

SPAIN TRANSPOSES THE WHISTLEBLOWING DIRECTIVE AND ESTABLISHES A WHISTLEBLOWER PROTECTION REGIME

More than a year after the deadline for the transposition of Directive (EU) 2019/1937, of 23 October 2019, on the protection of persons who report breaches of Union law (commonly known as the "**Whistleblowing Directive**"), and shortly after the European Commission announced its intention to denounce Spain -for that delay- before the European Court of Justice, the whistleblower protection regulation was finally enacted in Spain.

The Spanish Congress has just a few days ago approved Act 2/2023, regulating the protection of persons who report infringements and the fight against corruption ("**Act 2/2023**"), which was published in the Official State Gazette (BOE) on 21 February. This law entails important consequences for companies with more than 50 employees in both the public and private sector, which will, in any case, be under the obligation to implement internal whistleblower channels. Some of them are described below.

SOME KEY ASPECTS OF ACT 2/2023¹

Scope of protection

Who is protected?

Act 2/2023 maintains the broad scope of the Whistleblowing Directive and protects any whistleblower in both the private and public sector who discloses infringements in an employment or professional context (including, among others, employees, freelancers, volunteer staff, trainees, contractors' employees, subcontractors, suppliers, legal representatives and persons related to the whistleblower).

Key issues

- Companies with more than 250 employees must implement their internal whistleblower channels within 3 months; companies with between 50 and 249 employees, before 1 December 2023.
- Act 2/2023 extends its material scope of application to include any serious or very serious criminal or administrative infringement under Spanish law.
- If the entity has a website, information regarding the internal channel must be included on the home page, in a separate and easily identifiable section.
- Failure to implement the internal reporting channel is now considered a very serious infringement and may lead to fines of up to EUR 1 million.

¹ This Client Briefing limits its focus on the most significant or novel aspects of Act 2/2023 while comparing it to the Whistleblowing Directive, as well as the Preliminary Draft Law and the Draft Law.

Which infringements are reportable?

Spain goes beyond the minimum requirements, in transposing the Whistleblowing Directive. Apart from infringements of EU law set out in the Whistleblower Directive, Act 2/2023 makes it possible to report any serious or very serious criminal or administrative infringement under Spanish law and, in any case, those involving financial loss to the Spanish Treasury and Social Security.

Act 2/2023 in turn expressly excludes from the material scope of application those cases governed by its specific regulations, any obligations resulting from the protection of professional privilege, and classified information.

Types of Reporting Channels

In line with the Whistleblowing Directive, Act 2/2023 establishes both internal and external reporting channels, giving preference to whistleblowing done through internal channels. The external channel will be managed with independence and autonomy, under the supervision of the Independent Authority for Whistleblower Protection (in Spanish, AIPI) and will be complementary to the internal channels.

Internal Reporting Channels

- **Person in charge of the channel**

The management body will be responsible for implementing the channel and may, in turn, designate the person responsible for such management, i.e. the "System Manager" (*Responsable del Sistema*), who may be the entity's own compliance officer. The manager's functions will include keeping a record book of the communications received, investigations carried out and their outcome, as established in the procedure described in the Act.

- **Channel implementation policies**

The channel must have a policy that includes the main guarantees of the reporting procedure (this policy in corporate groups may be approved at the group level by the parent company, notwithstanding each company approving its own reporting system). The channel may be integrated into other existing channels.

- **Clear communication of the existence of the channel**

In the event that the company obliged to implement it has a website, such information must be included on its home page, in a separate and easily identifiable section. In any case, the information should be provided in a clear and accessible manner for all users.

- **Outsourcing**

With no major changes with respect to the Whistleblowing Directive, Act 2/2023 allows the reporting channel to be managed by an external third party, provided that this does not compromise in any way the established rights and guarantees.

- **Corporate groups**

Private sector companies with between 50 and 249 employees belonging to the same corporate group may share the same reporting channel(s) and resources allocated to the management and processing of

communications. However, Act 2/2023 does not state that this applies to group companies with more than 250 employees, even though they may have a group-level policy. In practice, this could turn out to be an obstacle to the centralisation of communications management and research in large companies. In this regard, Act 2/2023 does not resolve the doubts raised by the Whistleblowing Directive, as it does not offer any clarification in this regard.

- **Prohibition against retaliation**

In line with the Whistleblowing Directive, Act 2/2023 aims to ensure that no whistleblower suffers any kind of retaliation, while preserving the confidentiality of the channels and compliance with personal data protection regulations, even allowing for anonymous whistleblowing.

Sanctions

Act 2/2023 distinguishes between minor, serious and very serious infringements, and establishes penalties for persons (natural or legal) of up to 1 million euros in the event of non-compliance (e.g. breach of confidentiality, retaliation measures, or failure to comply with the obligation to have an internal reporting channel in the required terms).

In addition, companies may be subject to other measures, such as being publicly reprimanded, banned from obtaining subsidies or other tax benefits (for a maximum period of four years), or banned from contracting with the public sector (for a maximum of three years).

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