WHISTLEBLOWING INTERNATIONAL NETWORK
NGOs FOR WHISTLEBLOWING

SENT by email

Directorate General Justice and Consumers
European Commission
1049 Bruxelles, BELGIUM

25 January 2023

Urgent concern about non-compliance with the transposition of 'whistleblowing' Directive (EU) 2019/1937 into Spanish national law

We are writing to bring to your attention our concerns regarding the transposition of the Directive on the protection of persons reporting on breaches of Union law (EU) 2019/1937 - the 'whistleblowing' Directive - into Spanish national law and to ask you to intervene as a matter of urgency to alert the Spanish Government of the risk of failing to comply with the EU Directive. The reason for the urgency is the draft law is entering the final stage of the legislative process.

Draft law 121/00013 - '*Proyecto de Ley reguladora de la protección de las personas que informen sobre infracciones normativas y de lucha contra la corrupción*'[1] - was submitted to Parliament by the Government of Spain on the 22 September 2022 and approved by Congress on the 23 December 2022.

Serious concerns were raised by civil society that the proposal fails to properly protect whistleblowers in Spain. Several proposed amendments to improve the draft were submitted by whistleblower protection experts. Several recommendations were successfully implemented by Congress, yet many critical amendments were not adopted. Therefore, Spain now risks adopting transposition legislation which does not protect whistleblowers and does not conform with the minimum standard requirements of EU Directive (2019/1937).

We understand the flawed amended draft law will be passed to the Senate on the 26 January 2023 and be put to a vote on or before the 9 February 2023. Amendments are permitted at this stage of the legislative process, but only on the 26 January and we have been informed there is little political will to make further changes to the draft. Without intervention, it remains highly likely that this flawed legislation will be adopted.

The adoption of this flawed legislation could be disastrous for whistleblowers in Spain and Europe where a harmonized whistleblower protection is essential in the fight against corruption, upholding the rule of law and the effective enforcement of EU Law. Further, while this may not be a matter directly relevant for the

[1] Available at https://www.congreso.es/public_oficiales/L14/CONG/BOCG/A/BOCG-14-A-123-7.PDF

European Commission, we are concerned flawed legislation in Spain could become a flawed blueprint for whistleblower rights in Latin America.

We are in the process of doing a full assessment with our partners in Spain of the draft law using WIN's International Best Practice Criteria for Compliance with EU Directive 2019/1937. We will send you the report as soon as it is available.

For the purposes of this letter and to highlight the urgency of the situation, we set out **nine provisions** in the draft law which appear to violate the required minimum standards of the EU Directive. We also set our recommended amendments.

1. Lack of protection for blowing the whistle on abuse of authority

Art. 2(1) of the draft law only protects disclosures of illegality for the EU and significant national laws – ie. "actions or omissions that may constitute *a serious or very serious criminal or administrative offence.*" This directly violates the Directive, which also requires protection to cover reports exposing abuses of authority and anything that "defeats the purpose" of rules. This is essential, because whistleblowers should not lose their rights if they are on the wrong side of legalistic boundaries between abuses of power and technical illegality. Whistleblower laws challenge abuses of power through the truth. An abuse of authority or reporting information about wrongdoing or harm to the public interest is not misconduct that can be excluded from protection.

Recommendation 1: For every reference to protection for exposing illegality, remove the terms "*serious or very serious"* and add "or abuse of authority, or any matter that threatens or harms the public interest."

2. Protection only for whistleblowing through official channels

The draft law only offers rights when whistleblowers communicate protected information through official internal or external channels (Draft Law Art.1(1)). The Directive contains no audience loophole in its definition for internal reports, except that they are internal (EU Dir. Art. 5(4)).[2] Nothing in the Directive requires whistleblowers to operate through those channels or forfeit their anti-retaliation rights.

It is also dysfunctional and would dramatically shrink the Directive's protection. Allegations are only the tip of the iceberg for the flow of protected information necessary for organisations to function. Most of the time when protected information is communicated, it is not as an allegation. It is simply a matter of doing one's job to act on evidence or solve problems. The narrow channel only protecting allegations to the IAPI will force employees to bypass the chain of command and flood the Independent Authority for the Protection of Informants (IAPI), the Spanish whistleblower office, whenever they need to act on politically sensitive problems or misconduct. The IAPI whistleblower office will then refer the information back to the relevant agency with competence and expertise – the report's origin. The bottom line is that

[2] A explained in the definition, "'internal reporting' means the oral or written communication of information on breaches within a legal entity in the private or public sector." See also Recital, para. 62.

this restriction means the draft law only would protect the "tip" – a small percentage of those who need and deserve protection – leaving the "iceberg" and therefore the vast majority defenseless. Further and importantly, it would delay getting vital whistleblowing information into the right hands, which is a primary purpose of the Directive (EU Dir. Recital, para. 47)
The IAPI and other channels should be a protected audience, but not the only audience where anti-retaliation rights apply. Those channels should be an available additional option to the normal chain of command when the person with protected information thinks that usual forms of communication are too dangerous or will fail or backfire.

Recommendation 2: Art.1(1) of the draft law should clarify that reporting via a normal chain of command is protected.

3. Loophole for disclosing publicly available information

Art. 35(2)(c) of the draft law permits retaliation for disclosing information about misconduct that is already on the public record. This violates the Directive, which contains no such loophole. No other nation has this loophole in its whistleblower laws, and the U.S. Whistleblower Protection Act explicitly rejects it as disqualifying protection. This arbitrary loophole also undermines the purpose of whistleblower laws. The overwhelming majority of information on the public record is buried and beyond the awareness of government officials. Often it becomes significant, only because whistleblowers highlight it through their reports or public disclosures.

Recommendation 3: Cancel the loophole for disclosing publicly available information to prove misconduct.

4. Criminal liability limiting the legal protection to whistleblowers

According to the EU Directive, reporting persons shall not incur liability in respect of the acquisition of, or access to, the information which is reported or publicly disclosed (EU Dir. Art 21 (3)). Articles 18 and 38 of the draft law do not make it clear that such liability will not arise unless it is a self-standing crime not related to the obtaining or accessing information as part of making a report or a disclosure under the law. An example would be threatening or harming the safety of others. This lack of clarity will have a significant chilling effect on potential whistleblowers as people like Antoine Deltour, whose whistleblowing case (as part of LuxLeaks) led in part to the adoption of the EU Directive, would not be protected.

Recommendation 4: Remove criminal liability except with respect to self-standing criminal offences (for example, threats or harm to the safety of others) unrelated to the making of a report or disclosure of information under the law.

5. Directive's burden of proof only applies to proceedings for damages before courts or other authorities

The draft law is not sufficiently clear in this regard. First, it does not provide any competence for courts to assume jurisdiction over a whistleblower case, and second, the failure to apply this damages burden of proof to the IAPI or any other competent authority enforcing the law means that it flatly violates the Directive. To the contrary, outside the damages context in the draft law, there is no illegal retaliation unless whistleblowing was the "only" reason for an action (Draft law. Art. 36(2). This not only defies the Directive's burden of proof but is essentially the most hostile burden in the history of whistleblowing rights. It will make it realistically impossible for the IAPI or any other body to find illegal retaliation.

Recommendation 5: Apply the burdens of proof as per Article 38(3) to decisions in any agency or forum competent to enforce anti-retaliation rights.

6. Incomplete reverse burden of proof

In their limited context, the burdens of proof comply with the Directive with one significant exception: under Art. 38(4) the employer must prove that whistleblowing was "not linked" to the contested action. The Directive's recitals explains that means it is not linked "in any way" to the alleged reprisal (see Recital, para. 93). The distinction is critical. A premise for the Directive is that actions are illegal if contaminated by retaliation, even if there were mixed motives. It is not in compliance to approve actions would have occurred anyway because that were only 20-40% retaliatory. They must be uncontaminated – not linked "in any way".

Recommendation 6: Add the phrase "in any way" after "linked under" in Article 38(4) of the draft law.

7. Lack of court access or due process

The draft law does not provide any right to due process or court access. Whilst there is a reference in Article 38(4) to court actions for damages, informal investigations by the IAPI and local competent authorities are the only institutions currently identified as possibilities for enforcement, with no provision for judicial review of whatever decisions they are competent to make. This is even more concerning given that under the draft law the IAPI is being given investigatory powers (Draft Law Art.19) without having a judicial mandate to properly investigate. Due to resource limitations alone, a solely informal investigation by a remedial agency can only hope to have an anecdotal impact. It is no substitute for due process. Limiting relief to the unreviewed discretion of a remedial agency clearly violates the Directive, which describes an extensive process of judicial interpretation and review of administrative rulings.

Recommendation 7: Add provisions that – 1) As an alternative to a remedial investigation, the whistleblower law shall be entitled to a choice of forum for a due process proceeding in a court or employment tribunal; and 2) IAPI, other administrative or lower court rulings are subject to appellate judicial review.

8. Protection of those making anonymous reports is undermined by failure to ensure systems properly handle such communications and feedback

The draft law allows for a person reporting a concern to the IAPI to decide whether or not to report anonymously and sets out the rights of those who report, including the right to know the status and outcome of any investigation (Draft Law Art. 21). Articles 18 and 20 however, remove the right to be informed if the report was made anonymously. This legal uncertainty undermines the protections that are required by the EU Directive for those whose identities might become known after making a report and undermines the capacity of the authorities to build trust and confidence in their systems for handling reports of wrongdoing properly and lawfully, particularly with respect to on-line systems that allow for continuous communication with anonymous sources.

Recommendation 8: Establish clear requirements for reporting systems that allow for anonymous disclosure to ensure those who report anonymously are equally protected under the law

9. Substantive scope of relief

The draft law is silent on what relief the prevailing whistleblower is entitled to receive. As a result, they can still "lose by winning." The Directive requires a "make whole" remedy through "full compensation" for damages suffered. The draft law does not provide it.

Recommendation 9: Add a provision that explicitly gives prevailing whistleblowers the right to a "make whole" remedy, including damages, that eliminates the direct and indirect effects of illegal retaliation.

Finally, we are concerned that the Spanish authorities are not ensuring that NGOs, who have been the main channels of support for whistleblowers and who have worked collaboratively with all levels of government in that country to implement safe and effective on-line reporting platforms and to advise and support whistleblowers, are not protected as facilitators under the Spanish transposition draft. We see this as further evidence of a failure to properly consult with stakeholders and a lack of serious political commitment to transpose the EU Directive on the protection of whistleblowers (2019/1937) effectively and positively.

As stated at the outset, we will send you our full analysis once it is completed, but we wanted to get this letter to you as a matter of urgency with respect to the potentially serious areas of non-compliance that we have identified in Spain's draft law to transpose the EU Directive on whistleblower protection. We remain very concerned by the trend we are witnessing among many EU Member States to use the Directive as an excuse to reduce existing protections or to implement its standards in such a restrictive way that it defeats both the spirit and the letter of the law. It is therefore vital that the Commission is fully aware of these problems and advises Member States, including Spain, at the earliest opportunity of the risk they run of being non-compliant with the EU Directive.

We appreciate your time and efforts to ensure the smooth and effective transposition across Europe of this important law to protect whistleblowers as a matter of democratic accountability and to protect the public interest. We remain at your service in this vital work and are happy to answer any questions you may have or to discuss these issues in more detail.

Yours faithfully,

Anna Myers
Executive Director of WIN

On behalf of WIN's Board of Trustees:

Vladimir Radomirović – (Chair of WIN's Board of Trustees) Editor-in-Chief of Pištaljka (Serbia)
Cathy James – (Vice Chair of WIN's Board of Trustees) Legal Expert & Practicing Solicitor (UK)
John Devitt – Chief Executive, Transparency International Ireland
Giorgio Fraschini – Whistleblowing Programme Manager, Transparency International Italy
Annegret Falter – Chair, Whistleblower-Netzwerk E.V. (Germany)
Tom Devine – Legal Director at Government Accountability Project (USA)
Chido Onumah – Coordinator of the African Centre for Media & Information (Nigeria)
David Hutton – Senior Fellow of the Centre for Free Expression Whistleblowing Initiative (Canada)