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MANUAL FOR VOTING AMENDMENTS AND PROTECTING WHISTLEBLOWERS IN SPAIN

Analysis of the Draft Law on the Protection of Persons Reporting Regulatory Violations and the Fight against Corruption (121/000123) and its amendments

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Introduction

The following document identifies the most urgent and worrying issues that remain in the draft presented by the Government of Spain on September 23, 2022 121/000123 Draft Law regulating the protection of persons who report regulatory infringements and the fight against corruption, with a view to 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.

This document presents and describes each of the points that need to be amended in order to make real progress in the protection of whistleblowers in Spain, which could incorporate a new legal instrument without precedent at the national level, and shows an example to be considered for future implementation by the Member States.

The methodology used to prepare the document has carried out an evaluation of the draft presented, identifying the points that are still of extreme concern and urgency, even if many of them have already been raised by various civil society organizations at national and international level in response to the public consultation held in March of this year. Next, the amendments presented to each of the corresponding Articles have been evaluated, identifying those that may represent an improvement to the original version presented by the Government and -when necessary- those amendments that may even worsen what was proposed. Finally, the document recommends a series of positive and negative amendments that may have a significant impact on the draft, exceeding the points of extreme concern and urgency.

The document begins by addressing the issues that are considered of greatest concern and urgency: the criminal and civil liability of those who inform and the barriers to informing through a multiplicity of channels. This does not detract from the relevance of the many points raised below, without which this project will be insufficient.

The document has omitted the analysis corresponding to the coordination of jurisdictions and territorial responsibilities.

This document is accompanied by an infographic summarizing the points presented, pointing out the amendments with a positive or negative impact to encourage decision-makers, especially members of Parliament, to amend this project so that this opportunity will be worthwhile for all those who have risked everything up to today to report in defense of the public interest.

Summary table of recommendations

	Basque GP	GP Citizens	GP Plural	GP Confederal Government of Unidas Podemos	Republican GP	GP Popular in Congress	Socialist GP	GP VOX
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Source: own elaboration. References: Green: positive amendments recommended, when there is more than one positive amendment, the best one is highlighted in bold. Yellow: positive amendments but not completely satisfactory. Red: negative amendments.

Issues of greatest urgency and concern in the current draft

Article 38° Protective measures - Criminal liability

This is undoubtedly one of the most pressing, sensitive and complex issues of this project, establishing in a very unclear manner the civil and criminal liability of the persons who inform both when acquiring information of public interest and when disclosing it.

Again, this is in direct violation of the Directive, which makes it clear that informants can only be prosecuted for obtaining evidence that is independent of proof of their charges, such as breaking into a building or forcing entry into a room. If left unchanged, this Article and others that create very little legal certainty in this regard, this bill may become a trap that threatens imprisonment for those seeking evidence of wrongdoing. In Australia, with the Boyle case, the worldwide community working to protect whistleblowers has united against this counterproductive and very chilling interpretation. The Spanish bill openly threatens whistleblowers with prosecution for attempting to prove their accusations.

The draft completely omits the concept of temporary support. The Directive emphasized this principle, which may be the most important feature that makes the difference in triggering early settlements. It is also essential for the informant to be able to continue to lead a life during the proceedings, which often last between 2 and 5 years.

Positive amendments:

Amendment No. 258, Plural Parliamentary Group.

Amendment No. 157, Plural Parliamentary Group.

Comments:

We believe that Amendment 258 satisfactorily resolves this issue, which could turn this project into a mechanism completely contrary to its principles and objective.

Amendment 157 is also positive, but resolves it less specifically. However, it includes a mention of legal support and advice, which is missing in 258.

Article 35.2° Protective measures - limitation of carcasses

Article 35.2 establishes a list of cases in which protection would not be granted. The first of the cases listed denies protection to those who have reported through an internal channel and have had their communication rejected.

This is a rampant opposition to what is established in the Directive, attacking one of the basic principles of its design: the possibility of communicating through a diversity of equivalent channels (what is known in the whistleblowing literature as the three-tier-system).

The Article not only limits the use of external channels, but also blocks the possibility of recourse to the competent authorities once it has been submitted through the internal channel, eliminating the possibility of reporting it.

Moreover, the picture is aggravated by the serious limitations presented to appeal the decisions reached by those responsible for managing the internal channel and even the decisions of the IAI.

This can become a dead end for the people reporting.

Positive amendments:

Amendments Nos. 54, 153 and 255, Plural Parliamentary Group

Amendment No. 115 and 116, Republican Parliamentary Group

Amendment No. 77, Confederal Parliamentary Group of Unidas Podemos

Amendment No. 98, Republican Parliamentary Group (on Article 4)

Comments:

All of the listed amendments propose the elimination of limitations to ensure protection. We believe that Amendment 255 is the one that best accomplishes and justifies this.

Article 19. Investigation - possibility for the person under investigation to have access to files

Article 19.3 positively considers the possibility that the persons concerned may have access to an interview with those responsible at the Independent Authority for Whistleblower Protection, in order to be able to present their version of the facts in accordance with the presumption of innocence and, when required, in the exercise of their right of defense.

However, the informant is also given the possibility of accessing a copy of the file, which -even if there is a process of anonymization- implies an extreme risk for the informant as well as for the investigation of the facts and their clarification. This is an aspect that can quickly become a serious and irreversible obstacle for the protection of those who inform in a real and effective way.

There are other ways for affected persons to have access to the related facts, such as hearings with the National Authority or specific reports in which the National Authority discloses the facts. But access to the file cannot be guaranteed. The process of anonymizing the file may be much more burdensome for the State than the creation of a specific document intended to inform the affected person.

Article 19.5 also establishes the obligation of all persons to collaborate with the competent authorities, providing documentation and data when required. We believe that in the manner proposed in the original draft it is excessive and could potentially become a tool of excessive authority.

Positive amendments:

Amendment No. 72, Confederal Parliamentary Group of Unidas Podemos (19.3)

Amendment No. 144, Plural Parliamentary Group (19.5)

Negative amendments:

Amendment No. 196, Grupo Parlamentario Popular in Congress

Amendment No. 27, Ciudadanos Parliamentary Group

Comments:

We believe that Amendments 72 and 144 incorporate substantive improvements to address the two issues raised in the article. However, neither seems sufficient to resolve them satisfactorily.

On the contrary, Amendment 196 proposes that the alerts submitted anonymously be of a second degree of priority; as well as Amendment 27 establishes that the limits of the investigation be the right of the denounced person. We understand that both amendments are a significant setback to the rights of whistleblowers, going in the opposite direction to the objectives of the present project.

Article 28° - Public disclosures

There is an explicit limitation to the exercise of freedom of expression within the scope of the law. The bill expressly limits protection (20.2) to those who choose to avail themselves of freedom of expression as a right to be beneficiaries of protection within the scope of this law. This flaw is at the very basis of the draft, where this right is mentioned only twice, and one of those times is to deny it.

This is in clear opposition to the principles and regulations established by the Directive. The same preface of the draft mentions Recital 45 of the same, which states: "Protection against retaliation **as a means of safeguarding freedom of expression and freedom** and pluralism of the media should be granted both to persons communicating information about acts or omissions in an organization (...)". Emphasis added.

On the other hand, the draft ignores the duty of speech. The draft only protects those who lodge formal complaints with a complaint authority or other competent institution (Article 2, 35). Although the Directive emphasizes this, as it creates channels, the EU did not limit protection to these recipients. Whistleblowers should also be protected by the speech of duty, where they raise issues with a supervisor, or deliver assignments as auditors, inspectors, investigators, compliance officers/staff in channels or Independent Authority/etc. Formal flagging is only the tip of the spear of protected information communications. Communications made in the exercise of the duty to report are the iceberg.

Positive amendments:

Amendment No. 274, Grupo Parlamentario Socialista, Grupo Parlamentario Confederal de Unidas Podemos

Amendments Nos. 53, 148 and 254, Plural Parliamentary Group

Amendment No. 114, Republican Parliamentary Group
Amendment No. 35, Ciudadanos Parliamentary Group

Comments:

The amendments to the bill do not propose to expand protection to those seeking protection based on the right to freedom of expression. Likewise, neither the bill nor the amendments make mention of the duty to inform (duty speech).

However, the listed amendments broaden the conditions under which a person can inform the media and have the right to access protection under the terms of the law. We believe this is extremely positive and an amendment in the right direction.

Article 2 Material scope of application

The Article remains limited to serious or very serious crimes and administrative offenses. Paragraphs 2.4 and 2.5 limit classified information. Due to the limits of EU jurisdiction, national security cannot be included in the Directive. However, there is no obstacle for Member States to provide alternative channels to communicate in a protected manner in this regard, and these may involve whistleblowing on matters of utmost importance. As a result, several national laws in 2019 did not contain any national security loopholes. Most countries have restricted channels for classified whistleblowing, but there is no excuse for not regulating in this area, even with severe exceptions. Serbian and U.S. laws also have controls to limit this exception to responsible limits: 1) The information must be marked as classified, to alert the whistleblower and prevent ex post facto classification. 2) The information cannot have been classified to cover up misconduct.

Moreover, these articles omit abuse of authority, the Directive's largest and most important category of protected speech. Moreover, it means that whistleblower protection will depend on clashes over legal technicalities. Abuse of authority encompasses all betrayals of the public trust, without vulnerability to sophisticated objections from defense counsel.

Positive amendments

Amendment No. 247, Plural Parliamentary Group
Amendment No. 66, Confederal Parliamentary Group of Unidas Podemos

Comment

The proposed amendments are identical and extend the material scope beyond acts against European Union and Spanish law, covering irregularities and abuses of power. On the other hand, these amendments extend the material scope to classified information, understanding its vital importance.

Article 3° Personal scope of application

In line with the above, we advocate the inclusion of a system of definitions that includes the defined term "facilitator" as a "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 organizations that dedicate part of their activity to assisting these people.

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 supporting 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, non-governmental organization workers 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 to their employees, in the list of persons protected by the new law.

Positive amendments

Amendment No. 67, Confederal Parliamentary Group of Unidas Podemos

Amendment No. 248, Plural Parliamentary Group

Comment

Both proposals extend protection to civil society organizations, their members and anyone who has supported the reporter in the process of reporting the facts.

Article 9 and 20 Extension of mechanisms to communicate anonymously

The original draft includes a wide variety of formats for citizens to communicate with the corresponding persons and institutions to process the complaint. However, in the case of choosing to do so anonymously, the possibility of exchanging messages and information is limited because it does not explicitly include technical mechanisms to enable communication with informants even when they have communicated anonymously.

Positive amendments

Amendment No. 104, Republican Parliamentary Group

Amendment No. 109, Republican Parliamentary Group

Amendment No. 110, Republican Parliamentary Group

Comment

The supported amendments consistently edit Articles 9 and 20, encouraging the adoption of technical mechanisms that allow for communication with reporting persons, even when they choose to do so anonymously.

Article 13.5° Appeals against decisions made through internal channels

The original draft denies in this article the possibility of appealing its acts or decisions through contentious or contentious-administrative channels. We believe that the impossibility to appeal is an important limitation of the preliminary draft, as it blocks any ability of the complainant to fight any definition.

At the same time, Article 20.4 prohibits an appeal process on the decisions of the National Whistleblower Protection Authority. However, Article 50 appears to allow appeals under limited circumstances.

We believe that this is at least a matter to be clarified in the treatment of amendments.

Positive amendments:

Amendment No. 184, Popular Parliamentary Group in Congress

Comments:

Few amendments have addressed this issue. We believe that, although the proposal could be improved since the Popular Parliamentary Group in Congress does not make any reference to Articles 20 and 50, it at least proposes the deletion of 13.5, enabling the possibility of appealing decisions taken in internal channels. We also believe that this could be improved by clarifying the conditions under which the decision could be appealed and the mechanisms available to do so.

Article 20.4° Appeals against decisions of the A.A.I.

In line with what was stated in the previous section, Article 20.4 establishes the impossibility of appealing decisions made by the IAI. We believe this is problematic, creating a potential risk of abuse of authority. We recommend establishing situations and mechanisms so that, given certain conditions, these decisions can be appealed while maintaining due process.

Positive amendments:

Amendment No. 146 - Plural Parliamentary Group

Comments:

Amendment 146 incorporates important definitions to the Article, including "response" and "follow-up", eliminating the paragraph limiting the possibility of appealing the decisions of the IAIBA.

Article 18.3° Admission procedure

The current draft allows for the rejection of communications when the Independent Authority for the Protection of Informants (A.A.I.) considers that they have been obtained through the commission of a crime, notifying in this case the Public Prosecutor's Office. We believe that this can be extremely risky, meaning a possible risk of prosecution for those who choose to report. At the same time, the decision not to investigate communications that have allegedly been made through the commission of a crime may be arbitrary. The draft does not establish the need to justify this decision, nor to make it known to the informant. In line with what was mentioned in the two previous points, the informant does not have a clear mechanism to appeal it either.

Positive amendments:

Amendment No. 71, Confederal Parliamentary Group of Unidas Podemos

Amendment No. 107, Republican Parliamentary Group

Amendment No. 251, Plural Parliamentary Group

Comments:

The proposed amendments eliminate the third paragraph of Article 18, making the wording of the article consistent. The proposal made by the Confederal Parliamentary Group of Unidas Podemos also establishes short periods of notification to the informants when their communication has been sent to the Public Prosecutor's Office or corresponding Authorities under the presumption of a crime. Although Amendment 251 has the same spirit, we find it more limited in that it proposes that notifications should also be made to persons who claimed to report anonymously, thus encouraging organizations to establish adequate mechanisms for these purposes.

Article 36.2° Prohibition of retaliation - definition

Article 36.2 proposes a limited definition of retaliation in the work or professional sphere. In addition, the article offers protection against acts defined as retaliation only for a period of two years. We understand that this is extremely short, knowing that the judicial processes that whistleblowers go through are extremely long.

Positive amendments:

Amendment Nos. 55,154 and 256, Plural Parliamentary Group

Amendment No. 117, Republican Parliamentary Group

Amendment No. 78, Confederal Parliamentary Group of Unidas Podemos

Amendment No. 10, Basque Parliamentary Group

Negative amendment:

Amendment No. 208, Popular Parliamentary Group in Congress

Comment:

The selected positive amendments eliminate the exceptions raised in the original article, broadening the definition of retaliation. We believe that Amendment 256 is the most positive because it also eliminates the proscription of protection within a two-year period.

Amendment 10, while introducing positive changes, does not do so as satisfactorily as others.

Amendment 208 proposes an even more limiting definition of retaliation than the original.

Article 37 Support measures

The protection measures listed in the draft are rather limited, without making explicit and detailed mention of measures that both the whistleblower community and civil organizations and academics working on the issue have repeatedly mentioned over the years in Spain. An example of this is the support that any whistleblower needs in terms of free legal advice and accompaniment.

Positive amendments:

Amendment No. 257, Plural Parliamentary Group

Amendment No. 118, Republican Parliamentary Group

Amendment No. 79, Confederal Parliamentary Group of Unidas Podemos

Amendment No. 56, Plural Parliamentary Group

Amendment No. 11, Basque Parliamentary Group

Amendment No. 74, Confederal Parliamentary Group of Unidas Podemos (on Article 21)

Comments:

We believe that Amendment 257 satisfactorily resolves this issue, extending the support measures to offer "assistance, legal advice and legal defense in judicial proceedings free of charge".

Amendments 118, 79, 56 and 11 propose modifications in the same spirit, but in a less specific manner. Amendment 11 limits this support measure to cross-border processes.

Amendment 74, modifies Article 21 to also grant legal advice and accompaniment by the IAIBA.

Article 65° Sanctions

Sanctions are limited to economic sanctions, all being disciplinary measures of a civil nature. This rules out the deterrent impact of criminal sanctions. While the amounts of the sanctions may be exemplary and extra limits other legislative examples, summarizing the sanctions for non-compliance with this law to economic measures seems to be limited, given the various actions that organizations can exercise on whistleblowers and the severe professional and personal costs that telling the truth can bring.

This disproportionality is extremely troubling, given our understanding that there is something fundamentally unbalanced and wrong with a whistleblower protection law that allows criminal prosecution for investigating and acquiring information to make a communication or disclosure, while limiting liability to civil penalties for unlawful retaliation.

Comments:

Unfortunately, neither of the two amendments presented to the Article (288 and 233) propose modifications in this direction.

Article 64°, 68°, 32° Prescription of penalties

Articles 64 and 68 respectively regulate the statute of limitations for infringements and penalties within the framework of the law. Both offenses and penalties have a statute of limitations of 3 years for very serious offenses, 2 years for serious offenses and 6 months/1 year for minor offenses and penalties.

We believe that these deadlines are extremely short and we seek to support amendments proposing to extend them, especially following the most notable cases in Spain, which have been ordeals of lustrums or decades.

Article 32 regulates the processing of personal data in information systems. Paragraph 4 states that communications that have not initiated investigations within three months must be deleted. We understand that this involves the serious risk of deleting many communications, as several information systems may face challenges in processing communications within three months.

Positive amendments:

Amendment No. 9, Basque Parliamentary Group (to Article 32)

Amendment No. 15, Basque Parliamentary Group (to Article 64)

Amendment No. 16, Basque Parliamentary Group (to Article 68)

Comments:

Amendments 15 and 16 propose the deletion of Articles 64 and 68, although we believe that there may be more satisfactory solutions by extending the deadlines or conditions.

Amendment 9 eliminates the 3-month deadline for initiating the investigation, as well as the condition of deleting the communication for reasons of personal data protection. It proposes, on the contrary, to keep the communication stored for a period of three years, during which the reported facts would be subject to the statute of limitations.

Articles 53° and 54° Civil Society participating in the A.A.I.

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

In this regulation, we consider that it lacks, on the one hand, the monitoring of the activity to be developed 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 importance of the two new positions created under the Preliminary Draft in achieving the purpose of the Preliminary Draft, we consider the following:

1. In relation to the activity of the Chairman of the Independent Authority for the Protection of Whistleblowers, we believe it is important to regulate the accountability of said activity before the corresponding Commission of the Congress of Deputies, which is responsible for ratifying his appointment for a non-renewable five-year term.

It is essential that the Chairman regularly informs the Committee of the activities carried out within the framework of his functions, as well as the results of the regular and special meetings 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, which work for the construction of more transparent and accountable institutions and organizations, to have an opinion or even propose such candidates.

This is established in Article 26(4) of Law 11/2016, of 28 November, 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 commission will be transferred to the Plenary of the Corts Valencianes."*

3. Regarding the composition of the Advisory Committee for the Protection of Whistleblowers, Article 54 includes a series of members that will make up the Advisory Committee. 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, the Commission should include at least one representative of civil societies and non-profit organizations that, within the framework of their activities, assist the informants during the information 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 Whistleblower Protection Authority. For this purpose, the Independent Whistleblower Protection Authority should have a register of civil societies and non-profit organizations that would like to participate in this process and exclusively for this purpose.

1. Article 47 regulates the financing of the Independent Whistleblower Protection Authority, which designates a percentage of the sanctions made to ensure the development of its functions. This may be particularly risky, introducing a mechanism that may motivate sanctions to achieve a specific economic benefit, rather than being motivated by the pursuit of justice.

Taking into account international precedents, we should mention 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 public distrust. In this regard, a wide variety of stories, collected by the ACLU, can be consulted at¹.

Positive amendments:

Amendment No. 264, Plural Parliamentary Group (to Article 54)

Amendment No. 280, Grupo Parlamentario VOX (to Article 53)

Comments:

Both amendments propose, in different ways, the inclusion of the Civil Society in the advisory council of the IAI, as well as establish the possibility of nominating a person member of a civil society for the position of President, as long as he/she meets the requirements established by the present project.

New Additional Provision - Include the CNCM as an external channel in the project.

We believe that this amendment is extremely positive because it recognizes an extremely efficient channel with a long culture in the handling of information and protection of informants. Excluding this experience from the scope of the law seems to be a step backwards. Just as the draft recognizes the experience and value of the Authorities at the Autonomous Community level, we believe that it can also recognize that of the CNMC.

Positive amendments:

Amendment No. 272, Socialist Parliamentary Group

New Additional Provision - Retroactive effect for informants

This new additional provision proposes that, from the day the Law enters into force, the A.A.I. or its itinerant equivalent will have the capacity to review judicial resolutions against whistleblowers who comply with the terms of the project. We believe that this can be extremely positive to recognize and support those who have suffered persecution and exclusion for having reported in the public interest in Spain, showing a real willingness to transform this project into a tool for change in favor of integrity.

Positive amendments:

Amendment No. 86, Confederal Parliamentary Group of Unidas Podemos

Problematic amendments

The following is a list of amendments that we believe may be problematic, weakening and diminishing the levels of protection and guarantees granted by the original bill. We invite and recommend reviewing these amendments and voting against them.

Negative amendments:

Amendment No. 173, Grupo Parlamentario Popular in Congress
Amendment No. 188, Grupo Parlamentario Popular in Congress
Amendment No. 192, Popular Parliamentary Group in Congress
Amendment No. 196, Grupo Parlamentario Popular in Congress
Amendment No. 197, Grupo Parlamentario Popular in Congress
Amendment No. 26, Ciudadanos Parliamentary Group
Amendment No. 29, Ciudadanos Parliamentary Group
Amendment No. 143, Plural Parliamentary Group

1. Vid. <https://www.aclu.org/issues/criminal-law-reform/reforming-police/asset-forfeiture-abuse>