OBSERVATIONS OF THE ASSOCIATION BLUEPRINT FOR FREE SPEECH IN THE HEARING AND PUBLIC INFORMATION PROCESS OF THE PRELIMINARY DRAFT LAW REGULATING THE PROTECTION OF PERSONS WHO REPORT ON REGULATORY INFRINGEMENTS AND THE FIGHT AGAINST CORRUPTION TRANSPOSING DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 23 OCTOBER 2019 ON THE PROTECTION OF PERSONS WHO REPORT ON INFRINGEMENTS OF UNION LAW.

In Madrid, 17 March 2022

Blueprint for Free Speech has examined the preliminary draft law regulating the protection of persons reporting regulatory infringements and the fight against corruption transposing Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of Union law (the "**Directive**") (the "**Preliminary Draft**"), considering it necessary to make the following observations and proposed amendments to the Preliminary Draft, which are divided into two sections: (A) general observations; and (B) observations to the articles.

This document identifies and propose corrections for a wide range of risks and challenges in the proposal, however the process could be strongly benefited from the expertise of Civil Society working in Spain and internationally, if more time would have been provided to respond to the public consultation.

(A) GENERAL OBSERVATIONS

Inclusion of a system of definitions in line with the Directive.

It is striking that the Preliminary Draft does not include an article that includes definitions that are essential for the standard, since the Directive does include a list of definitions in Article 5.

In our opinion, a law should be clear and should not give rise to interpretative problems. If possible, this is even more evident in a law such as the present one, which transposes a European Union Directive in such a relevant and novel matter as whistleblower protection.

Given the relevance and transcendence of this regulation, not only for workers and private employers, but also for the public sector, which is also subject to its obligations, we consider that it is essential to include defined terms that allow a better understanding of the regulation and advocate greater legal certainty.

Thus, we recommend the inclusion of an article relating to the definition of certain terms that are not only repeated throughout the articles, but are essential for the understanding and interpretation of the regulation.

The minimum content of this system of definitions should include, at least, the definitions provided for in the Directive. Terms such as "informant" ("whistleblower" in the Directive), "facilitator", "work context", "public disclosure", "retaliation" or "monitoring" should be defined using the definitions provided for in the Directive as a basis.

Notwithstanding the above, the Preliminary Draft should not only replicate the minimum content provided for in the Directive; it should develop this minimum content in such a way that the definitions

are extended in certain fields and include new terms such as "General Interest" or "Classified Information".

By way of example, the Directive defines the term "facilitator" as "a natural person who assists a whistleblower in the whistleblowing process in a work context, and whose assistance must be confidential". However, certain legal persons and more specifically non-profit entities with a presence in Spain which, following the publication of the rule, will also be responsible for assisting and providing help to persons reporting infringements during the process and which should be able to be covered by the protection of the rule. The definition of "facilitator" should therefore be extended to both natural and legal persons.

General Interest Definition

The preamble of the Preliminary Draft, in developing the concept of general interest, provides that "*actions that seriously harm the financial interests of the State or that significantly alter the objective and impartial performance of public bodies by involving corrupt practices, clientelism or nepotism are considered particularly harmful to the general interest*".

We consider that, due to its transcendence, the definition of general interest cannot be restricted to actions that harm the financial interests of the State, but that the following should also be protected:

1. environmental rights;

2. nuclear safety;

3. food and product safety; and

4. human rights as enshrined in the Universal Declaration of Human Rights.

Although infringements of Union law on environmental, nuclear safety and food and product safety are already within the scope of application of the Draft, the concept of general interest is of great importance since, as the preamble points out, it defines the scope of application of the law and may be decisive when it comes to the inadmissibility of information ex. article 18.2 of the Draft.

The areas defined above are fundamental and of great importance in the current economic, legal and social order, which justifies their inclusion as being of general interest. Furthermore, they are areas that the Directive itself deals with and intends to protect. Thus, the Directive recognizes:

1. as regards the protection of the environment that, "gathering evidence, preventing, detecting and tackling environmental crime and unlawful conduct remains a challenge and actions in this regard should be strengthened, as recognized by the Commission in its Communication of 18 January 2018, entitled "EU actions to improve environmental compliance and governance"";

2. as regards the protection of nuclear safety, that "improving whistleblower protection would also enhance the prevention and deterrence of breaches of European Atomic Energy Community rules on nuclear safety, radiation protection and the responsible and safe management of spent fuel and radioactive waste";

3. as regards the protection of food safety, that "the introduction of a framework for the protection of whistleblowers would also help to strengthen the enforcement of existing provisions and prevent breaches of Union rules in the area of the food chain, and in particular in the safety of food and feed, as well as animal health, protection and welfare."

Human rights are of general interest and although they already enjoy constitutional protection, it is clear that they should be protected by the Draft Bill. This would facilitate the protection of whistleblowers who warn about human rights violations in the labor context.

Independent Authority to Protect Whistleblowers

Articles 53 and following of the Preliminary Draft regulate the organization of the Independent Authority for Whistleblower Protection.

In said regulation, we consider that it is missing, on the one hand, the monitoring of the activity to be carried out by the President of the Independent Authority for the Protection of the Informant and, on the other hand, the representation of civil societies and non-profit organizations in the Advisory Committee.

Given the transcendence of the two new positions created under the Preliminary Draft in the achievement of the purpose of the Preliminary Draft, we consider the following:

1. In relation to the activity of the President of the Independent Authority for the Protection of the Informant, we believe it is relevant to regulate an accountability of said activity before the corresponding Commission of the Congress of Deputies in charge of ratifying his appointment for a non-renewable five-year period.

   It is essential for the Chairman to report periodically to the Committee on the activities carried out within the framework of his functions, as well as on the results of the ordinary and extraordinary sessions of the Advisory Committee.

2. At the same time, we believe that the person appointed to act as Chairman of the Independent Whistleblower Protection Authority should be a person who meets the conditions of suitability, integrity and professionalism.

   It is necessary to democratize the selection process of the candidates aspiring to the position. In this way, we propose that the selection be made through parliament, opening the possibility for non-profit organizations and social associations in Spain that work for the construction of more transparent and accountable institutions and organizations, to have an opinion or even propose specific candidates for it.

   This is established in Article 26(4) of Law 11/2016, of November 28, of the Agency for the Prevention and Fight against Fraud and Corruption of the Valencian Community, with regard to the regulation of the local authority:

   "4. Candidates for the position shall be proposed to Les Corts by social organizations currently working against fraud and corruption in the Valencian Community and by the parliamentary groups. Candidates must appear before the corresponding parliamentary committee in the framework of a public call to be evaluated in relation to the conditions required for the position. The agreement reached in this committee will be transferred to the Plenary of the Corts Valencianes."

3. In relation to the composition of the Advisory Commission for the Protection of the Informant, Article 54 includes a series of members that will make up said Advisory Commission. However, it does not include the appointment of a representative of civil societies and non-profit organizations.

   In comparative law, other Member States, such as Slovakia, have included the presence of a representative of civil societies and non-profit organizations in their Commission.

   We consider it relevant that, in order to represent the interests of civil society, at least one representative of civil societies and non-profit organizations should be included in the Commission, who, within the framework of their activities, assist the informants during the reporting process.

The election of such representative(s) should be carried out by a majority of the civil societies and non-profit organizations registered with the Independent Authority for Whistleblower Protection. For this purpose, the Independent Authority for Whistleblower Protection should have a register of civil societies and non-profit organizations that would like to participate in this process and exclusively for this purpose.

4. Article 47 regulates the financing of the Independent Authority for Whistleblower Protection, which designates a percentage of the penalties incurred to guarantee the development of its functions. This may be particularly risky, introducing a mechanism that may motivate sanctions to achieve a specific economic benefit, instead of being motivated by the search for justice.

   Looking at the international experience, we note how in the United States asset recovery has been used to finance police activity as a way to enrich and benefit law enforcement personnel, introducing major distortions in the execution of their work, increasing the distrust of the population. In this regard, a wide variety of stories, collected by the ACLU, can be consulted[1].

Public disclosures

The wording in Article 28, setting out the conditions under which protection will be extended to those who choose to make a public disclosure closely follows the Directive, but read in line with the preamble suggests that not protecting them is the privileged decision by default. The preamble suggests that those who make public disclosures will be protected simply by the fact that the general public supports their action. International experience says otherwise.

"Title V deals with public disclosure. Whistleblowers using internal and external channels have a specific regime of protection against retaliation. Protection that, in principle, does not extend to those persons who have publicly disseminated such information. This difference is based, among other causes, on the guarantees and protection offered by the public opinion as a whole, protecting those who show a civic attitude when warning against possible crimes or serious infractions or violations of the legal system that harm the general interest, as well as the protection of the sources kept by journalists". (Page 14, Paragraph 5)

We believe that this should be modified in the preamble to establish clarity and legal guarantees to those who decide to alert through these channels, having complied with the provisions of the regulations.

This is of vital importance to achieve a project in line with the provisions in Directive 2019/1937. In fact, it is an aspect on which there is a background. Whistleblowers who make information public exercise their right to freedom of expression, enshrined in Article 11 of the EU Charter of Fundamental Rights and Article 10 of the European Convention on Human Rights, and enable the media to perform their public watchdog function, which is indispensable for the proper functioning of our democracies. Whistleblowers, having acquired sensitive information through their work activities, are best placed to determine which channels are the most appropriate, taking into account the particular circumstances of each situation and having complied with the provisions of the regulations. In this context, we refer to what have been pointed out by the European Court of Human Rights in the case of Grand Chamber Fressoz and Roire v. France (1999), the interest that the public may have in a particular piece of information can sometimes be so strong as to override even a legally imposed duty of confidentiality.

Inclusion of an extradition clause

[1] *Via. https://www.aclu.org/issues/criminal-law-reform/reforming-police/asset-forfeiture-abuse*

The law should provide that a court may order that an informant not be extradited to another country if extradition is sought on a ground related to public communication or disclosure. Such a court order should be given priority. In considering such a request, a court should have regard to:

1. the degree of connection between the disclosure and the conduct or circumstances giving rise to the request for extradition; and

2. whether extradition is necessary in all the circumstances, having regard to the public interest in the protection of informants, and current public confidence in these protections.

(B) Observations to the articles

Article 2 Material scope

Question 1: Letter b) of paragraph 1 of Article 2, section 1, which includes within the material scope of application criminal or administrative offenses, is worded as follows:

b) Actions or omissions that may constitute a serious or very serious criminal or administrative infringement or any violation of the rest of the legal system provided that, in any of the cases, they directly affect or undermine the general interest, and do not have a specific regulation. In any case, the general interest shall be understood to be affected when the action or omission in question implies an economic loss for the Public Treasury.

Drafting proposal: We propose to modify letter b) of paragraph 1 of Article 2 as follows:

b) Actions or omissions that may constitute a criminal or administrative infringement or any violation of the rest of the legal system provided that, in any of the cases, they directly affect or impair the general interest, and do not have a specific regulation. In any case, the general interest shall be understood to be affected when the action or omission in question implies economic loss for the Public Treasury.

Justification: We understand that the reference of "serious or very serious" should be eliminated given that it generates certain legal uncertainty. The purpose of this reference is to incorporate a subjective qualification, which, although it is included in the different applicable regulations, is unknown to a layman. In addition, it could be the case that there are certain offenses that the applicable rules do not classify as "serious" or "very serious" that could ultimately have an impact on the general interest.

On the other hand, the reference to an infringement of the public interest is, in this case, disadvantageous, as the draft law does not include any definition of what would actually be an infringement, thus adding an unnecessary and undetermined threshold for protection. As a result, this wording would make it highly likely that whistleblowers would have to defend their actions in court; moreover, the legal uncertainty could prevent whistleblowers from coming forward in clearer cases (for example, the EU legislation listed in Article 2 of Directive 2019/1937)

Therefore, we suggest that at least the reporting of breaches of all national legislation should be allowed, which not only increases legal certainty for whistleblowers, but also maximizes the impact of the proposed legislative initiative. So far, there are a number of pieces of legislation that set appropriate examples in the matter, such as Ireland's Public Disclosures Act 2014 which includes the following list of practices:

(a) that an offense has been, is being or may be committed,

(b) that a legal obligation, other than one arising from the employee's contract of employment or other contract by which the employee undertakes to perform or personally perform any work or service, has been, is being or may be breached

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur

(d) that the health or safety of any person has been, is being, or may be endangered,

(e) that the environment has been, is being, or may be damaged

(f) that an illegal or improper use of funds or resources of a public body, or of other public funds, has occurred, is occurring or is likely to occur

(g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement; or

(h) that information has been concealed, is being concealed or is likely to be destroyed that demonstrates any matter falling within any of the preceding subparagraphs.

Similarly, the French Sapin II Law, which serves as a predecessor to the recently introduced Law No. 4979 transposing Directive 2019/1937, provides as a protected disclosure.

"a crime or an offence, a serious and manifest violation of an international undertaking duly ratified or approved by France, of a unilateral act of an international organization adopted on the basis of such undertaking, law or regulations, or a serious threat or harm to the general interest, of which it has personal knowledge."

Question 2: Paragraph 3 of Article 2, which excludes from the material scope of application information affecting classified information (among others), shall be worded as follows:

3. The protection provided for in this law shall not apply to information affecting classified information. Neither shall it affect the obligations resulting from the duty of confidentiality of doctors, lawyers and the State Security Forces and Corps, the secrecy of deliberations established in laws and regulations and the reserved nature of information with tax implications and any other information when so established by its specific regulations.

Proposed wording: We propose to modify paragraph 3 of Article 2 as follows:

3. The protection provided for in this law shall not apply to information affecting classified information classified in the secret and reserved categories. Neither shall it affect the obligations resulting from the duty of confidentiality of doctors, lawyers and the State Security Forces and Corps, the secrecy of deliberations established in laws and regulations and the reserved nature of information with tax implications and of any other information when so established by its specific regulations.

Justification: We believe that the exclusion of classified information is not sufficiently determined in such a way that it could give rise to different interpretations and legal uncertainty. We propose to specify that this rule shall not apply to classified information included in the categories of "Secret" and "Reserved" and which is covered by Law 9/1968, of April 5, 1968, on official secrets. For clarification purposes, we understand that this regulation should protect classified information that falls within the groups of "Confidential" and "Limited Dissemination" since it is not covered (unlike the other two groups) by Law 9/1968 and, therefore, for this kind of classified information, the protection of the informant should prevail.

Although the protection of classified information is of vital importance and sensitivity for governments, some of the most serious actions affecting public interests are covered under this label. Knowing the current Spanish legislation on access to classified information, as well as the penalties for its disclosure, we recommend that consideration be given to adapting it: breaches, ethical and legal misconduct can occur in all sectors of society and, therefore, cause substantial damage to both public and economic interests. It is therefore highly advisable, in the context of several international recommendations, not to exclude disclosure of information related to the national security sector, but to design specific mechanisms to ensure particular scrutiny. Guidelines on how to address this delicate balance can be found in the Global Principles on National Security and the Right to Information (Tshwane Principles)[2]. In its Section 18, the Irish Public Disclosure Act 2014[3] provides a specific regime for disclosures related to national security.

Finally, there is national security information that is not classified. The typical example is an oral order given on a battlefield which, by definition, cannot be classified (written information is classified). Some

[2] Vid. https://www.justiceinitiative.org/uploads/bd50b729-d427-4fbb-8da2-1943ef2a3423/global-principles-national-security-10232013.pdf

[3] Vid. https://www.irishstatutebook.ie/eli/2014/act/14/section/18/enacted/en/html#sec18

classified information may not actually threaten national security: example of over-classified information.[4]

Article 3 Personal scope

Question 1.-: Letter a) of paragraph 1 of Article 3, which includes within the personal scope those persons who have the status of public employees or workers, shall be worded as follows:

a) persons having the status of public employees and employees;

Proposed wording: We propose to amend Article 3, paragraph 1, letter a) as follows:

(a) persons having the status of public employees or employees;

Justification: We propose to modify the letter "and" by the letter "o" since we understand that the intention of the regulation is to extend protection to public employees and workers alternatively and not jointly. The letter "and" may lead to interpretative errors.

Question 2.-: Letter a) of paragraph 4 of Article 3, which includes within the personal scope those persons who assist the informant in the process, is worded as follows:

a) Natural persons who, within the framework of the organization in which the informant provides services, assist the informant in the process.

Proposed wording: We propose to amend Article 3, paragraph 4 (a) as follows:

(a) Natural or legal persons who, within the framework of the organization in which the reporting person provides services or outside such framework assist the reporting person in the process.

Justification: In line with what has been pointed out above, we advocate the inclusion of a system of definitions that includes the defined term "facilitator" as that "natural or legal person who assists a whistleblower in the whistleblowing process in a work context, and whose assistance must be confidential". In the event that a system of definitions is not finally included, we propose that protection be extended to any natural or legal person who, within or outside the organization, assists the whistleblower in the whistleblowing process in order to protect, as mentioned above, those non-profit entities that dedicate part of their activity to assisting these persons.

In addition to whistleblowers acting in a prescribed manner, Article 3 includes as eligible for protection both potentially affected family members of a whistleblower and persons who support whistleblowers within their organization.

We believe that this deliberately excludes natural or legal persons eligible for protection under the provisions of Directive 2019/1937 that protect facilitators. This would affect, for example, workers of non-governmental organizations who, either psychologically, financially or with expertise, support whistleblowers before, during or after their disclosure. Our recommendation would therefore be to extend this protection to non-governmental organizations, as well as their employees, in the list of persons protected by the new law. An example of this approach can be found in the recently adopted French law transposing Directive 2019/1937, which reads as follows

"Facilitators, understood as any natural person or any non-profit legal person under private law who assists a whistleblower in making a report or disclosure in compliance with Articles 6 and 8"

To make the legislation as effective as possible and create as broad a deterrent mechanism as possible against discrimination against those who report in the public interest, we would further recommend that protections be included for journalists, as well as for public and private sector officials working on

[4] ECtHR, 2013, Bucur v. Romania: mass surveillance of journalists in Romania was unduly classified

whistleblower disclosures. Depending on the nature of a specific disclosure, these individuals may become victims of retaliation and deserve access to resources and support. In addition, in particular, the inclusion of journalists would strengthen media rights and freedom of expression in general, which are particularly threatened throughout the European Union. To our knowledge, Spain would be the first country in the Union to use the transposition of Directive 2019/1937 for this purpose, thus setting an important example.

Article 4 Communication of infractions through internal information systems

Question: Article 4, paragraph 1, which introduces the internal information system, shall read as follows:

1. The internal information systems are the preferred channel for reporting the actions or omissions provided for in article 2.

Proposed wording: We propose to modify paragraph 1 of article 4 as follows:

1. Internal reporting systems are the preferred channel for reporting actions or omissions provided for in Article 2, provided that the violation can be dealt with internally in an effective manner and provided that the reporter considers that there is no risk of retaliation.

Justification: The amendment is in line with the provisions of the Directive. We consider that the internal system should be the preferred channel, but always and in any case, when such channel is effective and the informant does not consider that there is a risk of retaliation. Otherwise, this could introduce risks for whistleblowers, forcing them to turn first to internal channels for legal protection, which may result in retaliation or even obstruction of justice. Although the purpose of the Directive and the Preliminary Draft is precisely to regulate a whistleblower protection system, the whistleblower should have the possibility of going directly to external information systems if he/she considers that the information channel established internally will not be effective or it is clear that it will not prevent possible reprisals.

The Directive regulates different alternatives for communicating information without preferences between these channels. This includes internal channels within organizations, external channels to regulators and public disclosures to the media or others: the whistleblower has the possibility to choose his or her preferred channel.

Many of the concerns about whistleblowers being able to choose where to make their report are misplaced. The overwhelming majority of whistleblowers-many studies find that more than 90%-usually make their first report to an internal channel, in any case[5]. The ability to initially turn to a regulator or other external body is critical in the minority of cases where an employer may ignore a report or, worse, penalize the whistleblower and destroy evidence when alerted to a violation. The introduction of provisions that make the use of internal channels mandatory as a first option creates enormous risks of retaliation for whistleblowers facing hostile work environments. Moreover, this can become an obstruction to justice, as it forces whistleblowing internally rather than directly to the authorities, including prosecutors, regulators or - in this case - the Independent Authority instituted in the same preliminary draft.

Article 6 Management of the system by an external third party.

Question: Section 1 of Article 6, which regulates the management of the system, understood as the reception of information, shall be worded as follows:

[5] Vid. Ethics Resource Center (ERC), Inside the Mind of a Whistleblower (2012), https://www.corporatecomplianceinsights.com/wp-content/uploads/2012/05/inside-the-mind-of-awhistleblower-NBES.pdf

1. The management of the internal information systems may be carried out within the entity or body itself or through an external third party, under the terms provided for in this law. For these purposes, the receipt of information shall be considered as management of the system.

Proposed wording: We propose to modify paragraph 1 of Article 6 as follows:

1. The management of the internal information systems may be carried out within the entity or body itself or by calling upon an external third party, under the terms provided for in this law. For these purposes, the receipt of information shall be considered as management of the system. The receipt of written information shall be carried out through an end-to-end encrypted or similar computerized method that guarantees that the information is protected and prevents unauthorized personnel from accessing it.

Justification: We consider that it is essential, in order to achieve the purpose of the regulation, to promote (through its inclusion in the articles) that the internal systems for receiving written information be double encrypted or a similar computerized method that guarantees the confidentiality and secrecy of the information and of the informant.

The Preliminary Draft allows third parties to manage the information channels, in accordance with the requirements of the law. However, it seems to us that there is not enough regulation to guarantee minimum equal standards for third parties that may provide this service. One of the ways to introduce greater control over the service provider is to establish a proper evaluation of these providers by the National Authority. The centrality of communications in protecting the integrity of whistleblowers and in dealing with irregularities and crimes makes this issue extremely relevant. At the same time, whistleblowers prefer internal channels as the main avenue for whistleblowing, which makes it even more important to regulate those who provide the service to manage them.

The provision of high-quality services can also be encouraged by introducing measures to create a competitive environment in this area, avoiding concentration in big players or consultants and stimulating the participation of diverse actors in their provision.

Similarly, the provisions included here will have to be extended to Article 15, regulating channels managed by third parties in the public sector.

Article 7 Internal information channels.

Question 1.-: Paragraph 1 of Article 7, paragraph 1, which regulates the internal information channels, shall be worded as follows:

1. All internal information channels available to an entity to enable the submission of information in respect of the infringements provided for in Article 2 shall be integrated within the internal information system referred to in Article 6.

Proposed wording: We propose to amend paragraph 1 of Article 7 as follows:

All internal reporting channels available to an entity to enable the submission of information in respect of the infringements referred to in Article 2 shall be integrated within the internal reporting system referred to in Article 5.

Justification: We consider this to be a typographical error since it is Article 5 that regulates the internal information systems. Article 6 regulates the management of the system by an external third party.

Question 2.-: The first part of section 2 of Article 7, which regulates the internal information channels, shall be worded as follows:

2. The internal channels shall allow communications to be made in writing or verbally, or both. The information may be provided either in writing, by mail or by any electronic means provided for this purpose, or verbally, by telephone or by voice messaging system. At the informant's request, it may also

be submitted by means of a face-to-face meeting. In the latter cases, whether the communication is made verbally or in person, the informant will be warned that the communication will be recorded and will be informed of the processing of their data in accordance with the provisions of Regulation (EU) 2016/679 and Organic Law 3/2018 of December 5, 2018 on the Protection of Personal Data and guarantee of digital rights.

When making the communication, the informant may indicate an address, email or safe place for the purpose of receiving notifications.

(...)

Proposed wording: We propose to amend paragraph 2 of Article 7 as follows:

2. The internal channels shall allow communications to be made in writing or verbally, or both, anonymously or by informing the identity of the informant. The information may be provided either in writing, by mail or by any electronic means provided for this purpose, or verbally, by telephone or by voice messaging system. At the informant's request, it may also be submitted by means of a face-to-face meeting. In the latter cases, whether the communication is made verbally or in person, the informant will be warned that the communication will be recorded and will be informed of the processing of their data in accordance with the provisions of Regulation (EU) 2016/679 and Organic Law 3/2018 of December 5, 2018 on the Protection of Personal Data and guarantee of digital rights.

When making the communication, the informant may indicate an address, email or safe place for the purpose of receiving notifications. Notwithstanding the foregoing, the possibility of reporting anonymously must be communicated, warned and announced at all times.

(...)

Justification: Section 3 of Article 7 provides for the possibility of anonymous communications; however, we consider that the rule reinforces other formats, mainly those referring to face-to-face meetings, where mechanisms for recording or annotation of communications are established. This may create risks for those who decide to do so, especially in small or medium-sized administrations or organizations, where exposure through these mechanisms is greater. It is proposed to reinforce the guarantee of anonymity and the recognition of these communications during the process.

Question 3.-: Section 3 of Article 7, which regulates anonymous communications, shall be worded as follows:

3. Internal channels shall allow for the submission and subsequent processing of anonymous communications.

Proposed wording: We propose to modify section 3 of article 7 as follows:

3. Internal channels shall allow for the submission and subsequent processing of anonymous communications through a end-to-end encrypted system that guarantees the anonymity of the informant.

Justification: In line with what is indicated in the previous section, the standard should promote the possibility of anonymous reporting. To this end, organizations must create a single system or channel for receiving anonymous information that duly guarantees anonymity.

The present Draft introduces a broad provision of different formats for internal reporting, including written and voice reports, and general provisions to maintain the confidentiality of the information, and the identity of each person involved in the report. However, no specific tools are included to guarantee anonymity. Many public administrations and private companies in Spain have already developed different types of formats, including opensource options such as GlobaLeaks. For example, the Anti-Fraud Agency of Valencia, the Barcelona City Council (Busta Ética), or the Spanish Union of Journalists have already tested these mechanisms, allowing two-way encrypted and anonymous communications, with positive results encouraging whistleblowing.

This Article should include a provision to ensure that at least one of the avenues for reporting provides the technical infrastructure to communicate information securely. If the law is to protect anonymous whistleblowing, Spaniards deserve to be assured that properly publicized and technically developed channels are in place to ensure this.

The Italian Legge 30 November 2017, n. 179 requires public administrations to put in place internal reporting mechanisms, where more than 600 have developed anonymous and digital systems to do so. This constitutes a strong precedent where civil servants have quickly deployed the knowledge and skills to manage them successfully. This Draft Bill regulates a new system that has yet to settle in our legal system; therefore, we highly recommend that the internal whistleblowing channels to be established as a result of the entry into force of the Draft Bill, should communicate and announce the whistleblower's right to report anonymously.

The creation and promotion of channels technically guaranteeing the anonymization of communications should also be extended to Article 17, which regulates the channels established by the Independent Whistleblower Protection Authority.

Another weakness in the constitution and governance of internal channels in the draft legislation is the absence of public performance reporting. The publication of regular information is of vital importance to evaluate and improve the implementation of the systems, which - if improved - could also have a positive impact on the trust of the channels and the receptiveness of employees and others to report through them.

Article 18º External channels and criminal liability of informants

Question 1.-: Section 2 of Article 18, which regulates the admission procedure,

Once this preliminary analysis has been carried out, the Independent Authority for the Protection of the Informant shall decide, within a period of no more than ten working days from the date of entry of the information in the register:

(a) Inadmit the communication, in any of the following cases:

1. When the facts reported lack all verisimilitude.

2º. When the facts reported do not constitute an infringement of the legal system included in the scope of application of this law or, if they do, they do not affect the general interest.

Proposed wording: We propose to amend paragraph 2 of Article 18 to include a mechanism through which the Authority's decisions in this regard can be appealed.

Justification: Article 18.2 grants the Independent Authority considerable discretion to disregard reports on the grounds that the violations "do not affect the general interest". The Independent Authority can reject a report without even giving its reasons for doing so.

Moreover, there does not appear to be an avenue for appealing the use of this discretion if a report is rejected. If it is possible to appeal to the courts, it will be cumbersome and possibly expensive.

Other jurisdictions have implemented an administrative (that is, within the Independent Authority) route of appeal, see for example Slovakia[6]:

> *On appeals. A6(4) - "The notifier who has not been granted protection under paragraph 3 may, within 15 days of receipt of the notification under paragraph 3, request the higher administrative authority, itself or through the Office, to examine the grounds for non-protection under paragraph 3. protection in accordance with Article 7 and shall notify the*

[6]Vid. https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2019/54/20190301

notifier, the employer and the Office in writing, or notify the notifier or the Office within this period that the notifier has not made a qualified notification".

The fact that the proposed Spanish Independent Authority is effectively also the route for challenging decisions of the internal channels (as noted in Article 13(5)) makes it all the more important that decisions on this point are reasoned and can be challenged.

Question 2.-: Paragraph 3 of Article 18, which regulates the receipt of communications, is worded as follows:

"When the communication is manifestly unfounded or there are, in the opinion of the Independent Authority for the Protection of the Informant, rational indications of having been obtained in an unlawful manner. In the latter case, provided that the access could constitute a crime that cannot be prosecuted ex officio, in addition to the inadmissibility, a finding of guilt shall be made or a detailed account of the facts deemed to constitute a crime shall be sent to the Public Prosecutor's Office".

Proposed wording: with a view to being able to modify this weakness in the Law, the text recently approved in Law No. 4979 transposing Directive 2019/1937 in France may be considered, where the following is determined:

"Article 122-9 of the Penal Code is amended as follows:

1° The word "procedures" is replaced by the word "conditions";

2° Two paragraphs are added as follows:

"Nor shall any whistleblower incur criminal liability who removes, misappropriates or conceals documents or any other support containing information of which he has legitimate knowledge and which he communicates or discloses under the conditions referred to in the first paragraph of this article.""

(Original: L'article 122-9 du code pénal est ainsi modifié :

1° Le mot : « procédures » est remplacé par le mot : « conditions » ;

2° Sont ajoutés deux alinéas ainsi rédigés :

« N'est pas non plus pénalement responsable le lanceur d'alerte qui soustrait, détourne ou recèle les documents ou tout autre support contenant les informations dont il a eu connaissance de manière licite et qu'il signale ou divulgue dans les conditions mentionnées au premier alinéa du présent article.)

Likewise, the following formulas developed by Blueprint for Free Speech for a model law used Germany for the transposition of EU Directive 2019/1937 can be considered:

(1) Any person who commits an offense for the purpose of obtaining information to report or disclose within the meaning of this law is not acting unlawfully if the obtaining or access, when weighing the conflicting interests, including the affected legal interests and the degree of danger threatening them, is the protected interest that significantly predominates. A protected interest is the prevention and detection of legal violations within the meaning of this law. Justification of intentional offenses against life and limb under this provision is excluded; this includes attempt, threat and actual endangerment.

(2) If the whistleblower commits a criminal offence for the purpose of obtaining information that is reported or disclosed within the meaning of this Act and the requirements of subsection 2 clause 2 are not met, the court may mitigate the punishment pursuant to section 49 subsection 1 of the Criminal Code or refrain from punishment if the whistleblower has made a significant contribution to the detection or prevention of a violation under this Act.

Justification: The Independent Authority will make an evaluation of each communication, where there seems to be a lot of room for maneuver to reject the reports. One of the most worrying aspects is that it will not accept cases in which there are "reasonable indications of having been obtained illegally". The Preliminary Draft must include reasonable exceptions that allow informants to report without fear of being accused of theft, computer crimes, among other causes that they may suffer if this aspect is not modified. Lawsuits agist whistleblowers are one of the most extended and common form of retaliation, and this draft is leaving wide discretionary to minimize this risk. The “reasonable indications” that may ground the case against the whistleblower are likely to be based on statements from the subject of the report; being unappropriated to regard them as neutral. Moreover, these cases should not be handed over to the Prosecutor's Office in first stage; this will introduce a substantial chilling effect in people’ inclination to report, undermining the entire purpose of the legislation. The current Article excludes from admission any information obtained illegally. This is in contradiction with Directive 2019/1937, which only excludes immunity for self-standing criminal offenses.

More generally, this could have a strong chilling effect on whistleblowers. Considering that Antoine Deltour (one of the whistleblowers in the case known as LuxLeaks, which exposed heavyweight tax crimes across Europe) was prosecuted and convicted, including at the appeal stage in Luxembourg for stealing the information from PwC. Should this provision be retained in the draft bill, it will make it almost impossible for whistleblowers to escape prosecutions such as Mr. Deltour's, but will also have a negative effect on encouraging citizens to report possible wrongdoing, as any information obtained illegally is inadmissible before the independent authority.

Finding exceptions to the criminal liability of whistleblowers in obtaining information to report infractions, crimes and malpractices is of vital importance for the development of a law in line with international standards. However, other aspects should also be considered when regulating this aspect:

1. allegations about the way in which information has been consulted should not impede the investigation of the substance of the report;

2. workers should be able to make a report without fear of being reported to the police on the grounds that their employer says they "should not have been able to access this information".

Article 20 Termination of proceedings

Question: Paragraph 5 of article 20, which regulates the termination of the proceedings, shall read as follows:

5. The decisions adopted by the Independent Authority for the Protection of the Informant in the present proceedings shall not be subject to administrative or contentious-administrative appeal, without prejudice to the administrative or contentious-administrative appeal that may be lodged against the eventual decision that ends the sanctioning procedure that may be initiated on the occasion of the facts reported.

Proposed wording: We propose to modify paragraph 5 of article 20, as follows:

5. The decisions provided for in letters b, c and d of paragraph 3 of this article, adopted by the Independent Authority for the Protection of the Informant in the present proceedings shall not be subject to appeal in administrative or contentious administrative proceedings, without prejudice to the administrative or contentious administrative appeal that could be lodged against the possible decision that puts an end to the sanctioning procedure that could be initiated on the occasion of the facts reported. A contentious-administrative appeal may be lodged before the Administrative Chamber of the National High Court against the decisions of the Independent Authority for the Protection of the Informant.

Justification: It may be reasonable that the decisions of the Independent Authority for the Protection of Whistleblowers provided for in paragraph 3 b, c and d are not subject to appeal, since in this case it would be possible to appeal against the decision of the disciplinary proceedings or to appeal against the decision of the Public Prosecutor's Office or the competent authority. However, decisions to close the

case must be subject to appeal, since in this case there is no means of checking the legality of the decision taken by the Independent Authority for the Protection of the Whistleblower. Given its nature as an independent authority, and in line with the provisions for the jurisdictional control of other entities of this type, the jurisdiction should correspond to the Administrative Chamber of the Audiencia Nacional.

Article 28º Public Disclosure. Conditions of protection.

Question 1.-: Article 28, regulating the conditions of protection, states as follows:

A person who makes a public disclosure shall only be eligible for protection under this law if any of the following conditions are met:

(a) That he has made the communication first through internal and external channels, or directly through external channels, in accordance with Titles II and III, without appropriate action having been taken thereon within the prescribed time limit.

b) Who has reasonable grounds to believe that:

(i) the breach may constitute an imminent or manifest danger to the public interest, in particular where there is an emergency situation, or there is a risk of irreversible damage, including a danger to the physical integrity of a person, or.

ii) in case of communication through an external channel, there is a high risk of retaliation or there is little likelihood of effective treatment of the information due to the particular circumstances of the case.

Proposed wording: We propose to modify Article 28 as follows,

A person who makes a public disclosure shall only be eligible for protection under this Act if any of the following conditions are met, in particular but not limited to:

(a) That he or she has made the communication first through internal and external channels, or directly through external channels, in accordance with titles II and III, without appropriate action having been taken thereon within the prescribed time limit.

b) That it has reasonable grounds to believe that:

(i) the breach may constitute an imminent or manifest danger to the public interest, in particular where there is an emergency situation, or there is a risk of irreversible damage, including a danger to the physical integrity of a person, or.

ii) in case of communication through an external channel, there is a high risk of retaliation or there is little likelihood of effective treatment of the information due to the particular circumstances of the case.

iii) the evidence and/or information will be destroyed or modified.

Justification: Article 28 is a satisfactory transposition of the text proposed in Directive 2019/1937. However, we believe it is important that these minimum provisions can be extended to broaden the scope of this essential regulation in the exercise of fundamental rights such as freedom of expression.

While it is important that there are internal and/or external reporting channels for whistleblowers, it is equally important that whistleblowers are able to disclose relevant information to the media, where appropriate. This should not be essential in cases where internal and/or external channels do not exist or do not function adequately, or cannot be expected to do so, but also where the breaches are so serious that the public has a right to know, regardless of the availability of communication

mechanisms. This Article should take into account the right of the public to be informed on matters of public interest and the right of journalists to publish information on such matters. As the European Court of Human Rights and the Council of Europe have pointed out, the balance between the interests of business and the interests of the public must take into account other democratic principles such as transparency, the right to information and freedom of expression, and the media.

In addition, as the UN special rapporteur noted in his report on the protection of sources and whistleblowers in 2015[7], the public may have an exceptionally strong right to know some types of information or allegations, such that they override even potentially effective internal or oversight processes. This includes, among other things, according to well-established case law of the European Court of Human Rights on whistleblowers, violations of a law, rule or regulation; gross mismanagement; gross waste of funds; abuse of authority; and substantial and specific danger to public health and safety.

Article 29 to 34 (Title IV) Data Protection

Question: If data is transmitted for investigative purposes to regional authorities, or vice versa, to other national regulators, the public prosecutor's office or any other actor involved, the same confidentiality regime applies. To reinforce legal certainty, this should be specified.

According to Article 31(2)(3), anonymity may be waived "in the context of a criminal, disciplinary or disciplinary investigation". To protect the identities of whistleblowers and prevent abuse, this should be limited and regulated, for example, to prevent disclosure of the identity of a public sector employee to his or her employer in the context of a "disciplinary" or criminal investigation of the whistleblower.

Article 36 Prohibition of retaliation

Question 1: Section 1 of Article 36, which regulates the prohibition of reprisals, shall be worded as follows:

1. Acts constituting reprisals, including threats of reprisals and attempts of reprisals against persons who submit a communication in accordance with the provisions of this law are expressly prohibited.

Proposed wording: We propose to amend section 36, paragraph 1, as follows:

1. Acts constituting retaliation, including threats of retaliation and attempts of retaliation against persons set forth in Article 3 who have acted within the framework of the provisions of the present law are expressly prohibited.

Justification: If the scope of personal protection of the Preliminary Draft extends to all persons listed in Article 3, such persons should be protected against acts constituting retaliation. Otherwise, the persons not mentioned in the current wording are left unprotected and the purpose of the rule is not fulfilled.

Question 2: Paragraph 2 of Article 36, which regulates the concept of retaliation, is worded as follows:

Retaliation is understood to be any acts or omissions that are prohibited by law, or that, directly or indirectly, involve unfavorable treatment that places the persons who suffer them at a particular disadvantage with respect to another in the labor or professional context, solely because of their status as informants, or for having made a public disclosure, and provided that such acts or omissions occur during the duration of the investigation procedure or in the two years following the end of the same or of the date on which the public disclosure took place. An exception is made in cases where such act or

[7] Vid. https://www.ohchr.org/en/calls-for-input/reports/2015/report-protection-sources-and-whistleblowers

omission can be objectively justified by a legitimate purpose and the means to achieve such purpose are necessary and appropriate.

Proposed wording: We propose to amend paragraph 2 of Article 36, as follows:

Retaliation is understood to be any acts or omissions that are prohibited by law, or that, directly or indirectly, involve unfavorable treatment that places the persons who suffer them at a particular disadvantage with respect to another in the labor or professional context, solely because of their status as informants, or because they have made a public disclosure, and provided that such acts or omissions occur during the duration of the investigation procedure or within a minimum of three years following the end thereof or of the date on which the public disclosure took place. An exception is made where such act or omission can be objectively justified by a legitimate aim and the means of achieving that aim are necessary and appropriate. The protection may be extended by as much as necessary, following an assessment of the case.

Justification: We propose to extend the years of protection to a minimum of three years following the communication of information or public disclosure of such information by a whistleblower against retaliation. The Directive defines "retaliation" as "any action or omission, direct or indirect, occurring in an employment context, which is motivated by an internal or external whistleblowing or by a public disclosure and which causes or is likely to cause unjustified prejudice to the whistleblower". We defend the determination of a period of time, but we suggest extending it to a longer period to ensure adequate protection of the whistleblower in his or her corresponding work context.

Question 3: In addition, to complete the following clause of paragraph 2 of Article 36:

"Exceptions shall be made in cases where such action or omission can be objectively justified in view of a legitimate purpose and the means to achieve such purpose are necessary and appropriate."

We recommend the addition of a provision clarifying that justification under this provision must be proven by the reprisalee. This reversal of the burden of proof corresponds to the measures provided for in Article 21(5) of the Directive.

To further strengthen interim support for whistleblowers, legislators may consider introducing a provision allowing for the suspension of the employer's action for 30 days if a whistleblower requests assistance. This type of provision exists in other legislation, such as Slovakia. Slovakia's Independent Whistleblower Authority was legislated in 2019 and finally became operational in 2021. In its first months of operation it used its powers to suspend disciplinary action against a whistleblower[8].

Article 37 Support Measures

Question: Article 37, paragraph 1, letter c), which regulates the financial and psychological support measures, shall be worded as follows:

(*c) Financial and psychological support, on an exceptional basis, if appropriate after assessment by the independent Authority for the Protection of the Informant of the circumstances arising from the submission of the communication.*

Proposed wording: We propose to amend Article 37(1)(c) as follows:

(c) Financial and psychological support if appropriate after assessment by the independent Whistleblower Protection Authority of the circumstances arising from the submission of the communication.

8 https://e.dennikn.sk/minuta/2610390

Justification: We propose to eliminate the reference to the "exceptional" nature of the measure since it is already indicated that such financial and psychological support will proceed after an assessment by the Authority.

The reference to exceptionality may mean that the Authority does not assess in all cases whether financial and psychological support is necessary, which in our opinion reduces the protection of the whistleblower. Such an assessment should in any case be made in line with the provisions of the Directive.

Article 38 Protection against retaliation

Question 1: Paragraph 2 of article 38, which regulates the measures of protection against reprisals, shall be worded as follows:

2. Whistleblowers shall not incur liability in respect of the acquisition of or access to information that is publicly communicated or disclosed, provided that such acquisition or access does not constitute a crime.

Drafting proposal: As mentioned in Article 18, exceptions should be found to the criminal liability of whistleblowers when accessing and communicating information necessary to point out crimes, irregularities or malpractices.

With a view to being able to modify this weakness in the Act, the following formulas developed by Blueprint for Free Speech for a model law used Germany for the transposition of Directive EU 2019/1937 can be considered:

> *(1) Any person who commits an offense for the purpose of obtaining information to report or disclose within the meaning of this Act is not acting unlawfully if the obtaining or access, when weighing the conflicting interests, including the affected legal interests and the degree of danger threatening them, is the protected interest that significantly predominates. A protected interest is the prevention and detection of legal violations within the meaning of this law. Justification of intentional offenses against life and limb under this provision is excluded; this includes attempt, threat and actual endangerment.*
>
> *(2) If the informant commits a criminal offense for the purpose of obtaining information that is reported or disclosed within the meaning of this Act and the requirements of subsection 2 clause 2 are not met, the court may mitigate the punishment in accordance with section 49 subsection 1 of the Criminal Code or refrain from punishment if the informant has made a significant contribution to the detection or prevention of a violation under this Act.*

Question 2.-: Article 38 subsection 4 which regulates the procedure to be followed in case of reaching treatment in jurisdictional bodies, shall read as follows:

4. In labor proceedings before a court concerning damages suffered by informants, once the informant has reasonably demonstrated that he has communicated or has made a public disclosure in accordance with this law and that he has suffered a damage, it shall be presumed that the damage occurred as a reprisal for informing or for making a public disclosure. In such cases, it shall be for the person who has taken the detrimental action to prove that such action was based on duly justified grounds not linked to the communication or public disclosure.

Proposed wording: We propose to modify Article 38, subsection 4 as follows:

4. In employment proceedings before a court concerning injury suffered by whistleblowers, ~~once the whistleblower has reasonably demonstrated that he or she has communicated or made a public disclosure in accordance with this Act and that he or she has suffered injury~~, it shall be presumed that the injury occurred in retaliation for reporting or making a public disclosure. In such cases, it shall be

for the person who has taken the injurious action to prove that such action was based on duly justified grounds not linked to the communication or public disclosure.

Justification: Protection against retaliation seems to apply mainly in courts during employment proceedings. It is worth noting that the UK has had such a system in place for many years under the Public Interest Disclosure Act 1998. Blueprint for Free Speech conducted a comprehensive study of UK employment tribunal cases and found that only a small proportion of whistleblowers had rulings in their favor in their cases[9]. Given this background, the reversal of the burden of proof is an important part of redressing the balance between whistleblowers and those involved in the information. It is the one who has allegedly committed a crime who has to prove that he or she has not done so, and not the whistleblowers who have to justify the legality of their communication and the links between the fact of having communicated and retaliation. This is a minimal and fundamental provision for effective whistleblower protection, as the economic cost and stress of legal proceedings are likely to remain.

9 https://static1.squarespace.com/static/5e249291de6f0056c7b1099b/t/5ea06ff8d801be771a29d32e/1587572764935/Report-Protecting-Whistleblowers-In-The-UK.pdf

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