BRIEF OF ALLEGATIONS TO THE PUBLIC CONSULTATION ON THE TRANSPOSITION OF DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, OF OCTOBER 23, 2019, RELATING TO THE PROTECTION OF PERSONS WHO REPORT INFRINGEMENTS OF UNION LAW ("WHISTLEBLOWERS"), MADE BY THE AGENCY FOR THE PREVENTION AND FIGHT AGAINST FRAUD AND CORRUPTION OF THE VALENCIAN COMMUNITY (AVAF).

- **Agency for the Prevention and Fight against Fraud and Corruption of the Valencian Community** , created by Law 11/2016, of November 28, of the Generalitat.

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- ***Email subject:*** *Brief of allegations to the public consultation on the* transposition of Directive (EU) 2019/1937, regarding the protection of whistleblowers.

1. **In relation to the power granted to the Member States to extend the protection in their national law to other areas or acts not provided for in article 1.1 (we understand there is a typographical error -reference to article 2.1-) of the Directive:**

   - **Should whistleblower protection be extended to any subject of national law beyond the rules arising under European law?**

Yes.

Whistleblower protection should extend to other matters regulated in national law beyond the twelve areas listed in Article 2(1) of Directive (EU) 2019/1937, as empowered to Member States by paragraph 2 of that provision.

> " This Directive is understood to be without prejudice to the powers of the Member States to extend the protection in their national law to other areas or acts not provided for in paragraph 1."

There is no doubt that the need to transpose this Directive should be seized as a unique opportunity to introduce in our positive law measures to fight corruption and to protect persons who report, inform or alert on acts that may constitute an infringement, as well as to define new frameworks of integrity and public ethics.

For this purpose, we may take as a precedent and reference the creation and more than three years of experience of the Agency for the Prevention and Fight against Fraud and Corruption of the Valencian Community (hereinafter, AVAF).

The AVAF was created not only to prevent and eradicate fraud and corruption in Valencian public institutions, but also to promote integrity and public ethics, and to foster a culture of good practices and rejection of fraud and corruption in the design, implementation and evaluation of public policies and in the management of public resources.

The AVAF was created by Law 11/2016, of November 28, of the Generalitat , in compliance with Resolution 58/4 of the United Nations General Assembly, which approves the United Nations Convention against Corruption , made in New York on October 31, 2003, which establishes, in its article six, the need to create entities responsible for preventing corruption in the different States Parties.

This United Nations Convention establishes the following demands addressed to the States Parties:

- Create independent entities in charge of preventing corruption, endowed with the necessary material resources and specialized and trained personnel for the performance of their functions (articles 6 and 36).
- Establish measures and systems to make it easier for public officials to report any act of corruption to the competent authorities when they become aware of it in the exercise of their functions (article 8.4).
- Facilitate access to anti-corruption entities for the public to report, including anonymously, incidents of corruption (article 13.2).
- Adopt the legislative and other measures that are necessary to tipify as a criminal offence, when committed intentionally, illicit enrichment, that is, the significant increase in the assets of a public official with respect to his legitimate income that cannot be reasonably justified by him (article 20).
- Adopt appropriate measures to effectively protect against possible acts of retaliation or identification of witnesses, experts and victims who testify on crimes of corruption, as well as, when appropriate, their relatives and other close persons (article 32).
- Provide protection against any unjustified treatment to persons who report to the competent authorities, in good faith and with reasonable grounds, any facts related to crimes of corruption (article 33).
- Encouraging persons who are or have been involved in acts of corruption to provide information for the purpose of mitigation of punishment or granting immunity from prosecution, as well as protecting criminals who cooperate (article 37, paragraphs 2, 3 and 4).
- Encourage cooperation between public agencies, public officials and agencies responsible for investigating and prosecuting crimes (article 38).

This Convention entered into force in Spain through a ratification instrument of July 19, 2006 (BOE no. 171, of July 19, 2006); date on which, in accordance with the provisions of article 96 of the Spanish Constitution, states that International Treaty is integrated into our legal system, produces effects and binds all public powers.

Thus, the AVAF is a public entity attached to the Corts Valencianes, with its own legal personality and endowed with independence from the public administrations in the exercise of its functions, with the capacity to act in receiving reports that affect the public sector as external channel, and power for its investigation, as well as for the prevention of fraud, corruption and irregularities, the promotion of integrity and public ethics and the protection of whistleblowers, with authority and sanctioning power.

Although some Autonomous Communities have recognized in their legislation the power related to the protection of whistleblowers, the AVAF is currently the only public entity in Spain that has been developing it in cases of alleged fraud, corruption or other types of irregularities, through the creation of a protection statute that is regulated in article 14 of the aforementioned Law 11/2016. To date, there are twenty-one protected persons in the AVAF, whose monitoring is carried out, and legal advice is provided each year to around a hundred people.

This is,

- The Valencian legislator anticipated Directive (EU) 2019/1937 itself.
- The State must legislate what the Valencian Community has already legislated.

It is therefore essential that the transposition of the Directive allows harmonize national law with the different autonomous regulations already approved and in force, as well as articulate the coordination between the administrative, criminal or any other type of controls and investigations.

In short, the transposition of the Directive cannot include a more limited objective or material scope than that already recognized by current legislation, approved by the Autonomous Communities in the exercise of their own powers.

Specifically, the AVAF has its purposes and functions regulated in its article 4 of Law 11/2016, of November 28, of the Generalitat , and its subjective scope of action in its article 3. This Law has been the object of development through the Regulation of operation and internal regime of June 27, 2019 of the AVAF (DOGV no. 8582, of July 2, 2019).

As a corollary to such regulation, the Resolution of October 5, 2020 specifies the scope of material action of the AVAF, for the purposes of the application of Law 11/2016, of November 28, of the Generalitat, and its Regulations, in the following facts or conduct:

> a) Corruption: Use or diversion of power or resources of public origin for purposes other than those granted; use or abuse of public power to obtain advantages, benefits or any other private advantage, own or third parties, or for any other purpose contrary to the legal system.
>
> b) Fraud: Act tending to elude a legal provision in a deceitful manner; inappropriate and harmful use of the resources and assets of an organization, contrary to truth and righteousness; irregular use or destination of public funds or assets.
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> c) Administrative irregularities and behavior constituting an administrative or disciplinary infraction, underlying a potential situation of fraud or corruption.
>
> d) Reprehensible behaviors and activities for being contrary to objectivity, impartiality, efficiency, probity, integrity, public ethics and good governance, as well as superfluous and unnecessary spending of funds public origin, whether or not they imply a direct infringement of the positive legal system.

Along these same lines, which focuses on fraud, corruption and irregularities in the public sector as its material scope of action, the **Network of European Integrity and Whistleblower Authorities (NEIWA)** , made up of sixteen countries, including Spain , represented by the regional entities AVAF and the Anti-Fraud Office of Catalonia, signed the Brussels Declaration of December 14, 2020.

This Declaration recommends **extending the material scope of Directive** (EU) 2019/1937 to other areas and policies of national legislation, **whenever there is a risk that non-compliance with these laws could cause serious harm to the public interest and the welfare of society**. It is also recommended, to the extent possible, **to harmonise existing national legal frameworks**; as well as to seize the opportunity to build a comprehensive reporting system covering the entire national territory**.**

- **In what specific areas or matters does the protection of whistleblowers need greater reinforcement?**

In AVAF's opinion, after several years of existence, the area that needs the greatest reinforcement for the protection of whistleblowers is public administrations and, especially, their dependent or related public sector (where there are fewer controls); areas where power is held, decisions affecting public interests are taken, privileged information is accessed and, in short, public resources and assets are managed.

As stated in the preamble of the aforementioned Law 11/2016, of the Generalitat Valenciana, corruption relies on opacity and secrecy to perpetuate itself, distorts the essence of democracy and perverts the democratic system by having public institutions and everything is public for private or personal benefit.

At this point, it is worth mentioning the traditional causes that prevent the emergence of irregularities that could give rise to legal responsibilities:

Firstly, the fear of reporting due to the high professional and personal risk involved in doing so, since the whistleblower is always in a position of inferiority to the person being reported and is therefore highly vulnerable.

Secondly, the lack of secure and confidential channels for alerts and complaints about malpractice and fraudulent or corrupt conduct.

And thirdly, the belief that "whistleblowing is useless". In other words, the lack of confidence that, if reported, a proper investigation will be carried out rigorously and with all its consequences.

To which we can add the classic and derogatory concept of whistleblower, which is associated with the name of informer, sneak or telltale; one who goes against the *establishment*.

With regard to the first cause of fear, the granting of a protection status implies that one or more competent authorities ensure that these persons do not suffer threats, harassment, intimidation, false accusations, reduction of rights, disciplinary proceedings or even dismissal, since once this status has been granted, the person reported and his or her situation are monitored, and for this purpose, as a dissuasive tool, the possibility of imposing sanctions on the retaliated person must be taken into account.

With regard to the second and third causes, it is necessary to establish safe, accessible and effective reporting channels, which also allow for anonymous reports; reports whose plausibility must be analysed and, if there are sufficient elements or evidence, must give rise to the opening of the corresponding investigation procedures.

And finally, with regard to the derogatory consideration of the term whistleblower, should be promoted a change of culture, since it is the whistleblower who, by putting himself at risk, allows corruption, fraud or bad practices to be uncovered, which should be sanctioned or corrected.

The whistleblower should not be a hero, but a normal person who does his duty and acts for the common good or for the benefit of the company and its business; and in this sense, society should be grateful for his actions, his example should be replicated and his figure should be reinforced.

That said, it should be noted that AVAF believes that the fight against fraud and corruption in Spain must be waged, both from the private sector and especially from the public sector, where its managers must be exemplary, since the suppression of abuses and the diversion of power to obtain illegitimate advantages or benefits favours the economy and the competitiveness of companies, increases the capacity and confidence of citizens in public institutions to solve the problems that affect everyone, and reinforces the constitutional principle of equality and with it the very pillars of democracy.

2. In relation to the personal scope of application provided for in article 4 of the Directive:

- **Which public sector entities should be included in the personal scope of the Directive? Should a broad conception of the public sector be adopted, taking as a reference the subjective scope of Law 19/2013, of December 9, on transparency, access to public information and good governance? Should constitutional bodies and/or political parties be included?**

Regarding the public sector entities that should be included in the subjective scope of the transposition of the Directive, the AVAF advocates a regulation similar to that contained in article 3 of Law 11/2016, of November 28 , of the Generalitat , which is transcribed below:

> "(a) The administration of the Generalitat.
> b) The instrumental public sector of the Generalitat, in the terms defined in Article 2.3 of Law 1/2015, of the Generalitat, on the Public Treasury, the instrumental public sector, and subsidies.
> c) The Corts Valencianes, the Síndic de Greuges, the Sindicatura de Comptes, the Consell Valencià de Cultura, the Acadèmia Valenciana de la Llengua, the Comitè Econòmic i Social, the Consell Jurídic Consultiu and any other similar statutory institution that may be created in the future, in relation to their administrative and budgetary activity.
> d) Entities forming part of the local administration of the Valencian Community and related or dependent public sector entities.
> e) Valencian public universities and related or dependent public sector entities.
> f) Public law corporations, as regards activities subject to administrative law.
> g) Associations made up of public administrations, public bodies and public entities.
> h) The activities of natural or legal persons who hold service concessions or receive public aid or subsidies, for the purpose of verifying the destination and use of the same.
> i) The activities of contractors and subcontractors who carry out work for public administrations and entities of the instrumental public sector of the Generalitat, or who have been assigned the management of public services or the execution of public works by any other title, in relation to the accounting, economic and financial management of the service or work, and with other obligations arising from the contract or the law.
> j) Political parties, trade union organisations and employers' organisations.
> k) Any entity, whatever its type or legal form, which is financed mainly by the public administrations or is subject to their effective control".

Thus, we consider that a **broad conception of the public sector should be chosen, which includes**:

- All public administrations and public sector entities linked to or dependent on them, including independent administrative authorities.

- The managing bodies and common services of the Social Security, as well as the mutual insurance companies for accidents at work and occupational illnesses that collaborate with the Social Security.

- Constitutional bodies, such as the Congress of Deputies, the Senate, the Constitutional Court, the General Council of the Judiciary, the Bank of Spain, the Council of State, the Ombudsman, the Court of Audit, the Economic and Social Council, and similar bodies of the Autonomous Communities, in relation to their administrative and budgetary activity.

- Public universities and related or dependent public sector entities.

- Public law corporations, with regard to activities subject to administrative law.

- Associations made up of public administrations, public bodies and entities.

- The activities of natural or legal persons benefiting from public aid or subsidies, as well as of concessionaires, contractors and subcontractors of public administrations and entities of their institutional public sector, in relation to accounting, economic and financial management and obligations arising from contracting or the law.

- Political parties, trade union organisations and business organisations.

- Any entity, regardless of its type or legal form, that is majority financed by public administrations or subject to their effective control.

3. In relation to the obligation to establish internal reporting channels and mechanisms contained in article 8 of the Directive:

- **Should Spain accept the option of anonymous reports?**

Yes. Anonymous reporting should be allowed as a source of information.

Anonymous reporting is the first and best way to protect a person who reports, reports or alerts irregularities.

It should be noted that the AVAF has a Reporting Mailbox, created by Resolution of April 25, 2018 (D OGV no. 8301, of 01.23.2018), and available on its website (h ttps://www.antifraucv.es). This reporting Mailbox is a secure telematic channel for submitting reports, information or communications, which allows intercommunication (bidirectionality), even when the information received is anonymous.

According to the data collected in these years of operation of the AVAF, the number of anonymous reports has been increasing progressively, in such a way that if anonymity is not allowed, a significant number of cases, sometimes of equal or even greater importance greater importance than the information obtained through identified reports. On the other hand, it is

important to point out that the false information provided through anonymous reports represents a highly insignificant percentage, having mechanisms so that this information does not have any repercussion (confidentiality) and at the same time these behaviors are sanctioned.

For these purposes, you can see the AVAF **Reports** of the fiscal years 2017 (last quarter), 2018 and 2019 .

The anonymous complaint has been admitted as a source of information in a clear and forceful way in our jurisprudence. In this sense, Judgment no. 54/2019 of February 6, 2019, of the Criminal Chamber of the Supreme Court , states in its Fifth Law Basis:

> " **As the Public Prosecutor pointed out, the anonymous denunciation does not prevent or limit the right of defense, nor does it cause defenselessness, being able to provide all the means of evidence that they wish to exercise as a discharge throughout the investigative phase.** It is appropriate here to point out that in the case under trial, it is not an anonymous report, but a report formalized by two councilors determined by name, who provided documentation that had come to them anonymously. Well, well, **even if it was an anonymous report, our jurisprudence gives it the potential to initiate an investigation.** Thus, STS 318/2013, of April 11, tells us in this regard that **the logical prevention against anonymous reporting cannot lead us to conclusions contrary to the very meaning of the investigation phase**. This would forget that art. 308 of the LECrim referred to the ordinary summary, requires the practice of the first proceedings immediately that the investigating judges (...) have knowledge of the perpetration of a crime. Undoubtedly, **this knowledge can be provided by a report in which the identity of the reporter is not known**. A different matter is that the anonymous nature of the report reinforces the duty of the investigating judge to carry out an early, provisional examination and, therefore, on a purely circumstantial basis, of the likelihood of the criminal acts brought to his attention. In the event of any report -whether anonymous or not-, the Instructing Judge may agree to file it immediately if the reported act is not of the nature of a crime or when the report is manifestly false" (art. 269 LECrim). Our system does not, therefore, know a legal mechanism that formally enables anonymous reporting as a vehicle for initiating criminal proceedings, but it does allow, reinforcing all jurisdictional precautions, to convert this document into the source of knowledge that, in accordance with article 308 of the LECrim, makes it possible to initiate of the investigation phase, in such a way that such a complaint naturally allowed the initiation of the investigation, since the facts reported presumably constituted a crime."

More recently, the Judgment no. 35/2020 of February 6, 2020, issued by the Criminal Chamber of the Supreme Court , validates an anonymous report as the origin of an internal investigation in a company to uncover fraud. Specifically, its Second Legal Basis includes the following:

> "The Court has sufficiently understood the existing evidence and the corroboration of sufficient entity, adequately motivating the sentence. (...) **It is remarkably interesting** that in the period of the proven facts an ad intra action mechanism is carried out within the company that has recently been regulated in the so-called **"internal complaints channel"** or also called Whistleblowing , and which has been included in the recent **Directive (EU) 2019/1937 of the European Parliament and of the Council, of October 23, 2019** , regarding the protection of people who report violations of Union Law.
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> (…) About this **need to implement these reporting channels**, and that was seen in this case to be highly effective as it constituted the start of the investigation as "notitia criminis" is collected by the doctrine in this regard that **the Directive is justified in the finding that informants, or whistleblowers, are the most important channel for discovering crimes** of fraud committed within organizations; and **the main reason why people** who are aware of criminal practices in their company, or public entity, **do not proceed to report, it is fundamentally because they do not feel sufficiently protected against possible reprisals** from the entity whose infractions they report.
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> In short, it seeks to **reinforce the protection of the whistleblower** and the exercise of their right to freedom of expression and information recognized in art. 10 ECHR and 11 of the Charter of Fundamental

> Rights of the EU, and thereby **increase its action in the discovery of illicit or criminal practices** , as in this case the due police investigation and discovery of the facts was carried out and promoted. Consequently, it should be noted that the implementation of this whistleblowing channel is an integral part of the needs that we have previously referred to in the regulatory compliance program, since with the whistleblowing channel whoever intends, or plans, to carry out irregularities You will know that from your most direct environment an anonymous complaint may be produced that will determine the opening of an investigation that will immediately close it.
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> In the case now analyzed, an **internal reoprt, in the manner of the internal channel exposed here, causes the opening of the investigation that leads to the discovery of the operations that the appellants were carrying out during the period of time indicated in the proven facts, and that caused the economic damage that has been considered proven.** It is therefore necessary to correlate the regulatory compliance program in the company to avoid and prevent crimes committed by directors and ad intra employees, as happened here with the three employees, in order to enhance internal control and knowledge of directors and employees of the possibility that within their company, and upon learning of an irregularity, as occurred here, harms the company itself, and, in the end, the workers themselves, if the volume of the irregularity could put at risk and danger even their own jobs, but **more because of their own feeling of need for professional honesty and avoidance of criminal activities, or mere irregularities within the company.**
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> (...) **An anonymous reports does not prevent a criminal investigation, but only requires a reinforced analysis** for its consideration that weighs the consistency and credibility of the data."

Furthermore, it should be mentioned that anonymous reporting has been accepted for a long time, both in certain sectors of our legal system (tax, Social Security, Labor Inspection, etc.), and in the business world. Denying the anonymous complaint would be a setback, in our legislation and in our jurisprudence.

- **Should anonymous reporting be recognized in both the public and private sectors?**

Yes.

Directive (EU) 2019/1937 expressly states in its article 4, under the heading, "Personal scope of application", that it "will apply to whistleblowers **who work in the private or public sector** and who have obtained information about infractions in a work context.

As indicated above, anonymous reports are fundamental tools for the protection of people who report or alert, even more so in the private sector, where the employment relationship between employer and employee is easier to terminate unilaterally. than in the public sector since there is no guarantee of tenure.

At the same time, it must be in the interest of the employer and of those who are part of the company's board of directors to know of any type of fraud that may exist in it, since this can directly harm not only the company's profits but also his reputation.

That is why the Directive emphasizes the circumstance that, **in no case** the denunciation of these facts or behaviors must suppose a **violation of the duty of secrecy** imposed on the personnel employed with respect to the matters that they know by reason of their functions, **nor nor liability of any kind** in connection with the disclosure.

In this regard, Judgment no. 97/2019 of July 16, 2019, of the Plenary of the Constitutional Court , which pronounces in favor of the legality of evidence of the so-called *Falciani list* , rejecting the

alleged violation of the rights of effective judicial protection, to a process with all the guarantees and to the presumption of innocence. According to its Sixth Legal Basis:

> "(…) a) In general, it must be borne in mind that the **fact that the original violation of the substantive right was committed, in the case at hand, by an individual does not in any way alter the canon of constitutionality applicable from the perspective of the right to a process with all the guarantees (art. 24.2 CE),** so that the exclusion of the evidence obtained must be, also in this type of case, the starting point or general rule, although, in each specific case, the The judicial body can appreciate, in accordance with the parameters that have already been exposed, the absence of procedural protection needs in relation to the consummated violation, incorporating, in those exceptional cases, the controversial elements to the body of evidence.
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> (...) c) The same conclusion is reached if one examines, also from the internal point of view, the "result" of the violation of the right to privacy. It can be noted that **the data used by the Spanish public treasury refers to peripheral and innocuous aspects of the so-called «economic privacy»** . No data has been introduced within the criminal process, such as the specific movements of accounts, which may reveal or allow the deduction of the behaviors or life habits of the interested party (SSTC 142/1993, of April 22, FJ 7, and 233 /2005, of September 26, FJ 4). The disputed data is, exclusively, the existence of the bank account and the amount deposited in it. **The result of the intrusion into privacy is not, therefore, of such intensity that it requires, by itself, to extend the need for protection of substantive law to the scope of criminal proceedings, given that, as has already been said, this does not has any instrumental connection with the act of interference verified between individuals.**
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> It should also be remembered that the intrusion into privacy has occurred outside the territory where Spanish sovereignty governs, so that the lesser intensity of the interference is added to the fact that "only the inalienable core of the fundamental right inherent to the dignity of the person [could] achieve universal projection» (STC 91/2000, of March 30, FJ 8).
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> d) (…) In other words: in Spain, the authorities obtaining bank details for the purpose of carrying out tax or criminal investigations is provided for by law and is fully accessible through ordinary procedural instruments. (...).
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> For all these reasons, we must conclude that the decision of the Supreme Court has not violated the right to a process with all the guarantees (art. 24.2 CE) that assists the appellant. Consequently, neither has the right to the presumption of innocence (art. 24.2 CE) been injured, since this specific complaint was purely related to the one that has just been ruled out. It is appropriate, for all of the above, to dismiss the protection sought by the appellant."

Ultimately, the protection strategy for people who denounce and alert, which Spain must approve when transposing Directive (EU) 2019/1937, must be comprehensive and refer to both public and private sector reports, with identical protection guarantees to persons who disclose information that is of general interest. From all angles, ethics, integrity and the creation of a culture of reporting must be promoted as a priority for authorities, managers and employers, both public and private.

- **Which subjects should comply with the obligation to establish internal reporting channels and/or mechanisms?**

Spain must promote the existence of internal reporting channels, provided that the infraction can be dealt with internally effectively and provided that the reporter considers that the there is no risk of retaliation.

In accordance with the minimums established by the Directive, internal channels will be mandatory in companies with 50 or more workers. This channel may be managed by the company itself or by a third party. In the case of companies between 50 and 249 workers, the same complaint channel and the entity that must carry out the investigations may be shared.

Likewise, in accordance with the minimums of the Directive, in the case of public administrations and their related public sector , including legal persons, whatever their form of incorporation, provided that they are subject to the control of the aforementioned, internal channels will be mandatory in municipalities with more than 10,000 inhabitants or when they have more than 50 workers.

For the rest of the companies or municipalities (with less than 50 workers or less than 10,000 inhabitants), the Member States will decide whether the existence of the channel is mandatory or not, being able to join or group together for these purposes and share internal reporting channels.

Notwithstanding the provisions of the Directive, given that in Spain our business fabric is based on small and medium-sized enterprises and our municipalities generally have an average number of inhabitants of less than 10,000, it would be reasonable for the Spanish legislator to reduce these figures to impose the obligation of the existence of internal channels to a greater number of companies and municipalities.

On the other hand, it could be opportune for the state law to reiterate what was said by the Directive (at least not available) and leave it to the territorial authorities to establish more demanding ratios in accordance with the configuration of their administrations and public sector and their municipalities.

- **Should Spain ensure that private entities with less than 50 workers establish internal reporting mechanisms and/or channels?**

The desirable thing would be for any company to have its own reporting channel. According to the freedom of enterprise, the employer cannot see this right limited.

At the same time, it is considered necessary to carry out an analysis of which private sectors, due to their purpose, the activity they carry out or the service they provide, present a greater risk of affecting public and general interests if fraud or irregularities occur, in such a way that so that special rules can be established in these sectors.

- **In which specific sectors should compliance by companies with having internal reporting channels be specially guaranteed?**

In particular, the obligation to have internal reporting channels should be guaranteed in those private entities, regardless of their type or legal form, whose object, activities or services may cause a **significant risk to the public interest and the safety of persons**, such as companies in **the health and pharmaceutical sector, social services, or sectors with a special impact on the environment or public health.**

Special emphasis should also be placed on companies that **are related to public administrations or their public sector: dealers, contractors and subcontractors, and recipients of aid and subsidies.**

- **Should Spain exempt public entities with fewer than 50 workers from the obligation to establish internal reporting channels and/or mechanisms?**

Consistent with what has been stated in the previous sections, the number of workers should not be a determining factor when exempting a public entity from the obligation to establish internal reporting channels.

Currently, Spain has 8,131 municipalities, of which 7,372 have less than 10,000 inhabitants. This represents 90.67% of the Spanish municipal plant. Also, these small municipalities have an organizational structure adjusted to their size, so that in the vast majority of cases the staff they have does not reach 50 workers.

This being the Spanish municipal reality, it must be taken into account that, if public entities with less than 50 workers are exempted from the obligation to have internal reporting channels, more than 90% of the Local Administration would be left out, which which would be highly counterproductive, since the accumulated experience of the AVAF shows that the largest number of complaints and requests for protection of people who denounce come, precisely, from the Local Administration.

However, it is necessary to point out that local public entities have various coordination and organization mechanisms for the provision of their services. By way of example, article 26 of Law 7/1985, of April 2, Regulating the Bases of the Local Regime provides that the coordination of certain services can be carried out through direct provision by the Provincial Councils or the implementation of formulas shared management through consortiums, associations or other mechanisms. In other words, also in this area, public entities with less than 50 workers can establish shared management formulas for the establishment of internal complaint channels.

- **Should reporting channels be allowed to be managed both internally by a person or department designated for this purpose and externally by a third party, notwithstanding that the responsibility for managing the channel rests with the company's internal body or entity?**

Regarding the issue raised, the AVAF considers that, **as regards the public sector,** those who exercise said function must be **public employees.** This is the AVAF model: all its workers are career civil servants from the different public administrations by legal prescription.

The activity of public servants is governed by the ethical and behavioral duties and principles regulated in Royal Legislative Decree 5/2015, of October 30, which approves the revised text of the Law on the Basic Statute of Public Employees (articles 52 to 54).

Specifically, the aforementioned article 52 indicates the following:

> "Public employees must diligently perform the tasks assigned to them and safeguard the general interests subject to and in compliance with the Constitution and the rest of the legal system, and must act in accordance with the following principles: objectivity, integrity, neutrality, responsibility , impartiality, confidentiality **,** dedication to public service, transparency, exemplary, austerity, accessibility, efficiency, honesty, promotion of the cultural and environmental environment, and respect for equality between women and men, which inspire the Code of Conduct for public employees configured by the ethical and conduct principles regulated in the following articles."

This should ensure compliance with Article 36 of the UN Convention, which should ensure that each State Party ensures that it has specialized persons for combating corruption through law enforcement; a body or bodies and specialized persons who should have the necessary independence to carry out their functions effectively and without undue pressure, with adequate training and sufficient resources.

Similarly, articles 9 and 12 of Directive (EU) 2019/1937 itself point out that internal reporting procedures and reporting channels must be managed in a secure manner that ensures that the confidentiality of the identity of the reporting person and of any third party mentioned in the report is protected, and prevents unauthorized personnel from accessing it .

However, in the **private sector,** outsourcing could be viable, provided that said service is provided guaranteeing the aforementioned principles, especially independence or functional autonomy, as well as impartiality and confidentiality.

4. In relation to the obligation to establish external reporting channels in article 11 of the Directive:

- **Should the procedure be closed in the case of a manifestly minor infringement?**

The best option is, without a doubt, not to close any report that has signs of plausibility, even more so when the expression "manifestly minor infraction" is an indeterminate legal concept that can give rise to different interpretations depending on the people who carry it out and the context.

In this sense, it is considered important to carry out good planning in the management of reports, which allows them to be prioritized based on predetermined, clear and reasonable criteria.

Following the Recommendation of the OECD Council on Public Integrity C(2017), the objective must be the promotion of the prevention perspective that, although it will not eliminate 100% the probability of illicit practices that pose a risk of fraud or corruption, it will that will allow its identification and proper management.

Accordingly, the reports' investigation may end with the formulation of recommendations leading to the adoption of the measures deemed appropriate in order to avoid malfunctions and promote practices that are likely to be improved.

- **Should it be provided that there is the possibility of closing the procedure with regard to repeated reports that do not contain new and significant information on infractions compared to a previous report in respect of which the corresponding procedures have been concluded, unless new circumstances arise? in fact or in law that justify a different follow-up?**

Yes, it would be possible to have this possibility of archiving.

This can find its analogy in the provisions of article 28 of Law 29/1998, of July 13, regulating the Contentious-Administrative Jurisdiction, according to which, the contentious-administrative appeal is not admissible regarding acts that are reproduction from previous definitive and firm ones.

However, the appearance of new data, elements or other circumstances that were not known at the

time of filing must also lead to the reopening of the procedure. This is stated in article 40.a) of the Regulations for the organization and operation of the AVAF.

5. In relation to the competent authorities in charge of receiving, responding to and following up on the reports provided for in article 11 of the Directive:

- **Should an independent administrative authority be created to receive, respond to, and follow up on reports filed through external channels, or should the functions be entrusted to an existing authority?**

As progress has been made, the United Nations Convention against Corruption , in force in Spain since 2006, includes the convenience of each State Party ensuring that it has one or more bodies or persons specialized in the fight against corruption through the application coercive law. The Convention adds that this body or bodies and specialized persons **must enjoy the necessary independence to perform their functions effectively and without undue pressure, with adequate training and sufficient resources.**

Article 19 of Directive (EU) 2019/1937 also states that the Member States shall ensure that the competent authorities establish **independent and autonomous external reporting channels** for receiving and processing information on infringements.

The independent administrative authorities at the state level, as provided in articles 109 and 110 of Law 40/2015, of October 1, on the legal regime of the public sector, are public law entities that, **linked to the General State Administration** and with own legal personality, are created by law and are assigned external regulatory or supervisory functions over economic sectors or specific activities, as their performance requires functional independence or special autonomy with respect to the General State Administration.

Through the creation of these entities, the legislator intends to reinforce the neutrality of their actions and avoid interference and controls by the Government or the Administration in response to the functions they perform. It has been said that its essential features are the following:

- The members of its governing bodies, **although appointed by the Executive, are irremovable** once appointed, except for extraordinary causes assessed in the Laws.
- Although subject to the Laws and Regulations that regulate their functions, **they cannot receive orders or instructions from the Executive on how to perform them** .
- Its members of the government **do not need to maintain the "political trust" of the government,** so that they can make decisions that are not to its liking, without fear of being fired.

However, the theoretical **"independence"** that would characterize this figure is not such in practice, but it would actually be, like a large part of the manifest doctrine, of management autonomy in order to comply with constitutional values that are understood to be left out of the contest partisan.

At this point we want to highlight the AVAF model, an independent and autonomous body, **attached to the Valencian Parliament.** Its characteristic features are the following:

- It is a single- **person body, chaired** by the figure of a director who must have the necessary

human and material resources, organized under a structure designed by the management.

- It is an entity endowed with **functional independence and institutional autonomy.** Only from his position of independence, legally guaranteed, can he effectively fulfill the functions assigned to him.
- It is an **external control body**. Control and supervision prominently integrate its core powers. This defining element is shared in our institutional system by other organizations with which it collaborates.
- It is a **specialized body,** and this specialization in prevention and fight against corruption is one of the distinguishing features with respect to other bodies that also have internal or external control powers.
- Both the director and his workers with inspection functions hold the status of **public authority**, which is complemented by the **sanctioning power** provided for in its founding rule.

Accordingly, the AVAF defends the creation of a National Authority to Fight Corruption, at state level and supplementary in those territorial authorities that do not have similar figures, with its own legal personality and full capacity to act for compliance of its purposes, **independent** of public administrations and its public sector, **and attached to the Congress of Deputies,** being accountable to both the legislative body and the citizenry.

Likewise, the **integration** into this National Authority for the Fight against Corruption of some **existing state structures should be assessed** , whose functions can be relocated under the same umbrella: the regulation, supervision and evaluation of public procurement, the coordination of actions aimed at protecting the financial interests of the European Union or the control of the conflicts of interest of senior officials.

Finally, in relation to the foregoing, it is worth mentioning the Rome Declaration of June 2020 , approved by the aforementioned **Network of European Integrity and Whistleblower Authorities (NEIWA)** , of which the AVAF forms part as a full member, in which text recommends to all governments, administrations and other interested parties involved in the implementation of the Directive the following:

> "Defend that ethics, integrity and the creation of a culture of denunciation continue to be a priority for employers and public and private managers.
>
> Designate one or more authorities in charge of receiving and evaluating reports and ensuring that disclosures related to all policy areas, or involving multiple authorities, or submitted by a reporting person who cannot identify the competent institution, are protected.
>
> Ensure that the competent authorities have the necessary powers and capacity to adequately follow up on complaints through investigations, prosecutions or other corrective measures, also allowing them to establish a threshold for initiating an investigation and to prioritize their activities with respect to those reports that have the greatest impact on society, while regularly reviewing their procedures.
>
> Ensure that the existing legal regime for the protection of whistleblowers in the different Member States is harmonized in order to offer whistleblowers a minimum level of protection against retaliation.
>
> Arrange for the personnel of the competent authorities to be continually reminded of their obligation to protect the confidentiality of the reporters, as well as of the reports; personnel that must be regularly updated and trained to ensure proper management.
>
> Harmonize the provisions on limits of the responsibility of the complainant in the legal system,

specifically, criminal, civil and labor laws, ensuring that the complainant is compensated for the damages suffered."

What has come to be completed by the Brussels Declaration of December 14, 2020 of said Network, in which governments are urged, among other measures, to:

> "Take advantage of the opportunity to build a comprehensive complaints system throughout the national territory, in which the internal reporting channels and the competent external authorities function autonomously, in accordance with their respective territorial or material competences, and are coordinated among themselves. yes to guarantee an efficient and coherent system for filing reports.
>
> Ensure that each designated external channel presents sufficient guarantees of necessary organizational independence and autonomy, and has the adequate resources and capacity to fulfill its purposes."

6. In relation to article 23 of the Directive, what type of applicable sanctions do you consider can be applied as effective, proportionate and dissuasive?

Regarding the type of sanctions, it is considered that the most effective are pecuniary, although the existence of others should also be made compatible, such as reprimands, public reprimands, disciplinary measures, dismissal or suspension of functions, especially aimed at reprisals.

The AVAF has recognized sanctioning power to enforce its purposes and functions in articles 17 and following of Law 11/2016, of November 28, of the Generalitat . These sanctions are of **a pecuniary nature** and can amount to up to 400,000 euros in the event of a very serious sanction.

However, the Valencian law contemplates, in addition to the financial sanctions, in the case of minor offenses, a **reprimand** , and in the case of serious and very serious offenses, the **declaration of breach of duty** and the **publication in the *Official Gazette of the Generalitat Valenciana* for information . general.**

Likewise, the Valencian regulation indicates that any act or resolution adopted as a basis for corrupt or fraudulent behavior classified as serious or very serious infractions will be considered **null and void .**

On the other hand, it is highlighted that the Valencian regulations allow both natural and legal persons to be sanctioned.

However, with respect to legal persons, it should be noted that, in the case of public administrations or any other entity financed by them, it could be concluded that the financial penalties are paid by the taxpayers themselves with their taxes.

To prevent this from occurring, the liability incurred must be repeated with respect to the natural person or persons who committed the offense on behalf of the legal entity, through agile and effective procedures, in which the burden of proof otherwise, according to the Directive, corresponds to the retaliator or retaliators; that is, who or who did not respect the protection status.

Additionally, in relation to the sanctioning regime, it is worth mentioning the Rome Declaration of June 26, 2020 , approved by the aforementioned **Network of European Integrity and Whistleblower Authorities (NEIWA)** , with the purpose of sharing instruments of good practices, in which text recommends to all governments, administrations and other interested parties involved in

the implementation of the Directive the following:

> "Provide that sanctions can be imposed on individuals and organizations for acting in a way that discourages reporting, for retaliating and/or undermining the protection of whistleblowers, while ensuring that there is no exhaustive list of punishable measures, which would allow possible new or unforeseen forms of retaliation to also be sanctioned.
>
> Consider various types of corrective and provisional measures, such as temporary suspension of the employment relationship or temporary blocking of discriminatory or unfair actions to avoid negative consequences for the reporters or for the people who help them or for the people involved.
>
> Establish sanctions aimed at natural or legal persons who act to prevent the filing of reports, retaliate against reporters or undermine their protection. In this regard, Member States should consider a wide range of sanctions (administrative, civil and criminal), which can be used cumulatively to ensure their effectiveness and deterrent power. The Member States will have the responsibility to guarantee that the imposition of any type of sanction is carried out through procedures initiated ex officio, as a requirement of social responsibility.
>
> Where sanctions are established as a result of knowingly filing false reports, verify that such information was intentionally provided in order not to dissuade other reporting persons from filing reports."

7. Should whistleblower protection measures include prizes or rewards?

Spain has not addressed the regulation of prizes or rewards for people who denounce, unlike what happens in other cultures and countries such as the United States. This is a controversial and debated issue, which due to its complexity would require a deeper study, and even the participation of civil society.

At this point, likewise, we must not lose sight of the fact that, in accordance with article 262 of the Law of Criminal Procedure, in our legal system there is an obligation to report. In other words, reporting is a duty.

The AVAF considers premature, at the present time and in our country, the general regulation of prizes or rewards, from the public, in favor of people reporting fraud, corruption or irregularities in this sector, without prejudice to the absolute respect and recognition of initiatives in this sense within the private sector of the company or non-profit organizations whose objectives and activities include this granting.

Notwithstanding the foregoing , we believe that it would be interesting to establish some alternative form of incentive for the reporters, such as public recognition of exemplary performance, the official apology in favor of the report or the granting of prizes or special mentions of a non-financial nature. ; and this without prejudice, in any case, to the right to compensation for damages, including moral damages, that should proceed.

From this perspective, it is once again necessary to highlight the importance of prohibiting retaliation and ensuring the indemnity of whistleblowers and whistleblowers, reversing the burden of proof for those who violate their rights. or attack your professional or personal sphere. Also to ensure the comprehensive repair of the damage and the recognition of the exemplarity of those who denounce.

At the same time, in accordance with Directive (EU) 2019/1937, it is essential to guarantee the confidentiality of all data, documents and information handled, as well as admitting the

anonymity of reports or alerts. The identity of the reporters or whistleblowers or any information that could identify the reporter or the affected person may not be revealed, except by judicial request.

We never tire of repeating that anonymity is the best way to protect the people who report: more effective, cheaper and simpler.

8. Finally, what other issues do you think should be considered apart from the transposition of the Directive?

Introduction.-

As we have been unraveling throughout these allegations to the public consultation raised, we have before us at this time the opportunity to incorporate into our legal system more effective and forceful mechanisms in the fight against corruption, allowing citizens to equip themselves with for the real and effective protection of people who denounce, inform or alert about facts that may constitute infractions or irregularities that must be corrected or remedied in the general interest.

That is why in the answer to question number 1 of this prior public consultation, in our allegations, we have reasoned the need to extend the protection of whistleblowers to all those material or objective areas in which there is a risk, actual or potential, to cause serious harm to the public interest and the welfare of society.

Comprehensive standard.-

At this point it is mandatory for us to highlight that, indeed, there are other issues to consider in the transposition of the Directive in addition to those already exposed, since this should not be limited to an adaptation of the minimum of domestic law, but rather through a standard A comprehensive and ambitious Law for the Prevention and Fight against Fraud and Corruption must be enshrined, in which not only the development of the main lines of the Community Directive must be addressed, but also all those provisions of the United Nations Convention Against Corruption of 2003, ratified by Spain in 2006 , which have not yet been incorporated into our legal system, as we have related and exposed in the allegations to question 1 of this prior consultation.

Comprehensive standard. Creation of National Agency.-

This comprehensive regulation will have to provide for the constitution of a National Agency for the Fight against Fraud and Corruption, of a nature that is fully independent from public administrations, in its organization and operation, and attached to the Congress of Deputies or to the Parliament, which will extend its powers to the entire national territory under the respect and the necessary harmonization of the regional and municipal legislation already in force and coordination with similar entities currently in operation, within a system of distribution of powers similar to that of the current OCEX (Tribunal of Accounts and similar bodies of the Autonomous Communities).

The National Agency must be knowledgeable, experienced and reliable, and politically neutral.

Other legislative provisions.-

In addition to the comprehensive standard, to which we have just referred, it must be said that there are numerous modifications that must be undertaken in the regulations currently in force, both substantive and procedural, as a consequence of the transposition of Directive (EU) 2019/1937.

Although at this initial moment of public consultation we do not intend to detail the legal precepts that would be affected by the transposition, we consider it convenient to point out the main lines of those modifications of our legal system that, in the opinion of this AVAF, must be taken into consideration by the legislator.

Criminal law.-

The transposition of the Directive must have a decisive impact on the configuration of the crime of revealing secrets. The current typification of this crime goes against the spirit of the Directive, becoming a threat to whistleblowers, and thus an obstacle to safeguarding the fight against fraud and corruption.

It turns out, as we see today through cases that follow one another and have behind them people who suffer from them with names and surnames, that this criminal type, quite the contrary, protects an undervalue of our society, namely, corruption and fraud , because those who seek to hide the crime take refuge precisely in this theoretical “secret”.

So much so that in the current criminal drafting not only those who denounce the fraudulent secret are persecuted, understanding secret as what it is not, but also those who, without having taken part in the discovery, spread it, are also persecuted (ex 197.3 PC).

The general part of the Penal Code should also be thoroughly revised in two of its institutions, namely exoneration and the statute of limitations. Thus, with regard to exoneration, this should be provided for in order to encourage fraud and corruption to take place at all times, and this exoneration (or, where appropriate, the mitigating circumstance) should be constituted as an element that allows fraud and corruption to be combated by rewarding the true and genuine repentant who denounces hidden and undiscovered situations; the so-called effective repentance, which provides key information for the investigation.

In order to achieve the same objective of prevention and fight against corruption, the current statute of limitations must be modified in order to avoid impunity in crimes of fraud and corruption, which, as experience teaches us, are crimes whose disclosure and outcrop are delayed in time.

Lastly, regarding substantive criminal matters, we cannot forget that the United Nations Convention against Corruption , which has been in force in Spain for almost twenty-five years, establishes that it must be included in the Penal Code and in the Law of Criminal Prosecution the crime of illicit enrichment or significant increase in the assets of an authority or public official with respect to their legitimate income (the so-called *dirty fortunes*), when it cannot be reasonably justified, with reversal of the burden of proof.

To complete the review of the criminal branch of our Law, it is necessary that the corresponding modifications be made in the current Law of Criminal Procedure to adapt it to the figure of the anonymous report on which we have made the corresponding defense in our allegations to question number 3 of this public consultation. The full recognition of the anonymous report will lead to the modification of articles 266 et seq. of the Law of Criminal Procedure, and the introduction of the reference to internal and external complaint channels.

In relation to the Law of Criminal Procedure and its necessary modification, we must remember that, certainly, there is currently a Preliminary Draft for the creation *ex novo* of a complete text of criminal procedure. However, in that Preliminary Draft, a *vacation laws* for the new criminal procedure law of five years. Such a long period of time requires that the precise modifications for the adaptation of the

criminal procedural rule to Directive (EU) 2019/1937 be made with greater urgency.

Additionally, Organic Law 19/1994, of December 23, on the protection of witnesses and experts in criminal cases, whose application and effectiveness to date has been very limited, as has been recognized by the judicial and prosecutorial sectors, must be reviewed. Said regulation must adapt to the content of the new regulations issued for the transposition of the Directive in order to ensure the real safeguard of the identity of the whistleblower and its effective protection.

Public Function Law. -

The staffing of the official staff of the National Agency (and the regional analogues), must entail the corresponding modification of the regulations governing public employees, and this is because it is necessary to establish a unique protection system for all its personnel, which must be comparable the staff of the Ombudsman, the Court of Auditors or the Constitutional Court, and the autonomous bodies similar to the first two, to guarantee their independence, impartiality and neutrality in the exercise of the powers of prevention, investigation and inspection, sanction and protection for whistleblowers.

From this point of view, it is therefore necessary that the transposition of the Directive makes the appropriate modifications in the Basic Statute of the Public Employee, so that the regulation of the administrative situation of special services, referred to in article 87, contemplates the personnel from other public administrations that begins to provide services in these bodies attached to the bodies of legislative power. In any case, this incorporation into the norm would entail the necessary positivization of a right that is already repeatedly recognized by jurisprudence. In favor of this, the Agreement a d opted for by the Plenary of the General Council of the Judiciary at its meeting on March 26, 2020 , which approves the Report on the Draft Law on the Fight against Fraud and Corruption in Andalusia and protection of the complainant (point 108, pages 35 and 36).

Likewise, the right of civil servants to protection in the event that they denounce, report or warn of facts that may give rise to legal responsibilities, the prohibition of reprisals and the establishment for this purpose of complaint channels, internal and external.

Labor Law.-

In parallel to the Public Function Law, the Workers' Statute must include the rights derived from the transposition of Directive (EU) 2019/1937, including the right to protection of workers who report or reveal information of general interest and for the company and the prohibition of retaliation.

Article 96 of Law 36/2011, of October 10, regulating the Social Jurisdiction, must also be modified in order to adapt the reversal of the burden of proof on any worsening of working conditions suffered by the complainant in the labor context as a result of the complaint filed.

Similarly to this, in relation to the reversal of the burden of proof, the Law regulating the Contentious-Administrative Jurisdiction must be amended when it affects public employees.