Portugal – Whistleblowing

May 2022

1. LEGISLATION | NOTABLE CASE LAW

1.1. Specific whistleblowing legislation

- Law No. 93/2021 of 20 December 2021 (only available in Portuguese here) ('the Whistleblowing Law')

The Whistleblowing Law establishes the general regime for the protection of whistleblowers, transposing the Directive on the Protection of Persons who Report Breaches of Union Law (Directive (EU) 2019/1937) ('the Whistleblowing Directive') into Portuguese law.

1.2. Sector-specific whistleblowing legislation

- Law No. 83/2017 of 18 August 2017 (only available in Portuguese here), which establishes measures to combat money laundering and counter-terrorist financing
- General Regime for Credit Institutions and Financial Companies (Decree-Law No. 298/92 of 31 December 1992) (only available in Portuguese here)
- General Regime for the Prevention of Corruption (Decree-Law No. 109-E/2021 of 9 December 2021) (only available in Portuguese here)
- Law No. 19/2012 of 8 May 2012 (only available in Portuguese here), regarding competition law infringements

1.3. Additional applicable legislation

- Article 313 *et seq* of the Industrial Property Code (only available in Portuguese here), regarding the protection of commercial secrets
- Articles 195, 196, 316, 342, 383, and 384 of the Criminal Code (only available in Portuguese here) ('the Criminal Code'), which cover crimes related to the violation of duties of secrecy
- Articles 135 to 137 of the Code of Criminal Procedure (only available in Portuguese here) ('the Criminal Procedure Code'), regarding procedures for the protection of the duty of professional secrecy during criminal procedures
- Article 371 of the Criminal Procedure Code, which covers the confidentiality of judicial investigations
- Article 242 of the Criminal Procedure Code, which covers the duty of statutory reporting in certain situations
- The Labour Code (only available in Portuguese here), which addresses the protection of whistleblowers and witnesses in lawsuits and administrative

offences procedures related to harassment at the workplace, particularly Articles 412 and 413 providing for a duty of secrecy for the members of employees' collective representation structures

- Law No. 93/99 of 14 July 1999 (only available in Portuguese here), regarding the protection of witnesses
- Deliberation No. 822/2020 of 21 August 2020 - Regulation of the Portuguese Bar Association on money laundering and terrorism financing (only available in Portuguese here), on reports by lawyers with matters related to combating money laundering and terrorism financing
- Decree-Law No. 433/82 of 27 October 1982 (only available in Portuguese here) ('the Administrative Offences Law'), setting the legal framework for administrative offences

1.4. Guidelines

In 2009, the Portuguese data protection authority ('CNPD') issued specific guidelines for the operation of whistleblowing channels for internal reports of irregular financial management via Decision No. 765/2009 (only available in Portuguese here) ('Decision No. 765/2009').

Unfortunately, no further guidelines on whistleblowing have been issued since then. Decision No. 765/2009 is now in collision with the Whistleblowing Law, and as such, it is expected to be updated. Until then, Decision No. 765/2009 will need to be interpreted as per the new mandatory rulings.

1.5. Case law

Not applicable.

2. COMPETENT WHISTLEBLOWING AUTHORITY

The National Anti-Corruption Mechanism ('MENAC') is the entity responsible for investigating any infringements to the provisions set out in the Whistleblowing Law and for imposing the corresponding fines.

However, if said infringements are carried out by a natural or legal person or by an equivalent entity subject to the whistleblower protection regimes provided for in the acts of the EU referred to in Part II of the Annex to the Whistleblowing Directive, or in Portuguese regulations implementing, transposing, or giving effect to such EU acts, the responsible

entities are the ones which have sanctioning powers under said acts or regulations, provided the latter include regimes for the protection of whistleblowers.

If there is more than one authority with sanctioning powers, with regard to the same infringement, the determination of the responsible authority shall be made in accordance with the rules provided for in the EU acts or national regulations containing regimes for the protection of whistleblowers. In the absence of determining rules in these acts and regulations, the responsible authority will be determined in accordance with the Administrative Offences Law.

3. SCOPE OF WHISTLEBLOWER PROTECTION

3.1. How are whistleblowers protected?

The identity of the whistleblower shall remain confidential and shall only be disclosed because of a legal obligation or a court order. Whistleblowers may also benefit from the witness protection measures within criminal proceedings as set out in the law.

The Whistleblowing Law prohibits any kind of acts of retaliation against the whistleblower. An act or omission is deemed an act of retaliation if it occurs in a professional context, is motivated by an internal or external report or public disclosure, and causes or may cause, directly or indirectly, in an unjustified manner, material or non-material damages to the whistleblower.

If certain events occur during the two years following the report or the public disclosure, it is presumed that these were motivated by the whistleblowing report, which means said events are presumed to be acts of retaliation unless the contrary is proven.

As such, any disciplinary sanction applied to the whistleblower up to two years after the report or public disclosure takes place shall be presumed to be abusive, unless the contrary is proven. Moreover, the whistleblower is entitled to be compensated for any damages caused by the retaliator.

The whistleblower cannot be held liable for reports or public disclosures made in accordance with the requirements of the Whistleblowing Law. Nevertheless, the

whistleblower can be held accountable whenever their access to information in the context of the whistleblowing report can be regarded as a criminal offence.

3.2. Who is protected?

The following persons are protected under the Whistleblowing Law (Article 5(2) of the Whistleblowing Law):

- workers in the private, social, or public sector;
- service providers, contractors, subcontractors, and suppliers, as well as any persons acting under their supervision and direction;
- shareholders and persons belonging to administrative or management bodies or to supervisory or controlling bodies of legal persons, including non-executive members; and
- volunteers and interns (remunerated or unremunerated).

The protection is extended, with adaptions, to the following persons (Article 6(4) of the Whistleblowing Law):

- any natural person assisting the whistleblower whenever said assistance should be deemed confidential, including trade union representatives or employee representatives;
- third parties connected with the whistleblower, such as work colleagues or family members, who may be a target of retaliation in a professional context; and
- legal persons or similar entities that are owned or controlled by the whistleblower, for which the whistleblower is employed or otherwise connected with in a professional context.

3.3. Is protection limited to certain subject matters?

The subject matter covered by the Whistleblowing Law includes the following (in addition to those set out by Article 2 of the Whistleblowing Directive):

- crimes, especially violent crimes, highly organized crime, as well as the crimes provided for in Article 1(1) of Law No. 5/2002 of 11 January 2002 (only available in Portuguese here); and
- any act or omission contrary to the purpose of the rules or standards covered by Article 3(1) of the Whistleblowing Directive.

In the fields of national defence and security, only the act or omission contrary to the procurement rules contained in the EU acts referred to in Part I.A of the Annex to the

Whistleblowing Directive, or contrary to the purposes of these rules, shall be considered a breach for the purposes of the Whistleblowing Law.

3.4. What kinds of reporting, disclosures, or actions are protected?

Both internal and external reporting channels are permitted. The existence of internal reporting channels is even mandatory in certain situations.

The internal reporting channel takes precedence over the external reporting channel and public disclosure, and the external reporting channel takes precedence over the public disclosure. This means that the whistleblower may only use the external reporting channel or publicly disclose a breach upon fulfilment of the criteria set out in the Whistleblowing Law.

As such, a person who reports a breach to the media without respecting the rules of precedence will not be able to benefit from the protection granted by the Whistleblowing Law.

In terms of external reporting, the reports shall be submitted to the authorities that should or may have knowledge of the matter described in the report in accordance with their attributions and competencies, including:

- the Public Prosecutor's Office;
- the Criminal Police;
- the Bank of Portugal;
- the independent administrative authorities;
- public institutes;
- inspectorates, similar entities, and other central services of the direct administration of the State endowed with administrative autonomy;
- local municipalities; and
- public associations.

3.5. Is anonymous reporting protected?

Internal and external reporting channels are required to allow anonymous reporting.

There are no specific circumstances required for a whistleblower to submit an anonymous report, and no special precautions are demanded. However, the reporting channels must comply with the requirements stated in the Whistleblowing Law.

3.6. What conditions or proof must whistleblowers satisfy or provide to qualify for protection?

A whistleblower can benefit from the protection provided by the Whistleblowing Law if (Article 6(1) of the Whistleblowing Law):

- they act in good faith;
- they have serious grounds to believe that the information was true at the time of the report or public disclosure; and
- they respect the rules of precedence mentioned in section 3.4. above.

4. MANAGEMENT OF INTERNAL WHISTLEBLOWING SCHEMES

4.1. What channels and follow-up procedures must be established?

4.1.1. General requirements

Any legal undertaking having 50 or more employees is required to have an internal reporting channel, including the Portuguese State and other legal persons governed by public law. All entities that are within the scope of the EU acts referred to in Parts I.B and II of the Annex to the Whistleblowing Directive must always have an internal reporting channel regardless of the number of employees.

Internal reporting channels must ensure the safe submission and follow-up of the whistleblowing reports, as well as their completeness, integrity, and safe-keeping. The channels must guarantee the confidentiality of the whistleblower's identity (i.e. anonymity), as well as any third party mentioned in the report, and equally prevent access from unauthorised persons.

Measures must be implemented to assure independence, impartiality, confidentiality, data protection, the duty of secrecy, and the absence of conflict of interest of the persons involved in the operation of the internal channel.

The reports may be written or orally presented, with or without the identification of the whistleblower, as mentioned above.

The legal entities obliged to operate the internal reporting channels must adopt the following follow-up procedures:

- within seven days from the date of receipt of the report, notify the whistleblower of their right to submit an external whistleblowing report, the competent authority to receive it, and any applicable requirements for said submission. This information must be delivered in a clear and accessible manner;
- verify the allegations contained in the whistleblowing report and, if possible, cease the continuance of the infraction. This is to be carried out through an internal investigation or notification to the authorities responsible for investigating the infraction at stake, including any institutions and entities of the EU;
- within a maximum period of three months from the date of receipt of the report, notify the whistleblower the measures envisaged or adopted to follow up on the report and the respective grounds; and
- upon request by the whistleblower, provide within 15 days the result of the analysis carried out on the report.

4.1.2. Hotlines

Internal hotlines are not mandatory. However, if oral reports are permitted by the internal reporting channel, the whistleblowing report may be submitted through any voice messaging system or, upon request by the whistleblower, in a face-to-face meeting.

4.2. With whom does the responsibility lie for the management of the scheme?

The internal reporting channel must be operated and managed by persons or services especially designated for this purpose, although reports may be received by a subcontractor.

4.3. Are there any prior notification, registration, and approval requirements?

No.

4.4. What information must be provided to employees about a whistleblowing scheme?

Although the provision of information on the conditions of use of the internal reporting scheme is advisable, there are no statutory requirements on this matter.

However, once the whistleblowing report is submitted, the whistleblower is entitled to receive information on the follow-up procedures (see section 4.1.1. above).

4.5. Are there requirements or restrictions for the use of external service providers?

The reporting channels may be operated by third parties for the purposes of receiving whistleblowing reports.

4.6. Are there requirements or restrictions for international/group organisations?

There are no specific requirements are set out in the Whistleblowing Law.

However, medium-sized companies (i.e. employing between 50 to 249 employees) may share resources for the purposes of receiving whistleblowing reports, including companies from the same group of companies.

5. PROCESSING OF WHISTLEBLOWING REPORTS

5.1. Is there a duty of confidentiality in relation to whistleblowing reports?

Yes. The reporting channels must assure the confidentiality of the whistleblower and any other person indicated in the report, including the accused person, and prevent any access from authorised persons.

5.2. Are there any record-keeping requirements?

The obliged entities and the authorities responsible for receiving and follow-up of reports must keep a record of the reports received and retain said reports for a period of

five years and during the pendency of any judicial or administrative proceedings relating to the reports.

5.3. Does the accused person have to be informed when data concerning them is recorded?

The Whistleblowing Law does not establish the obligation to provide any specific information to the accused person upon receipt of a report on their conduct.

5.4. How do data protection rules apply in relation to whistleblowing reports?

Data protection rules are applicable to whistleblowing reports and the operation of whistleblowing channels.

The Whistleblowing Law clearly states that the processing of personal data in the context of external and internal reporting channels must comply with the General Data Protection Law (Regulation (EU) 2016/679) ('GDPR'), and Law No. 59/2019 of 8 August 2019 (only available in Portuguese here) ('the GDPR Implementation Law'), which approved the rules on the processing of personal data for the purpose of prevention, detection, investigation, or prosecution of criminal offences or the enforcement of criminal sanctions.

5.5. Are there any restrictions to data subject rights (e.g. rights to be informed, access, rectify, erase, etc.)?

The Whistleblowing Law does not contemplate any restriction to the data subjects' rights. Nonetheless, for example, the right of elimination may be difficult to enforce during the statutory retention period of the reports.

6. PENALTIES AND LEGAL RECOURSE

6.1. Penalties for breach of duties and/or retaliation

Non-compliance with the legal requirements set out by the Whistleblowing Law may be deemed as very serious administrative offences, with possible fines between €10,000 and €250,000, or as serious administrative offences, with possible fines between €1,000 and

€125,000, depending on the type and severity of the breach. Retaliation against the whistleblower, for example, is a very serious administrative offence.

6.2. Other liability

An organisation may face criminal and civil liability in case of non-compliance with the Whistleblowing Law. For example, an organisation can be criminally and/or civilly liable for retaliation acts provided that the retaliation act committed is deemed a crime under the Criminal Code or other provisions of criminal law, and/or the whistleblower suffers any damages in result of the retaliation act.

6.3. Compensation for whistleblowers

Whoever commits an act of retaliation is required to compensate the whistleblower for any damages caused. This may be equal to monetary compensation, reinstatement of the employee, or even both, depending on the specific circumstances of the case.

6.4. Legal recourse for accused persons

The whistleblower is liable for any damages caused by a whistleblowing report that is not compliant with the requirements stated in the Whistleblowing Law (see section 3.6. above). In addition to this, the accused person maintains all rights or procedural guarantees set out in the law, including the presumption of innocence and the guarantees of defence in criminal proceedings.

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