Chapter 6

Whistleblower protection

Public officials are most likely to detect wrongdoing in the workplace, such as fraud, misconduct or corruption. However, experience shows that when a so-called whistleblower reports such cases they may suffer various forms of retaliation. The protection of whistleblowers is therefore an integral tool in an integrity framework to prevent and combat corruption. In Italy, until the adoption of the new Anti-Corruption Law, no legal protection was provided to whistleblowers. In line with the G20 Guiding Principles for Whistleblower Protection Legislation developed by the OECD, this chapter analyses the relevant provisions in the new Anti-Corruption Law. It also provides a gap analysis assessment and mitigation strategy to ensure the effective protection of whistleblowers in Italy.

Whistleblower protection as an integral part of integrity frameworks

Public officials[1] are most likely to detect fraud, misconduct or corruption in the workplace. However, many countries currently lack the proper legislation to protect people who disclose secret or confidential information. Furthermore, public officials have little incentive to report misconduct or corruption for fear of retaliation or because so doing would be at considerable cost to their career. Many OECD countries have recently advanced the cause of whistleblowers with legislation to protect employees in both the private and public sector from retaliation.[2] Comprehensive whistleblower protection (WBP) has become an important tool in integrity frameworks.

Twenty-nine OECD member countries have instituted some form of whistleblowing protection (OECD, 2009a). Despite country variations, all protection arrangements includes a legal obligation for public officials to report misconduct and/or procedures for protecting whistleblowers and enforcing fair treatment after a disclosure has been made. However, few countries have clear legislation that offers comprehensive protection to whistleblowers. This review suggests that comprehensive legislation should supersede Italy's statutory provisions to protect people who disclose information in the public interest.

This chapter is divided into five main parts. First, it discusses the importance and relevance of WBP as an integral tool in an integrity framework. Second, it reviews the current legal WBP setting in Italy. Third, it analyses the current provisions in the Anti-Corruption Law. The four part provides a gap analysis assessment and mitigation strategy. The final part offers recommendations for implementation.

The risk of corruption is significantly higher in environments where reporting wrongdoing is not supported or protected. Public sector employees have access to up-to-date information on practices in their workplaces are usually the first to recognise wrongdoings (UNODC, 2004). It is essential to facilitate reporting to shed light on a secretive act since the victims of corruption are generally difficult to identify. Due to the nature of corrupt practices, the traditional ways of reporting wrongdoing or offences to the authorities do not work. In addition, corruption is by nature covert and is very difficult to uncover. Even when corruption it is uncovered, it is often after a considerable period of time and statutes of limitations may have passed.

Whistleblower protection is essential if the exposure of misconduct, fraud and corruption is to be encouraged. Effective protection supports an open organisational culture and plays an important role in safeguarding the public interest and promoting a culture of public accountability and integrity. However, experience shows that those who report wrongdoings may be subject to reprisals in the form of dismissal or intimidation, harassment, or physical violence from co-workers or superiors. In many countries, whistleblowing is even associated with treachery or spying (Banisar, 2011; Transparency International, 2009).

It is therefore important to both support and protect whistleblowers. In the public sector, public servants need to know what their rights and obligations in respect of exposing actual or suspected wrongdoing within the public service. These should take the form of clear rules and procedures that officials can follow and a formal chain of responsibility. Public servants also need to know what protection they will be afforded should they expose wrongdoing (OECD, 1998a).

International instruments for combating corruption are recognition of the need for whistleblower protection laws to be in place as part of an effective anti-corruption framework. Among the first such instruments were Principle 4 in the OECD Recommendation on Improving Ethical Conduct in the Public Service, the Principles for Managing Ethics in the Public Service (1998b), and the 2003 OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service. The third publications includes guidelines to help countries to "[p]rovide clear rules and procedures for whistleblowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the compliant mechanisms themselves are not abused."

Whistleblower protection requirements have also been introduced in the United Nations Convention against Corruption,[3] the Council of Europe's civil and criminal law conventions on corruption,[4] the Inter-American Convention against Corruption,[5] and the African Union Convention on Preventing and Combating Corruption.[6] The 2009 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009b)[7] sets out ways of protecting whistleblowers in the public and private sectors.

In 2010, the importance of whistleblower protection was reaffirmed at the global level when the G20 Anti-Corruption Working Group recommended that G20 leaders support the Guiding Principles for Whistleblower Protection Legislation as a benchmark for enacting and reviewing whistleblower protection rules by the end of 2012 (see Box 6.1). As a result, the international legal framework for establishing effective whistleblower protection laws at country level has been strengthened.

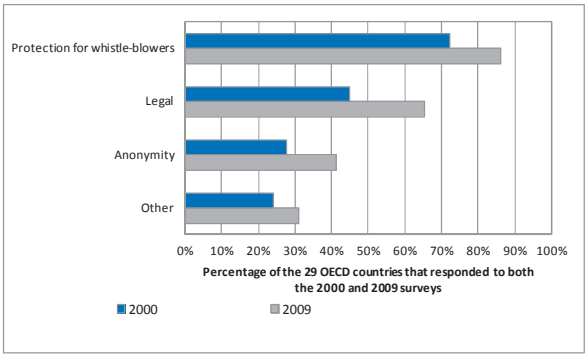
Box 6.1. G20 guiding principles for whistleblower protection legislation

1. Clear legislation and an effective institutional framework are in place to protect from discriminatory or disciplinary action employees who disclose in good faith and on reasonable grounds certain suspected acts of wrongdoing or corruption to competent authorities.
2. The legislation provides a clear definition of the scope of protected disclosures and of the persons afforded protection under the law.
3. The legislation ensures that the protection afforded to whistleblowers is robust and comprehensive.
4. The legislation clearly defines the procedures and prescribed channels for facilitating the reporting of suspected acts of corruption, and encourages the use of protective and easily accessible whistleblowing channels.
5. The legislation ensures that effective protection mechanisms are in place, including by entrusting a specific body that is accountable and empowered with the responsibility of receiving and investigating complaints of retaliation and/or improper investigation, and by providing for a full range of remedies.
6. Implementation of whistleblower protection legislation is supported by awareness raising, communication, training and periodic evaluation of the effectiveness of the framework of protection.

In some countries whistleblower protection is still in its infancy. However, it is increasingly recognised as an essential anti-corruption instrument and a key factor in promoting a culture of public accountability and integrity. Indeed, the percentage of

OECD countries that afford whistleblowers protection grew from 44% in 2000 to 66% in 2009 (see Figure 6.1).

Figure 6.1. OECD Countries that offer protection for whistleblowers, %, 2000 and 2009



Source: OECD (2009), *Government at a Glance 2009*, OECD Publishing, Paris, doi: *http://dx.oi.org/10.1787/9789264075061-en*.

Enshrining whistleblowing protection in legislation legitimises and structures the mechanisms under which public sector employees can disclose wrongdoings. It also protects public sector employees against reprisal and, at the same time, encourages them to do their duty and carry out efficient, transparent and high quality public service. If properly implemented, legislation to protect public sector whistleblowers may become one of the most effective tools for supporting anti-corruption initiatives and exposing and combating misconduct, fraud and mismanagement in the public sector (Council of Europe, 2008). Absence of appropriate legislation hampers the fight against corruption and exposes whistleblowers to risks of retaliation (Banisar, 2011).

Whistleblower protection in Italy

The need to afford whistleblowers effective protection has been much talked about for some time in Italy. The country has no legislation specifically to protect whistleblowers and relies mostly on labour law – particularly on protection against unlawful dismissal.[8] Article 18 of the so-called "Workers' Statute", entitled "Reappointment to a position", states that the dismissal is not effective if:

- there is not a just cause or it cannot be justified;
- the employer is an organisation that employs more than fifteen people (five if the employer is a farmer);
- the employee is hired with a permanent contract.

If dismissal is proved to be unlawful, the employer must reappoint the employee to the same position with the same duties and compensate the employee for his/her lost earnings from the day of the dismissal (compensation cannot be lower than five months of salary). The employee may choose not resume his/her job, in which case he/she can ask for a compensation equal to fifteen months of salary.

The Labour Code states that employees are entitled to report misconduct under the general right to freedom of expression, but it does not set forth any reporting procedures.

Case law seems to have applied this Labour Code provision to workers dismissed out of retaliation for whistleblowing. However, experience shows that dismissal is only one way in which a whistleblower may be silenced. In practice, reprisals take different forms, such as demotion, transfers, and hostile behaviour. Whistleblowers in Italy do not, in fact, enjoy protection against these or other forms of reprisal.

Article 45 of Legislative Decree 231/2007 on the Prevention of Money Laundering provides identity protection for a person reporting acts related to money laundering and terrorist financing. Yet this confidentiality can be waived at the request of the judicial authorities.[9] The Civil Code also contains provisions which can be assimilated to whistleblowing protection. Article 2408, for example, entitles shareholders of private companies to report any perceived wrongdoing or alleged irregularities to the Board of Auditors.[10]

An additional provision in the Italian legal framework that is relevant to whistleblowing (and exists in many other countries) requires public officials to report wrongdoing they become aware of in the line of duty.[11] If they fail to do so they may be sanctioned. Article 361[12] pertains to the "failure to report a crime by a public official" and stipulates the following:

> The public official who fails to report or delays reporting to the court, or to another authority which has the obligation to report to the court, an offence that he or she has become apprised of in the performance of his duties or because of his or her functions, shall be punished with a fine ranging from EUR 30 to EUR 516. The sanction is imprisonment of up to one year, if the offender is a judicial police official or agent, who learned of the offence but did not report it. The above provisions shall not apply when the offence that is punishable solely on the allegation of the offended party.

However, such an obligation and its associated punishment have proven to be ineffective in encouraging or compelling public officials to report wrongdoing in the public sector. It has been even more ineffective in corruption-related offences. Only a few cases have come before the courts in recent years,[13] probably because it is practically impossible to prove that a public official knew about a corruption offence yet failed to report it or because the EUR 516 fine is so low.

Witness protection laws and schemes are also indirectly related to whistleblower protection afforded by the law. Yet in Italy there is no witness protection law that could be used in cases of whistleblowing. There is, however, a law that protects witnesses who co-operate with the authorities. Known as "witnesses of justice", they are former members of criminal organisations who are given protection in exchange for their co-operation. However, this kind of protection ensures personal safety rather than job security and clearly does not apply to cases of public officials reporting corrupt practices in the public sector to the authorities.

These different provisions form Italy's current legal framework for whistleblowing. It is a fragmented framework that is not in practice intended for whistleblowers. Furthermore, it is confined to limited measures of protection and fails to provide mechanisms for reporting or enforcement.

The lack of protection afforded to whistleblowers in Italy has been highlighted by several international actors. The OECD Working Group on Bribery recommended "that Italy consider introducing stronger measures to protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of

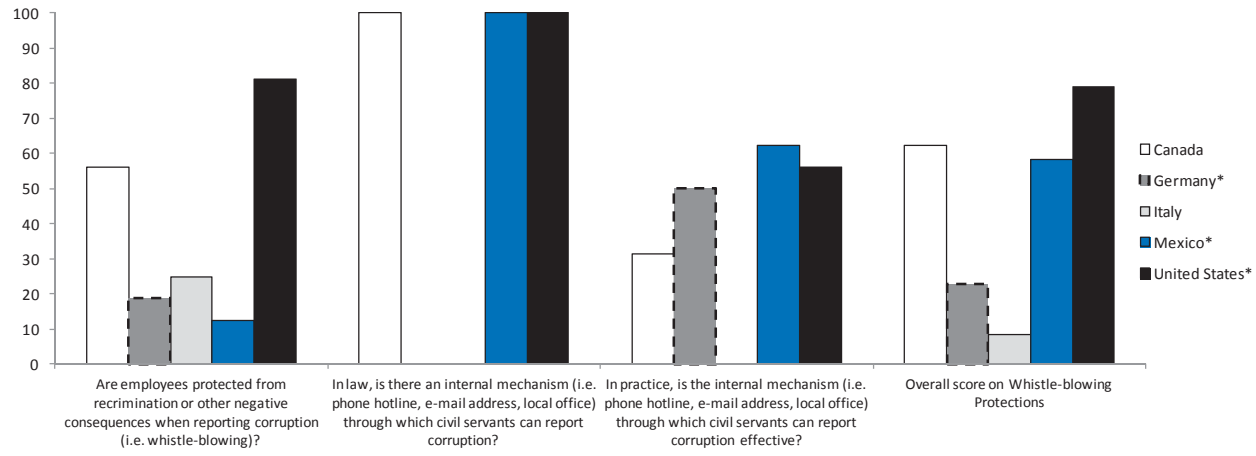
retribution" (OECD, 2007). The Council of Europe's Group of States against Corruption (GRECO) has also been critical of the poor whistleblower protection in Italy. It has recommended that "an adequate system of protection for those who, in good faith, report suspicions of corruption within public administration (whistleblowers) be instituted" (GRECO, 2011).

The Italian authorities responded to GRECO that the current Anti-Corruption Law includes a provision on whistleblower protection. However, GRECO considered the provision was limited and fell short of its recommendation. It argued that, in addition to the provision protecting whistleblowers:

> [A] more comprehensive/detailed protection framework for civil servants reporting suspicions of corruption in good faith, including concrete provisions on how reporting can be done in practice (e.g. internal/external reporting lines, confidentiality assurances, degree of suspicion) and the relevant mechanisms to protect them from retributive action (e.g. authorities and systems for enforcing protection, forms of compensation)" could also be provided.

Transparency International (2009) and Transparency International Italy (2009) have also highlighted the need for Italy to provide proper whistleblower protection,[14] and Global Integrity has given a very low score to Italian whistleblower protection (Figure 6.2).

Figure 6.2. Global Integrity scores for whistleblower protection in selected OECD countries



Note: * Data for Germany, Mexico and the United States as of 2011.

Source: Global Integrity Report for Canada (2010), Germany (2011), Italy (2010), Mexico (2011) and United States (2011), available at *www.globalintegrity.org/report*.

The Anti-Corruption Law's provision on whistleblower protection

The Anti-Corruption Law introduces the first provision specific to the protection of whistleblowers in the Italian legal framework. It is Article 1.51 of the Law, entitled "Introduction of Article 54b into Legislative Decree No. 165 of 30 March 2001", which states the following:

The following Article shall be introduced after Article 54 of Legislative Decree No. 165 of 30 March 2001: Article 54b. - (Protection for public employees reporting offences).

1. Except in cases involving liability for slander or defamation or on the same basis pursuant to Article 2043 of the Civil Code a public employee who reports to the judicial authorities or the Court of Auditors or informs his superior of unlawful conduct which has come to his attention in the performance of his duties may not be punished, dismissed or subjected to direct or indirect discriminatory measure, having an effect on his working conditions for reasons directly or indirectly related to the report.

2. The identity of the individual making the report may not be disclosed without his consent during disciplinary proceedings, provided that the disciplinary action was initiated on the basis of different evidence in addition to the report. If the disciplinary action was initiated entirely or partly on the basis of the report, the individual's identity may only be disclosed if this information is absolutely indispensable for the defence of the individual accused of misconduct.

3. The adoption of discriminatory measures shall be reported to the Department for Public Administration by the interested party or by the trade union organisations with greatest representation within the administration in which they were implemented in order to enable the appropriate action to be taken.

4. The statement shall not be available for access in accordance with Articles 22 et seq. of Law no. 241 of 7 August 1990.[15]

This article introduces whistleblower protection provisions into Legislative Decree 165/2001 which regulates the general employment rules and procedures for public service employees. According to Paragraph 1, persons liable for slander[16] (untruthfully reporting to the relevant authority a person for committing an offence or simulation of the proof of a crime), for defamation[17] (any communication that harms the reputation of another person or persons), or liable for an unjust action[18] (due to pay compensation for damages) will not be afforded the foreseen protection. With these three exceptions, public employees should receive protection when reporting unlawful conduct. However, in order to obtain protection the public employee needs first to report wrongdoing to a judicial authority, the Court of Auditors, or his/her superior.

With regard to the wrongdoing reported or disclosed, the Law describes it as any illicit behaviour of which a public employee becomes apprised of through his/her employment. Whistleblowers are protected against three types of workplace reprisal they may undergo as a result of reporting wrongdoing: i) dismissal, ii) disciplinary sanctions; iii) direct or indirect discriminatory measures. The list of possible retaliatory actions, particularly discriminatory measures, could be interpreted to include a wide variety of reprisals, such as demotion, harassment, forced transfer, bullying, etc. The Law also provides that discriminatory measures must be referred to the DPA.

Article 1.51 also provides that a whistleblower's identity shall be kept confidential. It may, however, be revealed in cases where disciplinary charges against the alleged wrongdoer are based exclusively on the whistleblower's report, or where the knowledge of the whistleblower's identity is absolutely necessary to the alleged wrongdoer's defence.

Gap and mitigation analysis of whistleblower protection in the Anti-Corruption Law

The experience of countries that provide whistleblower protection shows that it may originate either from comprehensive, purpose-designed laws and/or specific provisions in different laws. Among OECD member countries, Australia,[19] Canada,[20] Japan,[21] the United Kingdom,[22] and the United States[23] have passed comprehensive legislation specifically to protect public sector whistleblowers. The UK's legislation is considered to be one of the most highly developed and comprehensive (Banisar, 2011) due to its adoption of a single disclosure regime for both private and public sector whistleblowing protection (Chene, 2009). The UK also offers a hybrid scheme which includes public sector functions outsourced to private contractors.[24]

In the United States, the Whistleblower Protection Act of 1989 was recently supplemented by whistleblowing provisions in the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act. These two acts are targeted primarily at the private sector, yet also constitute part of the framework that protects whistleblowing employees of the federal government from reprisal and provides for redress. The Canadian Public Servants Disclosure Protection Act of 2005 applies only to disclosures made by the Canadian federal public service and to some federal Crown corporations. Australia's whistleblower legislation provides protection only for public sector whistleblowers, even though some jurisdictions in Australia offer hybrid schemes that afford protection to public employees on assignment in the private sector. The Japanese Whistleblowing Protection Act protects both public and private employees who make disclosures in the public interest. Article 7 of the act specifically addresses the "treatment of national public employees in regular service" and prohibits dismissal or any mistreatment in reprisal for whistleblowing.[25]

Other countries offer some form of whistleblower protection through one or more laws or statutory provisions and are generally to be found in criminal, labour and civil codes. Countries that make no specific reference to whistleblowers yet offer protection through statutory provisions include Austria, Denmark, Estonia, Finland, Greece, Poland, Slovakia, Sweden and Turkey (Council of Europe, 2009). However, as these statutory provisions cover specific persons or acts only, protection is limited.

Whistleblower protection may draw on a range of sources of law. The enactment of a comprehensive, whistleblower-specific law is an effective legislative means of affording protection. The visibility of a comprehensive, stand-alone piece of legislation would make it easier for governments and employers to promote (Banisar, 2009). This approach also allows the same rules and procedures to apply to all public sector employees, rather than piecemeal or sector-based approaches which often apply only to certain employees and to the disclosure of certain types of wrongdoing. Stand-alone legislation would also increase legal certainty and clarity.[26]

Sectoral laws are generally adopted in a piecemeal fashion through statutes governing only certain types of persons or information. One disadvantage is that outside certain sectors little is known about the scope of protected disclosures and who may be entitled to protection. Further, sectoral laws tend to focus only on disclosure and retaliation (Banisar, 2009) and not on strengthening the integrity framework.

In both stand-alone legislation and sectoral laws whistleblower protection should be supported by effective awareness-raising, communication, and training. Communicating to public sector employees their rights and obligations with respect to exposing

wrongdoing is essential. An effective way to raise awareness is to require by law that employers continually post notices informing employees of their entitlements to protected disclosures. Furthermore, public sector managers should be adequately trained in receiving reports and in recognising and preventing occurrences of discriminatory and disciplinary reprisals against whistleblowers.

Regardless of the legal approach, however, what is important is to ensure that the full scope of whistleblower protection is in place and that it includes – at the very least – clear, comprehensive legislation, clear procedures and channels for reporting wrongdoing, and robust protection against retaliatory action. (Box 6.10).

Box 6.2. Overview of comprehensive whistleblower protection

Clear, comprehensive Legislation	Mechanisms for protections	Clear procedures and channels for reporting wrongdoings	Enforcement mechanisms
Clear definitions "Good faith" or "reasonable grounds" Scope of coverage Scope of protected disclosures and persons afforded protection	Protection against retaliation National security Anonymity and confidentiality Burden of proof	Channels for reporting Hotlines Use of incentives to encourage reporting	Oversight and enforcement authorities Availability of judicial review Remedies and sanctions for reprisals

Although the Anti-Corruption Law introduces protection for whistleblowers, there are still large gaps which prevent Italy from providing an effective protection mechanisms. The provision needs to be made more specific. Drawing on the requirements set out in Box 6.2, the gap analysis in Box 6.3 reveals weaknesses in the efficacy of the Anti-Corruption Law. A public sector whistleblowing protection law should emphasise key features, protection arrangements, reporting procedures, and enforcement mechanisms. The gaps stem from the inability of the current system (i.e. the Anti-Corruption Law) to meet the design principles established in Box 6.2 and the functionality and usability requirements detailed in Box 6.3.

Box 6.3. Summary of gap analysis and mitigation strategies

Recommendation	Gap	Mitigation
1. Clear, comprehensive legislation	The Law does not seem to take into account the entire whistleblowing cycle. Nor does it specify procedures then could be adopted. "Good faith" provisions are not clear. Furthermore, the persons afforded protection are "public employees" only.	Including other categories of workers – consultants, contractors, interns, volunteers, former employees, etc. – would widen the range of persons afforded protection. Furthermore, including a "good faith" and "reasonable grounds" clause could help to reduce false and bad faith disclosures.
2. Mechanisms for protection	Public employees who are in violation of possible antitrust procedures when making disclosures risk retaliation under Article 1.51 of the anticorruption law. Furthermore, confidentiality criteria are not entirely clear. There is no indication as to whether anonymous reports would be accepted.	The Italian law should clearly list all possible retaliatory actions to avoid possible disputes over interpretation. Furthermore, the provision should clearly state exemptions to whistleblower protection (e.g. national security). It is also recommended that a burden of proof provision be included to further protect whistleblowers.
3. Clear procedures and channels for reporting wrongdoings	There is no indication as to whom public officials should report wrongdoings in order of preference. Other external channels also appear to be excluded.	By explicitly stating disclosure channels, the Law could facilitate disclosures. Further, hotlines and help lines provide guidance both inside and outside the organisation.
4. Enforcement mechanisms	The Law considers only punishment, dismissal and direct or indirect discriminatory measures as covered retaliatory acts. Article 1.51 does not provide any redress for whistleblowers who have suffered retaliation.	The Law does not seem to take into account the entire whistleblowing cycle. Nor does it specify procedures that could be adopted. The Law should various forms of redress.

Regulating the complex area of whistleblower protection in a single provision necessary leads to numerous gaps. Areas in which the Anti-Corruption Law's provision is found most wanting are examined below.

Clear, comprehensive legislation

Definitions and scope

There is no common legal definition of what constitutes whistleblowing. In the context of international anti-corruption standards, the OECD (2009b) refers to protection from "discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities".[27] Similar language is also found in national whistleblowing legislation. For example, the UK's Public Interest Disclosure Act refers to "any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following" – the provision goes on to list a series of acts, including criminal offences).[28]

Romania's whistleblowing legislation is Law 571 of 14 December 2004 on the protection of personnel working in public authority organisations, public institutions, and other establishments who report infringements. It also identifies the public interest as the good to protect. Key characteristics of whistleblowing could therefore include: i) the disclosure of wrongdoings in the workplace; ii) a public interest dimension – e.g. the reporting of criminal offences, unethical practices, etc. – as opposed to a personal grievance; and iii) the reporting of wrongdoing through designated channels and/or to designated persons.[29]

To strengthen the current whistleblowing provision in Italy's Anti-Corruption Law, an indication of its purposes would be useful. It would yield further emphasis by clearly stating and promoting the importance of reporting unlawful action in the public service and the positive, constructive role of whistleblowers. This would be particularly important in the Italian context where whistleblowing carries a negative connotation.

"Good faith" and "reasonable ground"

One issue that should be addressed is whether disclosures that happen to be unfounded should also be protected. Good faith requirements constitute the basis for protected disclosure in other whistleblower protection laws such as those of Japan, South Africa, and others. Australia does not have a single federal whistleblowing act, but different regional laws (e.g. the Whistleblowers Protection Act, 1993, Southern Australia; the Whistleblowers Protection Act, 1994, New South Wales; the Whistleblowers Protection Act, 2001, Victoria). All, however, require a reasonable belief of misconduct. Similarly, many other countries disclosures to be in good faith.

Article 1.51 of Italian Anti-Corruption Law is not clear as to the good faith requirement. Is the whistleblower protected if his/her allegations are not correct? To mitigate the current uncertainty in the Italian whistleblowing provision which may well discourage disclosure, a good faith provision should be clearly stated.

Scope of protection

Legislation in a number of countries affords comprehensive protection to whistleblowers in both the public and private sectors. Examples are South Africa, Japan, Korean, and the United Kingdom with its Public Interest Disclosure Act. Some countries restrict protection for whistleblowers to the public sector, e.g. Canada[30] and Romania, while[31] France confines it to the private sector.[32]

Article 1.51 afforded protection to "public employees", which suggests that workers who fall outside that category, such as consultants, contractors, interns, volunteers, and former employees, will not receive protection. It is crucial that protection be extended to other categories of employees in order to widen access to information on possible wrongdoing. It is also recommended that private sector whistleblowers enjoy protection.

Scope of disclosure

One of the main objectives of whistleblower protection laws is to promote and facilitate the reporting of "illegal, unethical or dangerous" activities (Banisar, 2009). Legal frameworks should supply clear definitions of protected disclosures, specifying the

acts that constitute violations, be it mismanagement, abuse of authority, endangering public health and safety, or corrupt action.[33] A "no loophole" approach would be most effective when identifying the breadth of subject matter that may be afforded protection.[34] Japan's Whistleblowing Protection Act, for example, expressly lists violations of food, health, safety and environmental laws. Other countries require wrongdoing to reach certain thresholds before triggering whistleblower protection. Under US law, for example, protected disclosures include gross mismanagement and gross waste of funds, while disclosures of "trivial" offences are not protected.[35]

Article 1.51 promotes and facilitates the reporting of "unlawful conduct". Although the term may be considered to have a broad reach, the provision fails to supply a clear definition of the wrongdoing that warrants protected disclosure or to specify the acts that constitute violations. Furthermore, there is no clear indication as to what degree of wrongdoing triggers whistleblower protection. The language of Article 15.1 needs to be precise and to strike a balance between being overly prescriptive and so precluding certain kinds of wrongdoing from disclosure, on one hand, and being so loose that any kind of wrongdoing could be disclosed – to the detriment of the organisation concerned.

Mechanisms for protection

Protection against reprisals

Reprisals for whistleblowing usually take the form of disciplinary action or harassment in the workplace. Whistleblower protection laws should provide comprehensive protection against discriminatory or retaliatory action. Legislation should therefore strive to protect whistleblowers' employment status against a wide range of retaliatory action, including unfair dismissal. The South African Law Reform Commission, for example, recommends an open-ended list of protections if victimisation is linked to whistleblowing. The list includes protection from "intolerable work conditions", "being prevented from participating in activities outside the employment relationship", and from breaches in confidentiality.[36] Similarly, the 2007 French Law on the Fight against Corruption provides broad employment protection for persons who, in good faith, have reported acts of corruption of which they gained knowledge in the exercise of their functions. They may not be excluded from recruitment and internships, or be disciplined, dismissed or discriminated against.[37] Canada, too, broadly defines retaliation as any measure that adversely affects the employment or working conditions of a whistleblowing public servant.

Under Article 1.51, whistleblowers cannot be "punished, dismissed or subjected to direct or indirect discriminatory measures having an effect on their working conditions for reasons directly or indirectly related to disclosure". While at first sight the wording seems comprehensive enough to cover many different types of retaliation, it would be preferable to detail what is meant by "discriminatory measures" so as to avoid multiple interpretations.

National security

In some countries, employees who disclose information related to official secrets or national security may be liable to criminal prosecution. Some countries with whistleblower protection legislation may consider waiving such criminal liability for

protected disclosures or afford protection only if the disclosure is made through a prescribed channel. In the US, for example, if a purported whistleblower makes a disclosure that the law or an executive order specifically requires be kept secret in the interests of national security, then that disclosure is "prohibited by law". The whistleblower will not be afforded protection unless he or she makes his or her disclosure to the department's or agency's Inspector General or the Office of Special Counsel.

There is no current provision in Italian law for exceptions to whistleblower protection. More comprehensive legislation specifies exceptions in the interests of national security. Introducing such provisions could strengthen current Italian law and avert multiple interpretations.

Anonymity and confidentiality

A key way to afford protection to whistleblowers and encourage reporting of wrongdoing is to guarantee them confidentiality. For example, the United Kingdom Public Interest Disclosure Act protects the confidentiality of the whistleblower, as does French law, albeit in the private sector only. Korean law provides that whistleblower's identity may be revealed only upon his/her consent, while in Germany, an anonymous hotline allows anonymous communication with whistleblowers. New Zealand describes confidentiality as "perhaps the most significant protection",[38] while the United States' Whistleblower Protection Act prohibits the Office of Special Counsel from disclosing the identity of a whistleblower without his or her consent. The one exception is if imminent danger to public health or safety or imminent violation of any criminal law makes it necessary to reveal a whistleblower's identity.[39]

While Article 1.51 provides a certain degree of confidentiality, it further define and clarify situations under which the confidentiality will not be kept. In the absence of greater precision, potential whistleblowers will have no certainty that their identity will be kept confidential throughout the whistleblowing cycle.

Burden of proof

Under the terms of whistleblower protection laws, the burden of proof is on employers, who must prove that action they have taken against an employee is unrelated to whistleblowing. This is in response to the difficulties an employee might face in proving that reprisals were a result of his or her disclosure of wrongdoing – "especially as many forms of reprisals maybe very subtle and difficult to establish".[40]

In this regard, South Africa's Protected Disclosures Act (PDA) states that any dismissal in breach of Section 3 of the Act is automatically deemed to be an unfair dismissal.[41] Another example is the United States, where the public agency needs to demonstrate proof "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure".[42] In the United Kingdom, the burden of proof is predicated on the length of an employee's term of employment. If an employee has been employed for more than one year, the burden of proof is on the employer. If the employee has been employed less than one year, the employee must prove that the dismissal was connected to the disclosure.

Currently, there are no burden of proof provisions in Italian law. The delicate situation between employee and employer should be framed by a legislative provision that articulates exactly how employees can establish they have been mistreated as a direct result of their whistleblowing. This would creating a step-by-step checklist to prove unfair treatment. If certain critical boxes were checked, dismissal could then be directly attributed to the employee's disclosure of wrongdoing. The burden of proof, which then shifts to the employer in the event of an unfair dismissal, would be clearly established in this framework.

Clear procedures and channels for reporting wrongdoing

Reporting

Whistleblowing legislation may specify one or more channels through which protected disclosures can be made. These may be internal disclosures, external disclosures to a designated body, or external disclosures to the public. For example, the United Kingdom's Public Interest Disclosure Act applies a tiered approach, whereby disclosures may be made to one of the following "tiers":

- Tier 1: internal disclosures to employers or Ministers of the Crown;
- Tier 2: regulatory disclosures to prescribed bodies (e.g. the Financial Services Authority or Inland Revenue);
- Tier 3: wider disclosures to the police, media, members of parliament and non-prescribed regulators.

Each tier incrementally requires a higher threshold of conditions which the whistleblower must satisfy to obtain protection. This arrangement is intended to encourage internal reporting and the use of external reporting channels as a last resort (Banisar, 2009).

The Anti-Corruption Law does not seem to take into account the entire whistleblowing cycle. Nor does it indicate in any precise manner what procedure a whistleblower should follow. It states only to which bodies alleged wrongdoing should be reported, without specifying an order of preference or whether one body's acceptance of a whistleblowing claim automatically precludes other bodies from accepting it. Similarly, there is no indication as to what happens once the whistle has been blown. Moreover, the Law fails to state through which disclosure channels reports can be conveyed.

Hotlines

Many OECD countries have established whistleblower hotlines to make it easier to report wrongdoing. Help lines or hotlines which provide some guidance could be established inside and/or outside the organisation where the whistle has been blown – in the CIVIT, for example. In the Czech Republic, 44% of all private companies have established hotlines for protection against fraud.[43] Furthermore, Belgium, France, Germany, the Netherlands, Switzerland, the United Kingdom and the United States are examples of OECD member countries who have implemented a form of hotline to assist the flow of reports of alleged corruption or misconduct. The facilitation of such reporting tools could take place within CIVIT, provided that adequate supporting resources are allocated to it.

Incentives to encourage reporting

To encourage whistleblowing, many OECD countries have put in place reward systems (which may include monetary recompense). In the US for example, the False Claims Act allows individuals to sue on behalf of the government in order to recover lost or misspent money. They can receive up to 30% of the amount recovered.[44] Korean Anti-Corruption and Civil Rights Commission (ACRC) may reward whistleblowers with up to USD 2 million if their claims contribute directly to recovering or increasing public agencies' revenues or reducing their expenditures. The ACRC may also grant or recommend awards when whistleblowing served the public interest.[45] Rewards systems, however, remain controversial in most countries with an organisational culture that values efforts to improve organisations, especially by identifying and correcting wrongdoing.

There are currently no such whistleblowing incentive provisions in Italy's Anti-Corruption Law.

Enforcement mechanisms

Oversight and enforcement authorities

Some countries have established independent agencies that are legally empowered to receive complaints of reprisals against whistleblower, to investigate them, and to seek redress. It is a policy that has proved effective. In the United Kingdom, for example, the Office of Civil Service Commissioners is an independent body that may receive public sector disclosures as a last resort. The United States' Office of the Special Counsel (OSC) serves as an independent federal investigative and prosecutorial agency that protects federal employee whistleblowers who claim to have suffered reprisals. In Canada, the Public Sector Integrity Commissioner reports directly to Parliament rather than to a minister.

Other countries, which do not have such specialised bodies, can rely on an ombudsman or information commissioners appointed under the terms of freedom of information acts and who have the power to order the release of information and redress. Information commissioners, however, tend to have limited jurisdiction and can therefore offer only limited protection to whistleblowers.

There is currently no indication that Italian law has any plans for creating a specialised body. It could, however, designate a body that advises public employees on whistleblowing, procedures, protected disclosures, and on other related issues. The same body would oversee how the working of the law, possibly review it, and collect and publish data on it. It could even promote cases where the law has proved its worth. The same body could promote awareness of the whistleblowing issue, co-operate with the public education system on disclosing wrongdoing in the public interest, and train public employees. This would narrow the gap in current design principles.

Availability of judicial review

An identified best practice for whistleblower legislation is to ensure that whistleblowers are entitled to a fair hearing before an impartial forum with a full right of appeal.[46] Such examples include the United Kingdom's Public Interest Disclosure Act,

which allows for appeals to the Employment Tribunal and the right of federal employees in the United States to bring complaints before the Merit Systems Protection Board and the US Court of Appeals. The disadvantage of judicial reviews – compared to independent oversight bodies – is precisely that they have no oversight of the entire whistleblowing system. Furthermore, their jurisdiction is restricted to cases of employment discrimination and rarely extends to other kinds of retaliation.

Italy's Anti-Corruption Law allows public employees to report wrongdoing to "judicial authorities or the Court of Auditors." As such, there is no gap in the Law's design and the legislation provides the availability of judicial review.

Redress and sanctions for reprisals

Whistleblower protection laws usually include redress for whistleblowers who have suffered reprisals. Legislation can cover all direct, indirect and future consequences of reprisal[47] and provide redress. It may take the form of a whistleblower resuming employment after unfair dismissal,[48] a transfer to a comparable job,[49] or compensation for detrimental treatment that cannot be remedied by injunctions such as unemployment and distress.[50] Redress may also involve initiating criminal proceedings against employers who take retaliatory actions, as is the practice in Canada[51] and the United States.[52] In Norway, where there is no special whistleblowing protection legislation, the Working Environment Act (WEP) sets uncapped compensation for public and private employees. In Canada, again, legislation has established a special court with powers to rule whether reprisals have indeed been taken against a whistleblower. It can then to award the whistleblower compensation and take sanctions against the retaliator. The United States False Claims Act allows individuals to file claims on behalf of the government and receive upwards of 30% of the amount recovered. The United States government estimates that USD 17 billion have been recovered under the Act since 1986.[53]

Article 1.51 does not provide that there should be remedy for whistleblowers who have suffered retaliation. Nor does it provide for any sanction against an employer who retaliates against a whistleblower.

Yet whistleblowers should be entitled to redress for reprisals they may have experienced. It could take different forms. In the event of dismissal from work, the focus would be on the whistleblower recovering his or her former employment. If retaliation is of another kind, the whistleblower may seek compensation. Among the different forms of redress to which a whistleblower may be entitled, it is worth mentioning the recovery of losses (be they monetary or not), compensation for past or future earnings losses and legal fees.

Proposals for action

This chapter has sought to demonstrate that whistleblower protection is a key tool in a sound integrity framework. It has assessed Italy's current legal framework for whistleblower protection in relation to other G20 and OECD member countries and finds that, while Article 1.51 of the Anti-Corruption Law provides a solid framework for whistleblower protection, gaps remain in its implementation. The mitigation strategy proposed in Part 4 seeks to narrow the gaps between legislation and implementation and prompts the following proposals for action:

- Issue a decree to amend Article 1.51 so that it comprehensively incorporates all the provisions this chapter has identified as contributing to effective protection for whistleblowers.
- Ensure consistency by amending, as necessary, all relevant labour, civil and criminal laws to include all the elements required for effective whistleblower protection that would further strengthen the provisions in the new Anti-Corruption Law.
- Foster change in the public perception of whistleblowing, as negative perspectives will limit the implementation of the new legal provisions. As in many European countries, whistleblowers are often ill-considered and viewed as traitors and informers. Purpose-designed communication strategies to raise awareness and emphasise the importance of whistleblowing and how it is in the public interest will contribute to the effective implementation of the relevant provisions in the new Anti-Corruption Law.

Notes

1. The term "public official" will be understood as: any person holding a legislative, executive, administrative or judicial office of a country, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; and any other person who performs a public function, including for a public agency or public enterprise, or who provides a public service, as defined in the domestic law of the country. See the United Nation Convention Against Corruption, Article 2, United Nations.
2. Whistleblowers are defined as persons who expose wrongdoing in the public service.
3. UNCAC Articles 8, 13 and 33.
4. Council of Europe Civil Law Convention on Corruption, Article 9; Council of Europe Criminal Law Convention on Corruption, Article 22.
5. Inter-American Convention against Corruption, Article III (8).
6. African Union Convention on Combating Corruption, Article 5(6).
7. OECD Anti-Bribery Convention (2009), Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Section IX.iii. and Section X.C.v., and Annex II to the Recommendation, Good Practice Guidance on Internal Controls, Ethics and Compliance, Section A.11.ii.
8. Law 300 of 20 May 1970 (so-called Workers' Statue), Art. 18.
9. LEGISLATIVE DECREE 231/2007 Implementation of Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and of Directive 2006/70/EC laying down implementing measures for Directive 2005/06/EC.
10. Article 149, paragraph 3 of Legislative Decree 58/1998 entitled: Consolidated Acts about Financial Mediation.
11. Criminal Code, Art. 361, *Omessa denuncia di reato da parte del pubblico ufficiale*.
12. Article 361 Criminal Code, *Omessa denuncia di reato da parte del pubblico ufficiale. Il pubblico ufficiale, il quale omette o ritarda di denunciare all'autorità giudiziaria, o ad un'altra autorità che a quella abbia obbligo di riferirne, un reato di cui ha avuto notizia nell'esercizio o a causa delle sue funzioni, è punito con la multa da euro 30 a euro 516. La pena è della reclusione fino ad un anno, se il colpevole è un ufficiale o un agente di polizia giudiziaria, che ha avuto comunque notizia di un reato del quale doveva fare rapporto. Le disposizioni precedenti non si applicano se si tratta di delitto punibile a querela della persona offesa*.
13. For example, Cass. pen., sez. VI, 19-03-2007.
14. Transparency International, *Alternative to Silence: Whistleblower Protection in 10 European Countries*, November 2009; Transparency International Italy, *Protezione delle "vedette civiche": il ruolo del whistleblowing in Italia*, December 2009.
15. Art. 12 (Introduzione dell'articolo 54-bis del decreto legislativo 30 marzo 2001, n. 165).
    1. Dopo l'articolo 54 del decreto legislativo 30 marzo 2001, n. 165, è inserito il seguente:
    "Art. 54-bis. (*Tutela del dipendente pubblico che segnala illeciti). – 1) Fuori dei casi*

di responsabilità a titolo di calunnia o diffamazione, ovvero per lo stesso titolo ai sensi dell'articolo 2043 del codice civile, il pubblico dipendente che denuncia all'autorità giudiziaria o alla Corte dei conti, ovvero riferisce al proprio superiore gerarchico condotte illecite di cui sia venuto a conoscenza in ragione del rapporto di lavoro, non può essere sanzionato, licenziato o sottoposto ad una misura discriminatoria, diretta o indiretta, avente effetti sulle condizioni di lavoro per motivi collegati direttamente o indirettamente alla denuncia. 2) Nell'ambito del procedimento disciplinare, l'identità del segnalante non può essere rivelata, senza il suo consenso, sempre che la contestazione dell'addebito disciplinare sia fondata su accertamenti distinti e ulteriori rispetto alla segnalazione. Qualora la contestazione sia fondata, in tutto o in parte, sulla segnalazione, l'identità può essere rivelata ove la sua conoscenza sia assolutamente indispensabile per la difesa dell'incolpato.3) L'adozione di misure discriminatorie è segnalata al Dipartimento della funzione pubblica, per i provvedimenti di competenza, dall'interessato o dalle organizzazioni sindacali maggiormente rappresentative nell'amministrazione nella quale le stesse sono state poste in essere. 4) La denuncia è sottratta all'accesso previsto dagli articoli 22 e seguenti della legge 7 agosto 1990, n. 241, e successive modificazioni."

16. Article 368 Criminal Code.
17. Article 595 Criminal Code.
18. Article 2043 Civil Code.
19. All Australian jurisdictions, except for the Commonwealth, have stand-alone acts that provide for the establishment of whistleblowing schemes and some form of legal protection against reprisals. See the Australian Capital Territory Public Interest Disclosures Act, the New South Wales Protected Disclosures Act of 1994, the Northern territory Public Interest Disclosures Act of 2008, Queensland Whistleblowers Protection Act of 1993, Tasmania Public Interest Disclosures Act of 2002, Victoria Whistleblowers Protection Act of 2001 and the Western Australia Public Interest Disclosures Act of 2003.
20. Public Servants Disclosure Protection Act of 2005.
21. Whistleblower Protection Act of 2004.
22. Public Interest Disclosure Act of 1998.
23. Whistleblower Protection Act of 1989.
24. Under section 230(3) of the Employment Rights Act of 1996.
25. Whistleblower Protection Act No. 122 of 2004.
26. See Transparency International, *Recommended Principles for Whistleblowing Legislation*, Recommendation 23: "Dedicated legislation – in order to ensure certainty, clarity and seamless application of the framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach."
27. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Recommendation IX(iii). See also OECD Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service and OECD Guidelines for Multinational Enterprises, Section II.9.
28. UK PIDA (1998), Part IV.A., Section 43B.
29. U4 Anti-Corruption Resource Centre, Good Practice in Whistleblowing Protection Legislation, *www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/downloadasset/404*.

30. Public Servants Disclosure Protection Act (PSDPA), 2001, *http://laws-lois.justice.gc.ca/eng/acts/P-31.9/*.
31. Act on the Protection of Whistleblowers, Law 571/2004.
32. Loi n.1598-2007, which introduced article L 11-1161-1 of the Labour Law.
33. As established in the UK PIDA §43(a), (b); the Japanese WA art. 2.3; the U.S. WPA §2(a)(2); the Uganda WPA §11.2; South African PDA §1; Korean ACA art. 2; Australian PDA §4; and Canadian PSPDA art. 8. See also, Government Accountability Project, International Best Practices for Whistleblowers Policies (20 June 2011) p. 2.
34. U4 Anti-Corruption Resource Centre, Good Practice in Whistleblowing Protection Legislation, *www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/downloadasset/404*.
35. The Federal Circuit defined "trivial" as "arguably minor and inadvertent miscues occurring in the conscientious carrying out of one's assigned duties." Drake v. Agency for International Development, 543 F.3d 1377, 1381 (Fed. Circuit 2008). However, the Federal Circuit has also held that disclosing a seemingly-minor event can be a qualified disclosure when the purpose of the disclosure is to show the existence of a repeated practice. Horton v. Dept of the Navy, 66 F.3d 279, 283 (Fed. Cir. 1995).
36. South Africa Protected Disclosures Act of 2000, Section VI.
37. Loi n°2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption, Art. 9, JORF 14 novembre 2007.
38. Id at 4.22.
39. 5 U.S.C. § 1213 (h).
40. U4 Anti-Corruption Resource Centre, Good Practice in Whistleblowing Protection Legislation, *www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl/downloadasset/404*.
41. South Africa PDA (2000), Section 4(2)(a).
42. 5 U.S.C. § 1214(b)(4)(B)(ll).
43. Results are based on findings from the PriceWaterhouseCoopers report Global Economic Crime Survey (2007).
44. False Claims Act, 31 U.S.C. §3729.
45. Anti-Corruption and Civil Rights Commission of Korea, "Protecting and Rewarding Whistleblowers", available at: *www.acrc.go.kr/eng_index.html*.
46. Transparency International, Recommended Principles for Whistleblowing Legislation, Recommendation 20.
47. See, Korean ACA art. 33; U.K. PIDA §4; U.S. WPA 5USC §1221(h)(1); U.S. False Claims Act 31 USC §3730(h).
48. As in the U.K.
49. As in the U.S. and South Africa.
50. As prescribed in the U.K. legislation.
51. Criminal Code, art. 425.1 (1)(a)(b).
52. 18 USC §1513(e).
53. Taxpayers Against Fraud Education Fund, False Claims Act Update & Alert, 24 January 2006.

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