Whistleblowing in Countries without Whistleblower Laws: the Italian Case

by Gabriele Gamberini

There are many definitions of whistleblowing but none of them are universally accepted. Basically, whistleblowing is the action of someone who decides to disclose illegal, irregular, dangerous, immoral or illegitimate practices. It can be a useful tool in Common Law countries, where it is even fostered by whistleblower (the person who makes the disclosure) laws, almost unknown in other systems.

The Italian Government recently made general commitments to act on whistleblowing in the light of international agreements. For example the commitment to protect employees who disclose corruption, in accordance with Law No. 112/2012, which reflects the Council of Europe's 1999 Civil Law Convention on Corruption, and the commitment to introduce appropriate legal measures to provide protection against any unjustified treatment of any person who reports corruption, in accordance with Law No. 116/2009, which reflects the United Nations' 2003 Convention against Corruption.
The only attempt to protect whistleblowers is to be found in Art. 54-*bis* of Legislative Decree No. 165/2001 (the so-called Consolidation Act for the Public Service), as amended by Art. 1(51) of Law No. 190/2012, where there is a provision for the protection of public employees who disclose illegal practices within public administration. According to the Organisation for Economic Co-operation and Development (OECD) (Integrity Review Of Italy – Reinforcing Public Sector Integrity, Restoring Trust For Sustainable Growth; see *www.bollettinoadapt.it*, A-Z Index, item *Whistleblowing*), with the adoption of this law the Italian Government is merely at the first stage of a very long process. Indeed, this legislation excludes private sector employees and refers only to crimes of bribery, meaning that Italy still does not have comprehensive whistleblower laws.

It is possible to explain the lack of specific whistleblower legislation in Italy and many other countries on the grounds that the application of other general provisions designed to protect employees from unfair dismissal, downgrading and other forms of reprisal, as well as constitutional protections for freedom of speech, offer safeguards for whistleblowers. However, this view only relates to the protection of whistleblowers and does not consider the opportunity to promote this tool or incentives to foster disclosure.
In practice, employees who decide to disclose illegal practices by their employers in the absence of whistleblower legislation must rely on the application of general provisions by the courts. A ruling by the Italian Supreme Court on 14 March 2013 (case no. 6501: http://t.contactlab.it/c/2001165/4284/7907506/91817, in Italian) involved an employee who waited ten years and endured three litigation procedures before he could obtain a declaration that he had been unfairly dismissed after his submission of a complaint to the Public Prosecutor's Office (with an attachment of confidential documents) regarding criminal acts committed by his employer, without informing his superior. Similarly, in a case heard by the European Court of Human Rights

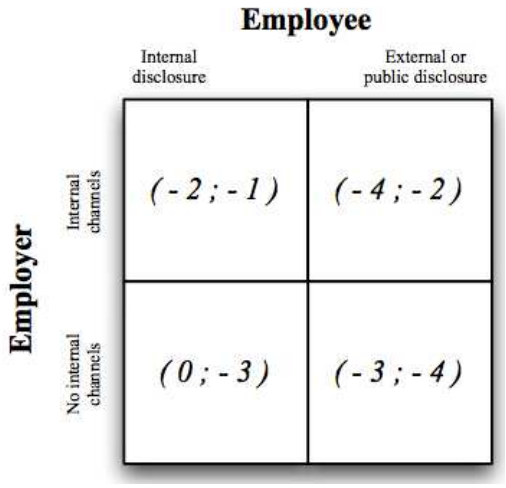
(Heinisch *v.* Germany [2011] IRLR, 922), a German employee waited six years for a declaration that her dismissal without notice after she filed a complaint of criminal behaviour against her employer had been disproportionately severe.
In both cases, a conflict between fundamental rights arose, but due to the lack of any whistleblower legislation, the judges involved arrived at two different solutions.

The Berlin Labour Court established that the dismissal had been unlawful since the employee exercised her right to freedom of expression and thus did not breach her duties under her employment contract. However, the Berlin Labour Court of Appeal reversed that decision and found that the dismissal had been lawful as the employee's criminal complaint had provided a compelling reason for the termination of her contract without notice and made the continuation of the employment relationship impossible. Later, the Federal Labour Court dismissed her appeal against the decision to refuse her leave to appeal on points of law, and the Federal Constitutional Court refused to admit her constitutional complaint for adjudication without stating further reasons. Eventually, she applied to the European Court of Human Rights, which established that she had been dismissed in breach of the right to freedom of expression laid down in Art. 10 of the European Convention on Human Rights and awarded her damages in accordance with Art. 41 of the Convention.

The Italian case is quite similar, although it was resolved by the national courts. The Naples Labour Court, and later the Naples Court of Appeal, rejected the employee's claim of unfair dismissal because he did not prove that the dismissal was due to the disclosure and that the disclosure was not motivated by personal grievance or personal antagonism. Since the Court of Appeal confirmed the lower court's judgment, the appellant took his case before the Supreme Court, which upheld his appeal. The Supreme Court established that his conduct had been lawful and that he had not acted in breach of the duty of loyalty, reserve and discretion owed to his employer, since that duty exists only with respect to lawful practices. Hence, the submission of a complaint to the Public Prosecutor's Office cannot as such be considered a fair reason for dismissal and the burden of proof lies with the employer. Where there has been criminal behaviour, employees are not required to inform their superiors before filing a complaint with the Public Prosecutor's Office but anyone who wishes to do so must attach supporting evidence, even if confidential. On these grounds, the Italian Supreme Court quashed the Naples Court of Appeal judgment.

The German and Italian cases show that without any whistleblower laws, it is quite complicated to balance freedom of speech against one's duty of loyalty, reserve and discretion, or the duty to disclose criminal practices on the one hand and the protection of the reputation and interests of the company on the other. As shown above, the balance depends ultimately on the presiding judge. Given that lawmakers in several countries are still not interested in passing whistleblower legislation, intervention from social stakeholders would appear desirable. The European Union's soft laws, designed to create an internal confidential reporting procedure that can encourage employees to report concerns about wrongdoing without any threat of retaliation, might be useful for this purpose.

The basic idea is to persuade social stakeholders to encourage firms to create internal confidential reporting systems through which every employee can report to the employer any suspicions of misconduct they have in the course of their work.
Game theory (see *inter* alia: P.K. DUTTA, *Strategies and Games: Theory and Practice*, MIT Press, Cambridge (US-MA), 1999) can be used to show the importance of creating internal channels for whistleblowing in countries with no whistleblower laws.



Assuming that the employee decides to disclose wrongdoing committed by the employer, we need to compare the employee's payoff (risk of retaliation) with the employer's payoff (fines and risk of lost market share).
Although it is not empirically verifiable, the model reveals the following values:

Employer	Cost	Value
Invests in internal channels (x) and pays the cost of an external or public disclosure (y)	$x + 0 \leq y \geq \infty$	*- 4*
Does not invest in internal channels and pays the cost of an external or public disclosure (y)	$0 + 0 \leq y \geq \infty$	*- 3*
Invests in internal channels (x) and does not pay the cost of an external or public disclosure	$x + 0$	*- 2*
Does not invest in internal channels and does not pay the cost of an external or public disclosure	$0 + 0$	*0*

Employee	Value
There are no internal channels (suggesting that the employer is narrow-minded and does not want to listen to employees' disclosures) and employee makes an external or public disclosure	*- 4*
There are no internal channels (suggesting that the employer is narrow-minded and does not want to listen to employees' disclosures) and he/she makes an internal disclosure	*- 3*
There are internal channels (suggesting that the employer is open-minded and wants to listen to employees' disclosures) and he/she makes an external or public disclosure	*- 2*
There are internal channels (suggesting that the employer is open-minded and wants to listen to employees' disclosures) and he/she makes an internal disclosure	*- 1*

The model shows that the Nash equilibrium is achieved when the employer does not invest in internal channels and the employee makes an internal disclosure. However, this is a highly unlikely scenario – especially in big firms – and it would be unattainable if social stakeholders were able to persuade firms to adopt internal channels, as happens in the US, where the Sarbanes-Oxley Act of 2002 requires the establishment of confidential reporting arrangements.
Assuming that the employer does not play the dominant strategy because it is persuaded to establish internal channels, the new Nash equilibrium will be achieved when the employee makes an internal disclosure.

Game theory helps to show how investment in internal channels is a win-win strategy, useful for both the employer (who can reduce the risks and costs of an external or public disclosure) and the employee (who is encouraged to report wrongdoing without any fear of retaliation).
Through internal channels, it is also possible to appreciate that whistleblowing is not just good for fighting corruption but also for other matters. Indeed, it is very likely that in their ordinary activities employees witness wrongdoing which, if flagged up through an internal reporting system, could help the employer to deal with it and thereby improve the firm's performance. For example, it might be suggested that employees should use internal channels to report suspected malpractice that can lead to wastefulness in an effort to improve efficiency. From this perspective, whistleblowing could also be used as a productivity enhancement tool and could be fostered by offering whistleblowers a percentage of the savings or gain made through the disclosure. In countries where whistleblower laws exist, they also help to improve the quality of Occupational Health & Safety systems and promote Corporate Social Responsibility.

Clearly, the development of a regulatory model for the protection of whistleblowers is a challenging task. However, governments or social stakeholders in countries without whistleblowing legislation could begin with certain good practices, such as Resolution 1729 (2010), which was adopted by the Parliamentary Assembly of the Council of Europe for the protection of "whistleblowers" (see *www.bollettinoadapt.it*, A-Z Index, item *Whistleblowing*) and established guidelines for the introduction of whistleblowing legislation. It might also be useful to look at some of the codes of good practice in force in countries with an effective legislative approach to whistleblowing, such as the PAS 1998:2008 on Whistleblowing arrangements published by the British Standards Institution (see *www.bollettinoadapt.it*, A-Z Index, item *Whistleblowing*).
Social stakeholders could lay down guidelines with regard to how firms could develop internal systems, establishing both protection and incentives for whistleblowers. Such arrangements could be used by courts called upon to examine allegations of retaliation.
Although it is preferable for an agreement to be reached by social stakeholders, it should also be possible for an employer to adopt an internal system independently from the position of the employer's organization to which it belongs.

Finally, this is a great opportunity for social stakeholders to adopt an innovative approach towards an issue that is of primary importance globally as well as at a European level, by adopting flexible regulations through soft laws that can protect whistleblowers.

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