

COMPLIANCE

THE GENERAL REGIME FOR WHISTLEBLOWER PROTECTION

THE LAW NO. 93/2021, OF DECEMBER 20 ESTABLISHES THE GENERAL REGIME FOR THE PROTECTION OF WHISTLEBLOWERS, TRANSPOSING INTO PORTUGUESE LAW THE WHISTLEBLOWING DIRECTIVE (EU DIRECTIVE 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF OCTOBER 23, 2019 ON THE PROTECTION OF PERSONS WHO REPORT BREACHES OF UNION LAW).

The purpose of this regime is to ensure the effective protection of individuals who, in a professional context, have access, in a lawful manner, to knowledge of infringements and who wish to report them.

Considering that this Regime enters into force on June 18, 2022, we have identified a set of practical issues related to it, which we will address.

1) Which infractions may be reported?

The scope of infractions is quite broad and includes:

I. Any act or omission contrary to the rules contained in the European Union acts and the national legislation implementing or transposing them, in the areas of public procurement, financial services, products and markets and the prevention of money laundering and financing of terrorism, product safety and compliance, transport safety, environmental protection, public health, consumer protection, protection of privacy and personal data, and network and information systems security;

II. Any act or omission contrary to and detrimental to the European Union's financial interests (fraud);

III. Any act or omission contrary to the rules of the internal market, including competition rules, state aid and corporate taxation;

IV. Violent crime, especially violent and highly organized, among other conducts.

It should also be noted that the complaint may relate to offenses committed, in the process of being committed, or which may reasonably be expected to be committed, as well as attempts to conceal them, provided that the complainant's knowledge is based on information obtained in a professional context.

2) Who can benefit from whistleblower status?

Any (natural) person who publicly denounces or discloses an infringement based on information obtained in the course of their professional activity, regardless of the activity performed and the sector in which it is performed, thus including employees in the private and public sector.

The law goes even further, and candidates, former employees, but also service providers, subcontractors, suppliers (or any persons under their direction and supervision), holders of shareholdings and persons belonging to administrative or management bodies or supervisory bodies of legal entities, including non-executive members, and lastly volunteers or trainees (whether remunerated or not) may also be considered whistleblowers.

THE GENERAL REGIME FOR WHISTLEBLOWER PROTECTION

(CONTINUATION)

3) What means of denunciation are provided by law?

1. Internal channels;
2. External channels (managed by the competent authorities);
3. Public disclosure.

4) Internal complaint channels

The Law clearly favors internal channels, establishing that their implementation is mandatory for the following entities:

- Private sector and public sector companies employing 50 or more employees and also for legal entities that are active in the fields of financial services, products and markets and prevention of money laundering and terrorist financing ("obliged entities").

This obligation also covers branches located in the national territory, of legal persons headquartered abroad, the State and the Autonomous Regions.

5) What requirements should the Internal Reporting Channel meet?

Following the obligation to create an internal whistleblowing channel, it must meet the following requirements:

- Ensure the secure submission and follow-up of complaints, in order to ensure the confidentiality of the identity or anonymity of whistleblowers and the confidentiality of the identity of third parties mentioned in the complaint;
- implementing security measures to prevent unauthorized access to the complaints;
- Ensure the integrity and conservation of the complaints (at least during the period of 5 years and, regardless of that, during the pendency of judicial or administrative processes concerning the complaint);
- Ensure that the complaint is received and processed by the people or services previously designated for this purpose;
- Implement internally rules that ensure the proper handling of complaints;

Note: However, companies may outsource the receipt of complaints (provision of As a service). Also in this situation, independence, impartiality, confidentiality, data protection, secrecy and absence of conflicts of interest must be ensured;

- Provide for the notification of the whistleblower within the legally established time limits.

6) What deadlines must the company meet?

- the whistleblower must be notified within seven days of receiving the complaint, and must be informed of the requirements, the competent authorities, and the form and admissibility of filing the external complaint;
- internal company investigations must last a maximum of three months and the measures taken must be communicated to the complainant at the end of the internal investigation;
- the whistleblower may request, at any time, that the obliged entities communicate to him the result of the analysis carried out on the complaint, within 15 days after its conclusion.

7) What is the relationship between this Whistleblower Regime and the General Regime for the Prevention of Corruption?

The internal whistleblowing channels are one of the mandatory elements of the Regulatory Compliance Program, whose adoption and implementation is also mandatory for legal entities employing 50 or more workers, under Decree-Law 109-/2021, of December 9, which approved the General Regime for the Prevention of Corruption, aimed at receiving and processing reports of possible acts of corruption and related offenses in the same manner.

8) How should complaints be filed?

Reports may be submitted in writing and/or verbally by employees, anonymously or with identification of the whistleblower.

If verbal denunciation is admissible, the internal denunciation channels must allow its presentation by telephone or other voice message systems and, at the request of the whistleblower, in a face-to-face meeting.

9) What care should the company take when handling personal data?

The confidentiality of the complaint, including the protection of the identity of the whistleblower and the reported person, are essential elements for compliance with the rules of the ethics channel, and failure to comply with them may lead cumulatively to the application of fines as provided for in the EU Regulation on GDPR, i.e. a fine of up to Euros 20,000,000.00 or 4% of the group's annual turnover.

10) Appointment of a Whistleblower Officer

The choice of the most suitable persons or departments within a company to be appointed to receive and follow up on complaints varies depending on the structure of the entity, but in any case the performance of the function must ensure independence and absence of conflicts of interest.

11) External whistleblowing channels (managed by the competent authorities)

The whistleblower may only use an external whistleblowing channel before the competent authorities in the following situations:

- I. there is no internal whistleblowing channel;

THE GENERAL REGIME FOR WHISTLEBLOWER PROTECTION

(CONTINUATION)

II. the internal whistleblowing channel only accepts the submission of complaints by employees, and the whistleblower does not;

III. the whistleblower has reasonable grounds to believe that the infraction cannot be effectively resolved internally or that there is a risk of retaliation;

IV. the whistleblower has initially filed an internal complaint without being informed of the actions taken as a result of the complaint within the legally established time limits;

V. the infraction constitutes a crime or misdemeanor punishable with a fine exceeding Euros 50,000.00.

12) Who are the competent authorities?

Depending on their attributions and competences, the competent authorities may be:

I. the Public Prosecution Service;

II. the criminal police bodies;

III. the Bank of Portugal;

IV. the independent administrative authorities;

V. the public institutes;

VI. the general inspections and similar entities and other central services of the direct administration of the State endowed with administrative autonomy;

VII. local authorities;

VIII. public associations.

13) In what situations can the whistleblower resort to public disclosure?

The whistleblower can only resort to public disclosure when they have reason to believe that:

I. the infringement may constitute an imminent or manifest danger to the public interest;

II. the breach cannot be effectively known or resolved by the competent authorities, having regard to the specific circumstances of the case;

III. there is a risk of retaliation, including in the case of an external complaint;

IV. it has filed an internal complaint and/or an external complaint, without adequate measures being taken within the deadlines set for that purpose.

14) What protection and support measures should the company adopt in relation to the whistleblower?

The law prohibits acts of retaliation against the whistleblower, defined as any act or omission that directly or indirectly harms the whistleblower, in an unjustified manner, in a professional context and motivated by the submission of the internal complaint, external complaint or public disclosure of the infraction.

Among others, the following acts are presumed to be motivated by the whistleblowing, when committed up to two years after the filing of the whistleblowing complaint or the public disclosure of the infraction:

I. changes in working conditions;

II. suspension of the employment contract;

III. negative performance evaluation;

IV. dismissal;

V. termination of the service provision contract.

15) What are the sanctions applicable to the company for non-compliance with the General Whistleblower Protection Scheme?

In general, the violation of the obligations set forth in the General Regime constitutes an administrative offence punishable with fines of up to €250,000.00 for the company, and up to €125,000.00 for individuals, which processing and enforcement is the responsibility of the National Anti-Corruption Mechanism.

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