

## WHISTLEBLOWING CHANNELS

(Law 179/2017)

Since December 29, 2017 is in force in Italy the Law n. 179, concerning the protection of the whistleblowers (the law has been published on Gazzetta Ufficiale, Serie Generale n. 291 of December 14, 2017)

Art. 2 of the Law 179/2017 has modified the Art. 6 of the decree 231/2001 affirming that the Organizational Models must set:

- a) one or more channels that allow employees, managers and directors to communicate detailed information of violation of laws or of the Organizational Model relevant according to the decree 231/2001 and grounded on specific facts, that they know because of their working activity. Such channels must guarantee the confidentiality on the name of the whistleblower and his identity while the provided information is managed.
- b) At least an alternative and informatic channel for whistleblowers that guarantees the confidentiality on the name of whistleblower and his identity

Confindustria (the Italian Association of Industries) with its document called “*Nota Illustrativa del gennaio 2018*” has clarified that the Surveillance Panel should be the only and sole addressee of the whistleblowing<sup>1</sup>:

Such solution, says Confindustria, seems to be able to achieve with efficacy the goals of the new discipline, to safeguard the company’s integrity and to protect the whistleblowers. If, instead, the Surveillance Panel is not the only addressee of the whistleblowing, it seems anyway opportune to involve it in parallel or just after, in order to avoid the risk that the whistleblowing is out of the control of the Surveillance Panel. After all, it is to be considered that the whistleblowing system is a portion of the Organizational Model that the Surveillance Panel has the duty to control.

If the addressee of the whistleblowing is not the Surveillance Panel, such third party, anyway, shall prove to have a relevant capacity on crime law and on the compliance 231, granting the confidentiality and the identity of the whistleblowers and in any event the Italian law n. 179/2017 will applied in full to such third party.

In the group of companies a further risk can be faced: if the addressee of the whistleblowing of a subsidiary is a Panel of the Parental company (worst if whose members are also employees of the Parental Company), there is the concrete risks that a Public Prosecutor could affirm that the Parental Company is strongly involved in the activity of the subsidiary, so it could be considered also liable for crimes committed by the employees of the subsidiary.

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<sup>1</sup> *Tale soluzione sembra poter realizzare con efficacia le finalità della nuova disciplina, di salvaguardare l'integrità dell'ente e tutelare il segnalante; finalità che difficilmente potrebbero essere perseguite se, invece, le segnalazioni venissero recapitate a soggetti nei cui confronti il segnalante abbia una posizione di dipendenza funzionale o gerarchica ovvero al presunto responsabile della violazione ovvero ancora a soggetti che abbiano un potenziale interesse correlato alla segnalazione. [Nota Illustrativa del gennaio 2018]*

*Se, invece, l'Organismo di Vigilanza non è individuato come destinatario esclusivo, sembra comunque opportuno prevedere il suo coinvolgimento in via concorrente ovvero successiva, per evitare il rischio che il flusso di informazioni generato dal nuovo meccanismo di whistleblowing sfugga del tutto al controllo dell'Organismo di Vigilanza. D'altra parte occorre considerare che tale meccanismo è una parte del più ampio MO di cui l'Organismo di Vigilanza è tenuto a verificare il funzionamento. [Nota Illustrativa del gennaio 2018]*

## THE COMPOSITION OF THE ODVS

Regarding the composition of the OdV, article 6 of the decree 231/2001 states “*Should the crime be committed by the persons indicated in Article 5, paragraph 1, letter a) the organization is not liable should it prove that (...)*

*b) the task of supervising the functioning and observance of the models and their updates was entrusted to a body with independent powers of initiative and control;*

*c) the persons have committed the offence by fraudulently eluding the models of organization and management;*

*d) there was no or insufficient supervision by the body referred to in point b)”*.

The provision is gaunt about the best composition of the Surveillance Panel; however, the *ratio* of the law is clear: the prevention of the corporate crimes is made through an enforced self-regulation and companies are liable for lacks self-regulations<sup>2</sup>.

Confindustria, with the document called “*Linee Guida per la costruzione dei modelli di organizzazione, gestione e controllo ai sensi del Decreto Legislativo 8 giugno 2001, n. 231 2018, aggiornate al marzo 2014*” has clarified the principles regarding the composition of the Surveillance Panel<sup>3</sup>.

The conclusion is that its best composition is collegial and made by only external members.

Doctrine and Jurisprudence<sup>4</sup> have pointed out the kind of powers that must be granted to the Surveillance Panel according to Decree 231/2001: the Surveillance Panel must have "autonomous powers of initiative and control" and shall receive the relevant information on relevant activities and the type of tasks to be done.

By developing these indications, the practice has identified three essential requirements that the Surveillance Panel must meet: autonomy/independence; professional and Continuity of action.

With specific regard to the group of companies, the Confindustria Guidelines<sup>5</sup> require that only a Surveillance Panel incorporated within each company may be referred to as "*the body of the institution, endowed with autonomous powers of initiative and Control*" (art. 6 (1), paragraph (b), Decree 231).

If, on the contrary, vigilance was exercised by a single committee constituted by the parent company, it would be likely to establish a position of guarantee (i.d. a possible liability originated

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<sup>2</sup> Levis-Perini (a cura di), *La responsabilità amministrativa delle società e degli enti*, Torino, 2014.

<sup>3</sup> Cfr Chapter IV of *Linee Guida per la costruzione dei modelli di organizzazione, gestione e controllo ai sensi del Decreto Legislativo 8 giugno 2001, n. 231 2018, aggiornate al marzo 2014*

<sup>4</sup> L'organismo di vigilanza nel sistema della responsabilità da reato dell'ente: paradigmi di controllo, tendenze evolutive e implicazioni penalistiche, Vincenzo Mongillo, in *Rivista 231*, 04/2015 e L'autonomia della responsabilità dell'ente ed i problemi conseguenti all'omessa individuazione della persona fisica autrice del reato, Paolo Di Geronimo, in *Rivista 231*, 04/2016.

<sup>5</sup> Cfr Chapter V, “la responsabilità da reato nei gruppi di imprese”, par. 4, *Linee Guida per la costruzione dei modelli di organizzazione, gestione e controllo ai sensi del Decreto Legislativo 8 giugno 2001, n. 231 2018, aggiornate al marzo 2014*.

by a contract) at the holding level. Especially if the Supervisory Panel had incisive powers of control over the activity of the companies in the group: in any subsequent judgement could easily support the omitted intervention of the leaders of the holding.

In order to avoid a rise of the responsibility to the parent company for the offences committed in the subsidiaries, *“it is also advisable to prevent the same persons from playing apical roles in several companies of the group”* (also called *“Interlocking directorates”*). The cumulation of roles could reinforce the thesis of the group interest related to the crime<sup>6</sup>.

There is exception to this advice, due to the shortage of staff with specific experience in subsidiaries. In this context, the subsidiaries may reasonably requires the competent functions of the parent company to support (and not appoint as a member of the Supervisory Panel) the control activities.

In conclusion, in order to avoid the rise of responsibility to the parent company, it seems not advisable to appoint in the Surveillance Panel a member coming from the holding, while it may be useful to ask to the central functions to support specific activities of the Surveillance Panel.

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<sup>6</sup> *Ibidem*