

TRANSPPOSITION OF THE WHISTLEBLOWER DIRECTIVE COUNTDOWN IN SPAIN HAS BEGUN

The deadline for transposing the Directive (EU) 2019/1937, of 23 October 2019, on the protection of persons who report breaches of the Union law (the "**Whistleblower Directive**") is 17 December 2021 (17 December 2023 for organizations with between 50 and 249 workers).

For that purpose, in Spain a working group within the Ministry of Justice started working on a draft in mid-year 2020, and the period for public consultation is currently open, until next 27 January. The aim is to gather opinion on a number of questions regarding the implementation of the channels, the determination of competent authorities to attend them, the scope of the material application, the admissibility of anonymous reports, or the measures of protection to be deployed, among others.

In order to transpose the Whistleblower Directive, Spain will have to introduce a more comprehensive legal framework on whistleblowing than the one included in the current piecemeal sectoral rules. Among the main obligations imposed by the Directive, the Spanish legislator will need to address the requirement for all companies with over 50 employees to introduce internal whistleblowing procedures, as well as the designation of the appropriate authority to facilitate external reporting and follow-up.

KEY ASPECTS OF THE WHISTLEBLOWER DIRECTIVE

The Whistleblower Directive establishes minimum requirements for the Member States' internal regulations concerning the protection of whistleblowers. It provides that the Member States (including Spain) must:

- Ensure that all **forms of retaliation** against whistleblowers are prohibited;

Key aspects

- A **public consultation period** has been recently opened in Spain in order to transpose the Whistleblower Directive
- Under the Whistleblower Directive: **(i) internal channels should be implemented by companies within the private sector with 50 or more workers, (ii) all forms of retaliation are forbidden, and (iii) anonymous reports are allowed.**
- **Specific laws in various sectors (financial, anti-money laundering and general crime prevention) already contain obligations** to introduce internal reporting channels or requiring competent authorities to provide external reporting channels for whistleblowers.
- The Preliminary draft of the new Spanish Criminal Procedure Act allows that **following a whistleblowing report, the person responsible for the whistleblowing channel, files the criminal complaint** without revealing the identity of the whistleblower.

- oblige legal **entities with over 50 workers**, in both the private and the public sector, to introduce specific internal reporting channels that ensure that the whistleblowers' identity is kept confidential; and
- designate the **competent authorities responsible** for external reporting and follow-up.

Who does the Whistleblower Directive apply to?

To reporting persons, working in the private or public sector, who:

- Acquired information on breaches of EU law in a workrelated context;
- have reasonable grounds to believe that the reported information is true and falls within the policy areas covered by the Directive; and
- reported the information internally, externally or by way of public disclosure.

What policy areas are covered by the Whistleblower Directive?

The scope of application of the Whistleblower Directive include breaches affecting the financial interests of the EU (in particular, fraud), breaches relating to the internal market (including competition and State aid rules), as well as breaches of the specific EU law acts relating to the following policy areas:

- Public procurement;
- financial services, products and markets, and prevention of money laundering and terrorist financing;
- product safety and compliance;
- transport safety;
- protection of the environment;
- radiation protection and nuclear safety;
- food and feed safety, animal health and welfare;
- public health;
- consumer protection; and
- protection of privacy and personal data, and security of network and information systems.

What reporting channels are available?

The Whistleblower Directive offers three reporting options to the whistleblowers, that must be included by the Member States in their national legislation:

- Internal reporting;
- external reporting; and
- public disclosure.

Which are the key factors for complying with the Whistleblower Directive?

- Implement an internal reporting system providing for confidentiality (anonymous reports are accepted);
- ensure acknowledgment of receipt of the report to the reporting person within seven days;
- designate an impartial person or department responsible for follow-up and feedback to the reporting person;
- ensure diligent follow-up by the designated person or department, including developing a follow-up procedure;
- ensure that feedback is provided to the reporting person within a reasonable timeframe, not exceeding three months from the acknowledgment of receipt of the report;
- implement a clear and easily accessible procedure for external reporting;

- ensure compliance with the Data Protection Regulation (EU) 2016/679 (applicable in Spain and in the EU) while processing personal data; and
- ensure that records of every report received are kept and that they are stored for no longer than necessary.

CURRENT SECTOR-SPECIFIC REGULATIONS IN SPAIN

At the present time, there are no universal regulations on whistleblower protection under Spanish law. Despite this, specific laws in various sectors already contain some provisions that are in line with the requirements laid down by the Directive, such as obligations to introduce internal reporting channels or requiring competent authorities to provide external reporting channels for whistleblowers:

A. FINANCIAL SECTOR REGULATION

Credit entities (i.e. banks, saving banks and cooperatives of credit), investment firms, management companies of collective investment undertakings, governing bodies of stock exchanges, and data reporting services providers have the following reporting obligations:

- *Internal reporting*

These persons are obliged to introduce channels for anonymous reporting of breaches of law or ethical standards, which should ensure (i) confidentiality of the whistleblowers' identity, (ii) appropriate handling of their reports and follow-up procedures; and (iii) that the whistleblower is protected against retaliation or unfair treatment as a result of the reporting.

- *External reporting*

To the CNMV: there is an obligation to report to the Spanish Securities Market Commission (CNMV, in Spanish) the following breaches:

- Breaches of Regulation (EU) 596/2014, on market abuse regulation,
- breaches of Regulation (EU) No 600/2014, on markets in financial instruments, or
- breaches of Regulation (EU) No 1286/2014, on key information documents for packaged retail and insurance-based investment products (PRIIPs).

To the Bank of Spain: breaches of the prudential supervisory obligations of credit entities set out in Spanish Law 10/2014¹ and in its developing regulations.

The reporting to both the CNMV and the Bank of Spain should provide all factual elements from which at least a founded suspicion of infringement can be reasonably derived. Reporting to the CNMV may be anonymous or include the identification of the person issuing them, whilst reporting to the Bank of Spain shall include the identification of the person issuing it.

The CNMV and the Bank of Spain are obliged to ensure that the means of communication used for reporting such breaches are independent, as well as that any information provided is kept confidential. No personal information on the reporting person may be disclosed to the auditor or the audit firm and the anonymity of the whistleblower must be guaranteed.

¹ Law 10/2014, of 26 June, on the organization, supervision and solvency of credit institutions.

B. ANTI-MONEY LAUNDERING REGULATION

Under Law 10/2010, of 28 April, on the prevention of Anti-Money Laundering and Terrorism Financing (the "**AML Law**"), in Spain all entities which are legally required to prevent money laundering and terrorist financing are obliged to comply with certain obligations:

- **Adopt in writing and implement adequate policies and procedures** to ensure the reporting and the compliance with the provisions of the Spanish AML Law, in order to forestall and prevent transactions related to money laundering or terrorist financing.
- Adopt measures to **ensure that whistleblowers who report such breaches are protected from retaliation, discrimination or any other unfair treatment**. The whistleblowing channel management shall be subject to the regulations on the protection of personal data for internal complaints reporting systems.
- **The whistleblowing channel may be a stand-alone procedure or it may be integrated into the systems** which the obliged entities may have set up for reporting information on the occurrence of acts or conduct contrary to other general or sectoral rules and regulations applicable to it (such as the ones referred to above regarding internal reporting in the financial sector).

C. CRIMINAL COMPLIANCE PROGRAMMES IN SPAIN

The Spanish Criminal Code includes "*an obligation to report to the compliance body any violation of the standards and controls (whistleblowing channel)*". This, if assessed as an effective compliance tool in conjunction with other essential elements of the criminal compliance programmes under Spanish law, **could lead to the exoneration of criminal liability for the legal entity**.

The provision lacks any details as to how such internal reporting should be managed, what minimum contents or reporting lines to include, and, most importantly, **it does not provide any guidance for whistleblowers' protection**. However, the Prosecutor General's Office has repeatedly insisted on the importance of both preserving confidentiality of the whistleblowers' identity and to ensure that they do not suffer any retaliation or unfair treatment.

D. THE PRELIMINARY DRAFT OF THE CRIMINAL PROCEDURE ACT PARTIALLY IMPLEMENTS THE WHISTLEBLOWER DIRECTIVE

The recently published Preliminary draft of the new Spanish Criminal Procedure Act foresees that, in the case certain facts have been informed by a whistleblower within a public or a private entity, the criminal complaint can be filed by the person in charge of the whistleblowing channel, without revealing the identity of that whistleblower, unless expressly requested to do so by the competent authority.

CONTACT



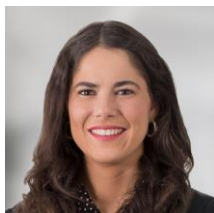
Carlos Zabala
Counsel

T +34 91 590 7415
E Carloz.Zabala
@cliffordchance.com



Sonia Trendafilova
Senior Associate

T +34 91 590 4172
E Sonia.Trendafilova
@cliffordchance.com



Sonsoles Callejo
Associate

T +34 91 590 4133
E Sonsoles.Callejo
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, Paseo de la Castellana 110,
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