Momentum

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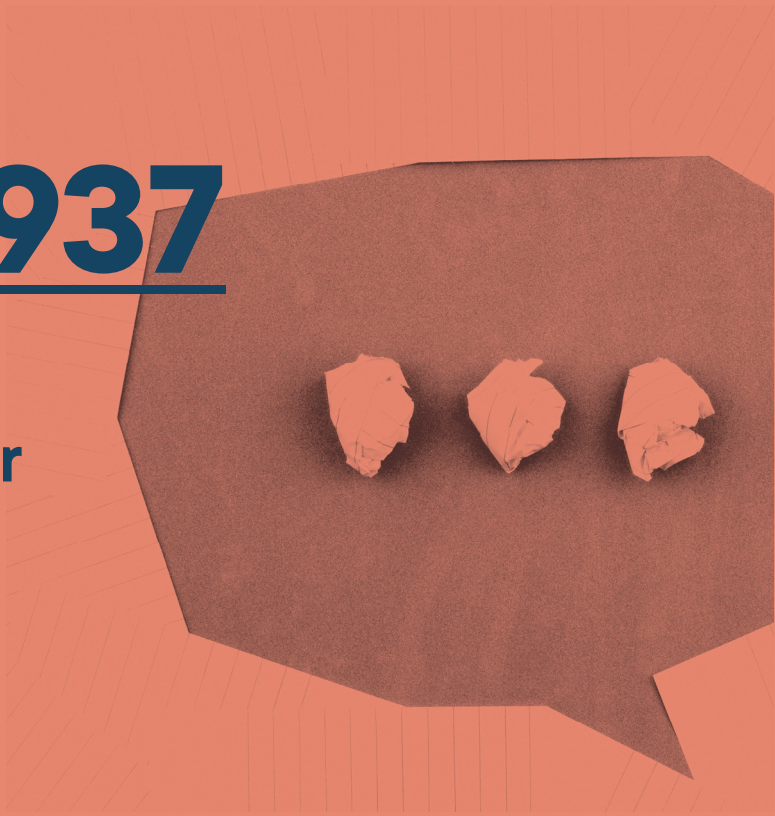
Directive n.° 2019/1937

A Step Towards a More Effective Whistleblower Protection



"See Something, Say Something" é a nova norma na garantia do respeito pelo Direito da União Europeia

The role of whistleblowers in modern society has been of utmost importance in revealing some the largest scandals of our days. In a time where whistleblowing protection is also being discussed in Portugal, comparative law and cases such as "Panama Papers" or "Cambridge Analytica" demonstrate the importance of reporting illegal practices and of establishing institutionalized mechanisms to protect whistleblowers. The European model and our societies are built upon a growing number of reports and public divulgation that «feed national and Union enforcement systems with information, leading to effective detection, investigation and prosecution of breaches of Union law».

These words are motivated by the entry into force in the EU legal order,

on 16 December, of Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law. SÉRVULO had previously commented on the legislative procedure of the Directive.

The Directive aims at ensuring a minimum standard of protection for whistleblowers. Its scope covers almost all areas of EU competence, including internal market, public procurement, public health, consumer and environment protection, transport and product safety and privacy and data protection. Subsidiarily, it also covers areas where there is already an EU legal instrument, such has the leniency program (in competition law), the instruments in the areas of financial services or prevention of money laundering and terrorist financing.

The Directive prescribes three manners through which a report can be made: internal reporting, external reporting and public disclosures.

Internal reporting is the preferential form through which reports can be made and it falls on public and private entities to implement it. It is up to them to establish the means and procedures through which reports can be made and acted upon. Private entities with under 50 workers are exempted from this obligation. In the public sector, the obligation to establish means for internal reporting is applicable to all entities, although member States can exempt municipalities with less than 10.000 inhabitants and public entities with less than 50 workers.

The mechanisms to be implemented include (i) channels for receiving the reports; (ii) an impartial service competent for following up on reports; (iii) a reasonable timeframe, up to 3 months, to give feedback regarding the report. The identity of the whistleblower is protected and can only be known to authorized personnel.

For whistleblowers, the Directive means access to a large acquis of rights, including the right not to suffer any retaliation for the report. The whistleblower cannot be held liable for any breach of a non-disclosure clause or for any infringement which does not constitute a crime regarding the access to information needed for the report. In addition, whenever there is litigation regarding a detriment suffered by the whistleblower, the person who adopted the detrimental measure must prove that the measure was based on duly justified grounds.
Member States must ensure that the persons concerned have the right to a fair trial, the presumption of innocence, the rights of defense and the same protection given to whistleblowers with regards to the confidentiality of their identity.

In this new culture of responsibility but also of reporting and mutual vigilance, the challenges are tremendous. Even though member States have two years to implement the Directive, the structural changes it imposes are enormous. Private and public entities alike must begin to work towards implementing the changes prescribed in the Directive and internally promote compliance. It is expected that the Portuguese State will promote a large public debate, to ensure an adequate implementation of this Directive.

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Information duties on sustainability in financial services sector

The concern for the transition to a more sustainable economy in the financial services sector

On December 9th of 2019, the Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector was published.

The European Union, faced with the consequences of climate change, resource depletion and other threats to the global ecosystem's balance, has once again demonstrated its concern to give priority to this central theme, aware that the promotion of a low-carbon and circular economy promotes the long-term competitiveness of the economy of the Union.

In order to achieve this goal, the Regulation lays down harmonized rules for financial market participants and financial advisers on transparency with regard to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with respect to financial products, by requiring financial market participants and financial advisers to continuously assess all sustainability risks – an environmental, social or governance event or condition – deemed to be relevant to negatively affect the financial return of an investment or advice.

Proper compliance with these rules presupposes that financial market participants and financial advisers (i) disclose specific information regarding their approaches to the integration of sustainability risks and the consideration of adverse sustainability impacts, and should specify in their policies how they integrate those risks and publish updated information of those policies on their websites; (ii) include in their remuneration policies updated information on how those policies are consistent with the integration of sustainability risks, ensuring that the structure of remuneration does not encourage excessive risk-taking; (iii) make descriptive pre-contractual disclosures on the manner in which sustainability risks are integrated into their investment decisions, investment or insurance advice and on the results of the assessment of the likely impacts of sustainability risks on the returns of the financial products they make available or they advise on; and (iv) always explain the results of the assessment of sustainability risks, even if there are no sustainability risks deemed to be relevant to the financial product.

By focusing on the correct assessment and disclosure of sustainability risks, the objective of the Regulation is to strengthen protection for end investors through disclosures made to them and thus reducing existing information asymmetries and ensuring a more stable financial system.

The Regulation entered into force on December 29th of 2019 and shall apply from 10 March 2021. It is important to note that the draft regulatory technical standards and the draft implementing technical standards, to be develop by the European Supervisory Authorities (EBA, ESMA and EIOPA), will be relevant for a future understanding of this topic.

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An increased taxation on real estate – keeping on taxing what can be taxed

In the State Budget 2020, the taxation of the real estate sector takes on a strong commitment for the Portuguese Government, while considered as an important source of tax revenue.

This source of revenue for the Portuguese State may trigger effects in the manner of how this relevant sector for our economy will develop.

Firstly, it is foreseen that income derived from the short-term renting activity under the simplified regime is considered in 50% of its amount, when resulting from the performance of the activity in houses or apartments located in the so-called containment areas. This results in an increase of the taxable base in relation to 2019, during which this income was considered in only 35%.

Also on what concerns the short-term renting activity and its taxation at personal income tax level, the withdrawal of this business is facilitated, to the extent that the real estate is transferred back to the personal sphere for the purposes of obtaining rental income. In case this latter condition does not verify, the transfer back to the personal sphere may be subject to tax on the capital gain incurred at personal level, which is a solution whose legality may be doubtful.

Secondly, it is foreseen the application of a unique rate of 7.5% of property transfer tax in case of acquisition of urban properties whose taxable value exceeds € 1,000,000. This solution results in an increase of property transfer tax in comparison with 2019. Before this Proposal, the maximum rate was of 6%, being now of 7.5%. Furthermore, it is foreseen that credit institutions acquiring real estate under credit execution procedures lose the exemption from this tax, if the real estate is not sold within five years or the acquirer is a related entity.

Thirdly, also the annual property tax has been subject to some changes, being foreseen a revocation of the exemption for buildings individually classified as national monuments or of public or municipal interest. On the other hand, it has been proposed the application of an extended aggravation of the tax rate already applicable to buildings that have been left vacant for over two years and to buildings in ruins, as well as the extension of its application also to building plots on urban land qualified as suitable for living, when located in urban pressure areas.

Lastly, and without being all bad news, it is foreseen an exemption of taxation, at personal income tax and corporate income tax levels, of rental income obtained under the so-called “Municipal Programs for affordable housing” (translation of ours).

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The Real Right of Long-term Housing: between lease and acquisition of property

Under the "New Generation of Housing Policies" (NGPH), Decree-Law no. 1/2020 of January 9th, which recently entered into force, creates and regulates, innovatively, the real right of long-term housing (hereafter "DHD").

This new right, as mentioned in the preamble, intends on one hand to introduce "alternatives to the acquisition of own housing and the consequent indebtedness of households" and, on the other hand, attempts to remove some drawbacks of the lease regime that "not always leads to stability and safety".

DHD allows contracts to be made available to "one or more private persons to enjoy the housing of others as their permanent residence for a lifetime, upon payment to the owner of a cash security deposit and periodic contributions."

The resident provides the homeowner with a cash security deposit which varies upon the will of the parties, between 10% and 20% of the average sales' value of the housing market, according to location and size, as it results from an update released by the National Statistical Institution ("INE").

The provision of the cash security deposit can be seen as one of the advantages of the owner in joining DHD, as it allows the owner to keep the availability of capital, which can be monetized in other properties or investments he wants, ensuring, at the same time, a considerable pecuniary security in the event of default by the resident. However, it should be noted that if the resident decides to terminate the DHD, which can be done with a minimum notice of ninety (90) days, the owner will have to return it.

On the other hand, the resident must also pay the owner a monthly payment, the amount of which is freely established by the parties, as well as to pay directly "the municipal taxes" and delivery to the owner "the amounts related to the Municipal Property Tax".

In addition, ordinary conservation works are of the responsibility of the resident and the owner is exempted from such charges, contrary to what is also provided, for example, for the lease regime. However, the owner can secure the property in a medium state of conservation until the moment of extinction of the DHD, while receiving an amount of capital borne by the monthly payment and the cash security deposit. Another advantage to the owner is the non-transferability mortis causa of DHD, which is not the case of the lease which does not expire upon the lessee's death.

It should be noted, however, that the owner may not oppose DHD, contrarily to the resident who may freely waive it as mentioned above.

In summary, the mentioned diploma strikes a balance between the owner's guarantee to maintain the property's conservation, as well as the payment of urban and IMI taxes at the resident's expenses and the possibility of the resident having a property, which eventually he could not acquire for a lifetime, always having the possibility of renouncing it. It should be mentioned that mortgage creditors may equally benefit from this scheme, since in the event of default and in the context of enforcement action, the owner has the option to purchase this right using the balance of the cash security deposit. Thus, there may be a faster sale.

It is now time to wait for the reactions of the real estate market to this figure, which is nothing more than a third way / tertium genus between the lease and the acquisition of property.

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Case-Law Judgement n.º 6/2019

The Supreme Court of Justice has delivered a judgment that has established the following case law: "When applying, by analogy, article 33/1 of the Decree-Law no. 178/86, of 3rd July, amended by Decree-Law no. 118/93, 13th April, to the commercial concession agreement, paragraph c) should be included, though tailored to that specific contract."

On the 4th of November of 2019, the Supreme Court of Justice has delivered a judgment that has established the following case law: "When applying, by analogy, article 33/1 of the Decree-Law no. 178/86, of 3rd July, amended to the Decree-Law no. 118/93, 13th April, to the commercial concession agreement, paragraph c) should be included, though tailored to that specific contract."

The subject, that receives divergent interpretation by national scholars and is the object of the above-mentioned case law, consists in the possibility of applying by analogy article 33/1, paragraph c) of the Decree-Law 178/86, 3rd July, which foresees the Agency Contract Legal Regime, amended by Decree-Law no. 118/93, 13th April, to the commercial concession agreement.

Portuguese scholars and a traditional case law trend argue for the application, by analogy, of the Agency Contract Legal Regime to the commercial concession agreement on the grounds that the latter encompasses an activity and set of tasks that are similar to the agency contract, having in consideration that the parties are identically bound by a lasting and stable relationship and also that the parties themselves should be considered as an important and key factor for clientele attraction due to the activity performed by them.

The so far disputed issue relates to requirements to be met. Accordingly, whereas the majority of the Supreme Court case law and certain scholars understand that only the fulfilling of situations foreseen in article 33/1, paragraphs a) and b) is necessary for granting a goodwill compensation, other scholars and court decisions argue for the need to fulfil also paragraph c).

The case-law under review, although taken with two votes against, has established that the fact that the distributor has made profits as a result of the clientele acquired and maintained should be considered for the purpose of paragraph c), which shall be applied to the commercial concession agreement with the necessary adjustments in order to prevent the award of a clientele compensation. This means that the award of a clientele compensation due to the termination of the commercial concession agreement can turn out to be more difficult or challenging in the future.

Furthermore, according to the court's interpretation:

— The term "reward" should be understood as profits earned by the distributor as a result of business or resales;
— The distributor must cease receiving any compensation for the business concluded after the termination of the commercial concession agreement and related to his previous activity;
— It is for the claimant to prove that he has ceased to receive any profits derived from its former distribution activity.

The abovementioned case law has helped to overcome disparities between national case law and scholars, although the fulfilling of requirements for the right to compensation in the case of termination of commercial concession agreement seems to be now more demanding.

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Video Surveillance and Artificial Intelligence: CNPD's refusal

What are the CNPD alerts so far?

On December 27, 2019, the Portuguese National Commission for Data Protection (the "C.N.P.D.") issued two opinions rejecting the use, in video surveillance systems, of artificial intelligence and machine learning technologies in the cities of Portimão and Leiria. The projects were submitted to the consideration of the C.N.P.D. by the Public Security Police after dispatch from the Ministry of Internal Administration.

The Portimão project foresaw the installation of 61 video surveillance cameras, 10 of which would be installed in the city and 51 in Praia da Rocha («Rocha's Beach»), which the C.N.P.D. considered "to cover practically the entire beach" and where people tend to be more exposed, reason why greater caution is required. In Leiria the scenario would be a slightly different since 19 video surveillance cameras already existed and the project aimed to include 42 more.

The use of video-surveillance images is a processing of personal data that must comply with Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 which provides that video--surveillance activities are possible in cases of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding and prevention of threats to public security, that are permitted by law and constitute a necessary and proportionate measure in a democratic society, with due regard to the legitimate interests of the natural person concerned.

The purpose of this new video-surveillance system would be the prevention and prosecution of crime, traffic management or the prevention of road accidents. But in both cities, the C.N.P.D. understood that video--surveillance allowed to capture, "in all directions and with great acuity, images of people and vehicles, plus the possibility of capturing sound", and enabled tracking of individuals and their behaviours and habits, as well as the identification of individuals based on information related with their physical characteristics".

The argument used by C.N.P.D. for the refusal was identical in both cities, focusing essentially on the affectation of the private life of people who circulated or were in these municipalities and the impact of these video-surveillance technologies on the fundamental rights of the data subjects. C.N.P.D. considered that a video-surveillance system with the aforementioned characteristics represented a "high risk to citizens' privacy, not only because of the amount and type of information that can be collected (...) but also because of the opaqueness of the process of defining patterns of analysis and detection" since there is not sufficient justification on the part of P.S.P. regarding the filters and "digital masks" that would be used to protect intimacy and privacy.

Adopting a conservative stance, for C.N.P.D. the use of video surveillance systems using artificial intelligence must be preceded by "particularly rigorous consideration". Nonetheless, these two opinions should not be seen as an absolute refusal to the use of this type of systems.

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The Regulation for the management of medicine's availability and the opportunity for a more efficient system

The continuous and adequate access to medicines has become one of INFARMED, I.P.'s top priorities, who published, on the 6th of November of 2019, a Regulation which aims to manage the availability of medicines (Deliberation 93/CD/2019).

The Regulation concerns the notification's obligations in case of lack or rupture of medicines as well as the measures to prevent shortages and criteria for determining minimum quantities in stock.

In general terms, the notification of the lack of medicines, which should be carried out by the different actors in the medicine circuit, must be made electronically and within 24 hours after the situation is known (Article 2, paragraphs 1 and 2).

Pharmacies are also obligated to notify situations in which it is found unfeasible to dispense a medicine for more than 12 hours after its request, regardless of whether the prescription is legally required (Article 3). Wholesale distributors are obligated to notify situations in which it is not possible to present a drug, as a result of a supply order not being satisfied by the holder of the respective marketing authorization (Article 4). The rupture of a medicine (Article 5) must be notified, except in cases of justified urgency (which are not defined a priori), at least two months before the scheduled date for the beginning of the unavailability of the medicine on the national market. This date is understood as the day "from which it is expected that a particular presentation will no longer be available to the wholesale distributors, based on the consumption of the medicine and the quantity placed on the market".

Ruptures are classified, regarding the risk to public health, as "low", "medium" or "high", a classification that is directly linked with the alternatives of medicine available on the market. It should be noted that, in the event of "medium" or "high" risk rupture, Article 5 paragraph 4 establishes the additional data that must be transmitted to INFARMED, I.P.
Concerning scarcity prevention measures, applicable to holders of marketing authorization, Article 6 of the Regulation defines the information that must be available on a permanent and up-to-date basis, including the identification of the actions to be taken, worldwide, to ensure the supply of the national market.

Regarding the criteria for determining minimum stocks, they vary depending on whether the medicines have been marketed for more or less than 12 months on the national market. In the first case, the stock should not be less than "the monthly average of orders from pharmacies and other entities authorized to dispense medicines to the public in the national territory, of the last year", whereas in the second situation the criterion is identical, but calculated since the date of effective marketing of the medicine. To these values can be added a safety net of 50%, as well as they can be reduced or mobilized, for reasons of public health and with the aim of guaranteeing the supply of pharmacies and other entities qualified to dispense medicines (article 7 paragraphs 2, 3 and 4). Taking into account these new obligations, companies involved in the medicine circuit must adapt their internal procedures in accordance with the Regulation.

Finally, the INFARMED I.P. encourages health professionals, patient representative associations and citizens to report situations of unavailability of medicines. However, given the obligations that companies already must observe, this encouragement of third-party collaboration may increase the entropy of the system and prove to be counterproductive in relation to situations which are already being solved or that, in fact, are not of unavailability of medicines on the national market, but only so understood by failures of information or communication, creating situations of unnecessary alarmism and harmful to other levels for public health.

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