

## FIRST INITIATIVES IN THE TRANSPOSITION OF THE WHISTLEBLOWING DIRECTIVE IN SPAIN: THE REGIONAL GOVERNMENT OF ANDALUSIA APPROVES LAW 2/2021, OF 18 JUNE, ON COMBATTING FRAUD AND CORRUPTION IN ANDALUSIA AND THE PROTECTION OF WHISTLEBLOWERS

Law 2/2021, of 18 June, which creates the Andalusian Anti-Fraud and Anti-Corruption Office and establishes the protection regime for those who file complaints with it (“Law 2/2021”) has been published in the Official State Bulletin (BOE) of 9 July 2021. The purpose of Law 2/2021 is to prevent and combat fraud and corruption, its object being (i) the creation of an Andalusian Anti-Fraud and Anti-Corruption Office (the “Office”) and the regulation of the procedure to be followed by the Office for the investigation and inspection of facts that could constitute fraud, corruption, a conflict of interest or any other illegal activity which is detrimental to public or financial interests; (ii) the creation of a system to protect people who file complaints with the aforementioned Office regarding facts that could constitute fraud, corruption, a conflict of interest or any other illegal activity which is detrimental to public or financial interests; and (iii) the regulation of a system of penalties for possible breaches of Law 2/2021.

The Explanatory Memorandum of Law 2/2021 makes specific mention of the whistleblower protection regime provided for in Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (the “Whistleblowing Directive”), which makes Law 2/2021 the first piece of legislation in Spain aimed at partially transposing the Whistleblowing Directive.

### 1. Measures to protect whistleblowers adopted in Andalusian Law 2/2021

For the purposes of Law 2/2021 whistleblowers are natural or legal persons and entities without legal personality that file a complaint with the Office regarding facts that could constitute fraud, corruption, a conflict of interest or any other illegal activity which is detrimental to public or financial interests.

Law 2/2021 provides for the submission of complaints to the Office to be made through procedures and channels that are designed, established and managed in a secure manner, in order to ensure that the confidentiality of the identity of the person making the complaint and any third persons mentioned in the complaint is protected. In addition, the complaint can be made anonymously, in one's own name or on behalf of the bodies, entities and institutions for which the whistleblowers provide services.

From the moment the complaint is filed, all whistleblowers will have the following rights: (i) the right to know the status of the investigation and inspection procedure arising from their

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complaints and to be notified of the acts and decisions issued in this regard (provided that, in the latter case, this is expressly provided for); (ii) the right for complaints to be finalised by means of a reasoned decision; (iii) the right not to suffer reprisals as a result of the complaints made (including threats and attempted reprisals); and (iv) the right to compensation for unjustified loss and damage suffered as a result of the complaints.

In relation to the above, it is worth noting that, under Law 2/2021, it will be presumed that the harm identified by the whistleblowers was inflicted in retaliation for whistleblowing (with the onus being on the person who has taken the harmful measure to prove that such measure was based on duly justified grounds). In addition to the above presumption, Law 2/2021 expressly states that the following will be considered unjustified harm in any case: (i) expenses incurred by whistleblowers in relation to legal advice, legal assistance and defence and representation in any judicial or administrative proceedings brought by or against the whistleblowers and arising directly from their complaints; and (ii) expenses relating to psychological assistance they may need as a result of mental illness arising directly from their complaints.

A special feature of Law 2/2021 is that it incorporates a specific protection framework for whistleblowers who have the status of civil servant under regional regulations. This is due to the obligation to report that applies to these individuals, among other reasons. Under this specific protection framework, as soon as it is agreed that the investigation and inspection procedure will be initiated, the whistleblower can contact the Office, requesting that it ask the competent body in matters of Civil Service of the Administration of the Andalusian Regional Government or, where appropriate, the head of the Vice-Ministry to which the entity is attached, to grant a provisional transfer to another post.

## 2. Whistleblower protection regulations

With the approval of Law 2/2021, Andalusia joins the list of Autonomous Communities that have passed specific anti-corruption and whistleblower protection legislation. In particular, these regional initiatives include the following:

- (i) **Aragon:** Law 2/2016, of 11 November, which regulates the actions to follow up on information the Autonomous Administration receives on facts related to crimes against the Public Administration and establishes the guarantees for informants; and law 5/2017, of 1 June, on Public Integrity and Ethics.
- (ii) **Principality of Asturias:** Law 8/2018, of 14 September, on Transparency, Good Governance and Interest Groups; currently in the process of regulatory development with the processing of the draft Decree regulating the whistleblower's statute of the Principality of Asturias.
- (iii) **Castile and León:** Law 2/2016, of 11 November, which regulates the actions to follow up on information the Autonomous Administration receives on facts related to crimes against the Public Administration and establishes the guarantees for informants.

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- (iv) **Catalonia:** Law 14/2008, of 5 November, on the Anti-Fraud Office of Catalonia.
- (v) **Community of Madrid:** Organic Regulation of the Municipal Anti-Fraud and Anti-Corruption Office, of 23 December 2016.
- (vi) **Valencian Community:** Law 11/2016, of 28 November, on the Agency for the Prevention and Combating of Fraud and Corruption of the Valencian Community.
- (vii) **Balearic Islands:** Law 16/2016, of 9 December, creating the Office for the Prevention and Combating of Corruption in the Balearic Islands.

The Whistleblowing Directive, which establishes that Member States must bring into force the laws, regulations and administrative provisions necessary to comply with the Whistleblowing Directive by 17 December 2021 at the latest, has not yet been transposed in Spain at a national level.

In this regard, it is worth noting that there have been three national legislative initiatives that have sought to transpose the Whistleblowing Directive, two of which were rejected by the Congress of Deputies and one of which is currently being processed. The first of these was the Proposed Law on anti-corruption measures, presented on 20 December 2019 by the Ciudadanos Parliamentary Group. Secondly, on 12 February 2020, the Vox Parliamentary Group presented the Proposed Law for the comprehensive protection of corruption whistleblowers, which went a step further than transposing the Whistleblowing Directive and proposed the implementation of a model of financial rewards for whistleblowers, closer to US regulations in this regard (notably the Dodd-Frank Act of 2010 and the Foreign Corrupt Practices Act of 1977). Lastly, the Proposed Organic Law on measures to combat corruption and protect whistleblowers, presented on 18 December 2020 by the Ciudadanos Parliamentary Group, is currently being considered by the plenum of the Congress of Deputies.

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The information contained in this Legal Briefing is of a general nature and does not constitute legal advice. This document was prepared on 26 July 2021 and Pérez-Llorca does not assume any commitment to update or revise its contents.

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