– FINAL COUNTDOWN FOR THE TRANSPOSITION OF THE *WHISTLEBLOWER PROTECTION DIRECTIVE* –

The Portuguese legislator will have until next December 17 – about a month, therefore – to transpose into the national legal system Directive (EU) 2019/1937 of the European Parliament and of the Council, of October 23, 2019 ("Directive"), relating to the protection of persons who report EU law breaches. The Directive's main purpose is to define a set of common minimum standards that ensure effective protection of whistleblowers that in a professional context, in the public or private sectors, become aware of infractions or situations detrimental to the public interest.

The Directive applies to all violations of EU law that essentially affect the following domains:

- Public contracting;
- Financial services, products and markets, and prevention of money laundering and terrorist financing;
- Product safety and compliance;
- Transport security;
- Environment protection;
- Protection against radiation and nuclear safety;
- Foodstuffs and animal feed safety, and animal health and welfare;
- Public health;
- Consumer defence;
- Privacy and personal data protection, and network and information systems security;
- Harmful breaches to the EU's financial interests;
- Breaches related to the EU's internal market, including violations of EU competition and state aid rules, as well as breaches related to the internal market regarding acts that infringe corporate tax rules or practices aimed at obtaining tax advantages that contradict the objective or purpose of corporate tax law.

Leaving outside the Directive scope of application are complaints about public contracting related to defense and/or national security. However, the Member States will be free to extend the provisions of the Directive to this, or even to other domains.

Relating to the subjective application of the Directive, it is significant the protection of the whistleblower who, in the public or private sector, has obtained information about breaches within a labour context. However, any person who may be object of retaliations, even if not a worker (including civil servants) in the strict sense is protected by the Directive. In other words, the Directive covers a wide range of potential whistleblowers, also sheltering self-employed persons, shareholders, directors and managers, management or supervisory corporate bodies, including non-executive members, as well as individuals outside the traditional employee-employer relationship, such as consultants, contractors, paid or unpaid volunteers and interns, board members, former workers and job

applicants, as well as any other persons who work under the supervision and direction of contractors, subcontractors and suppliers.

The legal protection provided by the Directive will also apply to whistleblowers who communicate or publicly disclose information about violations or breaches within a professional relationship that has, in the meantime, ended, or has not yet started, in cases where the whistleblower has obtained the information about the said breaches during the recruitment process or at other stages of pre-contractual negotiation.

It should also be noted, regarding the extension of the subjective scope, the application of the protection granted by the Directive to third parties, namely, family members, colleagues or even any other entities that, in some way, are linked to the complainant and that for that reason may be subject to reprisals, as well as to facilitators, meaning individuals who assist whistleblowers in the reporting or complaint process, and in a general way all individuals and legal entities connected with whistleblowers.

With regard to the commonly designated internal Whistleblowing channels, the Directive establishes that compelled entities (both in public and private sectors) must implement internal whistleblowing channels and respective procedures.

This obligation particularly applies to all private sector entities with 50 (fifty) or more workers, with the exception of entities that are already obliged to implement these channels under the legal framework for the prevention of money laundering and terrorism financing (regime that in Portugal is regulated by Law No. 83/2017, of 18 August).

With regard to the public sector, Member States may exempt from this obligation municipalities with less than 10.000 (ten thousand) inhabitants and public entities with less than 50 (fifty) workers.

It is a clear imposition of minimums. Member States, *«after an appropriate risk assessment, considering the nature of the entities activities and the subsequent level of risk, in particular to the environment and human health»*, may also require entities with less than fifty workers to implement reporting channels and related practices.

With regard to the requirements of internal whistleblowing procedures, these should include:

- Appropriate internal channels conceived and operated in a secure manner granting whistleblower confidentiality, as well as of third parties mentioned in the complaint;

- Appropriate mechanisms to prevent unauthorized personnel to access the relevant information;

- Receipt warnings of the complaint to the whistleblower within 7 (seven) days from the date of receipt;

- The appointment of a competent and diligent independent person or service to deal with complaints and who will maintain the necessary communication with the whistleblower;

- The return of information within a reasonable period, which does not exceed 3 (three) months from the receipt warning or, if this has not been sent to the whistleblower, from the expiry of the aforementioned period of 7 (seven) days after the filing of the complaint;

- The providing of up-to-date, clear and easily accessible information on the external complaints procedures towards the competent authorities;

- The possibility of submitting written or verbal complaints, or both, permitting telephone verbal complaint or other voice messaging systems, or even through a face-to-face meeting, always according to the complainant's request.

With regard to external complaints, Member States should assign competent authorities to receive and deal with such complaints and provide the authorities with adequate resources. In turn, these authorities should establish independent and autonomous reporting channels to receive and deal with the submitted complaints, ensuring their respective integrity and confidentiality, as well as efficient storage.

External whistleblower channels are not subject to the submission of a previous internal complaint. Therefore, any whistleblower may choose to use the internal reporting channels or directly resort to filing an external complaint with any competent authority.

For reasons of preservation of possible reputational damage, priority is given to the internal complaint. The debate is (and will continue to be) extremely interesting by raising vital questions of criminal policy in the domain of self-regulation.

Regarding the question of the whistleblower motivation for purposes of the respective legal protection, it is sufficient to demonstrate the existence of reasonable grounds to consider that, given the circumstances and the available information at the time of the complaint, the facts reported were true . Therefore, the reasons that lead the whistleblower to make the complaint are irrelevant, as long as the facts reported are true, or at least supported by reasonable reasons which permit, in good faith, the whistleblower to believe that they are. In other words, the whistleblower conviction of veracity is enough to trigger the protection granted by the Directive

Naturally, a whistleblower who deliberately communicates false or misleading information will not benefit from any protection. In this regard, the Directive determine Member States to enforce effective, proportionate and dissuasive sanctions applicable to whistleblowers who communicate or publicly disclose false information, as well as indemnity provisions for damages resulting from such complaints or public disclosures.

With regard to public disclosure, the Directive also grants protection to anyone who makes a public disclosure of the reported information, when they have previously filed an internal or external complaint in the following situations:

- When no adequate measures have been taken within the aforementioned deadlines;
- When the whistleblower has reasonable grounds to believe that the breach may constitute an imminent or manifest danger to the public interest;
- In case of an external complaint when there is a risk of retaliation;
- In front of an objective perception that the reported situation will not be effectively resolved.

Finally, the Directive determines that measures shall be taken to prevent any form of direct or indirect, or even attempted, retaliation against whistleblowers, including threats of retaliation.

Perhaps the main measure to protect whistleblowers is the obligation to maintain the confidentiality of the respective identity, an obligation that can only be derogated in the context of an investigation carried out by the competent national authorities, or in the context of judicial proceedings. In these cases, whistleblowers must be informed before disclosing their identity, unless such disclosure compromises those investigations or judicial proceedings.

It is expressly provided for Member States to adopt measures to protect the whistleblower in the labour environment, highlighting the prohibition of certain acts that may be configured as a form of retaliation (worker suspension, dismissals, demotions or refusals to promote, transfer of functions, change of working place or hours, reduction of salary, negative evaluations, application of disciplinary measures, exercise of coercion, intimidation, harassment or ostracization, creation of reputational damage, early rescission or termination of contracts).

Considering the above, the assistance of the whistleblower in judicial proceedings intended to react against possible retaliation must be ensured.

By another hand, in order to ensure the protection of whistleblowers, proportional and dissuasive sanctions must be provided, applicable to both natural and legal persons that prevent or try to prevent the complaint, who engage in retaliatory acts against the whistleblower, or persons related to him, who bring vexatious proceedings against whistleblowers, or persons related to them, or that infringe the obligation to maintain the confidentiality of the respective whistleblowers identity.

In conclusion, not directly raising from what was stating before, but focused on a discussion perspective allowed by the expectations generated by the transposition of the Directive, it is already very interesting to anticipate its combination with the most recent legal institutes aiming evident purposes of criminal policy, namely with the National Anti-Corruption Strategy 2020-2024, recently approved by the Resolution of the Council of Ministers n.º 37/2021, of 6 April.

The importance of protecting whistleblowers is not a new issue. It is already recognized in the United Nations Convention against Corruption, as its article 33, under the heading "Protection of persons who provide information", states that *«each State Party should consider incorporating into its internal legal system appropriate measures to ensure protection against any unjustified treatment of anyone providing, to the competent authorities, in good faith and on the basis of reasonable suspicions, information on any facts relating to the offenses established in accordance with the this Convention»*.

In the Portuguese legal system there are already dispersed rules on whistleblowers, namely those provided for in Law no. 93/99, of 14 July (protection of witnesses), in Law no. 19/2008, of 21 April (respective article 4 .º), in the context of fighting corruption, in Law No. 83/2017, of 18 August (respective article 108, No. 5), in the context of combating money laundering and terrorism financing, or in the Securities Code, in the General Regime for Credit Institutions and Financial Companies, and in the General Regime for Collective Investment Undertakings.

Even the Portuguese Attorney General's Office has an electronic reporting system on its website, under the name *"Corruption: Report here"*. This service is a recipient of complaints regarding corruption and related crimes that are practiced within the scope of activities of public or private services.

Now, as we already referred to above, a new era can be anticipated in what concerns to criminal policy: that of the much-discussed – in a cautiously way – *criminal Compliance* and *regulated self-regulation*, made possible by an (inevitable) increasing of the trust of public authorities in the action of the private sector, notably companies, giving rise to a differentiated public intervention model, in which the State promotes and finds its efficiency (this is what it is all about) through cooperation with individuals and private companies.

Amongst the instruments of this new policy – which, in the extreme, aims at the prevention and detection of risks of corruption in public action –, as this expressly results from the aforementioned National Anti-Corruption Strategy 2020-2024, are: the adoption of Compliance programs in the public sector (*public Compliance programs*), risk analysis and the implementation of risk management plans, as well as codes of ethics or conduct, and, finally, the implementation of reporting or whistleblowing channels.

Therefore, speaking of an instrument placed at the service of private individuals and companies to pursue the State's criminal policy – there is no doubt about that –, it will be challenging not only to assess an effective transposition of the Whistleblower Protection Directive, but mainly to realize, and at some point taking the pulse, the extent to which this transposition will implement an efficient criminal policy tool.

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