THE WORKER AS A WHISTLEBLOWER

THE LEGAL REGIMES IN THE UNITED KINGDOM, FRANCE AND PORTUGAL

Master Thesis carried out in the context of the

LL.M Law in a European and Global Context

under the supervision of Justice of the Portuguese Supreme Court Júlio Gomes

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“Throughout history, it has been the inaction of those who could have acted, the indifference of those who should have known better, the silence of the voice of justice when it mattered the most, that has made it possible for evil to triumph.”

Emperor Haile Salassie I, “Speech on Inaction”.

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LIST OF ABBREVIATIONS

- ECHR: European Court of Human Rights
- EU: European Union
- MS: Member States
- PIDA: Public Interest Disclosure Act
- UK: United Kingdom

ABSTRACT

It is a fact that the European Union legal framework does not expressly protect workers who formalize a report regarding a misconduct that occurred at their workplace. Even though some advances in the past years have already been verified, there is still a legislative gap that needs to be fulfilled, in order to guarantee a more effective and consistent scope of protection, and the Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, of 23.04.2018, as well as the European Parliament legislative resolution of 16.04.2019 on the Proposal for a Directive already mentioned, in a long term, will combat precisely that. In the light of some aspects regulated in both legal documents, this paper aims to analyse the discrepancies between Member States, by comparing the systems in the United Kingdom, France and Portugal.

KEY WORDS: Whistleblower, European Union, United Kingdom, France, Portugal, scope of protection, internal/external reporting, confidentiality, public interest.

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CITATIONS

Authors will be quoted by their surnames, followed by their first names, and the first citation, regardless of whether it is a book or an article, will be completely made in the footnote. Subsequent references to a book or article already mentioned will be abbreviated but will contain the necessary elements for its identification.

Exceptionally, the Spanish author will be referenced with his last two last names first, followed by the rest of the name.

Any translation made in this paper of texts written in a foreign language will be of the author's entire responsibility and will be properly identified.

Finally, the exposed links were last consulted on 20/06/2019 at 6:00 p.m. and were all functional.

INTRODUCTION

This paper aims to analyse how the worker as a whistleblower is protected across the EU.

More specifically, by comparing the systems in the UK[1], France and Portugal, and based on specific and controversial issues, it gives the opportunity to understand and criticize each regime's strengths and weaknesses, and therefore, to stress out whether the different national systems are harmonized with each other – for example, through common set of principles – or if they are rather fragmented and disassociated.

Additionally, this comparison is based on the Proposal for a Directive of 23.04.2018 and the legislative resolution of 16.04.2019. It is, in fact, considered to be a significant step towards enforcing the level of protection granted to whistleblowers across the EU, and will hopefully guarantee the so desired level of protection.

In this line of thinking, the following question needs to be asked: Why were these three national systems specifically chosen? Well, it is important to state that, in the EU, MS can be divided into three different categories of systems: an advanced, a partial, and a weaker system. In concrete terms, the UK is considered to be one of the most advanced systems, not only in Europe, but in the world. Differently, France is inserted in the partial system, while Portugal confers a less sophisticated scope of protection.

Regarding the structure, this paper is divided in five parts. First, an exemplificative but complete analysis of the legal instruments, both International and European, is conducted, allowing to understand in which way is whistleblowing regulated and the level of protection that is granted. A special emphasis is given to the Proposal for a Directive and the legislative resolution, as they are the most recent legal instruments aiming to protect the whistleblower by using consistent and complete mechanisms. The second part consists in a comparison between the selected juridical systems, as well as its scope of protection, which justifies why each country belongs to a different category. Then, the third part is divided in three pertinent topics concerning the Reporting Mechanism: Internal v. External whistleblowing; the 'Confidentiality' requirement and the 'Public Interest' requirement v. the 'Good Faith' requirement. The fourth part aims to reflect about the material scope of the legislative resolution, and briefly analyses its important advances and possible interferences with national

[1] NOTE: this paper was written and submitted before any final decision regarding Brexit was taken.

law. The last part is a conclusion of the main findings of this paper associated with the author's opinion.

Finally, for the purposes of this paper, the following definition of what is a whistleblower is the one that will be adopted:

> "*A whistleblower is any public or private sector employee or worker who discloses information about (…) wrongdoing and who is at risk of retribution. This includes individuals who are outside the traditional employee-employer relationship, such as consultants, contractors, trainees or interns, volunteers, student workers, temporary workers, and former employees.*"[2]

[2] TRANSPARENCY INTERNATIONAL, "Whistleblowing in Europe- Legal Protections for Whistleblowers in the EU", 2013, p. 6, footnote 3.

LEGAL INSTRUMENTS

Whistleblowing is a topic that has been addressed with the enactment of legislation, proposals and articles that have been contributing to the development of the protection of the whistleblower[3], not only at the European Union level, but also at the International level. The following references are the result of a thoughtful, but not exhaustive, analysis of the legislative advances that have been made regarding the topic.

INTERNATIONAL INSTRUMENTS

TERMINATION OF EMPLOYMENT CONVENTION, 1982 (NO. 158)

Regarding the protection of the whistleblower, this Convention establishes, in its Article 5, that it is not a justifiable reason to terminate the contract of employment in the case of: "(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities".

THE CRIMINAL LAW CONVENTION ON CORRUPTION[4]

This law is an interesting example due to the fact that, in Article 22, it is stated that "those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities"[5] shall be granted with an "effective and appropriate"[6] level of protection. Logically, the broadness of the subjective scope of this provision ("those") makes one believe that the worker as a whistleblower can also be included.

[3] "Whistleblowers clearly have a significant role in safeguarding the application of transparency and accountability principles in public and private sectors. The United Nations, Council of Europe, European Union, European Court of Human Rights and other international and domestic instruments have established a wide-ranging legal framework to shield whistleblowers." – KUSARI, F., "Whistleblower Rights In European Union Civilian Missions: EULEX Leaks", in *Developments in whistleblowing research 2015*, 2015, London: International Whistleblowing Research Network, p. 38.

[4] This Convention was opened for signature on 27.01.1999, but only entered in force on 01.07.2002.

[5] Criminal Law Convention on Corruption, Council of Europe, 1999, Article 22 a.

[6] Criminal Law Convention on Corruption, *op. cit.*, Article 22.

THE CIVIL LAW CONVENTION ON CORRUPTION

This legislative document of 1999[7], in its Article 9, grants some protection to the worker. It is stated that: "Each Party shall 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."[8]

Even though this Article does not make an express reference to the whistleblower, its scope is close enough to its definition, because it mentions the reporting of a fact by an employee suspecting corruption inside the workplace.

UNITED NATIONS CONVENTION AGAINST CORRUPTION

In the context of the threats that corruption poses to the society at a global level, this Convention of 2004, in Article 33, grants protection to reporting persons:

> "*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.*"[9]

This provision could be perfectly transposed to the situation of the worker as a whistleblower since the reporting of a misconduct within the workplace could also include corrupt activities.[10]

[7] This Convention was opened for signature on 04.11.1999, but only entered in force on 01.11.2003.
[8] Civil Law Convention on Corruption, Article 9.
[9] United Nations Office on Drugs and Crime, United Nations Convention Against Corruption, 2004, Article 33.
[10] TRANSPARENCY INTERNATIONAL, "International Principles for Whistleblower Legislation, Best Practices for Laws to protect whistleblowers and support whistleblowing in the public interest", 2013, p.4. – According to Transparency International, whistleblowing consists in the "disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organizations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect attention."

EUROPEAN UNION'S INSTRUMENTS

THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

In the same line of thinking, Article 10 of this Convention also ensures the right to freedom of expression of an employee, when blowing the whistle, without fearing retaliation. In fact, this fundamental right is intrinsically connected with his right to decide whether or not to report a misconduct.

THE CHARTER OF FUNDAMENTAL RIGHTS

It is unquestionable that the Charter of Fundamental Rights contains a variety of articles that are intrinsically related to the situation the whistleblower is involved in. One is, for example, Article 11, which regulates the freedom of expression and freedom of the media. Logically, we could frame the reporting of a misconduct that occurs at the workplace by an employee within the "freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers."[11]Also, Article 30 protects workers who are unjustifiably dismissed, which is the case when a worker is dismissed due to the formalization of a report. Additionally, if the whistleblower's reports are not taken seriously, or there is an act of retaliation, then there would be a violation of Article 31, which ensures that workers should have working conditions reflecting health, safety and dignity.[12]Not less important are the rights to respect for private life (Article 7), protection of personal data (Article 8), healthcare (Article 35), environmental protection (Article 37), consumer protection (Article 38) and the right to good administration (Article 41). It is also relevant to state that, "while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States" the Union must create "an area of freedom, security and justice"[13], and effective protection of the employee who reports a misconduct that occurs within the workplace would contribute to that.

[11] Charter of Fundamental Rights, Article 11(1).
[12] Charter of Fundamental Rights, Article 31(1).
[13] Charter of Fundamental Rights, Preamble.

COUNCIL REGULATION NO 723/2004

Interestingly, the subjective scope of this Regulation is restricted to the officials of the Communities, which means, an official who occupies a position within an institution of the EU.[14]According to Article 22a of this Regulation, if an official becomes aware of a misconduct that might affect the interests of the Community, he must report this fact to his superior.

Also, Article 22b states that the official who blew the whistle shall be protected against eventual acts of retaliation if:

> "*(a) the official honestly and reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and*
>
> *(b) the official has previously disclosed the same information to OLAF or to his own institution and has allowed OLAF or that institution the period of time set by the Office or the institution, given the complexity of the case, to take appropriate action. The official shall be duly informed of that period of time within 60 days.*"[15]

DIRECTIVE 2005/60/EC

This Directive is focused on the prevention of money laundering and terrorist financing. In its Article 27, it is stated that:

> "*Member States shall take all appropriate measures in order to protect employees of the institutions or persons covered by this Directive who report suspicions of money laundering or terrorist financing either internally or to the FIU from being exposed to threats or hostile action.*"[16]

[14] "Walden and Edwards rightly argue that whistleblowing in international governmental organizations is particularly challenging as whistleblowers "operate in a multinational environment [where] international governmental organizations are not subject to the legal regime of any one Member States in most types of dispute" (Walden & Edwards 2014)." – WALDEN, S. & Edwards, B., "Whistleblower Protection in International Governmental Organisation", *International Handbook on Whistleblowing Research* (Edward Elgar Publishing), 2014, p.42, *apud.*, KUSARI, F., "Whistleblower Rights In European Union Civilian Missions: EULEX Leaks", in *Developments in whistleblowing research 2015*, 2015, London: International Whistleblowing Research Network.
[15] Council Regulation no 723/2004, Article 22b, (a) (b).
[16] Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, 26 October 2005, Article 27.

Once again, it is not difficult to conclude that employees who report these suspicions are considered to be whistleblowers. Naturally, the risk of retaliation in this area is extremely significant and so there is a need to protect them from it.

RESOLUTION 1729

Resolution 1729[17] of the Parliamentary Assembly recognized that most EU Member States do not have proper legislation protecting whistleblowers, or do not have one at all, and so, there is a need to invest on that, more specifically towards harmonization of laws.

In fact, the Parliamentary Assembly wanted to create a "safe alternative to silence"[18/19] by incentivising MS to revise their laws, or to adopt new ones in order to fulfil common principles and rules regarding the protection of the whistleblower.

PROPOSAL FOR A REGULATION ON INSIDER DEALING AND MARKET MANIPULATION

The main goal of this Proposal is to guarantee the integrity of the financial markets across the EU. Notably, Point 3.4.5.2 of the Explanatory Memorandum is fully dedicated to describing the importance of a whistleblower in this area. In fact, the:

> "*Regulation enhances the market abuse framework in the Union introducing appropriate protection for whistleblowers reporting suspected market abuse, the possibility of financial incentives for persons who provide competent authorities with salient information that leads to a monetary sanction, and enhancements of Member States' provisions for receiving and reviewing whistleblowing notifications.*"[20]

As it happens in other areas, one of the main goals is to guarantee that the whistleblower does not suffer any act of retaliation due to the information reported.

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[17] Recommendation 1916 (2010) goes in the same line of thinking.
[18] Resolution 1729 (2010), p.1.
[19] Nevertheless, "Just having a whistleblowing policy is unlikely to be enough to get people to speak out about wrongdoing: the organisational culture and the experience of those working in it are more powerful determinants". – ASH, A., "Denial and paradox: conundrums of whistleblowing and the need for a new style of leadership in health and social care" in *Selected papers from the International Whistleblowing Research Network Conference*, Oslo, London: International Whistleblowing Research Network, 2017, p.80.
[20] Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM (2011) 651 final, 2011/0295 (COD), Point 3.4.5.2.

RECOMMENDATION CM/REC (2014)7 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE PROTECTION OF WHISTLEBLOWERS

This Recommendation is also seen as a significant advance towards the protection of whistleblowers. In fact, its main goal was to create general principles that Member States would integrate in their own jurisdictions, according to their specificities. Additionally, it should be mentioned that the Recommendation has also a very practical approach, focused on the protection of the public interest and democratic principles:

> "*Recommendation CM/Rec (2014)7 of the Committee of Ministers to member States on the protection of whistleblowers is designed to situate whistleblower protection firmly within the sphere of democratic principles and safeguarding the public interest. The purpose is to help member States design and develop a framework that protects whistleblowers in law, which is implemented in practice and which is properly tailored to national systems.*"[21]

DIRECTIVE 2016/943

This Directive, enacted on 08.06.2016 aims to protect "undisclosed know-how and business information (trade secrets) against unlawful acquisition, use and disclosure."[22]

So, its main goal is to protect the confidentiality of information that is important to a company and which places it in a more advantageous competitive position[23]. In the globalization era, the risks of "misappropriating trade secrets, such as theft, unauthorised copying, economic espionage or the breach of confidentiality requirements, whether from within or from outside of the Union"[24] are very high, and so the need to protect such secrets, which are crucial from an innovative and competitive point of view, has never been more demanding.

Nevertheless, the protection of trade secrets is not absolute and does not prevail in every situation, and so, rights such as freedom of expression should also be considered. In this line of thinking, the Directive mentions the need to protect the whistleblower. In fact: "the protection

[21] Council of Europe, Recommendation CM/Rec (2014)7 and explanatory memorandum, p.18.
[22] Directive 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 8 June 2016.
[23] *Op. ult. cit.* (paragraph 2).
[24] *Op. ult. cit.*, Preamble (paragraph 4).

of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed".[25]

COMMUNICATION ON TAX EVASION AND AVOIDANCE

On 05.07.2016 there was a Communication from the Commission to the European Parliament and the Council on "further measures to enhance transparency and the fight against tax evasion and avoidance".[26] This is an important topic which needs to be effectively addressed, since "tax evasion and avoidance deprive public budgets of billions of euros in revenues each year, distort competition between businesses and erode the fair and level-playing field for all taxpayers."[27]

In this Communication, there was a call to improve the protection of whistleblowers who report cases of fraud, corruption, tax avoidance and evasion. Considering the important role that whistleblowers play in this area, and since the information they report, in most cases, would not have been discovered otherwise, the need to protect them from acts of retaliation is urgent, and the EU's institutions have already realized it.

So, according to what was stated in this Communication:

> "*The protection of those who report or disclose information on acts and omissions that represent a serious threat or harm to the public interest does not only enhance employees' ability to impart such information but has also the potential to crucially contribute to increased detection of fraud and tax evasion, which deprives European tax authorities from legitimate tax revenue.*"[28]

RESOLUTION ON THE ROLE OF THE WHISTLEBLOWERS IN THE PROTECTION OF THE EU'S FINANCIAL INTERESTS[29]

In this Resolution, it was once again stressed how whistleblowers are important for society. Besides that, the European Parliament criticized the fact that the Commission had not yet adopted any legislative proposal regarding the protection of the whistleblowers against eventual

[25] Directive 2016/943, Preamble (paragraph 20).
[26] Communication from the Commission to the European Parliament and the Council, Communication on further measures to enhance transparency and the fight against tax evasion and avoidance, COM (2016) 451 final, 5 July 2016.
[27] COM (2016) 451 final, p.2.
[28] *Op. ult. cit.*, p.9.
[29] 2016/2055(INI)-14/02/2017.

acts of retaliation. So, there was not a minimum threshold regarding the level of protection that needed to be guaranteed at the EU level. Whistleblower protection is still an area predominantly developed at the national level, but only by some MS. As a consequence, there is a lack of harmonization regarding the rules adopted in this area.

Very interestingly, the

> "*Parliament stressed the need to establish an independent information-gathering, advisory and referral EU body, with offices in Member States which are in a position to receive reports of irregularities. It should be provided with sufficient budgetary resources, adequate competences and appropriate specialists, in order to help internal and external whistleblowers in using the right channels to disclose their information on possible irregularities affecting the financial interests of the Union, while protecting their confidentiality and offering needed support and advice.*"[30]

RESOLUTION ON 'LEGITIMATE MEASURES TO PROTECT WHISTLEBLOWERS ACTING IN THE PUBLIC INTEREST'

Even though many issues were discussed in this Resolution, some of them stood out. One was "the need for legal certainty regarding the protective provisions afforded to whistleblowers, as a continued lack of clarity and a fragmented approach deters potential whistleblowers from coming forward."[31]

There was also an incentive to change the EU's citizens' perceptions regarding the whistleblower, for example, with the use of 'awareness-raising campaigns'.

Additionally, it was defended that: "the general public interest should take precedence over the private or economic value of the information revealed, and that it should be possible to reveal information on serious threats to the public interest even when it is legally protected."[32]

[30] *Op. ult. cit*.
[31] Resolution on 'Legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies', 24.10.2017.
[32] *Op. ult. cit*.

THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT[33] AND THE EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION OF 16 APRIL 2019[34]

On 23.04.2018, a significant step towards a more effective protection of whistleblowers was taken by the European Parliament and the Council, with the creation of a Proposal for a Directive. However, this advance became even more significant with the Resolution of 16.04.2019, since it improved some provisions of the Proposal that were not very elaborated and also added new ones.

Both legal documents recognize the importance whistleblowers play in society, as they report misconducts that occurs in their workplace on behalf of the public interest.[35]

Most importantly, if whistleblowers' conditionalities are not properly addressed within the Union, this might provoke tremendous negative impacts on the enforcement of EU law, due to the fact that, as wrongdoing takes place in many sectors of the society, better protection of whistleblowers will not only encourage them to speak out more often and freely, but will also guarantee that EU legislation on these issues (such as fraud and corruption[36]) will be properly applied and prevent wrongdoing from harming the society.

Besides improving enforcement of EU law, the Proposal has also the aim of framing:

> "*a balanced set of common minimum standards providing robust protection against retaliation for whistleblowers reporting on breaches in specific policy areas where:*
>
> *i) there is a need to strengthen enforcement;*
> *ii) underreporting by whistleblowers is a key factor affecting enforcement; and*
> *iii) breaches may result in serious harm to the public interest.*"[37]

[33] Proposal for a Directive of the European Parliament and of the Council on the Protection of persons reporting on breaches of Union Law.
[34] European Parliament legislative resolution of 16 April 2019 on the Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union Law.
[35] "Whistleblower protection is increasingly recognised as important for the detection and rectification of wrongdoing in and by organisations, as well as for enforcement of citizen and worker rights" – BROWN, A.J., "Towards "Ideal" Whistleblowing Legislation? Some Lessons from Recent Australian Experience", *E-Journal of International and Comparative Labour Studies*, ADAPT University Press, Volume 2, No. 3 September - October 2013, p. 4.
[36] "(…) the proposal will contribute to strengthening the effective implementation of a range of core EU policies which have a direct impact on the completion of the single market, relating to product safety, transport safety, environmental protection, nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, competition, protection of privacy and personal data and security of network and information systems." – Proposal for a Directive, *op.cit.*, Explanatory Memorandum, p.5.
[37] Proposal for a Directive, *op. cit.*, Explanatory Memorandum, p.2 and 3.

So, considering that these common standards are only 'minimum', it means that Member States will have some leeway when applying the provisions of the Directive, by the time it is enacted. This will allow, logically, for some divergences between Member States concerning the form and methods chosen by them to apply the Directive and achieve its binding results. In fact, according to the legislative resolution of 2019, MS have the opportunity to create or preserve more favourable rights than the ones regulated in the Directive. Nevertheless, it also establishes that "Member States shall ensure that the rights and remedies provided for under this Directive may not be waived or limited by any agreement, policy, form or condition of employment, including a pre-dispute arbitration agreement."[38] Additionally, this Directive will guarantee the protection of fundamental rights, such as freedom of expression[39], the right to fair and just working conditions[40], the protection of personal data and respect for private life.

And why is it so important to protect whistleblowers?

> "*The underlying reason for providing them with protection is their position of economic vulnerability vis-à-vis the person on whom they de facto depend for work. When there is no such work-related power imbalance (for instance in the case of ordinary complainants or citizen bystanders) there is no need for protection against retaliation.*"[41]

It is also suggested that protection should be granted to a broad range of people. So, not only should workers, according to Article 45 TFEU, be protected against acts of retaliation for having reported a misconduct within their workplace, but also "natural persons, who, whilst not being 'workers' within the meaning of Article 45*(1)* TFEU, can play a key role in exposing breaches of the law and may find themselves in a position of economic vulnerability in the context of their work-related activities"[42], as well as volunteers and trainees.

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[38] European Parliament legislative resolution of 16 April 2019, *op. cit.*, Articles 24 and 25, no. 1.

[39] In the case of *Guja vs Moldova* "the ECHR set out expressly six factors to examine whether actions against whistleblowers infringe upon his or her freedom of expression and are therefore illegal in view of the Convention. These are the public interest of the disclosed information, the existence of alternative disclosure channels, the authenticity of the information disclosed, whistleblower good faith, the detriment to the employer and the severity of the sanctions imposed on whistleblowers." – CARVALHO, David, Maciej LAGA (2017) - "Whistleblowing and the Case of *Heinisch vs Germany* (ECHR, 28274/08): The Polish and Portuguese Perspectives", in *Labour Law and Social Rights in Europe – The Jurisprudence of International Courts – Selected Judgements*, Chapter 11, Gdansk University Press, p. 169.

[40] In fact, "the right of criticism of the worker limits the managerial and disciplinary power of the employer, who cannot sanction even unpleasant but legitimate statements protected by the law" – Grivet-Fetà, S. – "Pressuposti e Limiti del Diritto di Critica del Lavoratore", *Rivista Italiana di Diritto del Lavoro*, Partes II e III (2013), p. 89, (our translation).

[41] European Parliament legislative resolution of 16 April 2019, *op. cit.*, paragraph 37 (Preamble).

[42] European Parliament legislative resolution of 16 April 2019, *op. cit.*, paragraph 40 (Preamble).

Protection should also be granted not only to those who report past events but also to the ones who blow the whistle regarding future misconducts that can still be prevented.

THE THREE JURIDICAL SYSTEMS

UNITED KINGDOM

First of all, it is important to state that the UK is perceived to have one of the most developed systems in the world regarding the protection of the whistleblower.[43] For that reason, it is an inspiration for other jurisdictions characterized for being less advanced in the area. The emergence of that development in the UK took place in 1998, when a very effective law called 'The Public Interest Disclosure Act'[44/45] was enacted. In fact, "known as PIDA, the law applies to the vast majority of workers across all sectors: government, private and non-profit. It covers a range of employment categories, including employees, contractors, trainees and UK workers based abroad."[46]

Nevertheless, this Act excludes employees who work in the "security service and the police"[47], "self-employed professionals (other than in the NHS), voluntary workers (including charity trustees and charity volunteers) or the intelligence services".[48]

According to Article 43B, the concept of qualifying disclosure, for the purposes of this Act, is directed at offences that have already happened, are happening, or will only take place in the future[49], covering criminal offences, failure to comply with legal obligations, "miscarriage of justice", danger to "health", "safety" and "environment", or "that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."[50]

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[43] For example, Luxembourg, Romania, Slovenia, South Korea and Japan are also characterized for having an advanced system.

[44] "Whistleblowing law is located in the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998). It provides the right for a worker to take a case to an employment tribunal if they have been victimised at work or they have lost their job because they have "blown the whistle."- DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, "Whistleblowing. Guidance for Employers and Code of Practice", March 2015, p.3.

[45] Even though this was the most important achievement in the UK regarding the protection of the whistleblower, the fact is that, already in 1995, some committees were held, called the Nolan Committees. "This is a standing committee set up by the UK Parliament to safeguard standards in public life and first chaired by Lord Nolan. The Nolan Committee produced three reports. In its first (1995) it recommended that all civil servant departments in the UK should nominate a member of staff to hear the concerns of employees in confidence; its second and third reports recommended that local authorities should introduce codes of practice and procedures for whistleblowing."- SAHA, A., "Whistleblowing in the United Kingdom", 2008, p.2

[46] TRANSPARENCY INTERNATIONAL, "Whistleblowing in Europe (…)", *op. cit.*, p.83.

[47] SAHA, A., *op. cit.*, p.8.

[48] CHARITY COMMISSION FOR ENGLAND AND WALES, "Guidance- The Public Interest Disclosure Act", 1 May 2013.

[49] CHARITY COMMISSION FOR ENGLAND AND WALES, *op. cit.*

[50] Public Interest Disclosure Act, Article 43B.

The territorial scope of PIDA is very broad, since it also applies to situations in which an employee reports a misconduct in another country besides the UK (Article 43B (2) PIDA).

Interestingly, the origins of this law come from an "English common law principle of "no confidence in iniquity", under which employers cannot hide behind confidentiality clauses and prevent workers from speaking up about wrongdoing."[51]

Another relevant characteristic of this system is that PIDA gives preference to internal over external whistleblowing, allowing for the use of the external one only as a last resort, by applying a 'three-tiered approach'.

One of the most distinctive features of PIDA is that it is centred at protecting whistleblowers who report misconducts in the name of the public interest. This requisite is so important that it can surpass some of the established requirements, such as the three "tiered approach".[52]

Also, the reporting of the misconduct must be made in good faith. This means that the whistleblower must reasonably believe that the information that is being revealed is in fact true, leaving aside mere acts of revenge by the employer towards the employee.[53] This requirement is contained in numerous provisions of PIDA, such as Articles 43C (1), 43E, 43F and 43G, but the one that stands out is Article 43H, which states that:

> "*(1) A qualifying disclosure is made in accordance with this section if—*
> *(a) the worker makes the disclosure in good faith,*
> *(b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,*
> *(c) he does not make the disclosure for purposes of personal gain,*
> *(d) the relevant failure is of an exceptionally serious nature, and*
> *(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.*"

[51] TRANSPARENCY INTERNATIONAL, "Whistleblowing in Europe (…)", *op. cit.*, p.84.
[52] "The UK law that protects whistleblowers who disclose wrongdoing directly to the media – skipping over their supervisors and government regulators – has been successfully put to the test. The Employment Tribunal ruled in 2005 that the firing of a National Trust employee who gave a newspaper a confidential report detailing the potential public health hazards of a contaminated landfill near a beach was unfair. The employee's action, the tribunal said, met the law's standard for an exceptionally serious concern that justified a "wider disclosure". – TRANSPARENCY INTERNATIONAL, "Whistleblowing in Europe (…)", *op.cit.*, p.84.
[53] "The revelations of the fraud or wrongdoing must be made out of authentic concern. In case an individual intentionally makes false accusations with a clandestine purpose cannot be termed as whistleblowing."- SAHA, A., *op. cit.*, p.4.

Another important feature is that the burden of proof lies on the employer, which means that if the employee is dismissed, the employer must prove that the dismissal was not due to reasons related to the report.

An aspect that makes this legal system a unique one, is that it has an institution fully dedicated to offer legal advice on the matter: the Public Concern at Work.

Lastly, PIDA also provides compensation in case the whistleblower suffers retaliation by the employer[54], including not only personal injuries (such as suffering) but also damage to property (dismissal and consequent loss of salary).[55]

FRANCE

Overall, and comparing with the UK, the French system is characterized for having a partial level of protection.

First of all, it is important to have in mind that, since the French Revolution in 1789, freedom, including freedom of speech, has become one of the most important and respected rights in this country. So, in this line of thinking, "the restrictions which might be imposed on freedom of expression have to be strictly defined, as every exception to a principle of law." [56] This freedom of expression, however, has to be exercised in good faith.[57]

The emergence of whistleblowing in France was due to the fact that French companies that conducted businesses in America had to comply with "the Sarbanes Oxley's Act requirements: all companies, even foreign ones, listed in the New York stock exchange had to put in place a whistleblowing system."[58]

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[54] "The compensation should not be limited. Some workers may have a difficult time finding a new job following their disclosure. In the UK, an award of £ 278,000 was given to a 56-year-old man who successfully argued that he would not be able to find another job." – BANISAR, D., "Whistleblowing: International Standards and Developments", 2011. p.37.

[55] "The UK PIDA also allows for additional compensation for suffering. The courts have ruled that compensation can be allowed based on a three-tiered system developed in discrimination law. The top tier in cases of serious continuous and prolonged harassment, the maximum compensation can be £ 25,000 (~ US $40,000)." – BANISAR, D., *op. cit.*, p.37.

[56] DECKERT, Katrim, Morgan SWEENEY (2016), "Whistleblowing: National Report for France", in *Whistleblowing- A Comparative Study*, Springer, Volume 16, Chapter 6, Ius Comparatum- Global Studies in Comparative Law, p.125.

[57] "But in accordance with Article 35, paragraph 3 of the 29 July 1881 law, if the information revealed by the employee is true, defamation is excused and there is no ground for abuse of freedom of expression. Similarly, if the information turns out to be false, but is not disclosed in bad faith, there is no ground for abuse."- DECKERT, Katrim, Morgan SWEENEY, *op. cit.*, p.143.

[58] DECKERT, Katrim, Morgan SWEENEY, *op. cit.*, p.128.

One characteristic of the American system is that the anonymity of the whistleblower is considered to be crucial, in order to avoid acts of retaliation in the best possible way. In France, the system regarding anonymity is built on different premises, *i.e.*, it is not considered a priority. This system not only takes into consideration the need to protect the reporting person, but also considers that the interests of the accused person (usually the employer) should be safeguarded.[59] The accused person should be granted the right of being informed about the development of the accusation process, including the personal information that was accessed to formalize it, in order to be able to prepare a proper defence. This is in accordance with what is stated on Act n. º 78-17 on Data Processing, Data Files and Individual Liberties[60], more specifically on its Articles 6 and 32.

Additionally, anonymous reports can present a high value risk, as there is the possibility that they are made due to resentful motives, reason why there is a preference in France for a more transparent and open process.

In a nutshell, it is possible to conclude that freedom of expression is predominant in France, and so, it logically plays an important role in the regulation of its whistleblowing system.

PORTUGAL

Contrarily to the other two juridical regimes, the Portuguese one confers a weakest level of protection. In fact, the whistleblower is not yet considered to be a person of concern and priority in the Portuguese legislation, as well as in its society. Even though there are provisions conferring some protection, they are scarce, vague, and are not contained in one specific law.[61]

[59] "The CNIL has also stated that whistleblowing schemes should preserve the right of defence of the person reported. That is to say, this person has to be aware of the accusation and should have access to the necessary information in order to organize his defence. This person has the right to access its personal data and require any rectification and removal of any inaccurate, incomplete, equivocal or expired information." - DECKERT, Katrim, Morgan SWEENEY, *op. cit.*, p.132.

[60] Act nº78-17 of 6 January on Data Processing, Data Files and Individual Liberties (Amended by the Act of 6 August 2004 relating to the protection of individuals with regard to the processing of personal data).

[61] This lack of legislation has repercussions in the Portuguese jurisprudence and doctrine, which also does not consistently protect the whistleblower. In fact, even though some Portuguese judgments already mention the worker as a whistleblower, the protection that it is conferred is not enough, because the duties of loyalty and confidentiality the employee has towards the employer are seen as superior values, comparing to the reporting of a misconduct which might cause severe repercussions to the public. One example of a judgment is the one in which the court considered that the worker would not violate his duty of loyalty if he reported a situation that would put at stake the hygiene conditions at the workplace. Nevertheless, he would have to prove that the situation reported was true, otherwise he would be violating his duties of loyalty towards the employer. – 'Acórdão do Tribunal da Relação do Porto', 08-10-2012, (PAULA LEAL DE CARVALHO) available (in Portuguese) in www.dgsi.pt. Additionally, in 'Acórdão do Tribunal da Relação de Coimbra', 27-09-2012, (LUÍS MIGUEL FERREIRA DE AZEVEDO MENDES), also available (in Portuguese) in www.dgsi.pt, it is considered a fair cause of dismissal the

There is only one general principle protecting the whistleblower, and it is contained in Article 4 of 'Lei no. 19/2008'.[62] This provision was initially centred on the protection of the public and state functions, leaving aside the employees who worked in the private sector. Nevertheless, this Law was amended in 2015[63] in order to include, in the scope of the mentioned Article, the protection of the employees who also work in the private sector. Still, this inclusion of private functions was not enough, since this provision is too abstract, not allowing for an adequate interpretation of its scope. It mentions that workers cannot be put at a disadvantage if they decide to report a misconduct, but it does not provide a concrete measure that would effectively protect them from possible risks of retaliation.

Additionally, number two of the same provision only grants the whistleblower with one year of protection against the application of any disciplinary sanction. This is an aspect that favours the employer, who only needs to wait one year until it is possible to sanction the employee.

In fact, employees do not report misconducts so often due to fears of retaliation, and interestingly, those fears have a legal basis. For example, if an employee makes a report, he could then be accused of the crime of defamation, injury or violation of the public image of the concerned person.[64/65] Those are the types of legal protections employers use in order to retaliate against employees who decide to make a report.

Comprehensibly, due to this fear and lack of consistent legislative protection, employees in Portugal do not report so often. Whistleblowing in the Portuguese society has a negative connotation, and much still needs to be done in order to change this way of thinking.[66]

So, in general, there is a need for creating a more consistent system to protect whistleblowers in Portugal. The fact that there are provisions scattered in some laws, as it will be analysed in the following sections, is not enough, and consequently, it prevents the Portuguese system,

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case in which the employee participates to ASAE against his employer, regarding alleged failures in the area of safety and hygiene, and asks for his identity not to be revealed, causing the employer to be subject to an inspection, even though it was not demonstrated whether the facts were true or not, nor the employee had tried to correct the irregularities with the employer, which were easy to solve. The duty of loyalty prohibits the worker from making the complaint and, by doing so, to request for his identity to remain confidential (our translation).

[62] 'Lei nº19/2008, de 21 de abril, *Aprova medidas de combate à corrupção.*'

[63] 'Lei nº30/2015, de 22 de Abril', Article 5.

[64] TRANSPARENCY INTERNATIONAL, "Whistleblowing in Europe (…)", *op.cit*, p. 72.

[65] TRANSPARÊNCIA E INTEGRIDADE, "Uma Alternativa ao Silêncio: A proteção de denunciantes em Portugal Country Report: Portugal", February 2013, p. 5.

[66] This could be possibly justified due to historical reasons, as Portugal lived in a dictatorship, from 1933 to 1974. During those times, the act of reporting against someone, even if the latter had committed a crime, would be criticized by the community. – TRANSPARÊNCIA E INTEGRIDADE, *op.cit*, p. 7.

regarding the protection of the whistleblower, from becoming as strong and effective as many other systems in different jurisdictions already are.

THE SCOPE OF PROTECTION

UNITED KINGDOM

As it was mentioned in the previous section, the UK system is considered to be significantly advanced. In practical terms, this means that, under PIDA, whistleblowers benefit from effective provisions who protect them against unfair acts of retaliation by the employer. One example is the legitimacy to make a complaint to the Employment Tribunal.[67]

Nevertheless, there are other important laws in the UK that also grant some protection to the whistleblower.

In fact, it is important to mention that the Employment Rights Act of 1996 was subject to amendments, not only by PIDA itself, in 1998, but also in 2013, with the Enterprise and Regulatory Reform Act. One interesting change conducted by this Act was the insertion of the 'public interest requirement' in Section 43B (1) of the Employment Rights Act.[68]

Another important law is the Bribery Act of 2010, more specifically its paragraph (2) of Section 7 ("Failure of commercial organisations to prevent bribery"). For example, an organization that is accused of bribery will be able to defend itself by proving that it "had in place adequate procedures designed to prevent persons associated" with it "from undertaking such conduct." This anti-bribery procedure is related to a whistleblowing procedure, in which workers are given the chance to report a misconduct and, therefore, prevent wrongdoing from occurring.

Also, the Small Business, Enterprise and Employment Act 2015, in Part 11, has a chapter dedicated to whistleblowing. Its point 148 added to Section 43FA of the Employment Rights Act 1996 the duty to report on disclosures of information to prescribed persons, following Section 43F ("Disclosure to prescribed person"). With this Section, the prescribed person might have to produce an annual report regarding disclosures of information made by the workers.

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[67] "An employment tribunal can order re-instatement, re-employment or compensation for a justified complaint of unfair dismissal, or compensation for a well-founded claim of detriment. In the case of unfair dismissal for a disclosure protected under the PIDA, the damages awarded are not subject to the statutory cap that applies in standard unfair dismissal claims. For example, in July 2005, a prison officer was awarded record damages of GB £477,600 (about US$872,203) for unfair constructive dismissal as a result of making a disclosure about abuse and bullying in the prison (*Lingard v HM Prison Service 1802862104, 30 June 2005*)." – COLLINS, E., *et al*., "Rights and protections for whistleblowers", Practical Law UK Articles 2-203-2258, 2006, p.9.

[68] For a better understanding, the underlined part corresponds to the amendment made by the Enterprise and Regulatory Reform Act of 2013: In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure <u>is made in the public interest and</u> (…)".

However, and very interestingly, if the regulations so require, the prescribed person might have to omit from the report information concerning the identities of the whistleblower and the employer accused.[69]

The Children and Social Work Act 2017 has also a provision – Section 49C – that protects candidates applying for a children's social care position who have previously reported a misconduct configuring the notion of a protected disclosure. Therefore, this person cannot be put at a disadvantage regarding other candidates simply because he was a whistleblower in the past.

To conclude, even though PIDA is considered to be the 'leading' law, there are other important laws in the UK contributing for this level of protection to become even more complete and efficient.

FRANCE

In France, the year of 2013 was considered to be a remarkable one for the development of the legislation on whistleblowing, more specifically, in the areas of health, environment, economic crimes and conflict of interests.[70] More specifically, the Acts on public health and environment were enacted on 16 April 2013[71], and the Act on economic crimes and conflict of interests on 6 December 2013. In these areas, and in the fight against corruption, whistleblowers is granted protection in what concerns discrimination[72], either direct or indirect. "Outside those fields, the whistleblower only benefits from the protection inherent to the exercise of their freedom of expression."[73/74]

[69] Paragraph (2) of Section 43FA.

[70] "Three Acts of Parliament have been passed in 2013 to grant the whistleblower a protection in two fields: public health and environment in one hand and economic crimes and conflict of interest on the other hand."- DECKERT, Katrim, Morgan SWEENEY, *op. cit.*, p.133.

[71] "The law of 16 April 2013 formalizes an «alert right in public health and environment» and states that everyone «has the right to make public or disseminate in good faith» information likely to constitute a serious risk for health or for the environment."– LOCHAK, D., "Les lanceurs d'alerte et les droits de l'Homme: réflexions conclusives", 2017, p. 5 (our translation).

[72] "Any unfavourable measure taken against the employee in the fields of recruitment, internship, training, wage, reclassification, dispatch, qualification, classification, professional promotion, mutation or renewal of a contract is discriminatory."- DECKERT, Katrim, Morgan SWEENEY, *op. cit.*, p.146.

[73] DECKERT, Katrim, Morgan SWEENEY, *op. cit.*, p.146.

[74] Before any consistent evolution was verified in France, "European and French case law had been the main source of authority for defining who should be protected against retaliation after speaking out regarding conduct deemed reprehensible. Judges then referred to and relied on principles of freedom of expression recognized by the French constitution and the European Convention on Human Rights in making decisions"- PELICIER-LOEVENBRUCK, S., Charles DUMEL, "Decrypting the New Whistleblower Law in France", Littler, 2017, p.1.

After the 2013 Acts, there was another significant development. In fact, a law was enacted in 2016, and it was considered to provide a very extensive scope of protection to the worker as a whistleblower. It is called the 'Sapin II Act' (Act nº 2016-1691).[75]

To conclude this sub-section, it is possible to ascertain that the French system, before the Sapin II Act, was not so developed in comparison with the system in the UK. One reason, logically, was the fact that in the UK there is a law fully dedicated to the protection of the whistleblower, whereas in France there was not, and protection was dispersed in different laws, which was held as a deterrent factor concerning the consistency and effectiveness of the protection that was expected to be granted. Nevertheless, the Sapin II Act completely changed the level of protection for the better.

As an example, in the ambit of labour law, Article 10 of the Sapin II Act stipulates that no employee shall be penalized (e.g. dismissal) or suffer any kind of discrimination, *i.e.*, either direct or indirect, for having reported a misconduct that is in accordance with Articles 6 to 8 of the present Act. This also applies to whistleblowers who are still in a recruitment procedure or internship phase.[76] Also, according to Article 11, the whistleblower might be granted the right to be reinstated in his former job by the court.

In what concerns criminal law, the Sapin II Act, in paragraph 1 of Article 13, for example, establishes a punishment of one-year imprisonment and a €15.000,00 fine if someone prevents a whistleblower from transmitting an alert.

PORTUGAL

As it was already mentioned, the scope of protection of the whistleblower in Portugal is scattered in many laws. Besides 'Lei no. 19/2008', there are other legislations, divided in different areas of law, that should be referred to in this section.

[75] "The adoption of Law No. 2016 of 9 December 2016 on transparency, the fight against corruption and the modernization of economic life, known as "Sapin II", establishes the emergence of an alert culture in an enterprise." – LE CORRE, C., "Réflexions pratiques sur la mise en ouvre du dispositive d'alerte professionelle", *Loi Sapin II: l'arsenal répressif français et les défis de la modernité*, Revue Lamy – Droit des Affaires, nº 125, April 2017, p. 25 (our translation).

[76] This was an amendment to Article L. 1132-3-3 of the French Labour Code. Article L. 1161-1 of the French Labour Code (amended by *Loi n° 2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption*) stipulates that, in the circumstances stated above, no employee shall be penalized, and that it is for the employer to prove that the action taken against the latter was due to objective reasons not related to the report that was made.

In what concerns Criminal Law, the Portuguese Criminal Code, in the crimes of corruption, regulates that if the criminal agent reports the crime within 30 days after having committed it, and before a criminal procedure has been settled, the criminal sanction can be suspended.[77] Additionally, in the Portuguese Code of Criminal Procedure, there is an obligation of the police entities and civil servants to report crimes they become aware of in the performance of their duties.[78] Plus, any person has the choice to report crimes to the Public Ministry or to any other authority.[79] There is also a law that approves measures to combat Corruption, Economic and Financial Crimes[80], which resembles the topic that is being discussed, as it establishes, in its Article 9, a suspension mechanism of the criminal sanctions, if the persons that were involved report the crime.

Differently, within the ambit of Company Law, regarding a company regulated by the Portuguese Company Code[81], the auditor, the statutory auditor and the members of the supervisory board are obliged to report any public crime they become aware of, and which is able to put the object of the company at a serious risk, to the Public Ministry.[82]

Regarding Labour Law, Article 12 of Annex II of 'Lei no. 59/2008' – the Public Employment Contract Regime[83] – regulates that if an employee makes a complaint, and, during the period of one year, he suffers any kind of disciplinary sanction, it will be considered as presumably unjustified.

When there is no special regime, the whistleblower's situation will be regulated by the general labour laws, *i.e.*, the Portuguese Labour Code.[84] In fact, according to no. 1, a) of Article 129 of the Portuguese Labour Code[85], the employer is not allowed to prevent employees from exercising their rights, nor can he be sanctioned (e.g. dismissal), due to the exercise of those rights. Also, in case of an unjustified dismissal, an employee has the right to benefit from an indemnity or to be reintegrated in the company.

[77] 'Código Penal' (Portuguese Criminal Code), Article 374º-B.
[78] 'Código de Processo Penal' (Portuguese Code of Criminal Procedure), Article 242º.
[79] 'Código de Processo Penal', Article 244º.
[80] 'Lei n.º 36/94, de 29 de setembro'.
[81] Articles 420º/1, b), 420.º-A and 422º/3.
[82] CARRIGY, C., "Denúncia de Irregularidades no seio das empresas (Corporate Whistle Blowing)", *Cadernos do Mercado de Valores Mobiliários*, no.21, 2005.
[83] Regime do Contrato de Trabalho em Funções Públicas, Lei 59/2008, de 11 de setembro.
[84] TRANSPARÊNCIA E INTEGRIDADE, *op. cit.*, p. 17.
[85] 'Lei n.º 23/2012, de 25 de junho'.

It is important to mention that in 2012, with the alterations to the Labour Code[86], the situation of the worker as a whistleblower became even more precarious because the employer was given legitimacy to dismiss employees by extinguishing their job position[87], which is not justified by personal reasons related to them, but for market, structural or technological ones. By using this mechanism, the employer can conceal that the real motive for the dismissal was subjective, *i.e.*, related to the employees' actions.

So, considering the provisions previously mentioned, not all of them are directed at regulating the worker as a whistleblower, who will only have, as a last remedy (or maybe the only one) to make use of the general principles of Portuguese labour law in order to defend his rights.

[86] TRANSPARÊNCIA E INTEGRIDADE, *op. cit.*, p. 19.
[87] TRANSPARENCY INTERNATIONAL, "Whistleblowing in Europe (…)", *op. cit.*, p. 71, footnote 123: "Under recent changes to the Labour Code justified as necessary to promote economic recovery, employers can now legally dismiss their employees by simply extinguishing their job position, making it virtually impossible for an employee to prove that the extinction of his or her job position was a consequence of whistleblowing."

THE REPORTING MECHANISM

INTERNAL V. EXTERNAL REPORTING

The reporting mechanism, in procedural terms, can be divided in internal and external reporting.

Logically, internal reporting is a mechanism that is conducted inside the company where the misconduct took place, *i.e.*, the whistleblower makes a complaint to the employer or another person responsible to receive it, within and according to a system that was *prima facie* set up by the company.

Differently, external reporting occurs when the worker turns to an entity that is different from the company where he works. It could be the case of a public entity or an authority specialized in whistleblower cases, but also the media.[88] In this ambit, freedom of speech is predominant.

In the legislative resolution, even though both categories of reporting are regulated, there is a preference for an internal report, which is reflected on Article 7.[89] In fact, the "general principle" is that "Member States shall encourage the use of internal channels before external reporting, where the breach can be effectively addressed internally and where the reporting person considers that there is no risk of retaliation."[90]

So, this preference for internal reporting takes not only into concern the interests of the whistleblower (who is able to make the report), but also the interests of the company, that is given the chance to internally correct the misconducts that have occurred, without risking its reputation on the market. Also, and according to the case of *Heinisch v. Germany*: "In the light of this duty of loyalty and discretion, disclosure should be made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information can, as a last resort, be disclosed to the public."[91]

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[88]"The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest" – ECHR, 21 January 1999, 29183/94, *Fressoz and Roire vs. France*, paragraph 45 (ii).

[89]This preference for internal reports already existed in the Resolution 1729 (2010), on paragraph 6.2.1.

[90] Parliament legislative resolution of 16 April 2019, *op. cit.*, Article 7.

[91] European Court of Human Rights, *Heinisch v. Germany*, 21 July 2011, Fifth Section, Application no. 28274/08, paragraph 65.

In that way and considering that no retaliation measures against the employee are conducted, the interests of both parties are safeguarded, leading to a more balanced result.

In the UNITED KINGDOM, for example, PIDA requires the application of a 'three tiered approach', in what concerns the possible channels for reporting a misconduct, which means that the application of each tier will demand the whistleblower to fulfil certain requisites in order to be protected against acts of retaliation. Above all, there is, in this national system, a preference for reporting internally[92], and the view that external reporting should be seen only as a last remedy. The "tiered approach" is the following:

- "*Tier 1. Internal disclosures to employers or Ministers of the Crown;*
- *Tier 2. Regulatory disclosures to prescribed bodies (e.g. the Financial Services Authorities or Inland Revenue), and;*
- *Tier 3. Wider disclosures to the police, media, Members of Parliament and non-prescribed regulators.*"[93]

In fact, this mechanism would allow the company involved to be able to resolve internally the situation reported without damaging its reputation.[94]

To be able to report externally, one of these three preconditions have to occur:

"*So, provided they are not made for personal gain, these preconditions are that the whistleblower:*

- *reasonably believed he would be victimised if he raised the matter internally or with a prescribed regulator,*
- *reasonably believed a cover-up was likely and there was no prescribed regulator;*

or

- *had already raised the matter internally or with a prescribed regulator.*"[95]

In this ambit, especially in what concerns external reporting, public entities such as the Public Concern at Work play a crucial role, by offering legal advice to workers who wish to formalize

[92] "The UK Public Concern at Work describes internal disclosure as "'absolutely at the heart' of the [PIDA…] as it emphasizes the vital role of those who are in law accountable for the conduct or practice in question. It does this by helping that they are made aware of the concern, so they can investigate it."- BANISAR, D., *op. cit.*, p.33.
[93] G20 ANTI-CORRUPTION ACTION PLAN, "Protection of Whistleblowers- Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation", 2011, p.12.
[94] "The procedures are designed to encourage employees who notice problems to be able to disclose them and for the bodies involved to be empowered to resolve them before they grow into larger problems."- BANISAR, D., *op. cit.*, p.33.
[95] SAHA, A., *op. cit.*, p.15.

a report. As a last resort, and only in an extreme scenario, could the whistleblower report a misconduct to the media. In fact, whistleblowing reports directly made to the media are only admitted in certain cases, following the line of thinking of the *Heinisch* case.[96/97] Differently, in France and Portugal, the legality of media reporting is not certain.[98]

In FRANCE, contrarily to the UK, there used to be no preference between one way of reporting over the other, *i.e.*, between internal and external reporting. As it was mentioned earlier, the French system was centred on a fundamental right, freedom of expression, which meant that the whistleblower was free to decide how the report should be made.[99]

Freedom of expression of the individual is a right that should be prioritized, and this right is intrinsically related to the right to choose a reporting mechanism. Nevertheless, in exceptional cases, it can be restricted. In fact:

> "*Since the "Pierre" case law on 14 December 1999, the social chamber of the judiciary Supreme Court states: "except in the case of manifest abuse, employee enjoys freedom of speech inside and outside the company unless the employer set up justified and proportionate restrictions regarding the employee's position*."[100]

This is the case in which certain types of information were justifiably protected by the employer, due to its confidential scope, in order, for example, to preserve or create a competitive advantage.[101] Very importantly, if confidential information was revealed by the whistleblower,

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[96] "Whistleblower protection legislation needs to be balanced when contrasted against the duty of loyalty to their organisations and other agreements of non-disclosure. Certainly, as the European Court of Human Rights held on a recent case, the public interest in being informed about the quality of public services outweighs the interests of protecting the reputation of any organization (European Court of Human Rights, Heinisch v. Germany, application no. 28274/08, July 21st, 2011)."- G20 ANTI-CORRUPTION ACTION PLAN, *op. cit.*, p.25.

[97] In the same line of thinking, RUIZ SANTAMARÍA, José L. (2018) – "El Impacto del "Whistleblowing" en la Nueva Sociedad del Trabajo de los Estados Miembros de la UE", in *Health at Work, Ageing and Environmental Effects on Future Social Security and Labour Law Systems*, Cambridge Scholars Publishing, p. 407 – states that "in the legal conflict between the whistleblower exercise of freedom of expression and information and the duty of fidelity to the company we believe the former must prevail, because its primary purpose is to protect the health and safety of workers".

[98] THÜSING, Gregor**,** Gerrit FORST (2016), "Whistleblowing Around the World: A Comparative Analysis of Whistleblowing in 23 Countries", in *Whistleblowing- A Comparative Study*, Chapter 1, Volume 16, Springer, Ius Comparatum- Global Studies in Comparative Law, p.19.

[99] "Employees are free to speak their mind and to criticize employer's plan or action. French judges do not make any distinction when employees express their point of view inside or outside the company. In both cases they enjoy the same guarantee."; also footnote n. º 50: "In some situations, employees do enjoy immunity. For instance, according to article L.313-24 of the social work and family code a social-healthcare institution employee can denounce any abuse without risking any sanction." DECKERT, Katrim, Morgan SWEENEY, *op.cit.*, p.136.

[100] DECKERT, Katrim, Morgan SWEENEY, *op. cit.*, p.135 and 136.

[101] In fact, according to Article L. 1227-1 of the French Labour Code: "the fact that a director or an employee reveals or attempts to reveal a manufacturing secret is punished by a two-year imprisonment and a fine of 30,000 euros." (our translation).

the judge would have to conduct a balancing exercise between two different interests: "the public interest for the revelation with the company interest for secrecy."[102]

Nevertheless, it should not be forgotten that this was an exception to the general rule: freedom of expression. A good example of this general rule were the 2013 Acts. They did not establish a preferential mechanism of reporting. On the contrary, whistleblowers were free to report, whether internally or externally, as both mechanisms were not hierarchically organized.[103]

However, with the Sapin II Act, this procedure changed, and a structure very similar to the UK's system was adopted: the three 'tiered approach'. According to its Article 8, the employee should first report the information to the employer.[104] Then, if there is no answer, the employee has legitimacy to conduct the report to an external entity, such as a judicial or administrative authority. If there is still no response, he can redirect the report to the media. However, in a situation of a serious and imminent danger, or an irreversible one, the whistleblower can directly conduct the report to an external entity, which is usually the media, overlooking the two previous tiers. As it is possible to conclude:

> "*This graduated* p*rocess draws direct inspiration from the case law of the ECHR. When balancing the employee's duty of discretion against the freedom of expression, the ECHR maintains that the whistleblower initially must divulge the information to a supervisor or another relevant authority or body. Revelation to the public must be used as a last resort only, when no other options remain*."[105]

In PORTUGAL, however, the situation is different. As explained before, there is no consistent law regulating the whistleblower and establishing the mechanism that should be used to conduct reports. Considering that fears of retaliation felt by employees are an unfortunate reality, the number of formalized reports is, logically, very scarce. To improve the Portuguese system, even

[102] DECKERT, Katrim, Morgan SWEENEY, *op. cit.* p.137.
[103] "The Parliament put on the same level going publicly or to disseminate information which can be inside the company. However, Article L. 4133-1 of the labour code provides that employee should immediately alert the employer. This could imply that the employee has the obligation to alert the employer and has only the opportunity to blow the whistle outdoor. But the 2013 act does not impose the whistleblower to turn first to his employer before going public." - DECKERT, Katrim, Morgan SWEENEY, *op. cit.*, p.137.
[104] "The law designates the company as the first level in the reporting line because the employer can directly remedy the alleged misconduct within its control. This step also emphasizes the selfless nature of the report, because if the employee is truly advancing the general welfare, his or her goal would be remediation of the reprehensible conduct."- PELICIER-LOEVENBRUCK, S., Charles DUMEL, *op. cit.*, p.4.
[105] PELICIER-LOEVENBRUCK, S. & Charles DUMEL, *op. cit.*, p.5.

though there is a preference for reporting internally[106], external reporting is not disregarded. In fact:

> "*a complaint lodged before an external entity, upon internal alert or a grievance without any reaction by the employer, does not constitute a fair cause for dismissal, unless it interferes with the honour and private and family life of an immediate superior and of an employee, which is deemed unnecessary for the exercise of the right of criticism.*"[107]

After this analysis, it is possible to conclude that there is a discrepancy regarding the level of development between the three regimes. The UK and France prioritize internal reporting, even though France, before the enactment of the Sapin II Act, gave the whistleblower the choice of the reporting mechanism to be used, with some exceptions. Even though Portugal does not have yet a consistent system concerning the protection of the whistleblower, it is more likely that internal reporting will be established as the general rule.

So, the three systems at stake are in accordance to what the legislative resolution and the Proposal mandate. Nevertheless, there have been some criticisms, which should not be overlooked. In fact, the American 'National Whistleblower Center' has some concerns regarding the scope of the Proposal, and one of them is the priority given to internal reporting, by considering it to be risky, non-effective and, in the worst scenario, an obstruction of justice.[108] The Center supports that whistleblowers should have the opportunity to directly report misconducts to a law enforcement authority, *i.e.*, to an external authority, and that the mechanism adopted by the Proposal is in contradiction with some anticorruption conventions, such as the Civil Law Convention on Corruption (Article 9), the UN Convention Against

[106] "As a rule, the employee can present the claim to the employer in person, through an attorney, in a meeting or through an e-mail or letter. Nonetheless, when the subject is quite sensitive (e.g., sexual harassment, discrimination or illegal or criminal behaviours) or the author of the misbehaviour concerned is, for example, a colleague or a direct supervisor, the employee could drop his or her lodging of a complaint because of fear of the consequences at work or even in his or her life outside of work. In these cases, an internal dedicated channel for complaints could be a good instrument to avoid reprisals or retaliations, while also making the employer aware of the facts and circumstances, which would permit actions to be taken to correct the misbehaviour without harming its public image." – CARVALHO, David & Maciej LAGA, *op. cit.*, p. 175.

[107] CARVALHO, David, Maciej LAGA, *op. cit.*, p. 175.

[108] In what concerns the procedures in Article 4 Section 1 and Article 5 Section 2(b), the 'National Whistleblower Center" defends that "clarifications in these procedures are necessary to ensure that internal reporting channels are not used to cover-up misconduct. This is especially true when the criminal activity is large in scope or where the wrongdoing implicates high-level officials." Also, regarding Article 13, it is considered that "the provision constitutes an obstruction of justice, and it must be amended. It is a fundamental principle under laws prohibiting an obstruction of justice that any attempts to harass or intimidate persons who report criminal activities to law enforcement is a crime."- National Whistleblower Center, "Proposal for EU Whistleblower Directive/FEEDBACK, COM/2018/218", 2018, p. 8 and 10.

Corruption (Articles 13 and 33) and the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (Article 23).

THE CONFIDENTIALITY REQUIREMENT

The Proposal for a Directive, both for internal and external reporting (respectively on Articles 5, n. º 1, al. a) and 6.º, n. º2 al. a)), guarantees that the identity of the whistleblower is to remain confidential. The legislative resolution, in its Article 16 (1) stipulates that "Member States shall ensure that the identity of the reporting person is not disclosed without the explicit consent of this person to anyone beyond the authorised staff members competent to receive and/or follow-up on reports."

Before going into more detail, it is important to state that 'confidentiality' is different from 'anonymity', as it has different implications in the reporting procedure. While confidentiality means that the identity of the whistleblower is not to be revealed during the procedure (the identity of the whistleblower was *prima facie* divulged to a competent entity, which is responsible for keeping it confidential), anonymity is stricter, since the identity of the whistleblower is never known, even in the moment of reporting.

In the UNITED KINGDOM, it is possible for a whistleblower to ask for his identity to remain confidential. Nevertheless, "the law does not compel an organization to protect the confidentiality of a whistleblower. However, it is considered best practice to maintain that confidentiality, unless required by law to disclose it."[109]

Even though the report can also be made anonymously, there is a risk that, in the case the information given is not enough and there is a need for further clarification, the claiming procedure might not develop any further due to the fact that the identity of the reporting person is unknown, and so all the efforts of the whistleblower were made in vain.[110]

The worker, within a company, should be encouraged to reveal his identity when making a report, in order for his complaint to be qualified as a protected disclosure and also for him to be formally considered as a whistleblower. In the same line of thinking: "whistleblower groups

[109] DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, *op. cit.*, p.10.

[110] "Anonymous information will be just as important for organisations to act upon. Workers should be made aware that the ability of an organisation to ask follow up questions or provide feedback will be limited if the whistleblower cannot be contacted. It may be possible to overcome these challenges by using telephone appointments or through an anonymised email address." - DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, *op. cit.*, p.10.

such as UK's Public Concern at Work recommend that most people should make their concern publicly as a means of improving internal work culture."[111]

This would guarantee, or at least contribute, that reports were made in good faith, and that the whistleblower has conducted an informed and conscient complaint. By revealing his identity, the whistleblower would be more reluctant in reporting something that was not true, and thereby the genuineness of the report would be guaranteed and respected. This way, a slanderous report, for example, would be easily avoided, as they are mostly done when the identity of the whistleblower is unknown.

In general, while the FRENCH position regarding anonymity is considered to be a negative one, the one it has regarding confidentiality is more flexible. It is believed that, when the identity of the whistleblower is known, the report, in itself, will be made in a more consciously and responsible way.

> "*In practice, identified reports offer several advantages, as they make possible:*
>
> - *To avoid or at least limit false and/or slanderous accusations;*
> - *To organize the protection of the whistleblower against retaliation;*
> - *To ensure a better handling of the report, with the option of requesting additional details on the alleged facts from the author of the report.*"[112]

In France, it is expected from the entities that receive the reports to preserve the whistleblower's identity confidential. Anonymity, however, is the exception.

> "*By way of exception, an anonymous whistleblowing can be processed only if two requirements are met together: (1) The seriousness of the facts is established and the facts sufficiently detailed; (2) Processing such alert should be carefully done and for instance the one who received the alert should be able to choose whether or not to process the alert.*"[113]

'Loi n.º 2016-1691', in its Article 9, states that the reporting mechanism aims to guarantee a strict confidentiality of the authors of the report, *i.e.* the whistleblower, as well as the persons

[111] G20 ANTI-CORRUPTION ACTION PLAN, *op. cit.*, p. 36.
[112] COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS, "Guideline document adopted by the "Commission nationale de l'informatique et des libertés (CNIL) on 10 November 2005 for the implementation of whistleblowing systems in compliance with the French Data Protection Act of 6 January 1978, as amended in August 2004, relating to information technology, data filing systems and liberties" p.4, point 3.
[113] DECKERT, Katrim, Morgan SWEENEY, *op. cit.*, p.131.

targeted by it (usually the employer) and the information at stake.[114] This broad application of the confidentiality requirement shows concern from the French regime, not only in protecting the whistleblower, but also in guaranteeing the preservation of the rights of the reported person, as it was already explained.

Additionally, in Article 2 of the 'Délibération n. º 2005-305'[115], it is stated that the reporting person must identify himself, but his identity will be treated in a confidential way by the responsible organization for managing the reports. Also, in Article 10, it is stated that the subject of an alert, in the ambit of the right of access, is not allowed to obtain from the data controller the identity of the issuer of the alert, *i.e.*, the whistleblower.

Interestingly, in PORTUGAL's few provisions regarding the protection of the whistleblower, even though there is a reference to the confidentiality requirement, the anonymity one is predominant. Article 4, n. º3, al. a) of 'Lei n. º 19/2008' is a clear example of that. However, this provision is not protective enough, which might constitute one of the reasons why the fear of retaliation is so significant. In fact, the identity of the whistleblower is only kept anonymous until an accusation has been made. This means that, when an accusation is formalized, the employer will have access to the whistleblower's identity[116], putting the latter in a fragile situation. In this case, the worker has the right to ask for a transference and to benefit from the Law on witness protection.[117]

Also, in the Portuguese Code of Criminal Procedure, in its Article 246.º, n. º 6, an anonymous report is only taken into consideration if there is evidence of the practice of a crime, or the complaint constitutes a crime. Additionally, 'Lei 25/2008'[118], which creates measures to prevent the laundering of illicit advantages and the financing of terrorism, states in its Article 20 that whoever reports such kinds of activities is not violating a duty of secrecy. If the identity of the whistleblower, that was classified as confidential, is revealed, the person responsible for it will be penalized with a fine or a prison sentence up to three years.

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[114] Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.
[115] Délibération n° 2005-305 du 8 décembre 2005 portant autorisation unique de traitements automatisés de données à caractère personnel mis en oeuvre dans le cadre de dispositifs d'alerte professionnelle (décision d'autorisation unique n° AU-004.
[116] Note that it is not particularly difficulty for the employer to be aware of the whistleblower's identity, due to the fact that, in Portugal, most companies have a small or medium-size.
[117] 'Lei 93/99', de 14 de julho.
[118] 'Lei 25/2008', de 05 de junho, Medidas de natureza preventiva e repressiva de combate ao branqueamento de vantagens de proveniência ilícita e ao financiamento do terrorismo.

So, in Portugal, despite all the flaws that its regime is characterized for, there is, in general, an aim to protect the identity of the whistleblower. However, this protection is not directed at protecting the worker as a whistleblower. As previously mentioned, there are no provisions on this matter in the Portuguese legislation, which means that a worker who reports a misconduct that took place within the workplace will only benefit from the application of the general provisions of labour law.[119]

THE 'PUBLIC INTEREST' REQUIREMENT V. THE 'GOOD FAITH' REQUIREMENT

It is important to have in mind that workers, while conducting their professional obligations, can become aware, within their workplace, about wrongful conducts that might cause negative repercussions in the society. This means that, when reporting such misdemeanors, the workers will be acting in the name of the public interest. In fact, "in certain policy areas, breaches of Union law may cause serious harm to the public interest, in the sense of creating significant risks for the welfare of society."[120]

At the EU level, the worker as a whistleblower , and inserted in the context of a work-related activity[121], is in an advantageous position to become aware of misconducts in a multitude of areas, such as environmental protection, personal data, competition law, protection of financial interests, EU employment law and national security.

Additionally, it should also be considered that making a disclosure in the name of the public interest is intrinsically connected with the intention the whistleblower had when the report was made.

In this line of thinking, the following questions need to be asked: should a whistleblower be protected against acts of retaliation when the disclosure was made in the public interest, even if his intention was to harm the employer, *i.e.*, by acting in bad faith? And even if the reports were conducted in good faith, if the accusation turns out to be false, should the whistleblower

[119] CARRIGY, C., *op. cit.*, p.45.
[120] Proposal for a Directive, *op. cit.*, p.1.
[121] It is important to state that the mere act of reporting a wrongdoing does not make someone a whistleblower. For example, there is a close but different category of people who are entitled 'bell-ringers'. "In contrast to whistleblowers, who must be members, bell-ringers by definition are not member of focal organizations, even if they are in another relationship with them, such as clients, customers, consumers or competitors. For example, Markopolos, a competitor and not an employee of Madoff, reported the Madoff Ponzi scheme to the SEC because he wanted it investigated." – MICELI, Marcia P., Suelette DREYFUS, Janet P. NEAR (2014) – "Outsider 'whistleblowers': Conceptualizing and distinguishing 'bell-ringing' behavior", in *International Handbook on Whistleblowing Research*, Edward Elgar, p.78.

be deprived of his right of protection against retaliation, even though he believed that the reports were being made in the public interest?

According to Article 5 (1) (a) of the legislative resolution, one of the conditions for reporting persons to benefit from protection is that "they had reasonable grounds to believe that the information reported was true at the time of reporting and that the information fell within the scope of this Directive".

Also, in the case of *Heinisch v. Germany*:

> "*A whistleblower should be considered as having acted in good faith provided he or she had reasonable grounds to believe that the information disclosed was true, even if it later turned out that this was not the case, and provided he or she did not pursue any unlawful or unethical objectives*."[122]

This means that, even if the information reported turned out to be false, the whistleblower would still be protected, but only if he had acted in good faith. For the protection of the whistleblower to be guaranteed, not only is the public interest requirement essential, but also the intention he had when the disclosure was made.[123/124]

Within the different national legal systems there is a divergence regarding the value given to the intention behind the whistleblowers' reports. This divergence could be divided in two different groups: a pragmatic vision and an ethical vision.

"While for the pragmatic vision what matters is to denounce crimes, whatever the motivation of the whistleblower, the ethical vision will hesitate in extending the guardianship (especially against disciplinary sanctions) for those who acted in revenge or retaliation."[125]

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[122] European Court of Human Rights, *Heinisch v. Germany*, *op. cit.*, paragraph 80.

[123] "It is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet, means of remedying the wrongdoing was available to him or her." - ECHR, 15 February 2008, 14277/04, *Guja vs. Moldova*, paragraph 77.

[124] Curiously, Mr. Guja was dismissed two times from the same job, and in both times the ECHR held that the dismissals were unlawful and that there was a violation of Mr. Guja's freedom of expression, as they were considered to be a retaliatory measure against the report that Mr. Guja, acting as a whistleblower, decided to make in 2003 - EUROPEAN COURTS OF HUMAN RIGHTS, "Moldovan civil servant whistleblower wins rights violation case for second time", Press Release issued by the Registrar of the Court, ECHR 079 (2018).

[125] GOMES, Júlio Manuel Vieira (2014) - "Um Direito de alerta cívico do trabalhador subordinado? (ou a proteção laboral do whistleblower)", in *Revista de Direito e Estudos Sociais*, Year LV (XXVIII of the 2nd Serie), N.º 1-4.p. 134 and 135 (our translation).

The UNITED KINGDOM, as it was already mentioned, gives preference to the 'public interest' requirement.

Despite this, the Public Interest Disclosure Act of 1998 was not directed at protecting this value, and only in 2013, with the Enterprise and Regulatory Reform Act 2013 (which came into force on the 25th June 2013) was it considered as a requisite for a disclosure conducted by a worker in order to be legally protected. Logically, "this change means disclosures of a personal nature will not be protected" and additionally, "it will be for the whistleblower to show why they believe that the disclosure is in the public interest, and that the belief was reasonable in all circumstances."[126]

Also, the 'good faith' requirement was removed in 2013, enhancing even more the importance that the 'public interest' requisite has in this law. So, it is possible to conclude that the UK supports the pragmatic vision.

Nevertheless, other jurisdictions value more the intention of the worker over the public interest requirement, and one example is FRANCE.[127/128] Considering that freedom of expression is one of the most important principles in this country, it is comprehensible that the whistleblower is required to act in good faith when conducting a report. Nevertheless, freedom of expression is not an absolute right, and therefore it should not prevail in every situation, including the ones in which the information reported was false.

In this line of thinking, it is important to mention that in Article 10 of 'Loi 2016-1691', some modifications to Article 6 A of 'Loi n. º 83-634' of July 13, 1983 were conducted, regarding the rights and obligations of the civil servants. What matters to this discussion is the modification made in the last paragraph, establishing that "an employee who reports or testifies facts relating to a conflict of interest's situation in bad faith or any act which is likely to result in a disciplinary sanction, with the intention to harm with at least a partial conscience of the

[126] CLYDE&CO, "Changes to protection for whistleblowers", Employment, 25 June 2013, p.1.
[127] Other countries who also support this 'good faith requirement' are, for example: Austria, Brazil, Canada, Germany, Italy, Japan, Malta, the Netherlands, Poland, Romania, Slovenia, South Korea and the USA.
[128] Just as a matter of curiosity, the Italian system, which is also characterized to partially protect the whistleblower, has a different approach regarding the act of reporting. In fact, "the right of criticism finds its foundation directly in the Constitution, in art. 21, which recognizes to the generality of the associates the freedom to express their own thoughts, with a single limit, the non-opposition to good customs, and implicit limits linked to the value of the human person referred to in art. 2 of the Constitution itself." - Grivet-Fetà, S. – "Pressuposti e Limiti del Diritto di Critica del Lavoratore", *Rivista Italiana di Diritto del Lavoro*, Partes II e III (2013), p.87 (our translation).

inaccuracy of the facts made public or disseminated shall be punishable by the penalties provided for in the first paragraph of Article 226-10 of the Penal Code."[129]

So, the bad faith in the French system is something unacceptable, and it is, therefore, punishable. If the report was made in good faith but the information turned out to be false, the whistleblower would not suffer any sanction.

Interestingly, in what concerns the good faith requirement, the French courts have adopted a criterion to evaluate whether the whistleblower has acted in good faith based on the ECHR's one, which are if:

- "*the whistleblower had reasonable ground to believe that the information was true;*
- *the alert served the general interest; and*
- *the report was not motivated by a personal grievance, a personal antagonism, or the expectation of personal advantage, including pecuniary gain*."[130]

Also, in principle, there is a presumption that the employee has acted in good faith. And if the employee has suffered any type of retaliation (e.g. dismissal), it is for the employer to prove that it was not based on the report itself, but rather on distinctive and legitimate reasons.[131]

The approach followed by PORTUGAL relies on different premises. When whistleblowers formalize a report, protection will not be granted if the information revealed is false, "irrespective of whether they acted in good faith, i.e. believed the facts to be true".[132]So, only the content of the report will be considered to ascertain its validity, disregarding completely the intention behind the report.

[129] Article 10 II, paragraph 3.º, of 'Loi 2016-1691' (our translation).
[130] PELICIER-LOEVENBRUCK, S. & Charles DUMEL, *op. cit.*, p. 3.
[131] PELICIER-LOEVENBRUCK, S. & Charles DUMEL, *op. cit.*, p. 3.
[132] THÜSING, Gregor**,** Gerrit FORST (2016), "Whistleblowing Around the World: A Comparative Analysis of Whistleblowing in 23 Countries", *op. cit.*, p.19.

THE MATERIAL SCOPE OF THE LEGISLATIVE RESOLUTION: DOES IT CONFER ENOUGH PROTECTION?

The aim of this part is to reflect about the material scope of the legislative resolution of 2019, *i.e.*, its object, which is established in Article 1. By reading it, it is clear that it only aims to regulate breaches of European Union law reported by a whistleblower.[133]

However, this is a problem that does not exist merely in the ambit of EU law. In fact, national legislations regulating the whistleblower protect this figure at many different degrees. So, with the comparison that was conducted in this paper it was possible to conclude that there is no harmonized regulation among the Member States. Either they have a very advanced (e.g. UK), partial (e.g. France) or less sophisticated (e.g. Portugal) protection.

It is notorious that this legislative resolution is already a big step towards the protection of such an undermined figure in society. Nevertheless, the fact it only regulates breaches of EU law, in some specific areas detailed in Article 2, could be considered as a limit to the extent of actions that MS will have to enforce in their own jurisdictions in order to comply with it. However, this is an argument that was valid in the ambit of the Proposal for a Directive. Now, with the legislative resolution, which aims to develop into a Directive in the near future, it was added a provision (Article 2(2)) establishing that "this Directive is without prejudice to the possibility for Member States to extend protection under national law as regards areas or acts not covered by paragraph 1."

So, it is visible that there was a positive amendment with the legislative resolution, by extending the range of areas in which the whistleblower can be protected, in EU and national law.

In the ambit of the comparison conducted, Portugal will be the most affected jurisdiction, as its legislation on the matter is not so developed. Nevertheless, the future implementation of the Directive will contribute to the elimination of this gap. In what concerns the areas not regulated by the Directive and considering that "protection under national law" is admissible, according

[133] "Effective prevention of breaches of Union law requires that protection is granted to persons who provide information *necessary to reveal* breaches *which have already taken place, breaches* which have not yet materialised, but are *very* likely to be committed, *acts or omissions which the reporting person has reasonable grounds to consider as breaches of Union law as well as attempts to conceal breaches*. For the same reasons, protection is warranted also for persons who do not provide positive evidence but raise reasonable concerns or suspicions. At the same time, protection should not apply to the reporting of information which is already *fully available* in the public domain or of unsubstantiated rumours and hearsay." – European Parliament legislative resolution of 16 April 2019, *op. cit.*, paragraph 43 (Preamble).

to Article 2(2), Portugal could follow the example of other jurisdictions recognized for having consistent and effective laws protecting the whistleblower.

CONCLUSION

It is a fact that even though the legislative development – not only national, but also international – that has been verified during the past years has been a positive one, the protection of the worker as a whistleblower remains a controversial issue. It is a topic that is, indeed, of the utmost importance. The employee is *prima facie* the weakest part in the ambit of a labour contract, so, if he is not granted any kind of protection when reporting a misconduct, his undermined position will become even more fragile.

It was possible to understand, throughout this paper, that the most significant 'threat' that is posed at the EU level is the fragmentation of the laws between MS.[134] The future Directive focuses precisely on that issue, and by promoting harmonization on the areas covered, it will allow for a much more efficient and consistent scope of protection.

With the comparison between the three juridical systems that were studied in this paper, it became visible that this 'threat' is divided in three different categories of protection. While the UK represents the most advanced category, France and Portugal represent, respectively, the partial and limited categories.

So, there is no doubt that whistleblowers play a very important role, by reporting misconducts that are susceptible to cause significative negative impacts in the society, in what concerns the public interest at large. For this to happen, there ought to be created safe mechanisms that are able to prevent retaliation as a consequence of the whistleblower's report.

In this ambit, internal reporting, in contrast to external reporting, reveals itself as the mechanism that should be used in the first place, in accordance with what is stated in the legislative resolution. In fact, as it was previously mentioned, internal reporting is a more complete system, as it confers a double protection. Not only does it aim to protect the worker who conducted the report, but takes also into consideration the legitimate interests of the company – where the whistleblower works – who will, logically, want to preserve its reputation and competitiveness. One clear example is the UK, with its 'tiered approach'. This mechanism has potential to create

[134] The whistleblowers' situation "has been perceived in international and European legal acts, but is still insufficiently recognized by legal systems in the majority of European countries."; "European soft law on whistleblowing presents and recommends more comprehensive regulation of the issue. The comprehensiveness mentioned is considered in two dimensions. First, state regulations should cover diverse branches of law, in particular labour law, criminal law and procedure and media law (…). Second, internal legal systems should consist not only of a normative legal framework, but also properly functioning institutions (institutional framework) and an effective judiciary (judicial framework)." – CARVALHO, David, Maciej LAGA, *op. cit.*, p. 157 and 167, respectively.

a better involvement and communication between the parties in dispute – *i.e.*, employer and employee – without the need of 'harming' any of them. Only when this is not possible (for example, the probability of suffering retaliation is significant, or the report was already raised internally, without any positive effect), will the whistleblower, in my opinion, have legitimacy to make an external report. Of course a balancing exercise between the freedom of expression of the whistleblower and the interests of the company must be conducted in order to ascertain which right should prevail, in the case special circumstances do not allow for such a literal interpretation (*i.e.*, prevalence of internal over external reporting).

Another important issue is that the identity of the whistleblower should be kept confidential, so that possible acts of retaliation can be avoided. But this does not mean that his identity should remain anonymous. If that happens, there might be a risk that the reporting procedure will not advance, in case follow up questions need to be asked to the whistleblower, which will not be possible, as his identity was never revealed in the first place. So, even though identity protection is something crucial, it should not be taken to an extreme level.

In what concerns the conditions in which protection should be granted, it is important to extend it not only to situations in which the information reported was true, but also when that information turned out to be false. In this last case, the whistleblower must have acted in good faith. Nevertheless, this is a controversial issue, since that in some situations, the whistleblower might have acted as a way of revenge, but the content of the report, in itself, was a legitimate one and was able to protect the public interest at large. In this last case, should the whistleblower be provided with protection? Interestingly, the legislative resolution establishes, in paragraph 33 of the Preamble, that the "motives of the reporting person in making the report should be irrelevant as to whether or not they should receive protection". This means that, by the time the Directive enters in force, some MS will have to revise their laws in the part that regulates the motives behind the reports.

Additionally, even though the legislative resolution does not regulate a mechanism of rewarding the whistleblower, it is indeed something that could be taken into consideration. In fact, it is undoubtful that a financial incentive could be very appealing to someone who has concerns regarding the formalization of a report. As it was previously mentioned, the USA's National Whistleblower Center criticizes the fact that the Proposal for a Directive does not regulate this kind of financial encouragement, and defends that the positive outcomes that could be retrieved from it are very significant. As far as I am concerned, this is a technique that could, indeed,

increase the number of reports and, therefore, improve the protection of the public interest at a larger extent. "However, financial incentives for whistleblowers do have a downside as they increase the risk of denunciation for opportunistic reasons."[135] It is again another topic that raises some queries that should be consciously reflected.

With this legislative resolution of the European Parliament, whistleblowers' rights will be properly addressed, as a significant level of protection will be granted to them. It is admirable how this resolution leaves space for national legislation that already existed, without discarding, of course, EU law and the supremacy that defines it. In fact, according to Article 25(2), the "implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection already afforded by Member States in the fields covered by the Directive."

Still, "if the alert is valuable for the preservation of the rule of law and is an instrument for deepening democracy, whistleblowers should not be discouraged by the fear of reprisals."[136] Even though there have been significant developments regarding the protection of the whistleblower, this incentive, based on the rule of law and democracy, is still idealistic due to the fragmentation existent across the EU.

So, it is expected that the future Directive will raise the level of protection conferred to whistleblowers, and contribute to a more harmonized system. It would be an immediate success if two years after the transposition of the Directive, Member States, in their reports, according to Article 27 of the legislative resolution, would already give a positive feedback regarding the implementation of this legislative document.

After all these years of spaced advancements, it is high time the EU has acted upon this issue and tackle the risks inherent to the mere report of something that might be able to prevent the society from being harmed.

[135] THÜSING, Gregor**,** Gerrit FORST (2016), "Whistleblowing Around the World: A Comparative Analysis of Whistleblowing in 23 Countries", *op. cit.*, p.29.
[136] LOCHAK, D., *op. cit*., p. 7 (our translation).

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