

OPEN LETTER SENT BY EMAIL

REF (2019)7658508

Commissioner Reynders (Justice)
European Commission
Rue de la Loi / Wetstraat 200
1049 Brussels
Belgium

13th January 2019

Dear Mr. Reynders,

The Trustees of the Whistleblowing International Network are writing to request the European Commission amend the official Spanish translation of the EU Directive to protect reporting persons (“whistleblowers”), replacing the terms *denunciante* and *denuncer* with *alertador* and *alerta* respectively.

As legal experts in the field of whistleblowing law and practice (see brief background to WIN at the end of this letter), we have had the honour of working with jurists across Europe and around the world over many years. We have advised policy makers and legislatures on how best to transpose international and regional legal principles into different national laws to protect whistleblowers. We advocated for a strong EU Directive to protect reporting persons and provided the legal reasoning and the practical contexts to the European Commission, the Permanent Representations, and Parliamentarians for why such protections are necessary.

The EU Directive that was adopted last year and promulgated on the 16 December 2019 introduces minimum standards only. It is vital that nothing provides grounds for reducing the level of protection granted in transposition. Member States are strongly encouraged by the Directive, and by international best practice, to implement laws that are more favourable to the reporting person in order to protect Union law and the public interest.

We are writing to you to support the concerns expressed by our colleagues and a WIN associate in Spain, Xnet. The terms *denunciante* and *denuncia* in the official Spanish translation of the EU Directive are not the appropriate equivalents for *reporting person* and *reporting* or *disclosing information*, and risks undermining legal protections for reporting persons in Spain. This is because *denunciante* and *denuncia* are already defined under Spanish law in ways that conflict with both the spirit and detail of the EU Directive. We therefore urge you to replace these with the terms “*alertador*” and “*alartar*” as a matter of urgency.

We briefly set out the basis for our concerns here:

We know from our colleagues in Spain in particular but also from those we work with in other Spanish speaking countries around the world, that the term *denunciante* has negative social and cultural connotations similar to “informer” and “snitch” in English. This is why Spanish civil society and other experts in the field use “alertador” and “alerta” as socially neutral and more accurate terms to describe reporting suspicions of wrongdoing. Further, we note from our colleagues at Xnet that these terms are being increasingly used and recognised in the Spanish legal lexicon. “Alertador” was used in the Boletín Oficial del Estado (State’s Official Gazette) in November 2018 and the English term “whistleblower” has been used in Spanish case law to express the concept of whistleblowing that is now enshrined in the EU Directive, namely that

- a) a wide scope of information that can qualify for protection; and
- b) a range of recipients are appropriate to receive such reports;
- c) the choice is mainly up to the individual

and to differentiate a “whistleblower” from “denunciante”.

The most pressing problem, however, is that the term “denunciante” is currently defined in criminal and administrative rules of procedure in Spain in ways that conflict with the EU Directive. In Spain’s criminal procedure law, *denunciante* is defined as someone who witnesses a crime and therefore is obliged to “denounce” it immediately to the judicial authorities. This definition does not include the vast majority of whistleblowing, that is now protected by the EU Directive, that consists of appropriately reporting information on wrongdoing or harm (that could turn out to be criminal) to employers or other regulatory bodies. Further, under the Spanish rules, those holding certain jobs are obliged to “denounce” criminal activities to specified authorities immediately. This again conflicts with the EU Directive requiring protection for those who choose other appropriate channels, including to their employer, which is strongly encouraged under the Directive. Finally, under Spanish law “denunciations” must be in writing and signed by the individual. The EU Directive allows for anonymous reporting of suspected wrongdoing, in writing or orally.

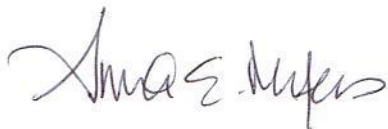
These problems are even more acute in relation to the rules of administrative procedure which defines “denunciation” as applying to those with a legal obligation to inform an administrative body of anything which could result in the launch of an administrative procedure. This covers a wider range of potential wrongdoing but again, by definition, imposes the channel that must be used which is in directly conflict with the EU Directive.

Unlike the definition of *denunciante* in Spanish law, the EU Directive aims to protect those who report a wide range of potential wrongdoing to a range of appropriate channels, leaving the choice of channel up to the whistleblower, irrespective of the substance of the potential wrongdoing disclosed or whether they choose to remain anonymous or not.

We are not aware of similar problems in the official translations of the EU Directive into the languages of the other 26 EU Member States but even in Spain, case law has demonstrated that other terms must be used. Xnet has pointed out that *denunciate* and *denuncia* are specifically excluded from Spain's data protection and the prevention of money laundering laws, using "communication mechanisms" or "information systems" for very similar reasons, to ensure that those reporting breaches can remain confidential or anonymous.

We urge the EU Commission to amend the Official Spanish Translation of the EU Directive to accurately reflect the legal intention of the European Union parliamentarians and governments by using the terms *alerta* and *alertador*, as accurate translations of the neutral terms "reporting" and "reporting person" in the English version. This is important to ensure a meaningful and correct transposition of the EU Directive on the protection of reporting persons (2018/0106 (COD)) in Spain and provide Spanish whistleblowers the certainty they need that it is safe to blow the whistle on breaches of Union law and matters of important public interest in the future.

Yours sincerely,



Anna Myers, Executive Director of WIN

John Devitt (Chair of WIN), Chief Executive of [Transparency International Ireland](#)

Tom Devine, Legal Director, [Government Accountability Project](#), USA

Annegret Falter, Chair, [Whistleblowers-Netzwerk](#), Germany

David Hutton, Senior Fellow, [Centre for Free Expression Whistleblowing Initiative](#), Canada

Cathy James, Lawyer and Independent Expert on Whistleblowing Law and Practice, UK

Vladimir Radomirović, Editor-in-Chief, [Pištaljka](#), Serbia

cc. D. Ignacio Herranz Elizalde, Abogado del Estado Consejero Jurídico
ae.cjur@reper.maec.es

Briefly about WIN

The Whistleblowing International Network (WIN), is an international network to connect and support the technical expertise and capacity of civil society organisations in 35+ countries around the world that advise, support and work with whistleblowers. See www.whistleblowingnetwork.org.

John Devitt – Chair of WIN Board of Trustees, Chief Executive of Transparency International Ireland.

WIN's Chair, John Devitt has over a decade's experience in supporting whistleblowers in Ireland and established the country's only free helpline and independent law centre offering advice to whistleblowers. TI Ireland's Speak Up Helpline has supported over 1000 people reporting wrongdoing since it was established in 2011. John was instrumental in bringing about the Protected Disclosures Act 2014 and advised the Irish Government on the legislation. He has also advised and delivered training on behalf of international organisations, including the UN, IMF, OECD, Council of Europe and European Commission on whistleblower protection laws.

Tom Devine is Legal Director at the Government Accountability Project in Washington DC

Since 1979, Tom has assisted over 7000 whistleblowers in defending themselves against retaliation and in making a real difference on behalf of the public. He has not lost a case since 2006, and has prevailed at numerous U.S. courts of appeals as well as the Supreme Court. Tom has led campaigns to pass or defend 34+ national or international whistleblower laws, including nearly all U.S. federal enacted laws over the last two decades. He has written and co-authored numerous books, articles and op-eds.

Annegret Falter (Dipl.-Pol.) is Chair of the non-profit organisation Whistleblower-Netzwerk, Berlin, Germany.

Whistleblower-Netzwerk has promoted whistleblower protection and supported individual whistleblowers since it was founded in 2005. For 15 years, Annegret was a member of the jury bestowing the German Whistleblower Award on behalf of the Association of German Scientists (VDW) and International Association of Lawyers Against Nuclear Arms (IALANA) (1999 – 2014). Annegret has written and edited numerous publications about whistleblowers, and on the political, social and legal importance of whistleblowing. She analyses whistleblowing in the context of the protecting the public interest and human rights, namely advancing the freedom of expression and the public's right to information. Annegret appears regularly in German press and media as an expert in the field

David Hutton, Senior Fellow, Centre for Free Expression Whistleblowing Initiative, Ryerson University, Canada

David has advocated for whistleblower protection since 2005. He worked with Federal Accountability Initiative for Reform (FAIR), a charity devoted to whistleblower protection, for ten years, serving as Chair of the Board and Executive Director for six years. He ran a free confidential help line and was contacted by more than 400 whistleblowers. David has spoken and written extensively about whistleblowing, published in-depth analyses of Canadian whistleblowing laws and their implementation, and created original guidance material for whistleblowers. He also initiated with the Canadian Standards Association the development of a guideline on the implementation of whistleblowing systems, published in 2016.

Cathy James, Legal Expert on Whistleblowing

Cathy is a practising solicitor with extensive knowledge of whistleblowing in the public interest. She was Chief Executive of the UK whistleblowing charity and legal advice centre Protect (formerly Public Concern at Work) for six years and prior to that worked 5 years as Legal Officer. For more than a decade, Cathy advised thousands of whistleblowers on how to raise their concerns effectively. She also provided expert advice to organisations of all sizes and sectors on the best practice principles of whistleblowing arrangements. Cathy has worked closely with boards, regulators, central and local government to effect change in this vital policy area, both in the UK and internationally. In 2019, Cathy was appointed as a part-time member of the Employment Tribunal panel for England and Wales.

Vladimir Radomirović, Editor-in-Chief of Pištaljka,

Vladimir has worked as a journalist for more than 20 years in Serbia and Bosnia-Herzegovina. In 2010, he founded Pištaljka, a whistleblowing investigative journalist platform and safe haven for whistleblowers. Pištaljka's work investigating whistleblowing tips and supporting whistleblowers was instrumental to Serbia's adoption of a Whistleblower Law in 2014. Vladimir was a key advisor to the Ministry of Justice on the detail of the new law and Pištaljka has worked extensively since training judges and prosecutors on how the law should work in practice. Pištaljka also provides independent legal advice and representation service to whistleblowers. Vladimir is the President of the Journalist's Association of Serbia (UNS) and a founding member of the European Centre for Press and Media Freedom (ECPMF) in Leipzig.

WIN's Executive Director, Anna Myers, is a lawyer with 20 years' experience in the field. She was Deputy Director of Public Concern at Work, now called Protect, a non-profit legal advice organisation set up in the UK in 1993 and on which the Netherlands government modelled the Adviespunt Klokkenluiders, the predecessor to the House for Whistleblowers. Ms. Myers was adviser to the Council of Europe's Committee on Legal Co-operation in the preparation of CM/Rec(2014)7 on the protection of whistleblowers and drafted the Explanatory Memorandum; and consultant the UNODC and drafted the Resource Guide on Good Practices in the Protection of Reporting Persons (2015).