

Letter from Transparency International Italy to the European Commission. An analysis of violations of the law transposing the European Directive on Whistleblowing

This document aims to examine the transposition of European Directive N. 1937 of October 23, 2019, regarding the protection of individuals reporting violations of Union law into the Italian legal system. The adoption of this directive took place through Legislative Decree No. 24 of March 10, 2023, *"Implementation of Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019, on the protection of persons reporting breaches of Union law and containing provisions on the protection of persons reporting breaches of national legislative provisions"*.

According to the provisions laid down by the European Directive, national legislations need to create common minimum regulatory standards aimed to harmonize the protection regime for whistleblowers who report misconduct of which they have become aware.

The transposition of EU legislation into the Italian legal system has resulted in certain violations of the EU principles. The disparities and regressions of the rights granted to whistleblowers outlined in the current national legislation - as a result of the application of Legislative Decree n. 24/2023 - contrast with what is affirmed in the framework set by the EU legislator, where, in Recital 104, it expressly states that *"This Directive introduces minimum standards and it should be possible for Member States to introduce or maintain provisions which are more favourable to the reporting person, provided that such provisions do not interfere with the measures for the protection of persons concerned. The transposition of this Directive should, under no circumstances, provide grounds for reducing the level of protection already granted to reporting persons under national law in the areas to which it applies¹"*.

¹Text of the Recital extrapolated from the European Directive and reported in full.

Article 25 of the Directive, titled *"More favourable treatment and non-regression clause"*², matters, too. Paragraph 1 states that *"Member States may introduce or retain provisions more favourable to the rights of reporting persons than those set out in this Directive, without prejudice to Article 22 and Article 23(2)"*³; paragraph 2 states that *"The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by Member States in the areas covered by this Directive"*⁴.

The level of protection mentioned in paragraph 2 of the Article 23 should be interpreted in connection with recital 104, which allows to understand the protection regime recognized in favor of the whistleblower, as intended by the supranational legislation.

The combined provisions of Recital 104 and Article 25 require Member States to comply with the legislative innovations introduced by the European Directive, provided that such compliance doesn't result in a reduction or in a limitation of the protection regime recognized in favor of the whistleblower, as already outlined in the previous legislation.

The aim of this document is to illustrate, point by point, the violations and regressions sanctioned by the entry into force of Legislative Decree N. 24/2023, through a comparison of the legislative text of the articles outlined in the European Directive and Italian legislation, highlighting the aspects mentioned in the preamble.

²Title of the article extrapolated from the European Directive and reported verbatim.

³Regulatory text extrapolated from the European Directive and reported verbatim.

⁴Regulatory text extrapolated from the European Directive and reported verbatim.

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Inconsistencies between European Directive and Italian national legislation

- *Material scope*

Article 4 of the European Directive concerns the material scope of the legislation, which applies to workers carrying out their work activities in both the public and private sectors.

This legislation aims to protect public and private sector employees, self-employed workers, shareholders, individuals in coordinating and supervisory roles, volunteers, interns, as well as those whose employment has ended or is yet to start.

The European legislator extends the application of whistleblower protection to so-called "facilitators", as well as individuals closely related to the whistleblower, such as relatives and coworkers.

The transposition of the European Directive into the Italian law has resulted in a disparity on this point, constituting a violation, as it doesn't delineate a uniform scope for the public and private sectors, as outlined by the European legislator.

The relevant legislative texts are provided below for the purpose of conducting a comparative analysis between them.

	DIRETTIVA EUROPEA 2019/1937	D. LGS. 24/2023	* Unofficial translation into English of the Italian regulatory text
ARTICLE	Article 4 Personal scope	Art. 3 Ambito di applicazione soggettivo	Art. 3 Personal scope of application
LEGISLATIVE TEXT	<p>1. This Directive shall apply to reporting <u>persons working in the private or public sector</u> who acquired information on breaches in a work-related context including, at least, the following:</p> <p>(a) persons having the status of worker, within the meaning of Article 45(1) TFEU, including civil servants;</p> <p>(b) persons having self-employed status, within the meaning of Article 49 TFEU;</p> <p>(c) shareholders and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members, as well as volunteers and paid or unpaid trainees;</p>	<p>1. <u>Per i soggetti del settore pubblico</u>, le disposizioni del presente decreto si applicano alle persone di cui ai commi 3 o 4 che effettuano segnalazioni interne o esterne, divulgazioni pubbliche o denunce all'autorità giudiziaria o contabile delle informazioni sulle violazioni di cui all'articolo 2, comma 1, lettera a).</p> <p>2. <u>Per i soggetti del settore privato</u>, le disposizioni del presente decreto si applicano:</p> <p>a) per i soggetti di cui all'articolo 2, comma 1, lettera q), numeri 1) e 2), alle persone di cui ai commi 3 o 4, che effettuano segnalazioni interne o esterne, divulgazioni pubbliche o denunce</p>	<p>1. <u>For public sector entities</u>, the provisions of this Decree shall apply to persons referred to in paragraphs 3 or 4 who make internal or external reports, public disclosures or reports to the judicial or accounting authorities of information on violations referred to in Article 2, paragraph 1 (a).</p> <p>2. For <u>private sector entities</u>, the provisions of this Decree shall apply:</p> <p>a) for persons referred to in Article 2, paragraph 1 (q), numbers 1) and 2), to persons referred to in paragraphs 3 or 4, who make internal or external reports, public disclosures or reports to the judicial or accounting authority of</p>

	<p>(d) any persons working under the supervision and direction of contractors, subcontractors and suppliers.</p> <p>2. This Directive shall also apply to reporting persons where they report or publicly disclose information on breaches acquired in a work-based relationship which has since ended.</p> <p>3. This Directive shall also apply to reporting persons whose work-based relationship is yet to begin in cases where information on breaches has been acquired during the recruitment process or other pre-contractual negotiations.</p> <p>4. The measures for the protection of reporting persons set out in Chapter VI shall also apply, where relevant, to:</p> <p>(a) facilitators;</p> <p>(b) third persons who are connected with the reporting persons and who could suffer retaliation in a work-related context, such</p>	<p>all'autorità giudiziaria o contabile delle informazioni sulle violazioni di cui all'articolo 2, comma 1, lettera a), numeri 3), 4), 5) e 6);</p> <p>b) per i soggetti di cui all'articolo 2, comma 1, lettera q), numero 3), alle persone di cui ai commi 3 o 4 che effettuano segnalazioni interne delle informazioni sulle violazioni di cui all'articolo 2, comma 1, lettera a), numero 2, ovvero, <u>se nell'ultimo anno hanno raggiunto la media di almeno cinquanta lavoratori subordinati con contratti di lavoro a tempo indeterminato o determinato</u>, segnalazioni interne o esterne o divulgazioni pubbliche o denunce all'autorità giudiziaria o contabile anche delle informazioni delle violazioni di cui all'articolo 2, comma 1, lettera a), numeri 3), 4), 5) e 6).</p>	<p>information on violations referred to in Article 2, paragraph 1 (a), numbers 3), 4), 5) and 6);</p> <p>(b) for persons referred to in Article 2, paragraph 1(q)(3), to persons referred to in paragraphs 3 or 4 who make internal reports of information on violations referred to in Article 2, paragraph 1(a)(2), <u>if in the last year they have averaged at least fifty employees with permanent or fixed-term employment contracts</u>, internal or external reports or public disclosures or reports to the judicial or accounting authority also of the information of violations referred to in Article 2, paragraph 1, subparagraph a), numbers 3), 4), 5) and 6).</p> <p>3. Except as provided in paragraphs 1 and 2, the provisions of this decree apply to the following persons who report, denounce to the judicial or accounting</p>
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	<p>as colleagues or relatives of the reporting persons; and</p> <p>(c) legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context.</p>	<p>3. Salvo quanto previsto nei commi 1 e 2, le disposizioni del presente decreto si applicano alle seguenti persone che segnalano, denunciano all'autorità giudiziaria o contabile o divulgano pubblicamente informazioni sulle violazioni di cui sono venute a conoscenza nell'ambito del proprio contesto lavorativo:</p> <p>a) <u>i dipendenti delle amministrazioni pubbliche</u> di cui all'articolo 1, comma 2, del decreto legislativo 30 marzo 2001, n. 165, ivi compresi i dipendenti di cui all'articolo 3 del medesimo decreto, nonché i dipendenti delle autorità amministrative indipendenti di garanzia, vigilanza o regolazione;</p> <p>b) <u>i dipendenti degli enti pubblici economici, degli enti di diritto privato sottoposti a controllo pubblico ai sensi dell'articolo 2359 del Codice civile, delle</u></p>	<p>authorities, or publicly disclose information about violations they have become aware of within their work context:</p> <p>(a) <u>employees of public administrations</u> referred to in Article 1, paragraph 2, of Legislative Decree No. 165 of March 30, 2001, including employees referred to in Article 3 of the same decree, as well as employees of guarantee, supervision or regulation independent, administrative authorities;</p> <p>b) <u>employees of public economic entities, private law entities subject to public control pursuant to Article 2359 of the Civil Code, in-house companies, public law bodies or public service concessionaires;</u></p> <p>c) <u>employees of private sector entities,</u> including workers whose employment relationship is governed by Legislative</p>
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		<p><u>società in house, degli organismi di diritto pubblico o dei concessionari di pubblico servizio;</u></p> <p>c) i <u>lavoratori subordinati di soggetti del settore privato</u>, ivi compresi i lavoratori il cui rapporto di lavoro è disciplinato dal decreto legislativo 15 giugno 2015, n. 81, o dall'articolo 54-bis del decreto-legge 24 aprile 2017, n. 50, convertito, con modificazioni, dalla legge 21 giugno 2017, n. 96;</p> <p>d) i <u>lavoratori autonomi</u>, ivi compresi quelli indicati al capo I della legge 22 maggio 2017, n. 81, nonché i titolari di un rapporto di collaborazione di cui all'articolo 409 del codice di procedura civile e all'articolo 2 del decreto legislativo n. 81 del 2015, che svolgono la propria attività lavorativa presso soggetti del settore pubblico o del settore privato;</p>	<p>Decree No. 81 of June 15, 2015, or Article 54-bis of Decree-Law No. 50 of April 24, 2017, converted, with amendments, by Law No. 96 of June 21, 2017;</p> <p>(d) <u>self-employed workers</u>, including those indicated in Chapter I of Law No. 81 of May 22, 2017, as well as holders of a collaboration relationship referred to in Article 409 of the Code of Civil Procedure and Article 2 of Legislative Decree No. 81 of 2015, who carry out their work activity with entities in the public sector or private sector</p> <p>(e) <u>workers or collaborators</u>, who carry out their work activities at entities in the public sector or private sector that provide goods or services or carry out works for third parties;</p> <p>(f) <u>freelancers and consultants</u>, who work for entities in the public sector or private sector;</p>
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		<p>e) <u>i lavoratori o i collaboratori</u>, che svolgono la propria attività lavorativa presso soggetti del settore pubblico o del settore privato che forniscono beni o servizi o che realizzano opere in favore di terzi;</p> <p>f) <u>i liberi professionisti e i consulenti</u> che prestano la propria attività presso soggetti del settore pubblico o del settore privato;</p> <p>g) <u>i volontari e i tirocinanti, retribuiti e non retribuiti</u>, che prestano la propria attività presso soggetti del settore pubblico o del settore privato;</p> <p>h) <u>gli azionisti e le persone con funzioni di amministrazione, direzione, controllo, vigilanza o rappresentanza</u>, anche qualora tali funzioni siano esercitate in via di mero fatto, presso soggetti del settore pubblico o del settore privato.</p>	<p>(g) <u>volunteers and trainees, paid and unpaid</u>, who work for entities in the public or private sector;</p> <p>(h) <u>shareholders and persons holding administrative, managerial, supervisory, or representative</u> positions, including when such positions are held on a de facto basis, with entities in the public or private sector.</p> <p>4. The protection of whistleblowers referred to in Paragraph 3 shall also apply if the report, complaint to the judicial or accounting authority, or public disclosure of information occurs in the following cases:</p> <p>(a) <u>when the legal relationship referred to in Paragraph 3 has not yet begun</u>, if information about violations was acquired during the selection process or other pre-contractual stages;</p> <p>(b) <u>during the probationary period</u></p>
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		<p>4. La tutela delle persone segnalanti di cui al comma 3 si applica anche qualora la segnalazione, la denuncia all'autorità giudiziaria o contabile o la divulgazione pubblica di informazioni avvenga nei seguenti casi:</p> <p>a) <u>quando il rapporto giuridico di cui al comma 3 non è ancora iniziato</u>, se le informazioni sulle violazioni sono state acquisite durante il processo di selezione o in altre fasi precontrattuali;</p> <p>b) <u>durante il periodo di prova</u>;</p> <p>c) <u>successivamente allo scioglimento del rapporto giuridico</u> se le informazioni sulle violazioni sono state acquisite nel corso del rapporto stesso.</p> <p>5. Fermo quanto previsto nell'articolo 17, commi 2 e 3, le misure di protezione di cui al capo III, <u>si applicano anche:</u></p>	<p>(c) <u>after the termination of the legal relationship</u> if the information on violations were acquired during the course of the relationship itself.</p> <p>5. Notwithstanding the provisions of Article 17, paragraphs 2 and 3, the protective measures set forth in Chapter III, <u>shall also apply to:</u></p> <p><u>(a) facilitators;</u></p> <p><u>(b) persons in the same work environment as the reporting person</u>, the person who made a complaint to the judicial or accounting authority, or the person who made a public disclosure and who are related to them by a stable emotional or kinship relationship within the fourth degree;</p> <p>(c) <u>co-workers of the reporting person</u> or the person who has made a complaint to the judicial or accounting authority or</p>
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		<p>a) ai facilitatori;</p> <p>b) alle persone del medesimo contesto lavorativo della persona segnalante, di colui che ha sporto una denuncia all'autorità giudiziaria o contabile o di colui che ha effettuato una divulgazione pubblica e che sono legate ad essi da uno stabile legame affettivo o di parentela entro il quarto grado;</p> <p>c) ai colleghi di lavoro della persona segnalante o della persona che ha sporto una denuncia all'autorità giudiziaria o contabile o effettuato una divulgazione pubblica, che lavorano nel medesimo contesto lavorativo della stessa e che hanno con detta persona un rapporto abituale e corrente;</p> <p>d) agli enti di proprietà della persona segnalante o della persona che ha sporto una denuncia all'autorità giudiziaria o contabile o che ha effettuato una</p>	<p>made a public disclosure, who work in the same work environment as the reporting person and who have a usual and current relationship with that person;</p> <p>(d) entities owned by the reporting person or the person who made a complaint to the judicial or accounting authority or made a public disclosure or for which the same persons work, as well as entities that work in the same work environment as the said persons.</p>
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		divulgazione pubblica o per i quali le stesse persone lavorano, nonché agli enti che operano nel medesimo contesto lavorativo delle predette persone.	
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Article 3 of Legislative Decree n. 24/2023 regulates the material scope of the national legislation, providing for a different regime depending on the recipient, as worker belonging to the public sector or the private sector.

It is specified as follows:

- In the public sector, national legislation applies to violations concerning national and Union law.

It also applies to publicly controlled companies and in-house companies of public administrations because they are assimilated by Italian law to entities belonging to the public sector.

- In the private sector, there is a further differentiation in the scope based on the number of employees (less than or more than 50) and the existence or absence of an organizational and management model under Legislative Decree n. 231/2001.

Therefore:

- a. Companies with more than 50 employees and with an organizational model under Legislative Decree n. 231/2001: whistleblowers can report violations of the model and violations of Union law.
- b. Companies with exactly 50 employees and without an organizational model under Legislative Decree n. 231/2001: they can only report violations of Union law.
- c. Companies with fewer than 50 employees and with an organizational model under Legislative Decree n. 231/2001: they can report violations related to offenses of the model using the internal reporting channel only (so they cannot report violations of Union law) Moreover, according to the regulatory Official Guidelines by the National Anticorruption Authority, it is not possible to use the external reporting channel when it is not possible to internally report the same offence.

The national legislation, as summarized, doesn't establish a uniform material scope for the public sector and the private sector, as expected by European provisions.

Private entities have a differentiated regulatory regime based on the number of employees and the introduction of an organizational, management, and control model under Legislative Decree n. 231/2001.

It is important to detail what the organizational, management and control models 231 are: these models were introduced by Legislative Decree 231/2001, on the administrative liability of legal persons. Back in 2001, Italian legislator decided to introduce a criminal liability (even if formally referred as administrative) for legal persons in case of crimes committed by their employees. The law also introduced some tools to prevent these legal persons from being held accountable for their workers' illicit activities: to escape liability, they need to implement an organizational, management and compliance model. Since 2017 these models, to be considered valid, need to include whistleblowing channels for internal reporting.

Legislative Decree n. 24/2023 doesn't provide for the private sector to report violations of national law, except for entities with an organizational model under Legislative Decree n. 231/2001, which are granted the right to report the predicate offenses indicated therein.

In contrast, the European Directive establishes a regulatory regime aimed at protecting both the public sector and the private sector in a broad sense, so the non-compliance of which results in a violation of the provisions contained therein.

This unequal treatment between the public sector and the private sector is also reflected in reference to the external reporting channel, which cannot be invoked when an entity doesn't have the mandatory provision of an internal reporting channel.

For more details on this point, see the following paragraph.

- *External reporting*

Chapter III of the European Directive, titled "*External reporting and its follow-up*⁵" details the external reporting channels recognized in favor of the whistleblower.

Article 10 prescribes the use of an external reporting channel, which can be used directly by the whistleblower as a preferred primary channel or after using the internal reporting channel.

Article 10 is connected to Article 12 which recognizes the whistleblower's right to make the report in written or oral form, using telephone calls, messages, and direct meetings.

The transposition of the European Directive into the Italian legal system on this point has resulted in a regulatory disparity because the national legislation has provided for the option to resort to external reporting channels when specific conditions are met.

The heading of Article 6 of Legislative Decree n. 24/2023 appears peculiar, intentionally titled "*conditions for making a report*" by the Italian legislator, to underline the existence of specific requirements to which the choice of the reporting channel by the whistleblower is subject.

The legislative texts are provided below for the purpose of conducting a comparative examination between the reference regulations.

⁵Title of Chapter III extrapolated and reported verbatim from the Directive.

	DIRETTIVA EUROPEA 2019/1937	D. LGS. 24/2023	* Unofficial translation into English of the Italian regulatory text
ARTICLE	Article 10 Reporting through external reporting channels	Art. 6 Condizioni per l'effettuazione della segnalazione esterna	Art. 6 Conditions for carrying out internal reports
LEGISLATIVE TEXT	Without prejudice to point (b) of Article 15(1), reporting persons shall report information on breaches using the channels and procedures referred to in Articles 11 and 12, <u>after having first reported through internal reporting channels, or by directly reporting through external reporting channels.</u>	La persona segnalante <u>può effettuare una segnalazione esterna se, al momento della sua presentazione, ricorre una delle seguenti condizioni:</u> a) <u>non è prevista</u> , nell'ambito del suo contesto lavorativo, <u>l'attivazione obbligatoria del canale di segnalazione interna ovvero questo, anche se obbligatorio, non è attivo o, anche se attivato, non è conforme</u> a quanto previsto dall'articolo 4; b) la persona segnalante ha <u>già effettuato una segnalazione interna</u> ai	The reporting person <u>may make report externally if, at the time of the submission, one of the following conditions occurs:</u> a) the mandatory activation of the internal reporting channel <u>is not set up</u> within his/her work context or <u>this, even if mandatory, is not active or, even if activated, does not comply</u> with the provisions of article 4; b) the reporting person has <u>already made an internal report</u> pursuant to article 4 and it has <u>not been followed up;</u>

		<p>sensi dell'articolo 4 e la stessa <u>non ha avuto seguito</u>;</p> <p>c) la persona segnalante ha <u>fondati motivi di ritenere che, se effettuasse una segnalazione interna, alla stessa non sarebbe dato efficace seguito ovvero che la stessa segnalazione possa determinare il rischio di ritorsione</u>;</p> <p>d) la persona segnalante ha <u>fondato motivo di ritenere che la violazione possa costituire un pericolo imminente o palese per il pubblico interesse</u>.</p>	<p>c) the reporting person has <u>reasonable grounds to believe that, if he/she made an internal report, it would not be followed up effectively or that the same report could lead to the risk of retaliation</u>;</p> <p>d) the reporting person has <u>reasonable grounds to believe that the violation may constitute an imminent or obvious danger to the public interest</u>.</p>
ARTICLE	Article 12 Design of external reporting channels	Art. 7 Canali di segnalazione esterna	Art. 7 External reporting channels
LEGISLATIVE TEXT	External reporting channels shall be considered independent and autonomous, <u>if they meet all of the following criteria</u> : (a) they are designed, established and operated in a manner that ensures the completeness, integrity and confidentiality	L'Autorità nazionale anticorruzione (<u>A.N.AC.</u>) <u>attiva un canale di segnalazione esterna</u> che garantisca, anche tramite il ricorso a strumenti di crittografia, la riservatezza dell'identità della persona segnalante, della persona	The National Anti-Corruption Authority (<u>A.N.AC.</u>) <u>activates an external reporting channel</u> which guarantees, also through the use of encryption tools, the confidentiality of the identity of the reporting person, the person involved and



	<p>of the information and prevents access thereto by non-authorised staff members of the competent authority;</p> <p>(b) they enable the durable storage of information in accordance with Article 18 to allow further investigations to be carried out.</p> <p>2. <u>The external reporting channels shall enable reporting in writing and orally.</u> Oral reporting shall be possible by telephone or through other voice messaging systems and, upon request by the reporting person, by means of a physical meeting within a reasonable timeframe.</p> <p>[...]</p>	<p>coinvolta e della persona menzionata nella segnalazione, nonché del contenuto della segnalazione e della relativa documentazione.</p> <p>[...]</p> <p>2. <u>Le segnalazioni esterne sono effettuate in forma scritta tramite la piattaforma informatica oppure in forma orale</u> attraverso linee telefoniche o sistemi di messaggistica vocale ovvero, su richiesta della persona segnalante, mediante un incontro diretto fissato entro un termine ragionevole.</p> <p>[...]</p>	<p>the person mentioned in the report, as well as the content of the report and related documentation.</p> <p>[...]</p> <p>2. <u>External reports are made in written form via the IT platform or in oral form</u> via telephone lines or voice messaging systems or, at the request of the reporting person, through a direct meeting set within a reasonable time.</p>
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Article 6 of Legislative Decree n. 24/2023 outlines the requirements that allow the whistleblower to use the external reporting channel, specifying that it is permitted when the following conditions are met:

- Internal reporting channel is nonexistent/inactive;
- Lack of follow-up on the internal report;
- Well-founded reason to believe the internal report is ineffective, risk of retaliation, imminent danger or clear public interest.

Article 7, moreover, pertains to the external reporting channel established at A.N.AC., which allows the whistleblower to make the report in written form, through access to an encrypted computer platform, or orally, using telephone lines, voicemail, or direct meetings.

National legislation requires the use of the external reporting channel when the conditions set forth in Article 6 of Legislative Decree n. 24/2023 are met.

The use of the external reporting channel limits the whistleblower's choice regarding the reporting methods, preventing them from submitting reports in paper format.

This regulatory provision also contradicts the EU directives, which instead recognize the whistleblower's right to choose between the internal or external reporting channels, thus leaving this choice to the whistleblower's discretion.

The European legislature also acknowledges the possibility of submitting reports in written or oral form with telephone lines, messages, or direct meetings.

In addition, it's important to explore the role recognized to the National Anti-Corruption Authority regarding the reporting procedure through the external reporting channel within the Italian legal system.

	DIRETTIVA EUROPEA 1937/2019	D.LGS. 24/2023	* Unofficial translation into English of the Italian regulatory text
ARTICLE	Article 11 Obligation to establish external reporting channels and to follow up on reports	Art. 10 Adozione di Linee Guida	Art. 10 Adoption of Guidelines
LEGISLATIVE TEXT	Paragrafo 2 Gli Stati membri provvedono affinché le autorità competenti: a) stabiliscano canali di segnalazione esterna indipendenti e autonomi per il ricevimento e il trattamento delle informazioni sulle violazioni [...]	L'A.N.AC., sentito il Garante per la protezione dei dati personali, adotta, entro tre mesi dalla data di entrata in vigore del presente decreto, le linee guida relative alle procedure per la presentazione e la gestione delle segnalazioni esterne. [...]	A.N.AC., having consulted with the Authority for the Protection of Personal Data, shall adopt, within three months of the effective date of this decree, guidelines on procedures for the submission and management of external reports. [...]

In this international, harmonized context, the guidelines of the National Anti-Corruption Authority (A.N.AC.) play a significant role, whose validity and mandatory nature are expressly provided by Italian national law.

Article 10 of Legislative Decree n. 24/2023 states that *"The A.N.AC., after consulting the Authority for the Protection of Personal Data, adopts, within three months from the date of entry into force of this decree, the guidelines concerning the procedures for the submission and management of external reports"*⁶.

The A.N.AC. guidelines are to be understood in the same way as the provisions contained in the national law because they are intended as indications and principles of a general nature for public and private entities that are required to comply to regulate the reporting procedure through the external channel.

The contents of Articles 6 and 10 of Legislative Decree 24/2023 have been transposed in the A.N.AC. guidelines, which recognize the right to use the external reporting channel when specific requirements are met.

These guidelines create a regulatory discrepancy with the content of the European Directive, since they exclude the possibility to make external reports for those individuals whose report is referred to an organization that does not have a mandatory obligation to set up an internal channel.

The content of the recent A.N.AC. Guidelines - titled *"Guidelines on the protection of persons who report breaches of Union law and protection of persons who report breaches of national laws.*

Procedures for the submission and management of external whistleblowing", just resolution 311 of 12 July 2023 - states *"So if the channel is not established because the entity is not obligated, the whistleblower is not considered a whistleblower and cannot transmit reports to A.N.AC. accordingly"*⁷.

⁶ Unofficial translation into English of the Italian regulatory text.

⁷ Unofficial English translation of the content of the A.N.AC. Guidelines - p. 43.

This impossibility of resorting to the external whistleblowing channel is determined by the lack of qualification of the reporter as a whistleblower, whose (non) qualification determines the non-application of the regulatory protections provided in favour of the reporter.

What is stated in the A.N.AC. Guidelines therefore represents an unequal treatment that constitutes a breach of the Community legislation, since it prevents a whistleblower from making a report through the external whistleblowing channel because of the non-existence or inactivity of an internal whistleblowing channel, dictated by an erroneous transposition of the Union legislation.

These considerations also lead to an assessment of the residual material scope of application, a point referred to in the previous paragraph.

- *Sanctions*

The European legislator, within the framework of measures for protecting whistleblowers, outlines sanctions against those who misuse the reporting, engage in retaliatory measures, initiate harassing proceedings or breach the obligation of confidentiality regarding the whistleblower's identity.

In these cases, EU legislation mandates the adoption of measures aimed at sanctioning the perpetrators of behaviors, by providing for ***effective, proportionate, and dissuasive sanctions***.

This need is recognized, as early as Recital 102 of the Directive, which expressly states that "***[...] The proportionality of such sanctions should ensure that they do not have a dissuasive effect on potential informants⁸***".

The transposition of this provision into the Italian experience has shown little application under the previous law, which has been directly confirmed in the transposition law, leading to a clear violation of the European Directive.

The legislative texts are provided below to conduct a comparative analysis between the reference regulations, including Recital 102 of the EU legislation.

⁸Text extrapolated from the Directive and reported verbatim.

	DIRETTIVA EUROPEA 2019/1937	D. LGS. 24/2023	* Unofficial translation into English of the Italian regulatory text
RECITAL	<p>Recital 102</p> <p><u>Criminal, civil or administrative penalties are necessary to ensure the effectiveness of the rules on whistleblower protection.</u></p> <p>Penalties against those who take retaliatory or other adverse actions against reporting persons can discourage further such actions. Penalties against persons who report or publicly disclose information on breaches which is demonstrated to be knowingly false are also necessary to deter further malicious reporting and preserve the credibility of the system. <u>The proportionality of such penalties should ensure that they do not have a dissuasive effect on potential whistleblowers.</u></p>		

ARTICLE	Art. 23 Penalties	Art. 21 Sanzioni	Art. 21 Sanctions
LEGISLATIVE TEXT	<p>1. <u>Member States shall provide for effective, proportionate and dissuasive penalties applicable to natural or legal persons</u> that:</p> <p>(a) hinder or attempt to hinder reporting;</p> <p>(b) retaliate against persons referred to in Article 4;</p> <p>(c) bring vexatious proceedings against persons referred to in Article 4;</p> <p>(d) breach the duty of maintaining the confidentiality of the identity of reporting persons, as referred to in Article 16.</p> <p>2. <u>Member States shall provide for effective, proportionate and dissuasive penalties applicable in respect of reporting persons</u> where it is established that they knowingly reported or publicly disclosed false information.</p> <p>[...]</p>	<p>1. Fermi restando gli altri profili di responsabilità, <u>l’A.N.AC. applica al responsabile le seguenti sanzioni amministrative pecuniarie:</u></p> <p>a) <u>da 10.000 a 50.000 euro</u> quando accerta che sono state commesse ritorsioni o quando accerta che la segnalazione è stata ostacolata o che si è tentato di ostacolarla o che è stato violato l’obbligo di riservatezza di cui all’articolo 12;</p> <p>b) <u>da 10.000 a 50.000 euro</u> quando accerta che non sono stati istituiti canali di segnalazione, che non sono state adottate procedure per l’effettuazione e la gestione delle segnalazioni ovvero che l’adozione di tali procedure non è conforme a quelle di cui agli articoli 4 e 5, nonché quando accerta che non è stata</p>	<p>1. Without prejudice to other liability profiles, <u>A.N.AC shall apply the following administrative pecuniary sanctions to the person in charge:</u></p> <p>(a) <u>from 10,000 to 50,000 Euros</u> when it ascertains that retaliation has been committed or when it ascertains that the report has been obstructed or attempted to be obstructed or that the obligation of confidentiality referred to in Article 12 has been violated;</p> <p>b) <u>from 10,000 to 50,000 Euros</u> when it ascertains that reporting channels have not been established, that procedures for making and handling reports have not been adopted, or that the adoption of such procedures does not comply with those referred to in Articles 4 and 5, as well as when it ascertains that the</p>

		<p>svolta l'attività di verifica e analisi delle segnalazioni ricevute;</p> <p>c) da 500 a 2.500 euro, nel caso di cui all'articolo 16, comma 3, salvo che la persona segnalante sia stata condannata, anche in primo grado, per i reati di diffamazione o di calunnia o comunque per i medesimi reati commessi con la denuncia all'autorità giudiziaria o contabile.</p> <p>2. <u>I soggetti del settore privato</u> di cui all'articolo 2, comma 1, lettera q), numero 3), <u>prevedono nel sistema disciplinare adottato ai sensi dell'articolo 6, comma 2, lettera e), del decreto n. 231 del 2001,</u> sanzioni nei confronti di coloro che accertano essere responsabili degli illeciti di cui al comma 1.</p>	<p>activity of verification and analysis of the reports received has not been carried out;</p> <p>c) from 500 to 2,500 euros, in the case referred to in Article 16, paragraph 3, unless the reporting person has been convicted, even at first instance, of the offenses of defamation or slander or otherwise of the same offenses committed by reporting to the judicial or accounting authorities.</p> <p>2. <u>Organisations in the private sector</u> referred to in Article 2, paragraph 1, letter q), number 3), shall <u>provide in the disciplinary system adopted pursuant to Article 6, paragraph 2, letter e), of Decree No. 231 of 2001,</u> sanctions against those who are found to be responsible for the offenses referred to in paragraph 1.</p>
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Article 21 of Legislative Decree n. 24/2023 outlines the pecuniary administrative sanctions provided for public entities and private sector entities that have a 231 Organizational Model. Private sector entities that don't have a 231 Organizational Model are not required to have a sanctioning apparatus. The national legislation also provides for a sanction for those who report offenses and become liable for the crimes of slander or defamation.

The establishment of sanctioning regime violates the prescriptions issued by the European legislator, since the delineated sanctions don't appear to be effective, proportionate, and dissuasive.

The sanctions provided for by the national legislation, although pre-existing and already outlined in the previous system laid down by Law n. 179/2017, have proven to be anything but *"effective, proportionate, and dissuasive"* as required by the European directive.

Article 1, paragraph 6, of the previous Italian legislation stated that *"If, within the investigation conducted by A.N.AC., the adoption of discriminatory measures is ascertained [...] **A.N.AC. applies to the responsible party who has adopted such measures an administrative fine ranging from 5,000 to 30,000 euros**"*⁹.

The same administrative fine, although of a different amount, ranging from 10,000 to 50,000 euros, is applicable when A.N.AC. verifies the absence of reporting procedures conforming to the current regulatory standards, as well as the failure to conduct adequate investigation activities regarding the reports received by the relevant office.

⁹ Unofficial translation into English of the Italian regulatory text.

The issuance of these fines represents the outcome of the sanctioning process initiated and conducted by A.N.AC., which consists of a plurality of phases as follows:

- Pre-investigative phase, where the prerequisites of admissibility and processability of the report are assessed;
- Initiation phase of the procedure, when communications are provided to both the whistleblower and the reported entity;
- Investigative phase, consisting of accessing documentation related to the charge, submission of pleadings and documents, all subject to a 30-day deadline each;
- Hearing phase of the investigative phase, which is an optional phase because it must be requested and justified, when the parties are heard in order to acquire useful elements for the completion of the investigative activity;
- Decision-making phase, when the decision is made, considering the evidentiary findings that emerged during the initiated procedure.

The sanctioning procedure appears to be very long and the length greatly exposes the whistleblower, especially in the context of investigation activities that could involve interviewing workers belonging to the same work environment, revealing his identity.

This procedure is protective, and it is assimilated to the Italian criminal procedure that can expose the whistleblower and undermine the protection regime provided by the legislation.

The sanctions imposed by A.N.AC. (National Anti-Corruption Authority) suffer from poor application to the extent that they don't serve as a deterrent against the adoption and application of detrimental conduct.

This is due to the scant number of sanctions issued by the National Anti-Corruption Authority, to an indefinite duration of sanctioning proceedings resulting in sanctions close to the minimum edict, as well **as to the absence of any reference to the sanctioned person**, which causes an absence of consequences for the reputation of the retaliator and the general knowledge in the working environment.

The lack of any reference to the subject and the sanctioned entity results in a **disparity of treatment between the whistleblower and the reported party**, given that, in practice, only the identity of the former is disclosed.

These deductions find confirmation in the annual reports prepared by A.N.AC. concerning the investigative activity carried out, which can be summarized as follows:

- In the year 2022, the authority imposed only **two pecuniary sanctions**, amounting to €5,000.00 each (a threshold value close to the minimum statutory);
- In the year 2021, the authority imposed **two pecuniary sanctions**, each amounting to €5,000.00;
- In the year 2020, the authority imposed **three pecuniary sanctions**, each amounting to €5,000.00.

It's evident the inadequate nature of the sanctions imposed by the National Anti-Corruption Authority, given the statutory range provided by the Italian legislature, already outlined in the previous system by Law No. 179 of 2017.

Infringement of article 25 of European Directive n. 1937/2019

The transposition of the legislation outlined in European Directive 2019/1937 has resulted in certain discordance into the Italian legal system, especially in order to the objective scope, the material scope, whistleblower protection conditions, external reporting channels and sanctions.

Some of these differences, summarized item by item in the initial part of this document, also constitute a **violation of Article 25 of the Directive, as they breach the application of the non-regression clause of the rights granted, aimed at providing more favorable treatment for the whistleblower.**

In this part it's intended to sum up the violations of Article 25 and referring to what has been outlined in the individual sections, the overall assessment of which determines a regime of protection less favorable to the whistleblower compared to the previous national legislation by L. n. 179/2017.

▪ *Objective scope*

Article 2 of European Directive 2019/1937 concerns the target of this EU legislation, which applies to violations related to acts of the European Union, the financial interests of the Union, the internal market, competition, and state aid. This scope of application, as specified in paragraph 2 of this article, doesn't preclude each Member State from extending the scope to other sectors or matters provided by national law.

The transposition of the directive into the Italian legal system has resulted in certain divergences because it extends the scope of application and excludes administrative irregularities, classified as instances of maladministration.

The following legislative texts are provided below to conduct a comparative analysis between the respective regulations.

	DIRETTIVA EUROPEA 2019/1937	D. LGS. 24/2023	*Unofficial translation into English of the Italian regulatory text	L. 179/2017	*Unofficial translation into English of the Italian regulatory text
ARTICLE	Article 2 Material Scope	Art. 1 Ambito di applicazione oggettivo	Art. 1 Objective Scope of Application	Art. 1 Modifica dell'articolo 54- bis del decreto legislativo 30 marzo 2001, n. 165, in materia di tutela del dipendente o collaboratore che segnala illeciti	Art.1 Amendment of Article 54-bis of Legislative Decree No. 165 of March 30, 2001, on the protection of the employee or collaborator who reports wrongdoing
LEGISLATIVE TEXT	1. This Directive lays down common minimum standards for the protection of persons reporting the following	1. Il presente decreto disciplina la protezione delle persone che segnalano <u>violazioni di disposizioni normative nazionali o dell'Unione europea che ledono l'interesse pubblico o l'integrità dell'amministrazione pubblica o</u>	1. This decree regulates the protection of people who report <u>violations of national or European Union provisions which harm public interest or the integrity of a public</u>	Il pubblico dipendente che, nell'interesse dell'integrità della pubblica amministrazione, segnala [...] <u>condotte illecite</u> di cui è venuto a conoscenza in ragione del	A public employee who, in the interest of the integrity of public administration, reports [...] <u>unlawful conduct</u> of which he has become aware by



	<p>breaches of Union law:</p> <p>(a) <u>breaches falling within the scope of the Union acts set out in the Annex that concern the following areas:</u> [...]</p> <p>(b) breaches affecting <u>the financial interests of the Union</u> as referred to in Article 325 TFEU and as further specified in relevant Union measures;</p> <p>(c) breaches relating to <u>the internal market</u>, as</p>	<p><u>dell'ente privato, di cui siano venute a conoscenza in un contesto lavorativo pubblico o privato.</u> [...]</p>	<p><u>administration or a private organisation, which they became aware in a public or private working context.</u> [...]</p>	<p>proprio rapporto di lavoro [...].</p>	<p>reason of his employment [...].</p>
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	<p>referred to in Article 26(2) TFEU, <u>including breaches of Union competition and State aid rules, [...].</u></p> <p>2. <u>This Directive is without prejudice to the power of Member States to extend protection under national law as regards areas or acts not covered by paragraph 1.</u></p>				
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Article 1 of Legislative Decree N. 24/2023 outlines the objective of national legislation, which applies to violations concerning national or European Union legislative provisions that harm public interest or the integrity of public and private organizations.

National legislation limits the objective scope to **only to the violation of national or European Union laws, without mentioning administrative irregularities.**

This regulatory framework constitutes a violation of the European Directive, especially reference to Article 25, titled "*non-regression clause of rights granted,*" as it doesn't apply to reports of maladministration, which were instead protected by the previous system outlined in the previous legislation in force under the Law n. 179/2017.

Article 1 of the former Italian law referred to reports made by employees within the public sector who become aware of unlawful conduct during their employment; the purpose of this reporting is seen in the intention to **safeguard the integrity of the public administration, by reporting any unlawful conduct, including administrative irregularities.**

Moreover, the current regime also doesn't apply to issues concerning national defense and towards members of the judiciary. This exclusion is due to the principle of judicial autonomy or the absence of a specific legal framework.

- *Conditions for whistleblower protection*

Article 6 of the European legislation governs the conditions for protecting whistleblowers when they make a report based on **reasonable grounds to believe that the subject of the report was true at the time of reporting, falls within the aim of the directive**, using either an internal or external reporting channel or the method of public disclosure.

The same article also regulates anonymous reports.

The incorporation of this provision into the Italian legal system has resulted in the creation of a regulatory divergent regime from that expected and outlined by the EU legislator, as it subjects the whistleblower protection regime to a material - purely discretionary - evaluation of the truthfulness of the reported matter, an evaluation existing at the time of reporting.

The following legislative texts are provided below to conduct a comparative analysis between the respective regulations.

	DIRETTIVA EUROPEA 2019/1937	D. LGS. 24/2023	* Unofficial translation into English of the Italian regulatory text	L. 179/2017	* Unofficial translation into English of the Italian regulatory text
RECITAL	<p>Recital 32</p> <p>To enjoy protection under this Directive, <u>reporting persons should have reasonable grounds to believe, in light of the circumstances and the information available to them at the time of reporting, that the matters reported by them are true.</u> That requirement is an <u>essential safeguard against malicious and frivolous or abusive reports</u> as it ensures that</p>				



	<p>those who, at the time of the reporting, deliberately and knowingly reported wrong or misleading information do not enjoy protection. At the same time, the requirement ensures that protection is not lost where the reporting person reported inaccurate information on breaches by honest mistake. Similarly, <u>reporting persons should be entitled to protection under this Directive if they have reasonable grounds to believe that the information reported</u></p>				
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	falls within its aim. The motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection.				
ARTICLE	Article 6 Conditions for protection of reporting persons	Art. 16 Condizioni per la protezione della persona segnalante	Art. 16 Conditions for protection of reporting person	Art. 1 L. 179/2019	* Unofficial translation into English of the Italian regulatory text
LEGISLATIVE TEXT	1. Reporting persons shall qualify for protection under this Directive provided that: (a) <u>they had reasonable grounds to believe that the information on breaches reported was true at the time of</u>	1. Le misure di protezione previste nel presente capo si applicano alle persone di cui all'articolo 3 quando ricorrono le seguenti condizioni: a) <u>al momento della segnalazione o della</u>	1. The protection measures provided for in this Chapter shall apply to persons referred to in Article 3 when the following conditions are met: (a) <u>at the time of reporting</u> or	Il pubblico dipendente che, nell'interesse dell'integrità della Pubblica amministrazione, segnala [...] o denuncia all'autorità giudiziaria ordinaria o a quella contabile, condotte	A public employee who, in the interest of the integrity of the public administration, reports [...] or denounces to the ordinary judicial authority or to the accounting authority, unlawful conduct of

	<p><u>reporting and that such information fell within the aim of this Directive;</u> and (b) they reported either internally in accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15. [...]</p>	<p><u>denuncia</u> all'autorità giudiziaria o contabile o della divulgazione pubblica, <u>la persona segnalante o denunciante aveva fondato motivo di ritenere che le informazioni sulle violazioni segnalate, divulgate pubblicamente o denunciate fossero vere e rientrassero nell'ambito oggettivo di cui all'articolo 1;</u> b) la segnalazione o divulgazione pubblica è stata effettuata sulla base di quanto previsto dal capo II. [...]</p>	<p>denunciation to the judicial or accounting authority or public disclosure, <u>the reporting or denouncing person had reasonable grounds to believe that the information about the reported, publicly disclosed or denounced violations was true and fell within the objective scope of Article 1;</u> (b) the report or public disclosure was made on the basis of the provisions of Chapter II.[...]</p>	<p>illecite di cui è venuto a conoscenza in ragione del proprio rapporto di lavoro non può essere sanzionato, demansionato, licenziato, trasferito, o sottoposto ad altra misura organizzativa avente effetti negativi, diretti o indiretti, sulle condizioni di lavoro determinata dalla segnalazione.</p>	<p>which he has become aware by reason of his employment relationship may not be sanctioned, demoted, dismissed, transferred, or subjected to any other organizational measure having direct or indirect negative effects on the working conditions determined by the report.</p>
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Article 16 of national legislation outlines **the conditions for the protection of the whistleblower existing at the time of the report**, by which it's meant the **well-founded reason to believe that the information regarding violations was true and fell within the objective scope of the legislation.**

This legislative innovation, according to the provisions contained in Recital 32 and Article 6 of the community provisions, violates Article 25 of the European directive and narrows the aim of whistleblower protection outlined by the previous system set forth in Article 1 of Law n. 179/2017, as it subdues the report to a discretionary evaluation, such as the well-founded reason to believe that the violations reported were true and fell within the objective aim of protection.

The article 1 of the Law N. 179 of 2017 states that "*the public employee who, **in the interest of the integrity of the public administration**, reports to the person in charge of corruption prevention and transparency [...] or to the National Anti-Corruption Authority (A.N.AC.), or reports to the ordinary judicial authority or the auditing authority, **unlawful conduct of which he became aware in the course of his employment** relationship cannot be sanctioned, demoted, dismissed, transferred, or subjected to any other organizational measure having direct or indirect negative effects on the working conditions resulting from the report"¹⁰.*

It's evident the absence of personal assessments regarding the validity of the report by the whistleblower, that is required to report the unlawful acts of which he became aware in the workplace. The previous Italian regulation recognized protection for the whistleblower against reports of unlawful conduct of which they became aware during the employment relationship in a broad sense, without mentioning, consequently, any motivation to which to subdue the report.

¹⁰Unofficial translation into English of the Italian regulatory text

- *External reporting channels*

Articles 10 and article 12 of the European Directive delineate **the use of the external reporting channel** adopted by the whistleblower to make the report, to which the whistleblower is granted the option to resort as the primary preferred channel or after using the internal reporting channel provided. Additionally, this legislation recognizes the whistleblower's right to submit the report in written form, using an encrypted computer platform, or orally, through phone calls, messages, or direct meetings. The transposition of these articles into the Italian legal system determines a violation of the articles 10 and 12 and also a violation of Article 25 because articles 6 and 7 of Legislative Decree n. 24/2023 restrict the choices offered to the whistleblower, establishing necessary requirements to access and use the external reporting channel established at A.N.AC..

Current national legislation doesn't recognize the possibility of submitting reports in paper format, an option which was, instead, acknowledged in the regulatory system define by the previous law system.

Article 1, paragraph 5, of Law No. 179/2017 states that "[...] *The guidelines include **the use of electronic methods** and **promote the use of encryption tools** to ensure the confidentiality of the whistleblower's identity and the content of the reports and related documentation¹¹.*

In particular, the national legislation nowadays allows the whistleblower to resort to the external reporting channel if the internal reporting channel is inexistent or inactive, if there is no follow-up to the internal report, or if there is reason to believe that the internal report would be ineffective, there is a risk of retaliation, imminent or manifest danger to public interest.

When the whistleblower perceives the existence of a "*well-founded reason to believe the internal reporting is ineffective*", he/she can resort to the use of the external reporting channel and the burden of proof falls on him.

¹¹Unofficial translation into English of the Italian regulatory text

There is a regression in this regard because the previous regulations didn't impose any burden of proof on the whistleblower.

The transposition of the European Directive into the Italian system has resulted in a regression of the whistleblower protection regime compared to the previous internal legislation, thus constituting a violation of EU provisions, concerning articles 10, 12, and 25 of the Directive.

For further considerations regarding external reporting channels, references are made to the above paragraph.