

A high-angle, blurred photograph of a busy city street. The ground is paved with light-colored tiles. A prominent yellow tactile paving strip runs diagonally across the lower half of the frame. Several people are walking, their figures blurred to convey motion. The overall color palette is dominated by cool blues and greys, with the yellow strip providing a sharp contrast.

# Whistleblower protection

Global guide



Freshfields Bruckhaus Deringer



# Whistleblower protection: global guide

This global guide sets out the legislative framework of the protections available to whistleblowers in 16 key jurisdictions across the Americas, Europe and Asia.

**Whistleblowing continues to make the headlines and the role of the whistleblower has become ever more prominent in recent times, as it is usually employees who raise the first red flag when businesses uncover wrongdoing within their organisations. Individuals reporting misconduct make use of their freedom of expression and the existence of effective protection mechanisms may encourage such disclosures.**

Multinational companies must be alive to the risks and opportunities associated with whistleblowing.

A clear whistleblowing policy and process, combined with a strong anti-retaliation message and a management team that empowers employees to speak up without fear of retaliation can help detect and deter violations and promote a culture of transparency, accountability and integrity.

The risks of getting the approach wrong can be high. A whistleblower who fears retaliation or who feels ignored may choose to report his/her concerns directly to a regulator or, in an extreme case, the media. If this happens, the company will lose control of the investigation process

and timetable and, with it, the opportunity to manage the legal fall out and the associated risks to its reputation.

Whilst it is clear that multinational companies need to carefully consider their treatment of whistleblowers, the legal landscape around whistleblowing can be difficult to navigate. At present, only a few countries have comprehensive whistleblower protection. The majority tend to have provisions scattered across different laws, leaving significant gaps.

Jurisdictions such as the UK, the US, France and Italy offer specific protection to whistleblowers who suffer retaliation by their employers. In other countries, such as Germany, Hong Kong and Brazil, there is no specific whistleblowing-related protection but general employment legislation may nevertheless protect an employee who is dismissed unfairly or subjected to detriment because of being a whistleblower.

Whistleblowing is high on the European Union agenda, too. On 23 April, the European Commission proposed legislation to address the fragmentation of protection for whistleblowers across the EU. The proposal sets out “common minimum standards” to protect whistleblowers against retaliation for reporting on breaches in specific EU

policy areas, such as financial services, product safety and protection of privacy and personal data. It is a follow up to various calls for a EU wide initiative, including a October 2017 resolution by the European Parliament, which in turn were building on recent scandals, eg the so called Lux Leaks.

Despite these complexities, it is critical to look at whistleblowing on a global basis given the nature of today’s businesses, the significant co-operation between regulators across the world and the extra-territorial reach of some bribery and corruption and competition laws. We can help you navigate these jurisdictional differences and it should, to a large extent, be possible for a multinational employer to adopt a uniform, global approach to whistleblowing.



# Contents





# Brazil

## 1. Is there specific legislation in place relating to whistleblowing?

There is no law regulating whistleblowing.

The Brazilian Clean Company Act provides for a fine of up to 20 per cent of the gross revenue of the company on the fiscal year prior to the administrative proceeding. It also provides for some ‘discounts’ that may be applicable to the fine. One of them is a discount of up to 4 per cent if the company proves to have an effective compliance program. In this context, a whistleblowing hotline or any other mechanism that the employees and third parties may use to report potential violations is an important element of a compliance program.

Internal policy should regulate whistleblowing, establishing provisions about confidentiality, privacy, non-retaliation, among others. The Federal Constitution’s principles such as the right of privacy and intimacy, the protection of image and reputation and non-discrimination rights should be complied with when implementing a whistleblowing program.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

There is no specific law conferring protection to whistleblowers.

On the other hand, Brazilian labour courts have been recognizing the employee’s general right to non-retaliation which might be used by whistleblowers.

## 3. Which categories of workers are eligible for protection?

N/A

## 4. How is protection triggered?

N/A

## 5. What is the extent of the protection?

N/A

## 6. What remedies are available to employees who blew the whistle?

Despite the absence of any specific protection, any employee is entitled to file an action against the employer in labour courts to claim any right, including but not

limited to breach of law, regulation, internal policy or any employer’s action that has caused any type of damage – material or moral.

The statute of limitation to claim labour rights is 5 years (if the employment agreement is terminated, the employee may file a claim up to 2 years as of the termination and claim any right related to the previous 5 years).

Material and moral indemnification based on evidence and severity of damage may be granted to the employee.

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

No prohibition nor restriction in this regard.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

There is no law in this regard.



# Brazil

**9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?**

There is no specific legal provision about such aspect. In Brazil, a confidentiality obligation is established by law, which prevents, in a broad way, employees from disclosing information that they have obtained during the relationship. However, any citizen is allowed to report crimes and such right would prevail over a confidentiality agreement.

**10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?**

No.



# US

## 1. Is there specific legislation in place relating to whistleblowing?

There are a number of federal and state laws regulating whistleblowing:

- Sarbanes-Oxley ('SOX') Act 2002 (principally section 806).
- Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (sections 748 and 922).
- SEC Whistleblower Statute (section 21F of the Securities Exchange Act of 1934).
- SEC Whistleblower Rules (found in sections 240 and 249 of title 17 of the Code of Federal Regulations).
- The United States Commodity Futures Trading Commission (CFTC) Whistleblower Statute (section 26 of the Commodity Exchange Act).
- CFTC Whistleblower Rules (found in section 165 of title 17 of the Code of Federal Regulations).
- The federal False Claims Act (31 U.S.C. §§ 3729–3733). The False Claims Act allows private citizens to sue those that commit fraud against United States government programs. The Act provides for up to treble damages and also provides awards of 15 to 30 per cent of recoveries for those bringing cases. The federal False Claims Act covers fraud involving any federally funded contract or

program, with the exception of tax fraud. A separate IRS whistleblower program covers federal tax fraud.

- Other state and federal whistleblowing laws and implementing regulations for specific industries and health, safety, and environment matters.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

Federal statutes and implementing regulations generally protect whistleblowers from any retaliatory action taken against them for reporting their reasonable belief of a possible violation of federal securities or commodities laws, rules or regulations, or other types of covered violations. For example, the Occupational Safety & Health Act ('OSHA') protects private and certain public sector employees from retaliation for exercising their rights under OSHA, including disclosure of workplace safety violations; the Affordable Care Act ('ACA') protects private and public sector employees from retaliation for reporting violations of ACA, including discrimination based on an individual's receipt of health insurance subsidies or the denial of coverage based on a pre-existing condition; and the SOX Act protects employees of publicly traded companies and their affiliates from retaliation for reporting alleged mail, wire, bank or securities fraud and related violations.

## 3. Which categories of workers are eligible for protection?

The large number of industry-specific federal and state whistleblower protection statutes and regulations means that many categories of individuals are protected, typically current and former employees and applicants for employment in the private or public sector, as well as contractors.

## 4. How is protection triggered?

The scope of protected whistleblower activity varies widely under different federal and state statutes. Contexts in which whistleblower protections may arise include corporate, financial, manufacturing, environmental, nuclear, transportation and airline safety, workplace health and safety, federal contractor fraud, tax and labour relations, among others. Standard components of a whistleblower protection claim are that (i) a covered individual engaged in protected whistleblower activity (typically, reporting or assisting in the reporting of certain covered violations, or participating in proceedings related to such violations); (ii) a covered entity had knowledge that the individual engaged in such activity; (iii) retaliation against the individual was motivated, at least in part, by the individual's protected activity; (iv) the individual was discharged or otherwise discriminated against



# US

with respect to his or her compensation, terms, conditions or privileges or employment, or suffered some other wrong actionable under state tort or contract theory (including threats and harassment); (v) the individual would not have been subject to an adverse action in the absence of the protected whistleblower conduct.

## 5. What is the extent of the protection?

The extent and length (such as the applicable statute of limitations for claims) of whistleblower protection varies widely under different federal and state statutes. For example, the SOX Act requires that an employee file a written complaint within 180 days of an alleged retaliation, while the Dodd-Frank Act permits claims to be made for up to 10 years after a retaliation. Please also see the response to previous question.

## 6. What remedies are available to employees who blew the whistle?

Whistleblowers subjected to retaliation can be reinstated with the same seniority level. They can also receive back-pay with interest, special damages, attorneys' fees and other litigation costs.

Any violation of the SEC or CFTC whistleblower protections could constitute violations of United States securities or commodities laws.

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

No prohibition nor restriction in this regard.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

Some whistleblowing statutes, such as the SOX Act and the Dodd-Frank Act, encourage the use of internal compliance systems, such as by factoring in plaintiffs' use of internal compliance and reporting systems in calculating monetary awards.

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

Yes. SEC Rule 21F-17, promulgated under the Dodd-Frank Act, prohibits companies from taking any action (including through confidentiality, employment, severance, or other type of agreements) to impede whistleblowers from reporting possible securities violations to the SEC. We do recommend the review of existing confidentiality provisions in employment, separation and other agreements and policies.

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

The SEC or CFTC will pay an award to whistleblowers who voluntarily give the SEC or CFTC original information about a violation of United States securities or commodities laws that leads to a successful enforcement action.

An award is payable to whistleblowers if the SEC or CFTC recovers a monetary sanction over \$1m.

The SEC or CFTC must award all entitled whistleblowers at least 10 per cent and up to an aggregate of 30 per cent of the penalties collected in the enforcement action.

Some statutes require covered entities to adopt whistleblowing policies and systems. For example, the SOX Act requires covered companies to set up systems for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters. Many employers have also adopted policies to formalize and document internal compliance with the various whistleblower protection requirements as a risk management tool.



# Belgium

## 1. Is there specific legislation in place relating to whistleblowing?

Until recently, formal whistleblowing procedures were only required in the public sector (by the Federal and Flemish authorities) – There was no general legislation on whistleblowing in Belgium’s private sector, aside from function specific rules and obligations. Two specific whistleblowing procedures applying to the private sector have now been recently introduced:

1. The Law of 31 July 2017 introduced a legal framework for the reporting of actual or suspected infringements to the financial laws and regulations of which the compliance is supervised by the Financial Services and Markets Authority (FSMA) by amending the Law of 2 August 2002 on the supervision of the financial sector and financial services (the Financial Supervision Law). The scope of these financial laws and regulations include, inter alia, rules regarding transactions in financial instruments, market abuse rules, rules regarding asset managers and investment advisors, rules regarding insurance companies and intermediaries, rules regarding financial intermediaries and occupational pensions providers. Effective 3 January 2018, the amended Financial Supervision Law imposes on the regulated persons and entities that are in scope of the financial supervision of

the FSMA (such as financial institutions and financial intermediaries) to put in place appropriate internal reporting mechanisms. The procedures for handling reports by whistleblowers were further set out by the FSMA in a set of rules approved by Royal Decree on 24 September 2017.

2. Effective 16 October 2017, the Law of 18 September 2017, implementing the Fourth Anti-Money Laundering EU Directive, provides for a similar whistleblowing regime in the private sector for notifications made to the supervisory authority (eg, depending on the case, the FSMA, the Minister of Finance or the Supervisory Authority for Auditors) or to the Belgian Financial Intelligence Processing Unit (CTIF-CFI) in the context of anti-money laundering and counter-terrorist financing. The entities subject to the Anti-money laundering and counter-terrorist financing (AML / TF) provisions need to have appropriate procedures in place for staff members, agents and distributors to report breaches of the obligations. They also need to ensure that individuals reporting on suspicious client transactions or internal failure to comply with the AML obligations are protected against any threat or hostile action, including against adverse or discriminatory actions by the employer (or principal).

Please note that all the answers below are based on the very specific scope set out by these two recent laws, and should not be intended to refer to a general legal framework on whistleblowing in Belgium, which does not exist to date.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

No specific labour laws exist, but on 3 January 2018 and 16 October 2017, new obligations on whistleblowing procedures came into effect for persons and entities falling under the scope of the anti-money laundering law or subject to financial supervision by the Financial Services and Markets Authority (FSMA).

## 3. Which categories of workers are eligible for protection?

The newly introduced rules provide protection to all whistleblowers, irrespective of whether they are employees or self-employed, that report breaches about regulated persons and entities in scope of the financial supervision of the FSMA (financial institutions and financial intermediaries) or on breaches of the anti-money laundering and counter-terrorist financing (AML / TF) provisions and on suspicious client transactions – such as staff members, agents and distributors.



# Belgium

## 4. How is protection triggered?

Keeping in mind that there is no general legal framework on whistleblowing in Belgium, and the two laws of July and October 2017 mentioned above both have a very specific scope, protection is triggered as soon as whistleblowers have made a notification in good faith to the FSMA, to the supervisory authority or to the CTIF-CFI.

Please note that this only applies within the relevant sectoral framework, as set out under the first question above.

## 5. What is the extent of the protection?

There is no general legal framework on whistleblowing in Belgium. Within the very specific framework of the two relevant laws entered into force in 2017 which we explained above, if the whistleblower is a staff member or a representative of the obliged entity and acted in good faith, he/she is protected against any civil, criminal or disciplinary claim or professional sanction with respect to the reporting.

Whistleblowers who have made a notification in good faith to the FSMA are, in addition, protected against acts of retaliation, discrimination and other forms of unfair treatment and are entitled to claim damages in case of breach of this prohibition. In case of dispute, the burden of proof is with the employer. Provided it can be reasonably

presumed that the employer (or principal) was aware that the employee blew the whistle, it is up to the employer (or principal) to prove that the above mentioned acts or treatments, if taken within 12 months after the employee blew the whistle, are unrelated to the whistleblowing.

Whistleblowers who have made a notification in good faith to the competent supervisory authority or to the CTIF-CFI are, in addition, protected against adverse or discriminatory treatment, including termination of the employment or representation mandate, in consequence of the reporting.

## 6. What remedies are available to employees who blew the whistle?

In case of breach of the prohibition of acts of retaliation, discrimination and unfair treatment taken by the employer (or principal) of the whistleblower, the latter is entitled to ask his/her reintegration or claim damages against his/her employer (or principal).

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

Both the amended Financial Supervision Law and the Law of 18 September 2017 guarantee the whistleblowers' anonymity.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

N/A

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

The confidentiality of the whistleblower's identity is guaranteed by the FSMA and a whistleblower who has reported an (alleged) infringement in good faith cannot be subject to any civil, criminal or disciplinary claims or professional sanctions as a result of the reporting. Reporting through this channel will also not be considered as a breach of any confidentiality or non-disclosure obligations to which the whistleblower is bound (there is an exception to this rule for external lawyers in respect of information received from their clients or about their clients in connection with the defence, representation or advice of such clients).

The supervisory authority or the CTIF-CFI receiving the information on non-compliance issues or AML / TF suspicions is bound by confidentiality and cannot disclose the whistleblower's identity.



# Belgium

**10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?**

The amended Financial Supervision Law imposes on regulated persons and entities that are in scope of the financial supervision of the FSMA to put in place appropriate internal reporting mechanisms. Actual or suspected infringements of the financial rules can be reported to the FSMA.

Under the Anti-money laundering and counter-terrorist financing (AML / TF) provisions, reports are to be directed to the AML Compliance Officer or the AML Manager through a specific, independent and anonymous channel.

In addition to the internal reporting possibility, whistleblowers have two external channels to report non-compliance issues or AML / TF suspicions: 1) reporting to the supervisory authority; 2) reporting to the CTIF-CFI.



# France

## 1. Is there specific legislation in place relating to whistleblowing?

The Sapin II law requires legal entities with at least 50 employees to implement appropriate arrangements for receiving concerns and alerts raised by whistleblowers.

A decree of 19 April 2017 has detailed the content and the conditions for the implementation of these arrangements. According to this decree, the arrangements must specify:

- with whom whistleblowers can raise their concerns (ie, their supervisor, employer or a specially appointed referee);
- which information must be provided (ie, relevant facts, information or documents to support their claims);
- how the employer or its representative should go about discussing the issue with the recipient of the report;
- steps to acknowledge receipt of the report and inform the whistleblower about the foreseeable timeframe for evaluating the report and how she/he will be informed of the outcome of the assessment;
- how the employer will ensure that the whistleblower's identity and the alleged facts remain confidential, even if the report is communicated to third parties for investigative purposes.

In addition, any whistleblowing system must comply with the French Data Protection Act of 6 January 1978 (as amended), the recommendations made by the French Data Protection Authority (CNIL) (notably the CNIL's decision dated 22 June 2017 and referenced under number 2017-191), as well as with the provisions set out by the French labour authorities (eg circular 'DGT' 2008/22 of 19 November 2008 soon to be replaced).

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

The Sapin II Law introduced specific protections on whistleblowers:

- The whistleblower benefits from a criminal immunity for breaching a secret protected by law if the disclosure is (i) necessary, (ii) proportionate to safeguard interests at stake and (iii) done in compliance with applicable process.
- In addition, specific protection is afforded against any retaliatory or discriminatory measures within the workplace (access to recruitment, discrimination, promotion, etc.), ie, any sanction against a whistleblower is null and void. The Sapin II Law also introduced a new specific legal action for whistleblowers who have the

possibility to bring a claim in summary proceedings in the event of dismissal notified after the whistleblower raised a concern or an alert.

- The protection is also ensured through several specific offences:

The disclosure of any confidential information (ie, any information received including identities of the whistleblower and the person affected by the alert) is sanctioned by a fine of EUR 30,000 and up to two years imprisonment for individuals or EUR 150,000 fine for legal entity; the obstruction to the whistleblower's disclosure rights is sanctioned by a fine of EUR 15,000 and up to one year imprisonment for individuals or EUR 75,000 fine for a legal entity; if a complaint for defamation against a whistleblower gives rise to the decision to dismiss proceedings, the Public minister has the possibility to pronounce a fine of EUR 30,000 for individuals and EUR 150,000 for legal entity.

## 3. Which categories of workers are eligible for protection?

Under the Sapin II law, the whistleblower can be an employee of the company or an external contingent worker employed by another company (eg consultant or temporary worker). The scope of protection provided for by the French Labour



# France

Code is vast and includes every employee present within the company regardless, inter alia, of his/her type of employment contract (fixed/indefinite term), the position held or his/her status (protected employee or not).

## 4. How is protection triggered?

In principle, whistleblowers, while reporting alleged unlawful behaviour or conduct must identify themselves, in order to benefit from legal protection against potential retaliation.

By way of exception, the CNIL allows anonymous reporting in case the seriousness of the alleged facts is established and factual elements are sufficiently detailed.

The Sapin II law introduced a new definition of the whistleblower. To benefit from the protection as specified above, the person must therefore be considered as a whistleblower and meet the conditions set by law, ie to be a whistleblower, the individual must report, selflessly and in good faith, one of the following breaches that he or she has been personally aware. The whistleblower must be:

- an individual
- who denounces:
  - a crime or an offence;

- a serious and manifest infringement of an international undertaking duly ratified or approved by France or a unilateral charter of an international organization adopted on the basis of such undertaking;
- a serious and manifest infringement of applicable laws or regulations;
- a threat or serious risk to the public interest;
- a report relating to the existence of conduct or situations in breach of the company's code of conduct (as the case may be).

- in good faith
- in a disinterested way.

## 5. What is the extent of the protection?

Any whistleblower who submits an alert in compliance with legal requirements is protected against sanctions or discriminations (eg in terms of remuneration, incentive or distribution of shares, training, reclassification, assignment, qualification, classification, professional promotion), but the whistleblower must be considered as such by fulfilling the conditions set by law. Failure to meet the legal conditions to be qualified as a whistleblower triggers an absence of eligibility to the legal protection.

## 6. What remedies are available to employees who blew the whistle?

As previously mentioned, in case an employee's dismissal is motivated by the fact he/she reported, while acting in good faith and in accordance with the legal definition of the whistleblower, the dismissed employee can turn to the Labour Court in order to have his/her dismissal held null and void.

In such case, two options are offered to the employee:

### 1) Reinstatement

First, the dismissed employee can ask to be reinstated, in principle, into his/her formerly held position. In addition to his/her reinstatement, said employee will be entitled to claim the remuneration he/she would have earned if he/she had worked between his/her dismissal and reinstatement.

### 2) Compensation

Indeed, rather than asking for reinstatement, the dismissed employee can opt for monetary compensation.

In such case, the dismissed employee, regardless of his/her seniority, will be entitled to claim for severance payment ie, legal compensation or compensation provided for by collective agreements as well as pay in lieu of notice, plus compensation amounting to at least 6 months of salary.



# France

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

Anonymous reports are not encouraged and should be exceptional. If they are to be accepted at all (rather than just deleted/rejected), the position of the CNIL is that they should relate to serious concerns, the facts should be sufficiently detailed to merit investigation and additional precautions such as an initial screening to decide whether to investigate or disregard anonymous reports should apply.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

No. In France, a whistleblower must act in a disinterested way. There is no financial reward.

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

See above re. strict confidentiality rules that must be complied when implementing whistleblowing processes.

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

The Sapin II law has introduced in the financial sector a special procedure where the whistleblower can address his/her alert directly to the *Autorité des Marchés Financiers*<sup>\*</sup> or the *Autorité de contrôle prudentiel et de résolution*<sup>\*\*</sup> when the facts relate to a breach of the obligations laid down by European regulations or the said authorities and the French Monetary and Financial Code.

All whistleblowing systems implemented within companies must comply with the Data Protection Act, the recommendations made by the Data Protection Authority (CNIL) as well as with the provisions set out by the French Labour Administration (eg, circular 'DGT' 2008/22 of 19 November 2008).

Moreover, all companies with more than 500 employees and a turnover of EUR 100,000,000 must put in place an anti-corruption compliance program which has to respect eight obligations:

1. A **code of conduct** defining and illustrating the different types of behaviour to be avoided as being likely to characterize acts of corruption or trading in influence.
2. A **whistleblowing system** designed to allow the collection of alerts from employees relating to the existence of conduct or situations contrary to the company's code of conduct;
3. A **risk mapping** in the form of regularly updated documentation designed to identify, analyze and prioritize risks to the company's exposure to external solicitations for the purpose of corruption, depending in particular on the sectors of activity and Geographical areas in which the company operates;
4. **Procedures for evaluating the situation of customers, first and intermediate suppliers** with regard to risk mapping;
5. **Internal or external accounting control procedures** to ensure that books, records and accounts are not used to hide acts of corruption or trading in influence. These controls may be carried out either by the company's own accounting and financial control departments or by using an external auditor when performing the certification audits provided for in Article L. 823-9 of the Commercial Code;



# France

6. **A training scheme for managers and staff** who are most exposed to the risks of corruption and trading in influence;
7. **A disciplinary regime to sanction employees** of the company in case of violation of the company's code of conduct;
8. **A system for internal control** and evaluation of the measures implemented.

\*The Autorité des Marchés Financiers (AMF) regulates participants and products in France's financial markets. It regulates, authorises, monitors, and, where necessary conducts investigations and issues sanctions. In addition, it ensures that investors receive material information, and provides a mediation service to assist them in disputes.

\*\* The Autorité de contrôle prudentiel et de résolution (ACPR) is responsible for supervising the banking and insurance sectors in France, preserving the stability of the financial system and protecting the customers, insurance policyholders, members and beneficiaries of the persons that it supervises.



# Germany

## 1. Is there specific legislation in place relating to whistleblowing?

No comprehensive legislation regarding whistleblowing exists in general in Germany to date, namely regarding employment and data protection aspects. However, whistleblowing systems must comply with general principles of employment law and data protection laws. The German Federal Labour Court has established certain principles on whistleblowing. According to case law, an employee who discovers certain deficiencies within the organisation should first of all inform the employer. Only if the employer does not take action regarding the issue or in certain cases when an internal whistleblowing complaint would seem unreasonable (eg the information is of special public interest, involvement of legal representatives of the employer), the employee may blow the whistle externally, ie, report directly to the authorities or make the allegations public before trying to have the issue resolved internally. These principles have been established to balance the employee's right of freedom of speech with the employee's duty of care.

Since 1 January 2014 regulated financial institutions are, according to the German Banking Act (Kreditwesengesetz) legally obliged to establish a process which helps employees to report violations against the law or other

criminal actions to an appropriate body by ensuring the confidentiality of the identity of the employee. Further, since July 2016 anyone can contact the German Federal Financial Supervisory Authority (BaFin) and provide information about actual or suspected violations of so-called supervisory provisions pursuant to section 4d of the Federal Financial Supervisory Authority Code (FinDAG). The term 'supervisory provision' is understood in a broad sense and contains all laws, legal regulations, administrative acts and other provisions as well as legal acts of the European Union for which BaFin has the mandate to ensure compliance by the companies and persons it supervises. Such information can be provided anonymously; the BaFin must protect the whistleblower's anonymity unless it is required by court rulings or other laws to disclose the person's identity. Apart from that, whistleblowing systems are often recognised as an important element of a proper compliance organization.

Under German employment law the works council may have a co-determination right regarding the establishment of whistleblowing systems. Therefore the employer has to inform the works council prior to the establishment of such systems and enter into negotiations on a works agreement on the whistleblowing system with the works council.

Further, the company's data protection officer must be involved.

Whistleblowing systems must in all cases comply with the established data protection principles according to the German Data Protection Act and must respect the personal rights of the involved persons. The data protection regulator has published certain guidance in this respect.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

In case employees provide information regarding actual or suspected violations of supervisory provisions to the Federal Financial Supervisory Authority, section 4d paragraph 6 of the Federal Financial Supervisory Authority Code stipulates that this behaviour must not be sanctioned. Apart from that, there is no explicit special statutory protection in force to protect whistleblowers. However, whistleblowers are, as all other employees in Germany, protected against unfair and discriminatory treatment by the employer, which means that if an employee raises a whistleblowing complaint in good faith and observes the above principles established by the Federal Labour Court, the employee must not be sanctioned and must be protected against retaliation for a whistleblowing complaint by the employer.



# Germany

### 3. Which categories of workers are eligible for protection?

In principle, all employees in Germany, irrespective of their category, are entitled to exercise their eligible rights and are protected against unfair and discriminatory treatment by the employer when doing so. So basically every employee who makes a legitimate whistleblowing complaint is protected.

### 4. How is protection triggered?

If an employee is, for example, dismissed on the grounds that the employee has blown the whistle even though this was done in good faith, a labour court could rule the dismissal to be null and void and the employee would be fully reinstated into his/her employment contract.

### 5. What is the extent of the protection?

The dismissal of the whistleblower may be invalid if he is dismissed only due to the fact that he revealed deficiencies within the organisation if the employee complies with the procedure as outlined above.

However, if the whistleblower does not comply with the procedure set out by case law, the employer can take disciplinary sanctions against the employee which may include a formal warning letter or in severe cases a termination for conduct-related reasons.

### 6. What remedies are available to employees who blew the whistle?

The most important remedy for employees is filing a claim against unfair dismissal. If an employee is dismissed only because he revealed deficiencies within the organization of the employer, the termination of the whistleblower may be invalid. The labour court has to weigh the employee's constitutional right to freedom of speech against the employer's interest to keep certain deficiencies confidential and to resolve them internally. If the labour court is convinced that the employee's interests outweigh the employer's interests or if there is a special public interest in the whistleblowing information, the dismissal might be invalid.

Further, an illegitimate treatment of a whistleblower may lead to an entitlement of the employee for financial compensation for injury to his/her personal rights.

### 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

German data protection laws do not, in principle, expressly prohibit anonymous whistleblowing. However, it is disputed in Germany whether whistleblowing systems should allow for or support anonymous whistleblowing. According to guidance from the data protection authorities

whistleblowing systems should at least not encourage anonymous whistleblowing, in particular because of the risk of abuse and due to the impact on the privacy rights of the accused person.

There are a number of restrictions to be observed when implementing whistleblowing hotlines in Germany from a data privacy perspective. For example, whistleblowing schemes should always ensure that the identity of the whistleblower is processed under conditions of confidentiality as far as legally possible (however, under German law usually no guarantee can be given that the identity of the whistleblower will be under all circumstances kept confidential, since at some point the accused person may have a right to information on the source from which his/her personal data was obtained).

Pursuant to section 4d paragraph 1 sentence 2 of the Federal Financial Supervisory Authority Code disclosures about violations of supervisory law can be provided anonymously. The Federal Financial Supervisory Authority has set up an electronic whistleblowing system, which ensures anonymity.



# Germany

**8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?**

No, but as outlined above employees are normally expected to raise concerns firstly internally before raising an external compliant.

**9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?**

There aren't any relevant legal provisions or regulatory guidance on the interaction between confidentiality provisions and whistleblowing rules.

**10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?**

If information regarding violations of supervisory law is provided by employees of corporations that are under the supervision of the Federal Financial Supervisory Authority, section 4d paragraph 6 stipulates that this behaviour

must not be sanctioned unless employees provide false information with intention or gross negligence.

As already outlined above, since 1 January 2014 regulated financial institutions are obliged to establish processes that helps employees to report violations against the law or other criminal actions to an appropriate body by ensuring the confidentiality of the identity of the employee.



# Italy

## 1. Is there specific legislation in place relating to whistleblowing?

here are a number of recent specific legislations regulating whistleblowing, all with a well-defined scope.

For the public sector, the first attempt of regulating whistleblowing in Italy has been provided by Law 190/2012, which introduced Article 54-bis of the Legislative Decree No. 165/2011. More recently, the relevant regulation has been amended by Law 179/2017.

For the private sector, Law 179/2017 introduced the opportunity for businesses to implement internal systems of whistleblowing. This law only applies to employers implementing the organization, management and control models pursuant to Legislative Decree 231/2001, which regulates the administrative liability of corporate entities resulting from the commission of certain crimes. The organization management and control models are not mandatory: employers can decide to implement them in order to decrease the likelihood of being held responsible for the commission of crimes within their organizations. Secondly, the definition of wrongdoings is particularly narrow, as it is limited to certain specific crimes and to violations of the relevant organization, management and control models, as implemented by each employer.

Moreover, always for the private sector, several sectoral legislative provisions transposing EU Directives have been enacted in the last few years, all containing provisions on whistleblowing (legislative decrees implementing CRD IV, MiFID II and the AML Directive).

When a whistleblowing situation is not covered by the above-mentioned laws, one will need to apply the general principles developed by the case law.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

Italian case law has traditionally deemed that the protection of whistleblowers against retaliation falls into the scope of freedom of expression, generally safeguarded by both Article 21 of the Italian Constitution and Article 1 of the Italian Workers' Statute. Consequently, if an employer dismisses an employee because he/she reported wrongdoings, this will be deemed as a retaliatory measure – and, as such, null and void - taken by the employer, who shall be condemned to reinstate the relevant employee. In these cases, the burden of proof lies solely on the employee. Should the whistleblowing situation be covered by the above mentioned Law 179/2017, then not only any direct or indirect retaliatory measure connected to the content of

the whistleblowing will be considered as null and void but, the employer will bear the burden of proof that any measure taken against the relevant employee was not based on the content of the whistleblowing.

## 3. Which categories of workers are eligible for protection?

In principle, all employees in Italy, irrespective of their category, are entitled to exercise their eligible rights and are protected against retaliation, according to relevant case law. The same case law deems that whistleblowing shall be considered as a protected form of freedom of expression provided that the relevant information is true, its communication has been measured, and the content of the information is of public interest. Otherwise, the employee breaches the duty of loyalty and, as such, will be exposed to disciplinary sanctions – ie, in the most serious cases, to a dismissal – which will be considered well grounded under Italian employment laws.

In addition to the above, employees blowing the whistle that fall within the scope of specific legislations mentioned under the first question will enjoy specific protection.



# Italy

## 4. How is protection triggered?

In general, according to the case law described above, the whistleblower that has been dismissed because he/she reported wrongdoings can file a claim against his/her employer claiming that the dismissal was retaliatory. If the employee can prove the retaliation, the judge will deem the dismissal null and void and will condemn the employer to reinstate the relevant employee.

The different pieces of legislation provide for specific procedures to be followed by the whistleblowers to enjoy the relevant specific protection provided by the law. For example, within the private sector, Law 179/2017 expressly provides that the relevant organization, management and control models pursuant to Legislative Decree 231/2001 shall establish channels through which the employee can report wrongdoings within the workplace, that guarantee the confidentiality of the whistleblower's identity.

However, the only misconducts that fall into the scope of this provision are specific crimes listed in Legislative Decree 231/2001 and violations of the organization, management and control models. As for the internal channels, at least one of them has to be implemented through IT systems in order to protect the whistleblower's identity. Normally, these channels are regulated by

internal policies, which provide for detailed rules aimed at regulating the modalities to do the reporting. Therefore, if the whistleblower wants to enjoy the additional protection provided by Law 179/2017 (eg anonymity and the fact that it is the employer – and not the employee – that bears the burden of proof that any measure taken against the relevant employee was not based on the content of the whistleblowing), it has to report the wrongdoing through the specific channels provided by the organization, management and control models.

## 5. What is the extent of the protection?

In general, any direct or indirect retaliatory measure against the whistleblower for reasons linked to his/her reporting of wrongdoings is null and void. Please bear in mind that, according to case law, whistleblowers are protected provided that the relevant information is true, its communication has been measured, and the content of the information is of public interest. Otherwise, the employee breaches the duty of loyalty and, as such, will be exposed to disciplinary sanctions.

Law 179/2017, when applicable, also provides that, for the public sector, the relevant whistleblower's protections are not granted if the discloser has been sentenced, among others, for slander or defamation and, for the private sector,

that the organization, management and control models must provide for disciplinary sanctions against those, who intentionally or by serious negligence, make unfounded reports.

## 6. What remedies are available to employees who blew the whistle?

If it is proved that the employee has been dismissed for reasons related to the whistleblowing, the dismissal is retaliatory (thus null and void) and the employee has the right to be reinstated in the workplace, to receive compensation for damages and payments of social security contributions for the period between the dismissal and the reinstatement.

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

Within the private sector, Law 179/2017 expressly provides that the relevant organization, management and control models pursuant to Legislative Decree 231/2001 shall introduce channels through which the employee can report wrongdoings. These channels shall guarantee confidentiality about the identity of the discloser. Outside the scope of this specific regulation, the admissibility of anonymous reports is not expressly regulated.



# Italy

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

Italian law does not provide for financial or other incentives.

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

The employee has a general duty of loyalty and confidentiality towards the employer. However, the case law described above deems that whistleblowers can disclose information covered by this duty of confidentiality provided that the relevant information is true, its communication has been measured, and the content of the information is of public interest.

The public interest of the revealed information prevails over the duty of loyalty of the employee and confidentiality must be provided for when the information is disclosed by the whistleblower using the channels provided by Law 179/2017; this is applicable to both public and private employers. Please note that this only applies to whistleblowing within the scope of the relevant law as noted above.

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

Within the private sector, Law 179/2017 expressly provides that the relevant organization, management and control models pursuant to Legislative Decree 231/2001 shall provide for channels through which the employee can report wrongdoings within the workplace, that guarantee the confidentiality of the whistleblower's identity. As for the internal channels, at least one of them has to be implemented through IT systems in order to protect the whistleblower's identity. Normally, these channels are regulated by internal policies, which provide for detailed rules aimed at regulating the modalities to do the reporting. No external channels are expressly provided, although the law specifies that, if a discriminatory measure is adopted against the whistleblower, the latter and the trade unions can report such fact to the labor inspectorate.

Within the financial sector, Legislative Decree 129/2017, transposing MiFID II, provides that certain employers operating in the financial sector need to implement

internal channels through which the employee can report wrongdoings within the workplace, that guarantee the confidentiality of the whistleblower identity. According to this regulation, employers shall also provide for specific procedures that allow their employees to report to the competent regulators (ie, Bank of Italy, CONSOB or IVASS) misconducts related to violations of the rules of the Legislative Decree 58/1998, regulating financial intermediation.

Within the public sector, the relevant legislation provides for both internal and external channels to do the reporting. As for the internal channel, it provides for the opportunity to inform the direct supervisor. Externally, the civil servant can report the misconducts to the judicial authority, the court of public auditors and the National Anti-Corruption Authority (the so-called ANAC).



# The Netherlands

## 1. Is there specific legislation in place relating to whistleblowing?

As per 1 July 2016, the Dutch Whistleblowers (Safe Haven) Act (Wet Huis voor Klokkeluiders, the Act) entered into force. Based on this Act, employers with 50 or more employees are obliged to have an internal whistleblowing policy. In addition, the Act provides for the establishment of a national independent body called the House of Whistleblowers (the House), which should provide for a 'safe haven' for potential whistleblowers where they can get independent advice and which has, under circumstances, the competence to investigate cases of alleged social wrongdoings. Basic principle of the Act is that an employee must first report (alleged) social wrongdoings internally to the employer before taking public action.

Also as per 1 July 2016, the introduction and implementation of a whistleblowing policy requires the prior approval of a works council under the Dutch Works Council Act.

Other decisions that may come up in the context of introducing a whistleblowing policy and that require the advice of the works council are: (i) decisions regarding the use of new technological facilities (eg in relation to the

establishment of a whistleblowing hotline) and (ii) decisions to recruit/ hire groups of workers (eg, call centre employees in connection with the implementation of the policy).

In terms of the process surrounding the follow-up of reports made to the whistleblowing hotline, we note that a policy should ensure a fair process, eg providing that the suspect is treated as not guilty until the contrary is proven, guaranteeing that any reports made in line with the applicable procedure will not lead to negative consequences (dismissal or change of position) for the employee filing the report etc. If such situation does occur, the employee could request for an opinion from the House.

Furthermore, the Dutch Corporate Governance Code (CGC), applicable to listed companies and which is based on the 'comply or explain' principle, contains a best practices provision referring to whistleblowing. The provision is broader than the Act as it also covers the reporting of irregularities and covers all activities of the company and its subsidiaries whether in the Netherlands or abroad.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

Based on the Act and the Dutch Civil Code, any reports made in line with the applicable (procedural) rules, may

not lead to negative consequences (eg dismissal or change of position) for the employee filing the report.

## 3. Which categories of workers are eligible for protection?

Under the Act the following employees are protected: 'the person who works or has been working for the employer, whether or not under an employment contract, or as a public servant'. This means that both current and former employees as well as self-employed contractors, interns, temporary workers and volunteers, are covered.

## 4. How is protection triggered?

Please see above. Based on the Act, protection is triggered by an employee reporting allegations with respect to the company he or she works for to the House. The Act only relates to whistleblowing on suspicions of matters endangering the public interest as a result of a violation of statutory rules or as a result of acts and/or omissions posing a threat to public health, the safety of people, the environment and the functioning of public ('social wrongdoings'). The House will assist the employee and take action where needed. In order to benefit from protection provided by the House, there must be allegations, based on solid grounds and in the public interest.



# The Netherlands

Employees must first report social wrongdoings internally. The employer then has to investigate whether the report is well-founded and whether it qualifies as social wrongdoing. If so, the employer must take measures to stop the social wrongdoings, to the extent possible. It is for the employer to decide whether and how it wants to carry out the internal investigation of the reported social wrongdoing and whether it wants to notify the relevant employee of the findings of the investigations.

External reports to eg a supervisory authority or regulatory body are only allowed where the internal report was not dealt with adequately by the company or if an employee in all reasonableness cannot be expected to report internally (for example if the management of the company is involved in the social wrongdoing or in case of an immediate threat). Employees are given the possibility to ask the House for advice when they suspect a social wrongdoing and, as an ultimatum remedium, to ask the House to carry out an investigation.

The Act gives companies a lot of freedom as to the contents of the whistleblowing policy, but it must at least include the following aspects:

- how the internal report will be handled and by whom (including who can report and what issues can be reported);

- the criteria for the presumption of an abuse (where the public interest is at stake);
- the obligation for the employer to handle the report confidentially, if the employee so requests (the identity of the reporting person must be kept anonymous unless the reporting person has given explicit permission to reveal his/her identity);
- the opportunity for the employee to engage an advisor on a confidential basis;
- under which circumstances employees can file an external report; and information about the legal protection of the employee filing the report (eg the applicable procedure may not lead to negative consequences for the employee reporting in good faith and the reporting employee has the right to be involved in the internal investigations (ie he has the right to be heard and must be allowed to respond to the investigation report and the opinion of the organization).

## 5. What is the extent of the protection?

The Act provides for protection of the employee (who acted in good faith) against being dismissed or suffering any detriment on the grounds of having reported an allegation.

## 6. What remedies are available to employees who blew the whistle?

Employees could request the House to conduct inquiries into deemed social wrongdoings. If an employee who filed a report in relation to a social wrong doing is dismissed, this dismissal is considered voidable. The employee who is dismissed or otherwise put at a disadvantage could go to court and file a claim against unfair dismissal or treatment or where he no longer feels that he can work for the company, file a claim for termination himself and ask for compensation.

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

No, but based on the guidelines of the Dutch Data Protection Authority (DDPA) organisations must in principle encourage non-anonymous confidential reporting. The Act requires employees to provide their name, address and signature when they file a request at the House to carry out an investigation.



# The Netherlands

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

N/A

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

There aren't any relevant legal provisions or regulatory guidance on the interaction between confidentiality provisions and whistleblowing rules. In court the employer's interest to keep certain deficiencies confidential and to resolve them internally and the employees constitutional right to freedom of speech are weighted in court against each other to which one should prevail in a particular case. The employer's interest to keep certain deficiencies confidential and to resolve them internally and the employees constitutional right to freedom of speech are weighted in court against each other to which one should prevail in a particular case.

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns

## directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

The Dutch Authority for the Financial Markets (AFM) introduced whistleblowing rules for the financial sector based on the Market Abuse Regulation (MAR) in June 2016. In relation to employees working for a company that is subject to the MAR, the AFM encourages employees to report wrongdoings such as for example insider trading or market abuse, directly to the AFM. In case the AFM receives a report of wrong doings from a whistleblower, it will independently investigate these allegations. The whistleblower will not be informed or involved during this process or afterwards.

Furthermore:

- the Dutch CGC entails a best practice provision referring to whistleblowing and the Act. According to this provision, listed companies should have a whistleblowing policy in place; and
- whistleblowing policies established by an employer have to be in compliance with the Dutch Data Protection Act and other applicable data protection regulations.



# Poland

## 1. Is there specific legislation in place relating to whistleblowing?

No specific legislation currently exists except for legislation governing activity of banks and investment agencies. In all cases of implementing a whistleblowing system (whether under legislation governing activity of banks and investment agencies or by entities not legally obliged to implement such systems) it needs to comply with the 1997 Personal Data Protection Act. Also, recommendations issued by the respective European bodies could be used as guidelines (good practices) (eg Art. 29 Working Party opinion 1/2006, recommendation of the Council of Europe of 1 April 2015 and Art. 29 Working Party opinion 2/2017).

As for banking and investments agencies sector – under the Polish Banking Law and the Financial Instruments Trading Act (as well as regulations issued bases thereon), banks and investment agencies are obliged to implement management systems that include procedures of anonymous reporting of infringements of law to either management or supervisory board.

The Government is at present assessing the matter and considering a draft bill under which a prosecutor could give a person (employee but not only) the status of a whistleblower when some conditions are met, with the whistleblower enjoying some extra protection (eg termination of his/her employment, if any, could only

take place with the consent of the prosecutor). The bill has not yet been sent to Parliament.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

There are no labour laws designed to confer protection on whistleblowers – general rules of protecting employees apply (eg against being harassed or discriminated, or against unlawful dismissal).

## 3. Which categories of workers are eligible for protection?

As for banking and investment agencies sector – under the aforementioned legislation banks and investments agencies are to ensure that whistleblowing employees will be protected at least against actions of repressive nature, discrimination, or other types of unfair treatment.

There are no such legislations applicable to other sectors.

## 4. How is protection triggered?

As for banking and investment agencies sector – banks and investment agencies are obliged to implement procedures that will allow for:

- (i) reporting infringements by employees without disclosing their identity;
- (ii) ensuring the identity of a reporting employee and of a person who is the subject of the report are protected in accordance with the 1997 Personal Data Protection Act;
- (iii) ensuring confidentiality and protection at least against actions of repressive nature, discrimination, or other types of unfair treatment, without prejudice to remedies described above.

N/A – in respect of entities other than banks and investment agencies.

## 5. What is the extent of the protection?

Please see above.

## 6. What remedies are available to employees who blew the whistle?

There are no specific remedies for employees who blew the whistle. General rules apply, including:

- (i) a whistleblower who was dismissed for a fictitious reason where an actual reason was that they blew the whistle, can appeal to the labour court on general rules and challenge the reason, demanding either reinstatement to work or compensation. As a rule this



# Poland

concerns indefinite-term employees dismissed upon notice (as they need to be given a reason for dismissal), exceptionally fixed-term employees (no reason for termination needs to be given – potentially based on abuse of the law and contrary to the principles of community coexistence arguments).

- (ii) a whistleblower who is discriminated or treated unequally comparing with other employees (violation of equal treatment in employment) may appeal to the labour court demanding compensation (there is no cap – minimum is the minimum national wage, ie, PLN 2,000 in 2017 and PLN 2,100 in 2018).
- (iii) a whistleblower who due to harassment suffers a health disorder can demand compensation for damages suffered.

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

Polish law is silent in that respect (except for legislation governing activity of banks and investment agencies which directly imposes an obligation for implementing anonymous whistleblowing procedures). However, as a good practice – based on the recommendation of Art. 29 Working Party opinion 1/2006, recommendation of the Council of Europe of 1 April 2015 – anonymous reports should be exceptional.

As for banks and investment agencies, such institutions are required, inter alia, to introduce an independent channel of communication that will allow for anonymous reporting and to ensure the confidentiality in case the employee discloses his/her identity or such identity may be determined. Management board members of banks and investment agencies are responsible for providing an appropriate and effective compliance system.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

N/A

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

There aren't any relevant legal provisions or regulatory guidance on the interaction between confidentiality provisions and whistleblowing rules. The employer's interest to keep certain deficiencies confidential and to resolve them internally and the employees constitutional right to freedom of speech are weighted in court against each other to which one should prevail in a particular case.

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

No.



# Russia

## 1. Is there specific legislation in place relating to whistleblowing?

No specific legislation exists in this respect. Generally, the whistleblowing practice shall comply with regulations established by Russian employment and personal data protection legislation. In 2015 and in the beginning of 2017 Ministry of Labour and Social Security of the Russian Federation developed two draft bills on protection of individuals who reported on corruption offences (eg, giving a bribe) to their employers or government bodies. The draft bills provide for protection of whistleblowers (provided that they report on corruption offences) as well as, per the draft proposed in 2015, certain monetary remuneration for such reports. However, neither of the draft bills has been introduced to Russian Parliament yet and it is not clear whether they will be adopted.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

No specific statutory protection exists. There is general protection from discrimination, which may be applied to an employee who blows the whistle on any wrongdoing by the employer or other employees, but this mechanism is quite vague.

## 3. Which categories of workers are eligible for protection?

N/A

## 4. How is protection triggered?

N/A

## 5. What is the extent of the protection?

N/A

## 6. What remedies are available to employees who blew the whistle?

There are no specific remedies for whistleblowers. General rules for protection of employees' rights shall apply, including challenging an employer's illegal actions in a court or bringing a complaint to the State Labour Inspectorate. In particular, wrongful dismissal of an employee may result in the employer's obligation to reinstate him/her, pay the employee his/her average salary for the period of forced absence and compensate certain other damages and costs.

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

No prohibition nor restriction in this regard.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

N/A

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

Since whistleblowing is not regulated by Russian law, there are no relevant legal provisions on the interaction between confidentiality provisions and whistleblowing rules.

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

No.



# Spain

## 1. Is there specific legislation in place relating to whistleblowing?

No specific legislation exists in this respect other than for investment firms – under the Spanish Securities Market Act, investment firms are obliged to have internal procedures that allow their employees to report any infringement through an independent, specific and autonomous channel. The procedures must guarantee confidentiality in respect of the natural person who reports and in respect of the natural person who commits the infringement. In addition, investment firms must guarantee the protection of the employees who report from any possible retaliation.

In addition:

- (i) the last reform of the criminal code (2015) included a provision that criminal corporate responsibility may be avoided if the company puts in place a compliance programme, with certain requirements. Although these requirements do not include any express mention to whistleblowing, most scholars understand that the implementation of a whistleblowing programme would strengthen any such programme;
- (ii) the Good Governance Code of Listed Companies, which contains guidelines on corporate governance for listed companies, states that the audit committee of a listed company, among other functions, has to set-up

and supervise a mechanism that allows employees to communicate any irregularity of potential significance they may notice. Such mechanism should be confidential at all times and anonymous in case it is possible and adequate;

- (iii) the Spanish Gender Equality Act provides that companies shall promote working conditions which prevent sexual harassment and harassment on the grounds of gender. Companies shall set out a specific procedure to prevent harassment in the workplace and in order to channel the receipt of harassment claims from employees affected by it. Again, there is no express reference to whistleblowing systems but we understand it would be an adequate means to enforce this provision;
- (iv) case law by employment courts has set out the so-called ‘guarantee of indemnity’ by which an employee cannot suffer retaliation for the exercise of employment-related rights (eg a termination grounded on the fact that an employee ‘blows the whistle’ would be considered null and void, meaning that the company would have to reinstate the affected employee).

Notwithstanding the above, when setting up a whistleblowing system, Data Protection provisions shall be complied with, ie, Spanish Data Protection Act 15/1999, of 13 December 1999 (the DP Act), Royal Decree 1720/2007 of 21 December developing the provisions of the DP Act, and

the General Data Protection Regulation which will enter into force as of 25 May 2018.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

No statutory protection exists. Whistleblowers can be protected by the guarantee of indemnity, under which an employer cannot use its organisational and disciplinary powers to punish its employees’ legitimate exercise of fundamental rights (eg, complaining about irregularities in the company).

## 3. Which categories of workers are eligible for protection?

Any employee – this should be assessed on a case-by-case basis.

## 4. How is protection triggered?

If an employee is, for example, dismissed on the grounds that the employee has blown the whistle (provided this was done in good faith) a labour court could rule the dismissal is retaliation and, as such, null and void so that the employee should be fully reinstated into his/her employment contract (and paid any pending salaries from the date of termination).



# Spain

## 5. What is the extent of the protection?

The dismissal of the whistleblower may be null and void if it was only due to the fact that (s)he revealed deficiencies within the organisation (ie, if it is considered as retaliation) they would be null and void. The same would apply to other measures such as a transfer, demotion, salary reduction, etc., they would be null and void if it could be shown that these are retaliatory against the employee for blowing the whistle.

However, if the whistleblower does not act in good faith, or reports false facts, the employer could take disciplinary action against the employee.

## 6. What remedies are available to employees who blew the whistle?

No specific remedies apply, but the general rules in case of breach of indemnity. This means that the relevant action will be null and void and the employee could also claim damages (for breach of fundamental rights).

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

There is no express prohibition in Spanish regulations, but the Data Protection Agency has the view that anonymous calls/reports should not be accepted in order to assure the

lawfulness of the scheme. The Data Protection Agency also considers that mechanisms must be established to guarantee the confidentiality of the whistleblower. Thus, we suggest including rules to encourage that whoever is blowing the whistle identifies him/herself, and different attention should be given to the claims when they are anonymous and not backed up with any supporting evidence.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

N/A

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

There aren't any relevant legal provisions or regulatory guidance on the interaction between confidentiality provisions and whistleblowing rules. Having said that, any clauses preventing employees (whether during or after employment) from disclosing irregularities would be invalid and non-enforceable.

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

No, only some guidelines from the Data Protection Agency (including the suggested prohibition of anonymous claims).



# UK

## 1. Is there specific legislation in place relating to whistleblowing?

Yes, the Employment Rights Act of 1996 (as amended by the Public Interest Disclosure Act of 1998 and the Employment and Regulatory Reform Act 2013).

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

The legislation protects workers from detriment and dismissal (including being selected for redundancy) on the grounds that they blew the whistle.

'Detriment' is not defined in the legislation. It might include threats, disciplinary action, loss of work or pay, damage to career prospects or suspension.

## 3. Which categories of workers are eligible for protection?

Protection is afforded to 'workers'. 'Worker' is defined very widely. It includes current and former employees and individuals who work (or who formerly worked) under a contract (express or implied) to provide work or services personally for the employer (but excluding individuals who are genuinely in business on their own account). This includes contractors under the control of the employer and LLP members.

## 4. How is protection triggered?

A worker must make a 'protected disclosure'. Certain conditions must be fulfilled for a disclosure to be 'protected' – in summary:

- the disclosure must, in the reasonable belief of the worker, tend to show that one of or more of the six specified types of failure is taking place or is likely to take place – namely (i) breach of any legal obligation; (ii) a criminal offence; (iii) a miscarriage of justice; (iv) danger to the health and safety of any individual; (v) damage to the environment; (vi) the deliberate concealment of any of (i) to (v);
- the worker must reasonably believe that their disclosure is in the public interest; and
- the disclosure must be made to a certain category of person, for example the employer or a legal adviser.

Affected workers must bring a claim in the Employment Tribunal.

## 5. What is the extent of the protection?

Workers are protected against being dismissed or suffering a detriment on the grounds of having made a protected disclosure.

## 6. What remedies are available to employees who blew the whistle?

There is no cap on the compensation which can be awarded in unfair dismissal or detriment cases brought under whistleblowing legislation. Damages can in some cases extend to career long loss.

If dismissed, a worker who is an employee could claim to be reengaged or re-instated but compensation is more likely.

Compensation may be reduced by up to 25 per cent where the disclosure was made in bad faith.

Additional compensation may be awarded in detriment cases for injury to feelings (unfair dismissal compensation cannot include compensation for injury to feelings).

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

No prohibition against anonymous reports but employees should not be encouraged to submit them.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

N/A



# UK

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

S43J of the Employment Rights Act 1996 provides that any provision in any agreement is void in so far as it purports to stop the worker from making a protected disclosure under the whistleblowing regime. It is common practice in employment contracts and settlement agreements to expressly carve out the right to make a protected disclosure. By virtue of s43J this is not technically necessary, but it is best practice so as to avoid any suggestion that the employer has created a culture in which workers do not feel that they can blow the whistle.

Although the legislation refers to an ‘agreement’, this would be interpreted to mean any provision on confidentiality to which the worker was subject, eg an internal policy.

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms’ whistleblowing policies and their governance?

The FCA and PRA whistleblowing regimes do not encourage or incentivise workers to escalate concerns direct to regulators in place of raising concerns with the employer, but they do require firms to tell their employees about the FCA or PRA whistleblowing services.

For the financial services sector, the FCA and PRA have put in place a new whistleblowing regime which firms must comply with from September 2016. Under this regime, firms are required to put in place a relevant whistleblowing arrangement which can handle all types of disclosures from all types of person. They are required to tell UK-based employees about the FCA and PRA whistleblowing services (and to require their appointed representatives and tied agents to tell their UK-based employees the same). Firms are required to inform the FCA if they lose an employment tribunal case with a whistleblower, are required to present a report on whistleblowing to the board at least annually, and must appoint a whistleblowers’ champion who will be

responsible for preparing an annual report. The rules apply to UK entities which are (i) UK deposit-takers with assets of £250 million or greater, including banks, building societies and credit unions; (ii) PRA-designated investment firms; and (iii) insurance and reinsurance firms within the scope of Solvency II and the Society of Lloyd’s and managing agents.

From 7 September 2017, a slightly less extensive FCA and PRA whistleblowing regime applies to UK branches of overseas banks (EEA and third-country) and UK branches of non-EEA deposit takers and non-EEA overseas insurers, including reinsurers. This regime requires UK branches to communicate to their UK-based employees that they can use the whistleblowing services offered by the FCA and PRA. If a UK branch has a sister or a parent company that is subject to the UK whistleblowing rules in its own right, it must inform its staff that they are able to use the other group entities’ whistleblowing arrangements too.



# China<sup>1</sup>

## 1. Is there specific legislation in place relating to whistleblowing?

Yes. The PRC Criminal Procedure Law and the PRC Administrative Supervision provide protection to the whistleblowers who report criminal and administrative offenses to the judicial authorities. The banking, insurance and security regulators have issued various guidelines which require companies to put in place an internal whistleblowing system as part of their internal control, governance and compliance system.

Various authorities (including the tax authority and foreign exchange control authority and food and drug administration authority) released specific regulations on implementation of the whistleblowing procedures, protection of the whistleblowers and the grant of monetary rewards for whistleblowing.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

The employers may be imposed monetary fines, administrative and criminal penalties for retaliating against the whistleblowers who report any employment related non-compliance. If an employee is dismissed for having reported the wrongdoing or violation of laws of his or her employer, the court may hold that the dismissal is illegal and the employee is entitled to reinstatement of employment or compensation, at the election of the employee. However, employees normally have various concerns over the potential consequences arising from their whistleblowing and may not be willing to do so.

## 3. Which categories of workers are eligible for protection?

All employees are all entitled to report the wrongdoings to the relevant authorities and are eligible for protections provided under the relevant regulations.

## 4. How is protection triggered?

Protection is available to an employee in case of retaliation or wrongful termination.

## 5. What is the extent of the protection?

Please refer to our answers above.

## 6. What remedies are available to employees who blew the whistle?

An employee is entitled to reinstatement of employment (with back pay), or alternatively compensation for unlawful dismissal. The amount of such compensation is twice the statutory severance pay that the employee would have been entitled to under a lawful dismissal. The severance pay is calculated on the basis of the employee's average monthly salary (but subject to a cap at three times the local average monthly salary as published by the local government on a yearly basis) and the service year with the employer.

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

No.

1. For the purpose of this document the definition of China excludes Hong Kong, Macao and Taiwan.



# China

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

We identify one PRC law in this regard, which is the Guidelines for Commercial Banks on Risk Management Compliance with the Relevant Regulations (2006), providing that banks should establish a system encouraging internal reports for non-compliant incidents.

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

We are not aware of any legal provisions or regulatory guidance that specifically refer to the interaction between confidentiality provisions and whistleblowing rules. Provided the disclosure is genuine and truthful, then the whistleblower's statutory rights to report the wrongdoings are not subject of the contractual confidentiality obligations he/she might own to the employer or any third parties.

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

The following PRC laws provide that whistleblowers shall be encouraged by financial rewards:

- Interim Measures for Handling Report of Securities and Future Related Illegal Acts (2014)
- Administrative Measures for Whistle-Blowing on Tax Illegalities (2011)
- Administrative Measures for Food and Drug Complaints and Reports (2016)



# Hong Kong

## 1. Is there specific legislation in place relating to whistleblowing?

No specific legislation exists in this respect. In accordance with the Corporate Governance Code issued by the Stock Exchange of Hong Kong Limited, the audit committee of any Hong Kong-listed company should ensure that arrangements are in place by which the company's employees can raise concerns about possible improprieties in financial reporting, internal control and other such matters.

Any company listed on the Main Board of the Hong Kong Stock Exchange which fails to comply with this provision must explain its non-compliance in its annual report. In addition, the Code makes it a recommended best practice for the audit committee to establish a specific whistleblowing policy and system by which concerns can be raised in confidence by employees or by other parties who deal with the company, such as customers and suppliers.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

It is a criminal offence for an employer to dismiss or discriminate against an employee because he or she has given or agreed to give evidence in proceedings,

or information in a public inquiry, relating to (i) the enforcement of the Employment Ordinance or the Factories and Industrial Undertakings Ordinance; (ii) an employment-related accident; or (iii) a breach of duty in relation to the safety of persons at work. An employer found guilty of this offence is liable to pay a fine and compensation.

The discrimination legislation also provides protection from victimisation when employees (i) give information or evidence in proceedings under the Disability Discrimination Ordinance, Sex Discrimination Ordinance, Family Status Discrimination Ordinance, Race Discrimination Ordinance or makes a complaint of discrimination / harassment.

The anti-money laundering legislation in Hong Kong (which includes the Organised and Serious Crimes Ordinance, the Drug Trafficking (Recovery of Proceeds) Ordinance and the United Nations (Anti-Terrorism Measures)) also protects employees from breach of confidentiality claims if an employee discloses confidential information belonging to an employer where the disclosure is related to any actual or suspected money laundering or proceeds of crime. Employees may also be protected from civil and criminal liability if the disclosures are made to an 'authorised officer' or an appropriate person in accordance with the procedures established by the employer.

## 3. Which categories of workers are eligible for protection?

In respect of the protection under the Employment Ordinance, all employees to which the Employment Ordinance applies will be covered.

In respect of the protection under the discrimination legislation, all employees employed in Hong Kong are covered, unless the employee does his/her work wholly or mainly outside Hong Kong.

In respect of the anti-money laundering legislation, all persons who employed at the time of making the disclosure are covered.

## 4. How is protection triggered?

Usually protection is triggered upon any sort of adverse treatment/ retaliation against an employee, including termination of his/her employment. The affected employee can make a claim to the Labour Tribunal. For protection under the anti-money laundering legislation, protection is triggered when an employee discloses confidential information belonging to an employer where the disclosure is related to any actual or suspected money laundering or proceeds of crime.



# Hong Kong

## 5. What is the extent of the protection?

Please refer to our answers above.

## 6. What remedies are available to employees who blew the whistle?

An employee may be entitled to compensation for unlawful dismissal or discrimination under the aforementioned legislation. The amount of any such compensation is left to the discretion of the court or magistrate, having regard to the circumstances of the case.

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

No.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

Not applicable, but see next question.

Also the United States Dodd Frank allows overseas whistleblowers (such as those in HK) to blow the whistle to the United States SEC in order to receive a financial reward.

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

Please see above.

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

The Competition Ordinance has a leniency regime whereby those who provide information on cartels to the Competition Commission may be given a pardon for his/her actions. There is no financial incentive though.



# India

## 1. Is there specific legislation in place relating to whistleblowing?

Yes, the Whistleblowers Protection Act, 2014<sup>1</sup>. While this Act has been passed by the Parliament and has received the assent of the President on 9 May 2014, it is yet to be brought into effect. This Act is intended to protect those making a public interest disclosure relating to an act of corruption or wilful misuse of power or wilful misuse of discretion by a public servant.

In addition, there are several scattered provisions relating to whistleblowing which are summarised briefly below:

- The Companies Act, 2013 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 require certain companies<sup>2</sup> including all listed companies to establish a vigil mechanism and ensure adequate protection of whistleblowers.
- The Government of India has passed a Public Interest Disclosure and Protection of Informers (PIDPI) Resolution authorizing the Central Vigilance Commission (CVC) and the Central Vigilance Officers (CVO) of the Ministries

1. Amended by the Repealing and Amending Act, 2015

2. Classes of companies:

- (a) Companies which accept deposits from the public; and
- (b) Companies which have borrowed money from banks and public financial institutions in excess of INR 50 million.

or departments of the Government of India as the designated authority to receive written complaints or disclosures on any allegation of corruption or misuse of office by or under any Central Act, Government companies, societies or local authorities owned or controlled by the Central Government and recommend appropriate action. The PIDPI Resolution is sought to be repealed by the Whistleblowers Protection Act, 2014.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

In relation to the listed companies and such other classes of companies (as mentioned above), the Companies Act, 2013 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 provide that the vigil mechanism established by the company shall provide for adequate safeguards against victimisation of employees and directors who avail of the vigil mechanism and also provide for direct access to the chairperson of the audit committee in appropriate or exceptional cases.

In addition, the Companies Act, 2013 also provides for an overarching protection to employees during the course of an investigation of the affairs of the company. Such a protection not being restricted to the whistleblowers.

The Companies Act, 2013 provides that the auditor of the company, in the course of the performance of his/her duties, is under an obligation to report fraud, which involves or is expected to involve individually an amount of INR 10 million or above, committed against the company by officers or employees of the company, to the Central Government. In the event the fraud involves an amount less than INR 10 million, the auditor is required to report the matter to the audit committee and the company is required to disclose details of fraud in the board of director's report.

In relation to private sector and foreign banks, the 'Protected Disclosures Scheme for Private Sector and Foreign Banks', provides that if any person is aggrieved by any action on the ground that he is victimized due to filing of the complaint or disclosure, he may file an application before the RBI seeking redressal in the matter. In case the complainant is an employee of the bank, RBI may give suitable directions to the concerned bank, preventing initiation of any adverse personnel action against the complainant.

Further, in relation to limited liability partnerships, the Limited Liability Partnership Act, 2008 provides that no partner or employee of any limited liability partnership may be discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against the terms



# India

and conditions of his/her limited liability partnership or employment merely because of his providing information or causing information to be provided in an investigation against the limited liability partnership or any of its partners or employees.

Lastly, the PIDPI Resolution provides that if any person is being victimized due to the disclosures / complaint made by him, he may file an application with the Central Vigilance Commission seeking appropriate redressal actions. The Central Vigilance Commission upon receipt of application of the complainant or on the basis of the information gathered may, if it deems necessary, issue appropriate directions to the concerned Government authorities to ensure protection of the complainant.

### 3. Which categories of workers are eligible for protection?

Please refer to our response to the previous question. In addition to the protection given to the employees, the protection is extended to the directors under the Companies Act, 2013 / SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and to the partners under the Limited Liability Partnership Act, 2008.

### 4. How is protection triggered?

Please refer to our responses above.

### 5. What is the extent of the protection?

Please refer to our answers above.

### 6. What remedies are available to employees who blew the whistle?

No remedies as such. The provisions only provide 'protection' against discriminatory treatment.

### 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

The Whistleblowers Protection Act 2014, the Protected Disclosures Scheme for Private Sector and Foreign Banks and PIDPI Resolution specifies that the anonymous complaints shall not be entertained.

No such prohibition or restriction is provided in this regard in the Companies Act, 2013, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and Limited Liability Partnership Act, 2008.

### 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

No.

### 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

There are no relevant legal provisions or regulatory guidance on the interaction between confidentiality provisions and whistleblowing rules.

### 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

The Companies Act, 2013 provides that the companies which are required to constitute an audit committee shall operate the vigil mechanism through the audit committee and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee would deal with the matter on hand. For other companies, the Board of directors are required to nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees would report their concerns.



# India

The 'Protected Disclosures Scheme for Private Sector and Foreign Banks', provides that all private sector and foreign banks operating in India may frame a 'Protected Disclosures Scheme' duly approved by their respective Boards of Directors. It further provides the following:

- The policy should clearly lay down norms for protection of identity of employees making disclosures under the scheme and safeguarding them from any adverse personnel action.
- The Board or a committee of Directors of the Board should be made responsible for monitoring the implementation of the scheme.
- Banks shall factor suggestions of the unions / associations of officers / employees before framing such a policy.
- Suitable mechanism should be put in place to make newly recruited employees of the bank aware of the existence of such a scheme in the bank.



# Japan

## 1. Is there specific legislation in place relating to whistleblowing?

Yes, the Whistleblower Protection Act (the Act).

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

An employee who has blown the whistle on alleged wrongdoing is protected against being dismissed or being subjected to any other detriment when the whistleblowing meets the requirements stipulated in the Act.

The legislation states that (i) a whistleblower's dismissal by reason of whistleblowing shall be invalid, and (ii) a detriment to a whistleblower by reason of whistleblowing is prohibited. Detriment includes demotion, salary reduction, or other disadvantageous treatment.

There have been a number of recent court cases in which dismissals against whistleblowers were held as invalid. The protection of whistleblowers has become increasingly important in Japan.

## 3. Which categories of workers are eligible for protection?

Employees (ie, workers directly employed by the firm) are eligible for protection under the Act.

## 4. How is protection triggered?

Protection is available to an employee without any specific 'trigger', as long as the whistleblowing meets the requirements stipulated in the Act.

## 5. What is the extent of the protection?

Please refer to our answers above.

## 6. What remedies are available to employees who blew the whistle?

If an employee has been subjected to a detriment or dismissed for having blown the whistle, such dismissal or other detriment shall be held as invalid in court.

Further, the employee can demand compensation for damage caused by such detriment or dismissal against the company.

The compensation granted to an employee for any detriment or dismissal can vary depending on the level of his or her salary. Generally awards granted by Japanese courts are relatively small.

Typical compensation for mental suffering that is payable to a whistleblower ranges from ¥500,000 to ¥2m.

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

No.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

No.

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

We are not aware of any legal provisions or regulatory guidance that specifically refer to the interaction between confidentiality provisions and whistleblowing rules. However, under Japanese law, protection for whistleblowers is considered to override employees' confidentiality obligations.



# Japan

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

The relevant governmental guidelines for private business operators provide various requirements, including the following:

- A person in charge of the overall whistleblowing system should be the firm's management;
- The firm needs to set up a contact point to receive whistleblowing and familiarise the employees with how to utilise it; and
- The firm needs to establish an internal policy setting out the details of the system, particularly the prohibition on disadvantageous treatment against the whistleblower as per the Act.



# South Korea

## 1. Is there specific legislation in place relating to whistleblowing?

Yes.

Among different laws and regulations available in Korea for the treatment and protection of whistleblowers, the most relevant one for corporations is the Whistleblower Protection Act. The Whistleblower Protection Act protects whistleblowers who report certain wrongdoings in the private sector, with respect to the violation of 279 laws and regulations relating to the public interest, to the Anti-Corruption & Civil Rights Commission (the 'Commission'), employers, investigative and other designated agencies. Under the amendment on July 24, 2015, the Whistleblower Protection Act expanded the list of laws and regulations from 180 to 279; reporting a violation is governed by the Act.

In addition to the Whistleblower Protection Act, the following laws and regulations contain provisions governing the treatment and protection of whistleblowers:

- The Act on Anti-Corruption and the Establishment and Operation of Anti-Corruption and Civil Rights Commission (the 'Anti-Corruption Act');
- The Act Concerning External Audit of Joint Stock Corporation;

- Financial Investment Services and Capital Markets Act;
- Labor Standards Act;
- Industrial Safety and Health Act;
- Trade Union and Labor Relations Adjustment Act;
- Monopoly Regulation and Fair Trade Act;
- Protection of Reporters, etc. of Specific Crimes Act.

## 2. Are there specific labour and employment laws designed to confer protection on whistleblowers?

In general, Korean whistleblower protection laws mentioned above prohibit a company from taking any disadvantageous measures against a whistleblower (ie, taking measures that can be fairly interpreted as retaliating against the whistleblower for having reported potential wrongdoing).

## 3. Which categories of workers are eligible for protection?

There are no provisions that limit whistleblowing protection to only certain categories of workers.

## 4. How is protection triggered?

The Whistleblower Protection Act regulates reports on 'conduct detrimental to public interest,' a term which is currently defined as infringements on the health and safety of the public, the environment, consumer interests and fair competition. There is no law limiting the subject matter of whistleblowing, but the Whistleblower Protection Act applies only to whistleblowers who report a violation of one of approximately 280 laws and regulations relating to public interests that are listed in the Whistleblower Protection Act and its Enforcement Decree.

The Anti-Corruption Act protects whistleblowers who report public officials engaged in certain 'acts of corruption' from suffering any 'disadvantage' in their employment or discrimination in their working conditions due to their reporting of corruption.

## 5. What is the extent of the protection?

The Whistleblower Protection Act enables a whistleblower to apply for protective measures to the Commission for any disadvantageous measures taken against the whistleblower. Upon such request, the Commission must investigate the case and can demand a person who has taken disadvantageous measures against the whistleblower to take appropriate protective measures including (i) undoing



# South Korea

the harm or (ii) refraining from taking such measures. Any individual who brings harm to a whistleblower's person, reputation or business will be subject to criminal penalty.

Under the Whistleblower Protection Act, whistleblowers are granted anonymity during investigation and court proceedings, and provided police protection, if deemed necessary.

The Whistleblower Protection Act does not provide protection for whistleblowers if (i) the whistleblower makes a public interest report while he/she knew or should have known that the details of the public interest report were untrue, (ii) the whistleblower requests money or other valuables, or a special favour in labour relations in connection with the public interest report, or (iii) makes the public interest report for other unlawful purposes.

## 6. What remedies are available to employees who blew the whistle?

Please see above.

## 7. Is there a prohibition (or any restriction) on accepting anonymous whistleblowing?

No.

## 8. Do the relevant laws incentivise workers (eg through financial rewards) to escalate concerns internally?

There is no incentive to escalate a concern internally.

Rather, under the Whistleblower Protection Act, a whistleblower may receive financial compensation if his/her public interest report leads to a direct recovery of or increase in revenues of the State or a local government. Under the Whistleblower Protection Act, a whistleblower may be awarded a reward of up to KRW 2 billion (approximately USD 1830,000, 4~20 per cent of the amount reclaimed by the State, or a local government) and the Compensation Deliberative Committee determines the amount of the reward. Up to date, the single largest sum paid to a whistleblower under the Whistleblower Protection Act was KRW 400 million.

Also, whistleblowers who disclose a violation of the Monopoly Regulation and Fair Trade Law ('FTL') and provide evidence for such violation may receive a financial reward within the Korean Fair Trade Commission ('KFTC')'s

budget. Accordingly, the KFTC promulgated 'Notice on Whistleblower Award for Report of a Violation of Fair Trade Act' which lists types of violations, including cartels, the reports on which are eligible for rewards. The KFTC determines the amount of the reward (maximum KRW 3 billion) to a whistleblower based on certain criteria, including the quality of the evidence provided by the whistleblower.

In sum, there are no special laws that incentivise the employees to escalate concerns internally versus directly to regulators.

## 9. Are confidentiality provisions which prevent employees from blowing the whistle enforceable?

Yes. Article 14.3 of the Whistleblower Protection Act explicitly provides that even in case the whistleblowing contains any confidential information, the whistleblower shall be viewed as not violating any confidentiality obligation under other applicable laws and regulations, Collective Bargaining Agreement, Rules of Employment, etc.



# South Korea

## 10. Are there applicable regulatory programmes encouraging or incentivising employees working for regulated firms (eg financial industry) to escalate concerns directly to regulators? Are there applicable regulatory rules on firms' whistleblowing policies and their governance?

No. Whether the employee reports the concern internally or direct to regulators, it will not matter. The employee will only get compensated if, as mentioned above, his/her public interest report leads to a direct recovery of or increase in revenues of the State or a local government.

Employers are allowed to have a whistleblowing policy and an anonymous whistleblowing hotline and there is no limitation on the types of wrongdoings that can be reported. There are no regulatory rules on implementing a whistleblowing policy or hotline. However, under the Labor Standards Act (the 'LSA'), when adopting or amending company policies related to labour and employment matters, an employer must obtain comments from the union representing the majority of the employees, or if no such union exists from the majority of its employees, concerning the company policy at issue before implementing them.



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