# WHISTLEBLOWING: THE EVOLUTION OF ITALY'S LEGISLATION AND A COMPARISON WITH THE UNITED STATES OF AMERICA

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# *1* Introduction

On 24 November 2012, an editorial entitled "*The anticorruption law's success will depend on public administration's resistance*"[1] was published in "*Guida al diritto",* a renowned Italian law journal.

Marcello Clarich, Professor of Administrative Law, just a few days before the approval of Law 6 November 2012 n. 190 "*Measures for the prevention and repression of corruption and illegal activities in the public administration*" was trying to send out a message full of doubts and hopes, and, even today, still relevant. Looking at the editorial's title, there was no room for ambiguity and misunderstandings: the law's approval, after a difficult parliamentary process, would have represented a real achievement only if anti-corruption regulations had been accepted and *internalized* by its final subjects.

According to Clarich, anti-corruption law's success would partially depend on a change of attitude, if, for attitude, we mean what the philosopher and jurist Paolo Grossi defined "*A set of values circulating in a spatial and temporal area*".

Clarich's doubts were focused on the effectiveness of article 54-*bis*, introduced by law 6 November 2012 n. 190 (d.lgs. 165/2001), concerning the tip-off and related accusations made by the whistleblower (a public servant who, acting in good faith, informs about an offence or irregularity found out in the performance of his duties).

The need to introduce a legal instrument able to facilitate the surfacing of unlawful conditions had been repeatedly stigmatized by more than one international organization[2]: the provision of instruments of protection for public servants who report unlawful behaviours, finally gave credibility to a regulation whose efficacy had been jeopardized for a long time because of a lack of guarantees and protection towards who, spontaneously providing relevant information, accepted retaliation risks.

[1] M. Clarich, *Sulle resistenze all'interno dell'amministrazione si gioca il successo della legge anticorruzione,* in *Guida al diritto*, n. 47, 24 November 2012, Edizioni il Sole 24 ore.

[2] United Nations, *Convention Against Corruption*, 2005; Council of Europe, *Civil Law Convention on Corruption*, 1999; Council of Europe, *Criminal Law Convention on Corruption*, 1999; Council of Europe, General Assembly, Resolution 1729 (2010), *Protection of "whistle-blowers*"; Council of Europe, General Assembly, Recommendation 1916 (2010), *Protection of "whistle-blowers*".

## 2. Whistleblowing protection in the United States of America

### 2.1. The Sarbanes-Oxley Act

It is necessary to clarify that the lowest common denominator between Italian and American whistleblowing protection measures, until recently, could be recognised only at a teleologic level, namely, both protection measures were aimed at exploiting privileged observer's potentialities in order to gain useful information about unlawful conducts.

Indeed, big differences in approach between Italy and The United States of America existed-and continue to exist-, especially with regard to whistleblowing's methodology, application and identification of its beneficiaries.

The United States of America are considered the main whistleblowing pioneers. The first legislation, the *False Claims Act* (1863) is a federal law, amended many times, which used to allow a private citizen to report single wrongdoers or companies 'activities aimed at defrauding governmental programmes.

Conducts considered as violations of the *False Claims Act* can be divided into four macro-categories: Presenting a false or fraudulent claim for payment or approval to an officer or employee of the United States Government or a member of the Armed Forces; making a false record of statement to get a false of fraudulent claim paid or approved by the Government; conspiring to defraud the Government by getting a false or fraudulent claim allowed or paid; making, using or causing to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to be Government.[3]

The *False Claims Act* amendment, in 1986, represented a fundamental step because it led to a substantial increase of potential reward for whistleblowers and an enlargement of the range of subjects authorized to file a lawsuit.[4]

Listing the main characteristics of what can be defined as one of the first tools in protecting whistleblowers is not just the final result of a pointless academic exercise, but is needed to emblematically prove the effective foresight of American legislation that, anticipating the quick evolution of corruptive methods, proposed a set of norms whose strength can be identified in the "reward system", inspired by the latin brocard "*qui tam pro domino rege quam pro se ipso in hac parte sequitur" : "(He)who sues in this matter for the king as well as for himself.".*

Today, the highly evolved U.S. legislation contains specific norms which have the merit of guaranteeing a series of accurate and comprehensive legal protection for whistleblowers, allowing them to achieve a full *juridic dignity,* with special regard to the *Sarbanes Oxley Act*[5], a federal law issued in July 2002 and born from a fusion of two different drafts by deputies Mike Oxley and Paul Sarbanes. The norm aimed at making some changes at a *corporate governance* level, defined as a set of mechanisms, institutions and principles which rule enterprise activities, often determining their success or prosperity.

Section 806, entitled "*Protection for employees of publicly traded companies who provide evidence of fraud"* amended chapter 73 of title 78 of the *United States Code*.

[3] It is strongly recommended to directly refer to the False Claims Act text for additional and specific details.
[4] E. Sangrey Callahan, Terry Morehead Dworkin, *Do good and Get Rich: Financial Incentives for Whistleblowing and the False Claim Act,* 37, in Villanova Law Review, 273(1992).
[5] Known also as *Public Company Accounting Reform and Investor Protection Act*

Publicly traded companies' employees were the main beneficiaries of this norm. Nobody is authorized to discharge, demote, suspend, threaten, harass or discriminate in any other way an employee because of his/her legitimate act, for having provided information or any other kind of help with regard to an investigation concerning any conduct considered by the employee as a violation of sections 1341, 1343, 1344, 1348 or any other regulation or norm of the *Security and Exchange Commission*, or any federal law which punishes frauds against shareholders.

The above-mentioned provisions are valid if the investigation is conducted by a Federal regulatory or law enforcement agency, or by any congressional committee, by any member of the Congress or by a supervisor who exercises power over the employee (or by any other subject who has the authority to investigate, uncover and put an end to illicit conducts).

The whistleblower can file evidence in order to back up his claims, testify, participate in lawsuit's sessions related to an alleged violation of the above-mentioned sections or regulations of the Securities and Exchange Commission, or any other federal law provision concerning fraud episodes against shareholders.

Anyone who is fired or suffers any other kind of discrimination can complain addressing the Secretary of Labor or, in case the Secretary does not take a final decision within 180 days and the delay is not justified by claimant's *mala fide*, is allowed to file a lawsuit in the appropriate U.S. district Court.

The employee who wins a lawsuit, is entitled to re-integration in the workplace in the same position he would have held if he had not been discriminated, to the payment in arrears and a compensation for any kind of damage suffered because of discriminatory behaviours, including legal advice and proceeding costs.

It is important to highlight a recent decision of the Supreme Court. In march 2014, indeed, the whistleblower protection discipline had been extended to public companies contractors' employees.

This choice is far from irrelevant and embodies the spirit of the entire SOX law. An already solid and effective protection system extended to other categories of potential whistleblowers can be interpreted as a crucial milestone in the natural implementation of guarantees.

### 2.2 Whistleblower's conduct: A concrete case.

For the sake of completeness, it is necessary to provide some clarifications about whistleblowers' duties and, more specifically, about conditions, deduced from case-law evolution, considered as prerequisites for the right to seek protection.

In this regard, the Harkness v. C-Bass Diamond case is emblematic.

In January 2005, the claimant, a company's employee operating in the legal sector, became aware that the company's Chief Executive Director was disclosing information about the company's budget review and the earning restatement to an external investor. The employee considered an investigation necessary and directly asked for clarifications to the President and the Chief Executive Officer.

She believed that the above-mentioned conducts could represent a violation of the SOX law and transferred information in her possession to the Chair of the company's audit committee, omitting to verify if Regulation FD[6] was applicable at the time or not and to consult company's legal staff before proceeding to the audit committee chairman. Her relationships with the President and the CEO started to deteriorate. The employee reported discriminatory practices, affirming to have been excluded from senior management meetings and to have suffered a downgrading of her role.

Court stated that, because of the whistleblower's hesitation and lacking accuracy in identifying the violation, she was not entitled to the protection guaranteed by the SOX law.

It follows that, despite section 806 provides the whistleblower with protection measures, his/her convictions are in any case evaluated also on the basis of the claimant personal experience, competency and accuracy of his/her assessment.

[6] *Regulation Fair Discosure*

## Whistleblowing in Italy: the legislative evolution

### 3.1 Article 54-bis

Information exposed until now should not be considered as comprehensive, complete summary of the complex U.S. whistleblowing regulations, but is just an attempt to provide the reader with a general framework, indispensable in order to make a comparison with the Italian discipline.

It is not a case that U.S. discipline represented an important frame of reference exactly in 2012, on the occasion of the approval of Law 6 November 2012 n. 190 and the consequent introduction of article 54-*bis* (amending d.lgs. 165/2001).

The primary objective was to discipline public servants' protection measures. But, despite symbolizing a gradual growth of awareness about the topic, it immediately encountered criticism.

The strong disapproval concerned various aspect of the norm. Here a short list:

- Article 54-*bis* protected whistleblowers from three kinds of discrimination: layoff, sanctions and direct or indirect discriminatory measures but did not mention any instrument able to encourage reporting activities.

- Subsection 2 allowed the whistleblower's identity disclosure if it had been "*absolutely indispensable*" for the legal defence of the accused. Someone objected that the expression "*absolutely indispensable"* was too much generic and too open to an uncountable number of different interpretations, as well as a potential, strong demotivating factor for the whistleblower.

- Despite article 54-*bis* listed all the bodies responsible for receiving a report, it did not either identify the criteria which the whistleblower should follow in choosing the right organism, or specify the communication method (verbal, written…)

- Reports concerning facts which the employee knew by chance and not as a result of his specific job duties were automatically kept out from the whistleblower's protection mechanism.

- The legislator's choice to concentrate the discipline just in one article and to include protection measures in the wider labour law framework, renouncing the creation of an independent legislation, had been judged as a *too prudent* attitude towards the issue.

In a few years, the need to develop an autonomous legislation with a more accurate set of guidelines, became a pressing concern.

### 3.2. A new legislative proposal to improve whistleblowers' protection

In January 2016, the Italian Chamber of Deputies approved a new law about whistleblowing which is now about to be discussed by the Senate.

The aim is to enhance the present legislation. The main beneficiaries will be public employees, including state-controlled companies' employees, private state-controlled companies' employees and employees working in the private sector.

Here a list of the main points:

- The *bona fide:* The public employee has to be considered in good faith when he/she reports an alleged violation in the belief that the existence of an unlawful conduct is highly probable. The *bona fide* does not subsist when the whistleblower acts with gross negligence. In this case, the whistleblower is subjected to a disciplinary proceeding, which can also lead to dismissal without notice.

- The inclusion of other figures different from the public employee: Discipline is extended to independent contractors, consultants and interns.

- The whistleblower's identity: The new legislative proposal tries to fix the extreme generality of article 54-*bis* with regard to whistleblower's identity disclosure. In the context of criminal proceedings, the identity is protected by article 329 of the Criminal Procedure Code. In the context of Court of Auditors, identity cannot be disclosed until the end of the pre-trial, investigative stage. With regard to disciplinary proceedings, identity cannot be disclosed in the absence of whistleblower's consent. Identity can be disclosed if the charge is totally, entirely based on the whistleblower's report and if the disclosure is "absolutely necessary" for the accused defence.

- Discriminatory behaviours' reporting process: The adoption of discriminatory measures against the whistleblower is reported to the National Anti-Corruption authority (ANAC), or, alternatively, to the most representative trade unions. In case discriminatory measures are demonstrated and verified, ANAC applies a financial penalty (between 5.000 and 30.000 euros). Protection measures are not guaranteed if the employee is responsible for defamation offences, or in case of fraud and gross negligence.

- Reward system: In case the report's validity is fully demonstrated, employee is entitled to receive a reward, whose details should be contractually defined.

## *Conclusions*

The choice to analyse the Italian discipline in a comparative framework is aimed at gaining an objective, impartial vision of regulatory evolutions, allowing jurists as well the legislator to identify not only progresses but also grey areas.

It is easy to understand as the recently approved law proposal presents a long series of similarities with the U.S norms. The biggest one is the decision to regulate whistleblower's protection in an independent law proposal, renouncing an extremely concise approach.

Secondly, the presence of strong analogies with the U.S. rules is very clear taking into consideration some innovations recently introduced: from the identification of accurate guidelines to protect whistleblowers' identity, to a precise description of reports' evaluating processes; from the extension of the discipline to private sector employees to the introduction of a reward system.

Obviously, the law can't be defined as totally complete and satisfactory, and still appears characterized by vagueness and inaccuracy.

Finally, it is important to underline that a strong whistleblowing discipline and a cultural and behavioural mutation are two interdependent aspects. The biggest future challenge will probably be related to the creation of a virtuous circle.