

Providing an Alternative to Silence:

**Towards Greater Protection and Support for
Whistleblowers in the EU**

COUNTRY REPORT: PORTUGAL

This report belongs to a series of 27 national reports that assess the adequacy of whistleblower protection laws of all member states of the European Union. *Whistleblowing in Europe: Legal Protection for Whistleblowers in the EU*, published by Transparency International in November 2013, compiles the findings from these national reports. It can be accessed at www.transparency.org.

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An alternative to silence

Whistleblower protection in Portugal

Executive Summary

It has been acknowledged both by international organizations (such as the OECD, the Council of Europe, and the UNODC) and civil society (Transparency International, Global Integrity, Public Concern at Work) that, in the fight against corruption and related crimes, whistleblowing (and any kind of information disclosure for that matter) is one of the main instruments for the detection of this kind of criminality, mainly due to corruption's secret and victimless nature. This recognition of whistleblowing as a key anti-corruption instrument for both the public and private sectors has been the basis of several international and domestic initiatives in this field in order to promote citizens' acknowledgement of the importance of disclosing information and reporting any suspicion or occurrence of criminal activity or misdemeanors in the line of duty that can be resourceful for the detection and prosecution of corruption.

These efforts produced minor effects in Portugal. After GRECO's second evaluation report recommending that appropriate protection be taken towards the protection of whistleblowers a general legal provision was adopted for public sector employees in 2008, even though its application remained vague and unregulated. No additional developments or improvements have been registered since then. Portuguese decision-makers have failed to develop a coherent legal framework and noteworthy instruments in this field. Today, whistleblower protection remains an illusory concept, scattered in various pieces of legislation and without proper guarantees to ensure that reporting corruption and collaborating with the judicial authorities is indeed a safe alternative to silence.

An analysis of the Portuguese legal framework and of the experience of whistleblowers with the competent authorities reveals that although the law has placed upon public officials and police authorities the duty to report crimes discovered in the performance of their duties, their protection when fulfilling this duty is not properly assured.

The present report detected two kinds of weaknesses in the protection of whistleblowers: 1) those resulting from limitations and inadequacies in the legal system; and 2) those resulting from the lack of adequate institutional practices. Among these findings are:

- The lack of a comprehensive whistleblowing legal framework: the Portuguese law provides only for a general principle of protection of the Public Administration's officials against unfair treatment as part of a general anti-corruption law, but does not complete this principle with any kind of specific regulation on this issue.
- The lack of a central authority to collect and analyze denounces and actively protect whistleblowers. The personal experience of the whistleblowers interviewed for this report reveals that the Portuguese authorities show a great degree of indifference and passivity regarding their protection against negative personal consequences (such as personal or family threats, unjustified dismissal from office, compulsory transfer, harassment, etc.).
- The extreme vulnerability of whistleblowers to legal mechanisms related to the protection of individual public image, such as the crime of defamation, civil liability for moral damages, etc. This retaliatory practice has been frequently used against corruption denounces that reach the media and transmits a strong incoherence and disproportionality of the judicial system: while it provides corrupt agents all the necessary means to fiercely contest unjustified allegations; it is incapable of protecting the latter against all sorts of undue pressures and reprisals.

- The complete lack of protection of employees in the private sector, and even in some areas of the public sector that are not covered by article 4 of Law 19/2008, April 21. Private sector whistleblowing mechanisms are still scarce and underdeveloped. There is an increased interest in this field of Corporate Social Responsibility, however, besides the unilateral initiative of a few multinationals (such as Siemens), whistleblowing remains a low priority issue for the majority of businesses (in particular with regard to SMEs), a situation that has been aggravated by the current financial crisis.

The outlook is hazy for whistleblowers, particularly for public officials and police authorities who have the duty to report crimes, the main incoherence being the fact that the legal system demands a public employee to report a crime, but fails to protect him from unfair consequences of this action.

The experience of the interviewed whistleblowers reveals that whistleblowing may have severe negative consequences and that these can hardly be escaped, the effects of these consequences may, however, be hampered or diminished by the personal circumstances of each whistleblower: being a politician with media visibility or being a lawyer, can sometimes provide some protection against harsher attacks. A random everyday public official, however, will not have the same tools. It was a common ground between interviewed whistleblowers that if a common public official intended to blow the whistle, he/she should be ready for the possibility of “losing everything”. Witnesses and experts within criminal proceedings, on the other hand, seem to have adequate protection regarding their role in criminal proceedings, although such protection mechanisms are not commonly put in practice, and notwithstanding the fact that there is always room for improvement towards more guarantees and a comprehensive protection.

It is, therefore, urgent that appropriate action be taken to amend this flaw, particularly through the approval of an adequate, comprehensive and specific legal framework for the protection of whistleblowers, with appropriate rewarding mechanisms in order to provide whistleblowers added incentives to disclose relevant information (the report recommendations are elaborated more in detail on chapter 7).

1. Introduction

An overview of recent policy statements in the anti-corruption and anti-fraud areas reveals that organizations, both private and public, have been recognizing an increasing importance of information disclosures or whistleblowing. This is a consequence of the secret nature of these kinds of crimes, which are mostly known only to those involved, and have no victims that may complain to the authorities. Consequently, the exposure of corruption relies mainly on two mechanisms: internal prevention mechanisms, such as audits and inspections; and whistleblowing or information reports made by persons who have knowledge of the crime (e.g., because they were directly involved in it, or simply happened to stumble upon information while performing their duties).

This dependence on whistleblowing is also present in a recent statistics report about corruption crimes registered by the Public Prosecutor's Office between 2004 and 2008¹, which shows that 63.9% of corruption-related criminal proceedings started with information disclosures from non-official sources, almost half of which (31.4% of the total proceedings) were initiated with information reported by an anonymous source. In the private sector, whistleblowing was recently demonstrated to be one of the most effective means to detect corporate fraud.²

Despite the importance of whistleblowing for anti-corruption activity, we are still faced with different social attitudes regarding the whistleblowing activity. The fact that most corruption denunciations are made anonymously is indicative of the lack of confidence of whistleblowers on protection mechanisms and/or the negative connotation given to this type of practice (by their peers and the society in general). The reporting of information of crimes committed by third parties may still be frowned upon by other citizens, particularly in post-authoritarian countries with a past history involving secret police bodies³. Besides this possible cultural repression, it is often common for whistleblowers to avoid disclosing sensible information due to fear of reprisals. Most of the times they are confronted with the hard task of choosing between two evils: if they do not report the occurrence of corruption, where they may face disciplinary action; if they do, they may face harsh professional and personal consequences in their lives.

The purpose of this report is to make an assessment on the current state of affairs regarding whistleblower protection and guarantees, as well as the analysis of institutional and social practices in this field. Among the questions raised are the following: Is there an adequate legal framework that protects whistleblowers from unfair consequences? Are authorities complying with whistleblower legislation? Are whistleblowers protected in practice? What are the strengths and weaknesses regarding whistleblowing regimes? Is there a strong political will towards the protection of whistleblowers?

The present assessment is based on a methodology previously established by Transparency International and the structure of the report has been adapted in order to best fit those requirements. The analysis is based on Transparency International's definition of whistleblowing, i.e. "the disclosure of information about a perceived wrongdoing in an organization, or the risk thereof, to individuals or entities believed to be able to effect action".

2. General principles and international recommendations regarding whistleblower protection

The protection of whistleblowers is present in the main international anti-corruption conventions such as the United Nations Convention against Corruption⁴ (henceforth, the UNCAC) and the Council of Europe's (CoE)

¹ DCIAP-PGR e CIES-ISCTE (2010), *A corrupção participada em Portugal 2004-2008*, Resultados globais de uma pesquisa em curso, Tables 12, and 13, pp. 67, 68.

² Alexander Dyck, Adair Morse, and Luigi Zingales (2010), "Who Blows the Whistle on Corporate Fraud?", in *Journal of Finance*, December 2010; PricewaterhouseCoopers (2011), *Cybercrime: protecting against the growing threat Global Economic Crime Survey*, November 2011.

³ Transparency International (2009), *Alternative to Silence - whistleblower protection in 10 European countries*, p.7.

⁴ Full text in English of the United Nations Convention against Corruption available at: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50025_C.pdf. [Accessed 1 September 2012].

Criminal Law⁵ Convention on Corruption⁶ and has been considered as one of the most effective instruments in the detection of corruption and financial crimes (when adequately implemented)⁷. Portugal is signatory to these conventions, but has not fully implemented its provisions or done so in a very superficial manner.

The UNCAC, signed by Portugal in December 2003 and ratified in September 2007, mentions in article 33 that: “each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention”.

The CoE’s Criminal Law Convention on Corruption (ETS 173) states in its article 22 that States “shall adopt such measures as may be necessary to provide effective and appropriate protection for: a.) those who report the criminal offences established in accordance with Articles 2 to 14 [referring to corruption related crimes] [...]”. This Convention was signed by Portugal in April 1999 and ratified in May 2002.

It should be noted that in both articles the core idea is to protect whistleblowers from unjustified and unfair sanctioning or treatment, and that these actions might have multiple forms and different intensities. Common negative consequences for whistleblowers include: unemployment, creation of an unsustainable working environment for the whistleblower, discrimination of the whistleblower regarding other employment opportunities in other organizations/institutions, the initiation of retaliatory proceedings (e.g., disciplinary investigations) in order to divert the attention over the reported case, or even the questioning of the whistleblowers professional and mental capacities in order to harm his/her credibility.⁸

There are two international evaluation reports that mention the Portuguese whistleblowing mechanisms:

- GRECO’s Second Evaluation Report⁹, where GRECO recommended that appropriate protection for whistleblowers be taken. After the insertion of a whistleblower protection principle in the Law 19/2008, April 21, GRECO considered in its compliance report that Portugal had successfully implemented the recommendation.
- The OECD’s Phase 2 Evaluation Report, where the WGB recommended Portugal to “pursue its efforts to encourage companies to provide internal channels for communication by, and internal protection for, potential whistleblowers” (recommendation 2-f). A recommendation that is not directly derived from the OECD Anti-Bribery Convention, but rather from the recommendations issued regarding it¹⁰.

In addition to the above recommendations (resulting from country assessments), research done by NGOs and international organizations have led to a set of general guidelines and principles of whistleblowing, such as: the legal protection of any person reporting in good faith; the protection of external reporting (including the media) when internal reporting mechanisms are not adequate; the protection against any of the abovementioned negative consequences for whistleblowers; the protection against criminal prosecution of the whistleblower on the grounds

⁵ Full text in English of the CoE’s Criminal Law Convention on Corruption (ETS 173) available at: <http://conventions.coe.int/Treaty/en/Treaties/Htm/173.htm>. [Accessed 1 September 2012].

⁶ The CoE’s Civil Law Convention on Corruption is also worth to be mentioned, first signed by several members of the Council of Europe in November 1999, states in its article 9 that States should: “provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities”. Unlike its criminal law version, this Convention has not yet been signed, ratified or approved by Portugal. Full text in English of the CoE’s Civil Law Convention on Corruption (ETS 174) available at: <http://conventions.coe.int/Treaty/en/Treaties/Htm/174.htm>. [Accessed 1 September 2012].

⁷ See José A. Tabuena and Chris Mondini (2005), Internal reporting and whistle-blowing, Deloitte Financial Advisory Services LLP; Transparency International Policy Position, Whistleblowing: an effective tool in the fight against corruption (2010);

⁸ Council of Europe Parliamentary Assembly (2010), Resolution 1719: “Protection of ‘whistle-blowers’”, p. 10

⁹ [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2\(2005\)11_Portugal_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2(2005)11_Portugal_EN.pdf) [last accessed 25 September 2012], and its compliance report [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2\(2008\)2_Portugal_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2008)2_Portugal_EN.pdf) [last accessed 25 September 2012].

¹⁰ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009, Recommendation C-v.

of defamation or breach of secrecy; the protection of journalistic sources; the implementation of adequate whistleblowing channels.¹¹

3. Legal Framework

The following is a list of domestic legal regulations and norms applicable to whistleblowing by order of relevance. This list was elaborated by looking at any law or regulation that could abstractly apply to a whistleblower, be it regarding the whistleblowing process, the protection against retaliation, the compensation for damages suffered by the whistleblower, or even the rewarding mechanisms for information disclosures.

Law 19/2008, of April 21

The only norm within Portuguese Law that specifically mentions whistleblowing and the protection of whistleblowers is article 4 of the Law 19/2008, of April 21. This article has been inserted in a set of anti-corruption measures and its objective is to establish the principle of protection against unfair treatment applicable to whistleblowers employed by both the public administration and state-owned companies:

“employees belonging to the Public Administration and state-owned companies who report information regarding the commitment of infractions, which were discovered in the performance of their duties or due to these duties, cannot, under any form, including involuntary transfer, be treated unfairly.” (Article 4, of the Law 19/2008, of April 21).

The wording of the article presents several shortcomings that need further consideration:

- Limited scope of application. The first problem is the group of people that the law aims to address. Protection is granted to public administration or state-owned companies employees, excluding private sector and judiciary employees;
- Vague wording of the type of protection granted. The law does not specify what type of protection is granted to whistleblowers, it merely states that they cannot be treated “unfairly” without qualifying its meaning: Are moral and patrimonial damages included? What type of negative actions aimed at the whistleblower is included? Can these be non-employment related (personal threats, consequences to the whistleblower’s family, etc.)? The non-specification of what type of protection is included, and the adoption of such a general wording, may easily work as a cardboard shield for whistleblowers, who may be misguided to thinking that any kind of unfair treatment is included, thus confidently reporting corruption based on the (wrong) assumption that the law will protect them at all times.

The second number of article 4 establishes a legal presumption that any disciplinary sanction against whistleblowers is to be considered abusive. At first glance this number represents a bold step in favor of whistleblowers. However, the wording of the law restricts this measure to one year after the date of the reporting of the information, a short period when taking into account the fact that investigations can take several years, sometimes to the point of reaching the statutes of limitations (now set to 15 years). In addition, this paragraph limits the scope of protection to disciplinary sanctioning, by restricting the kind of consequences to which the whistleblower is protected in the first paragraph. In other words, a joint interpretation of both numbers could mean that the first paragraph aims to protect only employment related retaliation.

Lastly, number three of article 4 establishes that public administration employees are entitled to anonymity until the person suspected is formally charged. This paragraph constitutes a positive practice in the protection of whistleblowers, and it should be applied also to information disclosures made to administrative bodies, such as

¹¹ Among others, see: Council of Europe Parliamentary Assembly (2010), Resolution 1719: *The protection of "whistleblowers"*; European Parliament (2006), *Whistleblowing Rules: Best Practice; Assessment and Revision of Rules Existing in EU Institutions*; Transparency International (2010) *Whistleblowing: an effective tool in the fight against corruption*.

auditing or inspecting bodies (e.g., General Inspectorates), in order to prevent the discovery of the identity of the whistleblower through administrative procedures.

Although this article was sufficient to convince GRECO in its compliance report that appropriate protection to whistleblowers had been effectively granted, a more in depth analysis of its wording and applicability would immediately dismiss such positive assessment. The legal provision set under article 4 of the Law 19/2008, of April 21 is insufficient to cover a comprehensive range of defensive mechanisms against unfair consequences to whistleblowers. Furthermore, recent cases of whistleblower's protection (such as is the case of João Dias Pacheco from the municipal company Águas de Coimbra case) indicate that legal mechanisms have not been met with adequate institutional practices. The way state authorities have addressed this case is a clear example that article 4 is faulty and misleading.

Law 25/2008, June 05 – Preventive and repressive measures regarding money laundering and the financing of terrorism

Article 20 of Law 25/2008, June 05 establishes the duty of several kinds of individuals and legal persons (such as companies auditors, accountants, financial and credit institutions, lawyers, solicitors, gambling or real estate companies, etc.) to report any activity that may constitute money laundering or the financing of terrorism. The reporting of this information should be addressed to the Prosecutor General or the Financial Information Unit of the Criminal Police (Judiciary Police).

To protect these institutions and individuals with whistleblowing duties, that same law establishes two different legal mechanisms:

1. The law states that while reporting information in compliance with the duties established in Law 25/2008, the abovementioned persons, institutions or bodies cannot be held liable for the breach of secrecy, legally established or otherwise.
2. The Law also establishes that any individual who reveals the identity of the whistleblower, even if unintentionally, will be sanctioned with a fine or up to three years imprisonment.

This second mechanism can also be held as a positive practice within the Portuguese legal system, protecting whistleblowers through the preventive effect of criminal laws. However, the same mechanism is not provided for whistleblowers not covered by Law 25/2008, which constitutes the majority of information disclosures regarding corruption and related crimes.

Law 93/99, July 14 and Law-Decree (Act) 190/2003, September 22 – Witness protection measures

The witness protection framework of Law 93/99, July 14 (and its regulations in Law-Decree 190/2003, September 22) mainly aims to protect people in order to ensure their effective deposition and their personal integrity, rather than protecting them from unfair consequences on a personal or professional level, mainly when these are not related with their participation in the criminal procedure.

The definition of witness is present in article 2/a which explains that, for the purpose of these laws, witness is “any person who, independently of his/her status regarding the procedural law, disposes of information or knowledge necessary to the discovery, perception or appreciation of the facts which constitute the object of the criminal procedure, that when used results in danger for themselves or another”.

Article 1 of the Law 93/99, July 14 specifies those situations in which the witness protection framework applies. Protection is granted to witnesses in a criminal procedure “when their life, physical or psychological integrity, freedom or patrimonial assets of considerable high-value are endangered due to their contribution for providing evidence in favor of the facts which constitute the object of the criminal procedure” (paragraph 2 of the same article extends this protection to the witness's family).

The framework protects witnesses in a variety of ways, such as concealment of identity, relocation of residence, police escort, etc. Article 2 extends protection to non-formal witnesses, including information-holders.

However, a close reading of the wording of these two articles shows that many of the situations faced by whistleblowers cannot be adequately covered by this legal framework for two reasons: first, because the contribution of a whistleblower may have been used merely to start an investigation (or even a preliminary investigation) and it may have no relationship with the actual object of the criminal procedure that will reach the Court; secondly, because the unfair treatment of the whistleblower may not aim at her/his life, integrity or high-value assets, but rather to her/his employment stability, or even to her/his family members' employment, education or social status.

Portuguese Criminal Procedure Code, approved by Law-Decree (Act) 78/87, February 17

The Portuguese Criminal Procedure Code imposes on public officials and police authorities the duty to report information on crimes discovered during the performance of their duties (article 242 of that same code).

If public officials do not comply with this obligation, they may be object of disciplinary sanctions that may range from a fine to suspension (articles 9 to 26 of Law 58/2008, of September 9 – disciplinary statutes of employees of the local and central administration¹²).

However, it could also be said that given the current situation of whistleblowers (lack of protection, exposure to defamation, etc.), the lack of reporting could easily fit one of the mitigation conditions of the sanction – paragraph d) of article 21 of Law 58/2008, September 9, which states that a disciplinary sanction may be mitigated if it was not expected of the employee to act otherwise.

Law 36/94, 29 of September, Measures of Combat against Corruption and Financial and Economic Criminality

The Law 36/94, 29 of September establishes a rewarding system for active bribers (article 9) who have reported the bribery crime in which they were involved. In this case, the criminal procedure against the whistleblower is suspended and the criminal sanction replaced with civil sanctions, probation conditions or other alternative sentences (article 9.º/3 of the mentioned law, and article 282 of the Portuguese Criminal Procedure Code).

This rewarding mechanism is different from the ordinary mechanism provided under the Criminal Procedure Code since it removes some of the basic requirements, such as the absence of prior convictions of related crimes (criminal record), absence of a previous suspended criminal procedure regarding a crime of similar nature, the absence of a high degree of intent (*mens rea*), and the fact that the suspension of criminal procedures can only be done regarding crimes with a maximum imprisonment sanction of 5 years. All these requirements are replaced by a single one: having disclosed information on a corruption case.

Portuguese Criminal Code, approved by Law 48/95, March 15

Within the Portuguese Criminal Code there is also an article regarding whistleblowers: article 374-B/1 institutes a rewarding mechanism for whistleblowers, allowing for the suspension of the sentence of defendant found guilty if one of the corrupt agents reported the crime within 30 days of its occurrence, and before a criminal proceeding was initiated regarding that crime.

The mechanism of suspension of sentence allows whistleblowers that are also corrupt agents to disclose information on the crimes and be rewarded with a probation period and a suspended sentence. This kind of mechanism does not particularly relate to the protection of whistleblowers, but rather to the promotion of

¹² Available at: <http://www.dgaa.pt/pdf/pessoal/Estatuto%20Disciplinar.pdf>

information disclosures. However, it has also been criticized, particularly by GRECO in its second evaluation report, due to the fact that article 374/B-1, a) allows for criminal agents to easily achieve impunity while providing one of the corrupt sides with an easy mechanism to frame the opposite side, meaning that this part of the corruption pact benefits from a considerable negotiating advantage over the other part, being able to easily coax the other briber through threats of reporting.

Also within the same article (374-B/2, a)) the law allows for a reduction of the criminal sanction if the suspected agent concretely cooperates in the gathering of evidence for the identification and capture of the other criminal agents.

Portuguese Code of Labour, approved by Law 7/2009, February 12

The Portuguese law defends employees from unfair action on behalf of their employers, particularly if these employees are exercising their rights, in particular the right (and civic duty) to report a crime. Article 129 of the Code of Labour states that employers are neither allowed to prevent employees from exercising their rights nor to dismiss, sanction or treat them unfairly due to the exercise of such rights.

In case of dismissal, an employee may bring an action to Court against her/his employer. If the Court considers the sanction to be out of scope, i.e. beyond the restricted cases provided by Law constituting grounds for fair dismissal, the employee may make full use of the provisions provided under the Code, such as: compensation for moral and patrimonial damages, reinstatement of his/her position, compensation in case of refusal (by the employee) to be reinstated.

One of the major issues in the private sector is that the dismissal of an employee can only be considered illegal by a Court, meaning that the workers themselves must incur in the costs and the trouble of bringing an action before the Court (hence the usefulness of legal presumptions, such as the one present in Law 19/2001, of April 21 – see above).

However, the recent changes to the Labour Code do not support these compensation mechanisms. Thanks to the amendments introduced in 2012, justified as necessary to promote economic recovery, employers can now (legally) dismiss their employees, including those with a temporary contract by simply extinguishing their job position. The current legal framework makes it virtually impossible for an employee to prove that the extinction of his/her job position was a consequence of whistleblowing.

The penalties applicable to the employer are not as heavy as they are in the case of the Public Administration (see above Law 19/2008): if found guilty of having illegally sanctioned an employee in breach of article 129, employers will be fined anywhere from EUR 2,000 to EUR 60,000 (number 2 of article 129, and article 554).

Law 59/2008, September 11, Law regulating public officials and civil servants contracts

Public officials have their working contract regulated by a specific law – the Law 59/2008, September 11 - but the defense mechanisms of employees against unfair treatment are analogous to those present in the Code of Labour (see above).

Dismissals will be considered illegal if the reason that supports them does not fit in one of the cases provided by law, or if it is based on political, religious, ideological or ethnical grounds.

Article 275 of this law states that any dismissal considered illegal will cause the employing institution or body to compensate the employee for moral and patrimonial damages, plus the amount of unpaid wages (article 276), followed by a reintegration of the employee in its former job position. The employee may freely choose if he wishes to be reinstated by his employer or if he chooses to receive an additional monetary compensation (article 277).

It should be mentioned that Annex II to this law also states in its article 12 that within the time limit of one year after an employee has brought an action, or lodge a complaint regarding his service or institution, any dismissal or disciplinary sanction applied to that same employee will be considered (presumed) as lacking a substantiated reason.

Protection of Journalistic Sources

The Constitution of the Portuguese Republic defends the right of journalists to professional secrecy. Paragraph 2 of article 38 of the Constitution states that journalists have the right to “access sources of information and to the protection of independence and professional secrecy...”.

Despite its nature as a constitutional right, the right to professional secrecy (and secrecy of sources) is occasionally compromised by the Courts. Some past cases reveal that judicial courts have decided to force journalists to reveal their sources¹³, the refusal of journalists to comply with a Court order may result in a criminal procedure, i.e. refusal to depose as a witness, which can lead to a sanction ranging from six months to three years imprisonment, or a minimum 60 days fine.

4. Institutional Practices and Experience of Whistleblowers

Institutional Practices

The competent authorities to receive and treat reports of criminal offences are police authorities (GNR, PJ, PSP, ASAE) and judiciary authorities (i.e. the Public Prosecutor's Office), the latter being the only authority competent to initiate investigations and judicial criminal proceedings. In theory, however, information reports regarding the commitment of crimes can be communicated to any public body, this public body in turn will have the duty to report any information that it obtains which may indicate the commitment of crimes to the competent authorities.

Ordinarily, whistleblowers tend to use channels that are more commonly associated with police or supervision authorities, such as police bodies (PSP, GNR, PJ or the Public Prosecutor's Office) and public inspection services (e.g. General-Inspectorates, General-Directorates, the Supreme Court of Auditors), but only after an internal channel has been used and its result was unsuccessful.

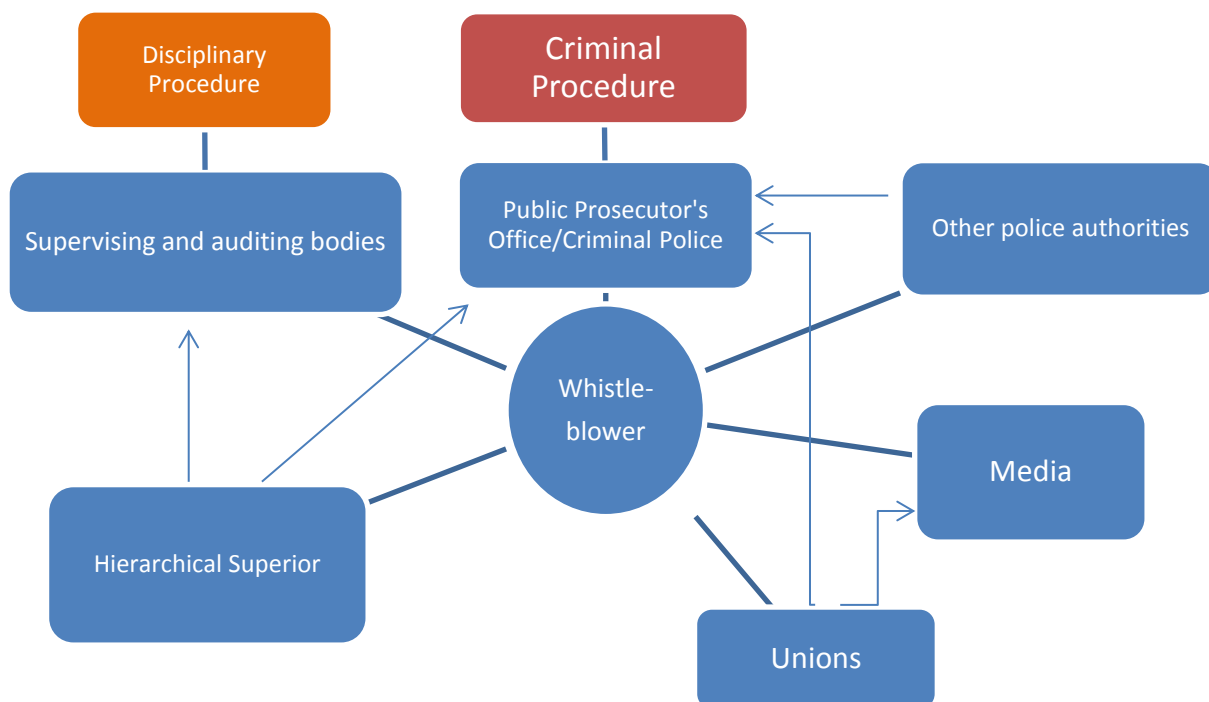
This statement is supported by data¹⁴ from a 2008 survey regarding corruption in which 30% of respondents stated that they would first disclose their information to the police, 20% to the judiciary/judicial authorities, and 20% to their hierarchical superiors. Although only a small percentage of respondents stating that they would not report it or report it to other persons/organizations (such as the media), the experience of interviewed stakeholders and whistleblowers seems to indicate that whistleblowers tend to firstly seek counsel with trusted people, such as close relatives or their lawyer, particularly when they fear the possible consequences¹⁵.

The ordinary course of whistleblowing of suspected crimes to public authorities may be described as follows:

¹³ Sindicato dos Jornalistas, *O sigilo jornalístico é um dever, não é um privilégio de classe*, Communication from the Union of Journalists, 06/01/2004, available at: <http://www.jornalistas.eu/?n=1694>.

¹⁴ De Sousa, Luís and Triães, J. (2008), *A corrupção e os portugueses. Atitudes, práticas, valores*, Lisbon, RCP Edições, question 28.

¹⁵ Interview with Jorge Mata, union lawyer, 26 September 2012.



Even though any citizen may, at any time, report crime-related information to any of the above mentioned bodies, the only dedicated and widespread whistleblowing mechanism for corruption crimes is the Central Department for Prosecution and Investigation's whistleblowing website, available at: <https://simp.pgr.pt/dciap/denuncias/>.

This website initiated its activities with quite positive results, having received almost one thousand and seven hundred information reports from its beginning (November 2010) until the end 2011. According to that from July 2011, up to that date 6 of these information disclosures had resulted in the initiation of formal criminal-proceedings and 83 of them had initiated preliminary investigations¹⁶. It should also be noted that, at the date of research, the Public Prosecutor's Office's whistleblowing website was the first result when searching for "denunciar/denúncia corrupção" ("whistleblowing/report corruption") in the Portuguese Google engine (www.google.pt).

The contents of the website aim specifically at information reporting, providing basic information about the nature of corruption and possible indicators of this crime. One of the submenus of the portal also provides information about the rights of witnesses and whistleblowers, but it merely replicates what is already written in the Law (article 4 of Law 10/2008), and offers no further explanations on how the whistleblowing protection mechanisms may be executed in practice. The website allows for whistleblowers to report without revealing their identity.

Each information disclosure will start a separate proceeding, and will be attributed a specific number. This allows whistleblowers to consult the status of their complaint/information disclosure. This status is updated according to the progress of the criminal proceeding that it may have started.

Besides this website, citizens may also use the Criminal Police's (Judiciary Police) criminal complaint website to report corruption related crimes¹⁷. The Criminal Police's complaint website, however, requires users to validate their identity online through their citizen card (using the credentials obtain through a card reader). Furthermore,

¹⁶ Paula Torres de Carvalho (2011), "Mais de mil denúncias de corrupção na PGR em oito meses", in *Público Online* July 16, 2011.

¹⁷ Available at <https://www.policiajudiciaria.pt/PortalWeb/page/%7B5BF8C28DE-D200-4BCC-9422-F495EE8EE82A%7D> [last accessed: 25 September 2012].

this website does not provide any information regarding the protection of whistleblowers (or witnesses for that matter).

The Ministry of Home Affairs also makes available a criminal complaints' website, available at: <https://queixaselectronicas.mai.gov.pt/>. The Ministry provides two versions of the same site: an easy access version for people with special needs, and a base version of the website. The website, however, is made only to receive complaints regarding a minor role of crimes that are not in the reserved competence of the Criminal Police, such as theft, robbery, domestic abuse, etc. It does not allow users to report crimes that are not provided in that role, and does not offer citizens information on how they should report other crimes to the competent authorities. Like the Criminal Police's website, the Ministry's website also requires citizens to register their identification, although offering more ways to do so: through digital signature of the citizen card, through their judicial representative (lawyer),

The Ombudsman's Office also provides citizens with a complaint system. Since the Ombudsman has no competences in the investigation of crimes, the complaint system also does not provide citizens with the capacity to complain on this matter. However, it should be noted that the Ombudsman's complaint system allows citizens to expressly request anonymity, and also mentions that it is a practice of the Ombudsman never to reveal (whenever possible) the complaining citizen's identity, even when anonymity is not requested. Other bodies and their mechanisms also have an important role in the detection of corruption, such as the complaints received by the General Inspectorates.

Experience of Whistleblowers

The experience of interviewed whistleblowers reveals that they tend to go through an extensive number of difficulties resulting from an inadequate legal framework and institutional mindset towards this kind of procedural actors. To ensure a broad and comprehensive overview of potential obstacles to whistleblowing, a group of whistleblowers with different social and professional backgrounds (lawyers, politicians and administrative employees) were interviewed.

From the statements of whistleblowers and other interviewed stakeholders we may conclude that:

1. The social or professional status of whistleblowers highly influences the consequences of their actions: a politician with high visibility may deflect attacks on his credibility, and a lawyer may easily cope with the costs of judicial representation;
2. There tends to be a large difference between the judicial representation of whistleblowers (usually represented by a single lawyer, often working pro-bono) and the targeted corrupt agents (usually represented by a law firm, or several lawyers);
3. Consequences may easily come from situations where there is a broad discretionary power from third parties: for instance, employees with a temporary contract/bond (politicians, public managers, etc.) will not see their contracts renewed. In certain cases, however, this kind of situations can be mitigated due to the duty of substantiation of administrative decisions;
4. On more extreme cases, whistleblowers feel that their family may also be affected by their actions, even if not directly. For instance, a whistleblower whose child is refused admission in a public school.
5. Institutional practice seems to ignore whistleblowers' safety and wellbeing: in most cases, interviewees revealed to have been at some time threatened¹⁸, suffered housebreaking¹⁹, lost their jobs²⁰. However, in none of these cases neither did the judiciary authorities or the police link these consequences with the procedure, nor was ever an attempt to actively protect whistleblowers on this matter.

¹⁸ Phone interview with whistleblower José Dias Pacheco (09.08.2012).

¹⁹ Interview with whistleblowers Maria Teresa Goulão (02.08.2012) and Ricardo Sá Fernandes (31.07.2012).

²⁰ Interview with whistleblower Maria Teresa Goulão (02.08.2012).

6. Whistleblowers with an elevated status within their organizations usually resort to internal channels in order to prevent/impede an illegal situation (e.g. sending an urban planning project for legal review, or ordering an inspection on certain issues), and only when these channels seem to become ineffective (due to external pressure or due to collusion) do whistleblowers resort to other channels (judiciary authorities, media).
7. Whistleblowers with a lower hierarchical status who are reporting against their hierarchical superiors tend to use more secure channels for counsel and advice before proceeding, such as Unions, Lawyers or close relatives. However, it has been mentioned that the predominant feeling of whistleblowers when searching for counsel is fear: fear of consequences and fear of retaliation. Individual employees tend to avoid pursuing themselves such judicial causes, and will often seek help on professional associations or unions.
8. In addition, it should also be mentioned that a high percentage of information disclosures received by unions and professional associations is made anonymously. This is due to a common distrust in the members of such associations, and due to fear of leaks of information (which could eventually lead to the identification of the whistleblower being discovered by the suspects).

Private Sector practices

Due to the lack of specific legislation, whistleblowing is not a common practice in the private sector. The only positive developments worth mentioning have been led by multinational companies that have become increasingly aware of the risks and costs of being caught and prosecuted due to their employees' misconduct. Larger companies, such as Siemens, feature comprehensive compliance systems, which include whistleblowing hotlines, annual corporate governance reports, etc.

Due to this increased awareness of corruption in the private sector, there is an increasingly market for anti-corruption and whistleblowing solutions. Having this in mind, certain auditing and consultancy companies, have started to develop solutions to aid other companies avoiding normative risks, such as criminal liability.

PricewaterhouseCoopers is one of such companies, and it has recently started to develop a whistleblowing platform to collect information concerning employees' criminal activity (with particular focus on fraud and money laundering) on behalf of a client company's administration. The structure of such platforms, however, is still very primitive, particularly regarding the independence of the bodies in charge of receiving information, the guarantees of anonymity of whistleblowers, and the creation of alternative channels (such as private sector ombudsmen) or even cooperation with judiciary authorities.

6. Perceptions and political will

Culture and perceptions

Due to historical and cultural reasons, whistleblowing is still an uncommon practice in Portugal. Similar to other countries with an authoritarian past, reporting is often mistaken with “snitching”, an activity which is historically connoted with the repressive dimension of dictatorships. The Estado Novo regime which ended in 1974 left such negative perception regarding the figure of the whistleblower, often regarded by their peers as a «snitcher» (in Portuguese: «chibo» or «bufo»).

This negative perception has been mitigated over time, and currently there is a mixed perception regarding whistleblowing. Interviewed whistleblowers refer that there seems to be as many people who consider them as heroes as those who try to discredit them. The idea of the whistleblower as a person who was brave enough to fulfill her/his civic duty despite the risks and negative consequences that may suffer from his/her decision is still far from the standard mindset of citizens. However, in our the current context of economic crisis, any initiative (including whistleblowing) leading to the prosecution of corrupt agents is likely to be viewed positively by public opinion.

An opinion survey conducted in 2006 (De Sousa and Triães, 2008) regarding the perceptions and attitudes of citizens towards corruption revealed that the major reasons for refusing to report corruption are based on the fear of retaliation and the inconsequence of reporting, thus denoting both the inadequacy of whistleblowing mechanisms and an overall negative perception about the efficiency of justice.

The common practice of filing defamation charges against whistleblowers, regardless of the validity of their information disclosure, is probably the major legal constrain on this civic activity. The crime of defamation (article 180 of the Portuguese Penal Code) and the interpretation given by the Courts to that effect play a major role in limiting the practice of whistleblowing, due to the large number of citizens (mainly journalists) convicted for this crime. The persecution of citizens anonymously reporting corruption has even reached the internet, a common refuge for anonymous whistleblowers (recently, and for the first time, an anonymous online blog reporting situations of corruption was convicted of defamation and ordered to be removed²¹). This prosecutorial environment is not only curtailing citizens’ duty to report corruption it is also preventing them from taking an active role in the judicial system. Instead of demanding citizens to prove the veracity of their allegations, judicial authorities should be educating citizens on what is corruption and how should it be reported, to avoid misinterpretations of facts and wrongful accusations. Corruption is a crime hard to prove due to its secret nature, hence we should not expect more from citizens than we do from judicial authorities. The fact that citizens come forward to help justice to do its job should be valued and cherished.

The issue of the crime of defamation is closely related with the issue of protection of whistleblowers, and the existence of such a large number of anonymous denounces that often provide less clear information than an identified disclosure would offer.

Politics

Whistleblowing has not been a priority in the political agenda. The approval in 2008 of the principle of whistleblowers’ protection against unfair treatment was a mere window-dressing operation in reaction to GRECO’s second evaluation report. Article 4 of Law 19/2008 referring to the protection of whistleblowers was adopted following a proposal of the Socialist Party (Bill 341/X²²). No other party presented a similar proposal or solution in this domain, even though recommendation vii of GRECO’s Second Evaluation Report specifically

²¹ http://www.tsf.pt/paginainicial/vida/interior.aspx?content_id=963013

²² Available at the Portuguese Parliament’s website: <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=33369> [accessed September 1 2012]

mentioned it) revealing a complete absence of sensibility of the political sphere (Government, Parliament and political parties) towards the issue of whistleblowing and its protection.

On December 2009, the parliament set up a special committee to evaluate the portuguese legal anticorruption framework (*Comissão Eventual para o Acompanhamento Político do Fenómeno da Corrupção e para a Análise Integrada de Soluções com Vista ao seu Combate*). The issue of whistleblowing was only marginally addressed during the various sessions and audiences with practitioners and experts and it was never object of a legislative proposal. The 2010 transparency package, which saw the approval of various anti-corruption laws did not include a stand-alone regime for whistleblowers' protection.

Media attention on this issue has also been quite low. The issue of whistleblowers's protection is ignored in most corruption news. One of the few exceptions to this was a recent article about corruption by a mainstream newspaper (*Público*²³) that covered the issue in 2010. The article was mostly based on the experience of whistleblower José Dias Pacheco, one of the people interviewed for this report.

TIAC's (TI's national contact point) advocacy towards an effective protection of whistleblowers has also gained some media attention²⁴.

7. Strengths, weaknesses and recommendations

Below is a summary of the main strengths and weaknesses of the Portuguese case, based on our findings.

Strengths:

- The mandatory communication by any Public Official and institution from the Public Administration, to the competent authorities (usually the Public Prosecutor's Office) of any crimes which are reported or which they become aware of. This transforms the entire public administration in a massive whistleblowing hub, even if at the moment internal reporting channels are not secure or effective.
- The media attention given to the Public Prosecutor's Office whistleblowing website, leading to positive results in its initial period (despite the absence of communication strategy).
- The legal provision of the right of whistleblowers to anonymity, even if only until formal charges are brought against the suspect.
- The protection of whistleblowers that report information in compliance with Law 25/2008 through the provision of criminal sanctions to any person who reveals the identity of whistleblowers.

Weaknesses:

- Lack of a dedicated whistleblower protection framework.
- The negative social perception of whistleblowers in particular and the judicial system in general, which explains citizens' reluctance to report corruption.
- The lack of a dedicated body to receive information disclosures and monitor the situation of whistleblowers.
- The extreme vulnerability of whistleblowers to judicial remedies regarding moral damages and the protection of public image (e.g. the crime of defamation).
- Lack of any protection for whistleblowers in the private sector, and other public officials/civil servants not covered by article 4 of the Law 19/2008, April 21.

²³ Lurdes Ferreira (2010), "Ser denunciante, ainda por cima assumido, é 'experiência dolorosa'", in *Público*, December 9 2010, p. 3.

²⁴ Diogo Vaz Pinto (2012), "Governo pressionado para dar mais protecção a 'whistleblowers'", in *I*, May 19 2012, p. 6.

Main recommendations for the Portuguese case

The creation of a dedicated and comprehensive legal and institutional framework for the protection of whistleblowers. Portugal must adopt a dedicated legal instrument that can enforce a comprehensive legal and institutional framework protecting whistleblowers and any other informants (including experts or investigation consultants) from unfair treatment. This framework should have a detailed regulation and should be followed by a set of efficient practices by the involved authorities, in order to avoid giving whistleblowers the illusion of being protected, i.e. providing them and their relatives only with a cardboard shield against all sorts of unjustified attacks and reprisals. This framework should include:

- The **protection of whistleblowers from all sectors (public sector, including the administrative and the judiciary, the State's private sector, and also the private sector), which report in good faith**; the good faith of whistleblowers should be presumed, and the burden of proof regarding the lack of such good faith **should always lie on the persons or bodies reported**. This does not mean that citizens, bodies and institutions should not be protected against unfounded accusations done in bad faith, but this protection should only be conferred in the case of evidence supporting the lack of good faith.
- Detailed and comprehensive description (although not restrictive) of which kinds of unfair treatment is the whistleblower protected from (from dismissals, disciplinary action or demotion to unwanted transfers or excessive work assignment).
- **Compensation and remedies for moral and patrimonial damages** (past, present or future) which the whistleblower suffered, or for the costs incurred (legal representation, mediation, etc.) which were directly connected with the information disclosure (including any consequences or unfair treatment).
- The existence of safe **external channels as an alternative to internal channels**, since in many cases whistleblowers may report situations involving the persons which would also constitute their internal channel (e.g., their superior officer).
- The protection of **information reports made to external bodies or institutions**, including the **media and civil society**.
- Provision of criminal sanctions for any person who, intentionally or with grave negligence, identifies the identity of a whistleblower in the exercise of his right to anonymity.

Protection against defamation. Whistleblowers must be protected from being convicted for defamation when reporting in good faith. This measure may be implemented through the amendment of the law (Portuguese Criminal Code) in order to create an exception to this crime in the case of whistleblowing/information disclosures in good faith (and providing limits for civil remedies in this case) or even through the abolishment of this type of crime (in this case civil liability would be sufficient).

The creation of a body or **authority competent for the reception and treatment of information reports** (whistleblowing) regarding criminal offences (particularly corruption related crimes), and for the monitoring of whistleblower and witness protection mechanisms; along with the **periodic and detailed monitoring** of the mechanisms of protection of whistleblowers, witnesses and experts.

The provision of adequate rewarding mechanisms and incentives for whistleblowers besides those already present within criminal laws (rewarding through reduction or suspension of criminal sanction), for instance, through the provision of a *Qui Tam* clause, i.e. providing non-governmental individuals and companies to file an action, independently of the Public Prosecutor's Office and entitling the initiators of the criminal action to receive a percentage of the final recovered damages (in a similar way as it is already provided by USA's False Claims Act²⁵).

²⁵ 31 U.S.C. §§ 3729–3733, also called the "Lincoln Law"

8. References and Sources

Sources

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Alexander Dyck, Adair Morse, and Luigi Zingales (2010), “Who Blows the Whistle on Corporate Fraud?”, in *Journal of Finance*, December 2010

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Transparency International (2009), *Alternative to Silence - whistleblower protection in 10 European countries*, p.7, available online at: http://www.transparency.org/whatwedo/pub/alternative_to_silence_whistleblower_protection_in_10_european_countries.

Interviewed stakeholders

- Jorge Mata, Union Lawyer
- José Dias Pacheco, Legal adviser for Águas de Coimbra E.E.M., whistleblower
- Marçal Mendes, President of the Union of Employment Officials, whistleblower
- Maria Teresa Goulão, jurist, Specialist in environmental planning, whistleblower
- Paulo Morais, Vice-President of Transparência e Integridade, Associação Cívica, whistleblower
- Paulo Sousa Mendes, Corporate Compliance Officer at Pricewaterhouse Coopers
- Ricardo Sá Fernandes, Lawyer, whistleblower

Complete list of legal instruments (by year)

1. Constitution of the Portuguese Republic (1976)
2. Code of Criminal Procedure Law, approved by Act 78/87, February 17
3. Law 36/94, September 29
4. Code of Criminal Law, approved by 48/95, March 15
5. Law 93/99, July 14
6. Law 19/2008, April 21
7. Law 25/2008, June 5
8. Law 59/2008, September 11
9. Act 190/2008, September 22
10. Code of Labor Law, approved by Law 7/2009, February 12
11. “Lincoln Law” - False Claims Act (31 U.S.C. §§ 3729–3733)

Complete title: Law 19/2008, April 21

	Yes	No	Partial	Notes
Broad definition of whistleblowing			X	The concept of <i>whistleblowing</i> is comprehensive and seems to indicate any person who discloses information on criminal activity.
Broad definition of whistleblower		X		The concept of <i>whistleblower</i> is not comprehensive enough, as it merely includes employees from the Public Administration and from the State-owned Private Sector; thus excluding: employees from the Judiciary Administration, private sector employees.
Broad definition of retribution protection			X	Abstractly, one might say that there is a broad definition of retribution protection, since article 4 mentions that whistleblowers are protected against “any unfair treatment”. However, the lack of specific regulations on this issue may lead to stricter interpretations, particularly when considering that the remaining paragraphs of article four seem to focus only on disciplinary sanctions.
Internal reporting mechanism		X		
External reporting mechanism		X		
Whistleblower participation		X		
Rewards system		X		
Protection of confidentiality		X		
Anonymous reports accepted		X		
No sanctions for misguided reporting		X		
Whistleblower complaints authority		X		
Genuine day in court		X		
Full range of remedies		X		
Penalties for retaliation		X		
Involvement of multiple actors		X		

Complete title: Law 25/2008, June 05

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		Whistleblowing is defined as the information disclosure in the terms provided by the reporting mechanism, which covers only the communication to the authorities of suspicious financial criminality, any protection therein refers to this kind of information disclosure.
Broad definition of whistleblower		X		Only a limited number of organizations/companies and positions are included in the reporting mechanism provided by Law 25/2008, these are mostly financial/credit/banking/accounting organizations.
Broad definition of retribution protection		X		The law states that while reporting information in compliance with the duties established in Law 25/2008, the abovementioned persons, institutions or bodies cannot be held liable for breach of secrecy, legally established or otherwise.
Internal reporting mechanism		X		
External reporting mechanism	X			Law 25/2008 establishes an external reporting mechanism to the Public Prosecutor's Office and the Police's Unit for Financial Information, regarding any suspicious activities in the field of financial criminality
Whistleblower participation		X		
Rewards system		X		
Protection of confidentiality			X	The Law establishes a criminal sanction (up to three year imprisonment or fine) for any person who, even without a direct intention, reveals the identity of the whistleblower.
Anonymous reports accepted		X		
No sanctions for misguided reporting		X		
Whistleblower complaints authority		X		
Genuine day in court		X		
Full range of remedies		X		
Penalties for retaliation		X		
Involvement of multiple actors		X		

Complete title: Law 93/99, July 14 and Law-Decree (Act) 190/2003, September 22

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		
Broad definition of whistleblower		X		
Broad definition of retribution protection		X		
Internal reporting mechanism		X		
External reporting mechanism		X		
Whistleblower participation		X		
Rewards system		X		
Protection of confidentiality	X			
Anonymous reports accepted		X		
No sanctions for misguided reporting		X		
Whistleblower complaints authority		X		
Genuine day in court		X		
Full range of remedies		X		
Penalties for retaliation		X		
Involvement of multiple actors		X		

Complete title: the Portuguese Criminal Procedure Code, approved by Law-Decree (Act) 78/87, February 17

	Yes	No	Partial	Notes
Broad definition of whistleblowing		X		
Broad definition of whistleblower		X		
Broad definition of retribution protection		X		
Internal reporting mechanism		X		
External reporting mechanism		X		
Whistleblower participation		X		
Rewards system		X		
Protection of confidentiality		X		
Anonymous reports accepted	X			
No sanctions for misguided reporting		X		
Whistleblower complaints authority		X		
Genuine day in court		X		
Full range of remedies		X		
Penalties for retaliation		X		
Involvement of multiple actors		X		