fine from EUR 10,000,00 to EUR 50,000.00, when it is ascertained that reporting channels were not instituted and a whistleblowing procedure adopted, or if the procedures and channels are not in compliance with what is required by the Decree. The same fine is applied also in the case in which, even if a correct whistleblowing procedure was implemented, the verification activity and the analyses of the received reports were not actually performed.

Also envisaged are administrative fines from EUR 500.00 to EUR 2,500.00 for any false reports.

Additional reporting methods

Other than the internal ones, the Decree provides for two other reporting channels, external and public, that can be activated under certain conditions.

In fact, not only can reports be communicated inside the company, but also externally, through a report to the Autorità Nazionale Anticorruzione [National Anticorruption Authority] ("ANAC"), under the following scenarios:

(i) where the obligatory activation of the internal reporting channel is not provided for, in the whistleblower's workplace context, or that, even if obligatory, it has not been activated, or - if activated - it is not in compliance with what is required by the Decree;
(ii) where the report has been made through the internal channel, but this has not be followed up, or there is a real fear that the report itself may lead to the risk of retaliation;
(iii) where the whistleblower has reason to believe that the violation may constitute an imminent or clear danger to the public interest.

When certain preconditions are met[3], the report may be made by public disclosure and the whistleblower shall benefit from the protection measures provided by the Decree.

Finally, additional forms of protection in favour of whistleblowers are envisaged, more specifically a protection against any retaliation by employers, with a list of a whole series of actions that are presumed to be "retaliatory" (for example, dismissal, demotion or non-promotion; non-renewal of a term contract), with the burden on the employer to demonstrate that these actions are motivated by circumstances that are completely extraneous to the report made by the *whistleblower*.

The Decree also provides for the reformulation of Article 4, Law No. 604/1966, including among the invalidity grounds for dismissal the case relating to the report of an offence that the employee became aware as a result of the employment.

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[3] More specifically, if: a) the whistleblower has previously made an internal and external report, or has directly made an external report and has not received any feedback within the time period provided by the Decree; b) the whistleblower has reason to believe that the violation may constitute an imminent or clear danger to the public interest; c) the whistleblower has reason to believe that the external report may lead to the risk of retaliation, or may not have an effective follow-up, due to the circumstances of the actual case.

The Law Firm remains available with regard to any further information and to provide all necessary support in order to assist in the adaptation, within the time periods, to the relevant legislation.

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