

DRAFT LAW ON WHISTLEBLOWER PROTECTION: 10 RECOMMENDED AMENDMENTS

The undersigned organisations, on the presentation of the Draft Bill¹ transposing *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* and Regulatory Impact Analysis Report² by the Spanish Ministry of Justice, **consider necessary several amendments of its provisions - to ensure the adoption of an effective and ambitious national legal framework, which complies with the Directive and meets international best practice principles.**

In line with the submissions of civil society organisations responding to a consultation³ held between March 8, 2022 and March 17, 2022 - the Ministry of Justice, the Government and the Congress of Deputies and the Senate - are requested to amend the Draft Bill in the following aspects:

- 1) **Broaden and clearly define the material scope of application of the law**, to include wider categories of acts and omissions as provided by the Directive; extending protection to all types of wrongdoing and limiting any exceptions only to those set out in the Directive. It is also vital to provide a clear definition of ‘**public interest.**’
- 2) **Remove any conditionality for protection with respect to the whistleblower’s motivation** and instead properly implement the “*reasonable belief in the truth*” standard, as defined by the Directive; and regardless of whether or not the reporting person has an employment or professional relationship with the organisation linked to the information they are reporting.
- 3) **Guarantee the freedom of the whistleblower to choose the most appropriate reporting channel, as established in the Directive.** The law should explicitly protect reports via multiple and diversified channels **without establishing priority among them**; including proper protection of public disclosures, NOT limited to institutional reporting lines. Failure to protect whistleblowers who choose non-institutional channels undermines freedom of information and expression, and source protection.
- 4) **Guarantee reporting persons shall not suffer retaliation and shall enjoy full immunity from any liability arising from actions necessary to disclose a breach** including, but not limited to, confidentiality clauses or other duties to which they may be legally subject to, such as intellectual protection and data protection as well as trade or official secrets. Reporting persons must be protected during any investigation of their conduct as well as any other procedures initiated, including criminal prosecution.

¹ Vis. The draft proposal can be found here:

https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/APL%20INFORMANTE%20TRAMITE%20AUDIENCIA%20E%20INFORMACION%20PUBLICA_0803.pdf

² Vis. The Regulatory Impact Analysis Report can be found here:

https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/APL%20INFORMANTE%20TRAMITE%20AUDIENCIA%20E%20INFORMACION%20PUBLICA_0803.pdf

³ Vis. The public hearing can be found here: <https://www.mjusticia.gob.es/es/areas-tematicas/actividad-legislativa/normativa/participacion-publica-proyectos-normativos/proyectos-real-decreto>

5) **Broaden the definition of retaliation** to include, for example, any harm, unfair treatment, coercion, intimidation, discrimination or disadvantage by removing the two-year time limitation, and expanding to those acts occurring before and after the investigation procedure. Any general exceptions should also be removed, as they could lead to legal arbitrariness.

6) **Provide more robust measures to protect whistleblowers**, including free and ongoing legal assistance, designation of court-appointed lawyers specializing in the defending whistleblowers, comprehensive psychological and medical support, as well as guarantees to maintain the whistleblower and their family's financial stability. **The application of the principle of indemnity should be included**, providing avenues for recourse and compensation for any damages suffered.

7) **Ensure continuous protection without time limitation**, including for facilitators and civil society organisations which assist whistleblowers.

8) **Fully reverse the burden of evidential proof** to all cases where retaliation has been suffered, and not limited to labor proceedings. **Ensure injunctive or interim relief measures** favorable to whistleblowers in such legal proceedings.

9) **Guarantee protection of anonymous whistleblowers** at all times (both during and after any investigation) regardless of the reporting channel chosen. **Enforce minimum standard regulation of reporting platforms** to ensure anonymity both technically and technologically; and sanction any misleading advertisement of identity protection.

10) **Ensure the independence of the Independent Whistleblower Protection Authority**. Guarantee: an open and transparent selection procedure for its Director; effective accountability mechanisms; right to appeal to autonomous oversight function; impartial funding arrangements which guarantee independence; and the inclusion of civil society in its governance. **The law must clearly define the Authority's investigatory powers**; its capacity in any investigation or legal proceedings; its ability to collaborate with other competent authorities, and exercise proportionality to uphold the rights of whistleblowers against other persons concerned.

Signatories

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Asociación de Usuarios de la Comunicación (AUC)

Asociación para la Comunicación e Información Medioambiental (ACIMA)

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