Public Authorities

The Whistleblower Protection Act 2/2023: two problematic issues (one possibly unconstitutional)

Two problematic issues raised by the Whistleblower Protection Act 2/2023 are discussed: the flawed determination of its scope of application and the possibly unconstitutional statement that decisions of the Independent Whistleblower Protection Authority are unappealable.

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1. Act 2/2023 of 20 February transposes, with considerable delay, 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, better known as the Whistleblower Directive.

2. What is striking from the outset is that the law has opted for the term "informant" and for the expressions "information" and "communications", which are used interchangeably, when the truth is that we are dealing with "reports", according to the RAE definition: "a document in which the competent authority is informed of the commission of a crime or misdemeanour".

This legislative option seems to respond to the desire to distinguish the reports regulated in this law from those already provided for in our legal system, such as, among others: the criminal complaint, regulated in Articles 259 et seq. of the Criminal Procedure Act (LECr); the reporting of administrative violations, regulated in general terms in Article 62 of the Common Administrative Procedure Act 39/2015 and provided for in several sectoral regulations; and that envisaged in the Money Laundering and Terrorist Financing Prevention Act 10/2010 (following its amendment by Royal Decree-law 11/2018). In addition, many regional laws have already addressed whistleblower protection and the creation of institutions in charge of receiving whistleblower reports.

3. The first of the two problematic aspects of the law that we would like to point out is the defective regulation of its scope of application and its linking with pre-existing rules.

4. It is clear that the law has the character of basic national legislation, with the exception of Title VIII, relating to the Independent Whistleblower Protection Authority, in accordance with the powers set out in its eighth final provision.

   It also appears that only public reporting or disclosures referred to in the legal acts of the Union listed in Part II of its Schedule (Article 2(5)) are governed by its specific legislation. This is the case of Directive 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, transposed in Spain by the aforementioned Royal Decree-law 11/2018. This is also the case of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, which establishes the obligation for credit institutions to have internal whistleblowing channels, which has been transposed in Spain by the Credit Institutions (Regulation, Supervision and Solvency) Act 10/2014.

   It is important to specify that, in these cases, *when the specific legislation* transposing these European rules *so provides*, companies are required to have an internal whistleblowing channel, regardless of the number of workers. However, the tortuous wording of Article 10(2) of Act 2/2023 has led some commentators to claim that all sectors referred to in Part II of the Schedule - of which there are many - are required to set up a whistleblowing channel, even if they have fewer than fifty workers.

5. Also deficient is the linking that the law makes between the "information" - in short, reporting - system that it establishes with that regulated both by administrative laws, in particular when they recognise public action, and by the LECr when it is a question of unlawful conduct constituting a criminal offence.

   With regard to this criminal procedural act, the explanatory notes state that citizen cooperation "is a key element in our government of laws and, furthermore, is envisaged in our legal system as a duty of all citizens when they witness the commission of a crime". This is indeed the case: Article 264 LECr imposes, in general terms, the obligation to report on anyone who becomes aware of the commission of a crime, and Article 262 states that "those who, by reason of their positions, professions or trades, become aware of a public crime, are obliged to report it immediately to the Public Prosecutor's Office, the competent court, the investigating judge and, failing that, to the municipal or police officer closest to the place if it is a flagrant offence", classifying non-compliance with this obligation as a violation.

   This duty allows the law to impose on the internal reporting channels the obligation to "immediately forward the information to the Public Prosecutor's Office when the facts could be indicative of a crime" (Art. 9(j)). However, no provision has been introduced to the effect that the individual whistleblower fulfils the duty provided for in Articles 262 and 264 LECr by reporting the commission of an act that could constitute a crime through the internal or external channel of the company or the General Government.

6. In view of the above, the already complex insertion of the whistleblower protection system in our law is compounded by an Act of Parliament that is deficient in many respects, which will undoubtedly lead to interpretative doubts and much litigation.

And here we come to the second problematic issue raised by this regulation, which could even lead to its declaration of unconstitutionality, as it that of the legal impossibility of appealing the decisions of the Independent Whistleblower Protection Authority (IWPA) or of the competent regional authority.

7. The Directive requires Member States to designate competent authorities to receive, respond to and follow up "reports" from external channels, and to provide them with adequate resources. In doing so, it gives wide autonomy to Member States, stating in its recitals that such "could be judicial authorities, regulatory or supervisory bodies competent in the specific areas concerned, or authorities of a more general competence at a central level within a Member State, law enforcement agencies, anticorruption bodies or ombudsmen". The Directive only requires that these authorities either have the necessary capacities and powers to ensure appropriate follow-up of the allegations made in the report and to address the reported breaches, or "to refer the report to another authority that should investigate the breach reported, while ensuring that there is appropriate follow-up by such authority".

8. In Spain, the second alternative has been chosen, as Act 2/2023 establishes, as basic legislation, that the external reporting channel will be the Independent Whistleblower Protection Authority or the relevant regional authorities or bodies, in accordance with the regulation contained in Title III thereof.

   This title regulates the administrative procedure for receiving reports, the admission procedure, investigation and termination, as well as the rights and guarantees of both the whistleblower and the person affected by the information.

   After all the proceedings have been completed, the Independent Whistleblower Protection Authority or the competent regional authority will issue a report and take one of the following decisions:

   a) Closure of the procedure, which shall be notified to the whistleblower and, where appropriate, the person concerned.

   b) Referral to the Public Prosecutor's Office if it appears from the course of the investigation that the facts are of a criminal nature and, if the offence affects the financial interests of the European Union, referral to the European Public Prosecutor's Office.

   c) Referral of proceedings to the authority, entity or body considered competent to conduct them.

   d) Decision to initiate sanctioning proceedings for the violations contained in Title IX of the Act.

   Except in the last case, Article 20(4) of Act 2/2023 states that the decisions of the Independent Whistleblower Protection Authority or regional authority "shall not be subject to administrative appeal or applications for judicial review".

9. In our opinion, this legal provision is unconstitutional due to its infringement of Articles 24 and 106 of the Constitution. Suffice it to recall, in this regard, the reiterated doctrine of the Constitutional Court which states that "the right to an effective remedy recognised in Art. 24(1) of the Constitution prohibits the legislator from preventing, in absolute and unconditional terms, access to the aforementioned rights and legitimate interests; a prohibition which is reinforced by the provisions of Art. 106(1) of the Constitution when it comes

to judicial control of administrative action" (Constitutional Court Judgments 202/2002; 149/2000; 197/1988; 18/1994; and 31/2000). In application of this doctrine, the Constitutional Court has quashed various legislative provisions.

In the case in question, the prohibition on appeals does not seem to affect the whistleblower's rights, given that when the administrative authority decides not to refer the report, nothing prevents the whistleblower from lodging it again through other channels, whether criminal or administrative. This explains why the law, after denying the possibility of appeal, adds - in principle, surprisingly - that "the submission of a report by the whistleblower does not, in itself, confer on him or her the status of interested party" (Art. 20(5)).

On the other hand, the aforementioned provision is likely to significantly harm the rights and interests of persons concerned, since in order to guarantee their "right to the presumption of innocence, the right to defence and the right of access to the case file under the terms regulated in this law, as well as the same protection established for whistleblowers, preserving their identity and guaranteeing the confidentiality of the facts and data of the procedure" that Article 39 recognises, Article 19 regulates a whole series of rights in the investigation before the administrative authority, such as: the right to make allegations; the right to be interviewed whenever possible, to access the case file and to be heard at any time; and the possibility, of which they must be informed, to appear with a lawyer.

When these rights are infringed in the conduct of the case, the person concerned should be able to seek judicial examination of the adequacy of the procedure carried on by way of appeal against the decision of the Independent Whistleblower Protection Authority or regional authority. It cannot be said, in this respect, that the person concerned will be able to defend himself or herself later, before the judge or relevant authority, as he or she will already be incriminated for his or her conduct as a consequence of the referral of the report, in breach of the law or constitutional principles, by an administrative authority, whose public servants are vested with the status of authority and consequent presumption of veracity (Art. 19(4)), and whose decisions are not, therefore, comparable to the reports of individuals.

Conflicts may also arise over the actions taken by the independent administrative authority in relation to, for example, its scope of action or its application of the provisions of the law in areas regulated by specific laws.

10. Consequently, there are many disputes that may arise. This is demonstrated by the judicial conflict arising from the decisions adopted by the Council for Transparency and Good Governance or the regional body that replaces it, which hears requests for access to information and is closely related to the fight against corruption (to the point that some regional laws, such as Act 8/2018 of the Principality of Asturias, regulate the protection of the whistleblower in the Transparency Act). One of the latest judgments handed down by the Supreme Court has determined that the fact that there is specific legislation in no way excludes the interested party from lodging a complaint with the Council for Transparency and Good Governance (Supreme Court Judgment 312/2022). It is possible that this experience has influenced the legislator's decision, which is questionable and possibly unconstitutional, to try to eliminate *a radice* any possible judicial conflict regarding the decisions of the independent administrative authority in matters of whistleblower protection.

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