Statement of **BULGARIAN INSTITUTE FOR LEGAL INITIATIVES FOUNDATION** on the Consultation Document on the Protection of the persons, signaling or publicly reporting information for breaches draft bill – 18.10.2021

STATEMENT

1. What should be the material scope of the bill – in all areas of public relations, or only in the areas that are exhaustively listed in the Directive (item 2 "Description of the proposal", second indent)?

Art. 2 para. 2 of the Directive gives Member States the discretion to extend whistleblowers' protection under their national law to areas or acts, which not covered by it. It is our opinion that, in accordance with the awareness of corruption as a key problem for the country by a significant part of Bulgarian society, the opportunity provided by the Directive to extend the substantive scope of the legislation to introduce whistleblower protection should be used to the maximum extent possible by the Bulgarian legislator. We believe that the areas that should be included in the material scope of the future law are: **energy industry** /not only radiation protection and nuclear safety, in view of the data reported by investigative journalists about dependencies and corruption in Bulgarian Energy Holding, Electricity System Operator, etc./; **education** /the corruption is most problematic in higher education – prior leakage of information about exams, inflated grades, etc./; **all administrative procedures related to the issuance of building permits** /the activities of the National Building Control Directorate are problematic, as revealed by the study of the parliamentary committee on Ahmed Dogan's properties – the so-called "Sarays" /; **internal security** /the activities of the Police Directorate in view of the evidence of inadequate reactions and ignoring by the police of reports made by citizens to emergency number112 in the Anti-corruption Fund investigation "Eight Dwarfs"; also the evidence of unlawful actions in the execution of the compulsory detention measure in detention facilities/; **justice** – in view of the low trust in the prosecution and the allegations of corrupt practices in the bar.

2. Which should be the institutions that reports of violations can be submitted to?

Our consistent and strong view is that a single specialized body should be established to receive, process and investigate whistleblowing. We don't consider the idea that reporting signals should be sent to and processed by existing bodies in different areas is ensuring the effectiveness of whistleblowing, nor of guaranteeing the safety of whistleblowers. The dozens of bodies currently in place in the various authorities, which are tasked with internal checks and dealing with signals, can hardly convince potential whistleblowers that they will be able to respect the necessary standards of confidentiality. It is also difficult to see how the structures for external reporting would emancipate themselves from the body with which they are subordinate

in order to be able to offer the necessary measure of whistleblower verification and protection and/or support in situations where the whistleblowing is directed against wrongdoing within the body itself.

The Directive does not define how the institutions that can act as external whistleblowing channels should be organized, but only frames the requirements that they must cover. It can be inferred that one possible approach is to adopt the idea of a centralized body acting as a general external whistleblowing channel. In this line of thought, the Counter-Corruption and Unlawfully Acquired Assets Forfeiture Commission (CCUAAFC) appears closest in its characteristics to the functions of the future centralized body, although its competences are strictly regulated and narrower in scope than those required by the Directive. We believe that through a legislative change to the competence of the CCUAAFC, it could take on the role of a centralized body to act as a general channel for external whistleblowing. In the same time the need for amendments, targeting the structure and management of the Commission also need to be keep in mind.

The alternative approach, seeing the currently existing inspectorates within the ministries in this role (for external channel) requires real, rather than cosmetic reform of their structures and exclusively – their separation from the ministries themselves. Once finally separated from the bodies of which they are currently a part, the inspectorates could be consolidated into a single structure. The newly formed institution could then, by consolidating the current inspectorates, take on the role of a centralized body acting as a general channel for external whistleblowing, while continuing to exercise most or all of its current powers under Art. 46 of the Administration Act. The separation from the ministries is also likely to increase the effectiveness of the current powers of the inspectorates /e.g. with regard to Art. 46 para. 4 item2 the preparation of a corruption risk assessment and proposing measures to mitigate it/.

If neither of the two approaches proposed above is adopted, there would be a real risk that the requirement of Art. 11 para. 2 item a) of the Directive, that external whistleblowing channels be independent and autonomous, would not be met. It also opens the door to a number of other challenges, such as which will be the relevant external whistleblowing channels in cases where the whistleblower is an employee of a private sector entity, which authority will monitor the implementation of the requirements of the future law and hold accountable for its non-implementation.

3. What should be the measures for protection of whistleblowers or persons who publicly disclose information about breaches?

In case the possibility of submitting anonymous reports is not taken up, the most important part of the protection of whistleblowers remains the confidentiality of the information they provide and the preservation of the secrecy of their identity. Whether the duty of confidentiality will work effectively as a protection tool depends both on the number of officials who will be involved in the handling of whistleblowing, and on the specific liability (disciplinary,

administrative and/or criminal) that they will bear in the event of a non-compliance. The penalties for non-compliance with the confidentiality requirements for the personal data of whistleblowers should not be insignificant. With regard to the other elements of the general nature of whistleblower protection and support – the prohibition on retaliation (Art. 19 of the Directive), measures to support whistleblowers (Art. 20) and measures to protect against retaliation (Art. 22) – all the mechanisms provided for by the Directive need to find explicit regulation in Bulgarian legislation, as there are currently no direct parallels for many of them. This implies a broad process of harmonization of general and sectoral legislation. A good start would be to provide for measures analogous to those provided for in employment law in the event of unfair dismissal – reinstatement by court decision if the retaliatory action took the form of dismissal.

At the moment, it is a challenge for any Bulgarian citizen to exhaustively list all the institutions that are, or could be, involved in dealing with whistleblowing, fighting corruption and its prevention. Practice shows that such a situation is rarely effective. With the attempt to strengthen effective witness protection as the most important prerequisite for combating irregularities, consideration should be given to the possibility of adopting a single and autonomous body to protect and support whistleblowers. This could be done by creating an entirely new body or by assigning new competences to an existing one. In either case, consideration should be given to how the already unbalanced mechanism of state institutions in Bulgaria will be changed. To begin with, in special cases of overreaction that potentially endanger the life or physical integrity of a person, the protection of that person could be entrusted to the Witness Protection Bureau, whose competence could be extended to these cases through a statutory change.

4. Who should be the competent authority to impose sanctions for the violations of this law?

Administrative and criminal liability and the corresponding sanctions should be imposed by the body that will act as an external whistleblowing channel. The practical option is that this should be the centralized body referred to in point 2. In this sense, the absence of such a body would make it very difficult to answer the question of exactly which body is competent to impose sanctions, especially in cases where the whistleblower is an employee of a private sector legal entity.

5. Do you consider it appropriate to oblige private entities with fewer than 50 employees outside those active in the areas listed in Annexes IB and II of the Directive to set up internal whistleblowing mechanisms? If yes, in which areas?

6. Should the registration and handling of anonymous whistleblowing be allowed and under what conditions?

The text of Art. 6 para. 2 of Directive 2019/1937 allows Member States to decide whether or not private or public sector entities are obliged to accept anonymous signals. That means that the decision whether to accept and process anonymous alerts is a matter of principle and depends solely on the judgment of the appropriateness of the procedure according to the Bulgarian legislator. In Bulgaria, a fearful debate "for or against" anonymous whistleblowing has already been held once during the discussion of the Counter-Corruption and Unlawfully Acquired Assets Forfeiture Act (CCUAAF). However, there is nothing to suggest that the approach adopted in the CCUAAF should be used in the future Whistleblower Protection Act, as neither the scope nor the objectives of the two laws coincide.

A poll commissioned by BILI Foundation in 2021 shows that the possibility of submitting anonymous signals was approved by over 70% of Bulgarian citizens. Over 80% would feel somewhat more protected in the event of a whistleblowing if such a mechanism existed. In view of the survey data, we believe that it is appropriate to provide for anonymous whistleblowing, provided that the person is concerned and fearful of the possibility of retaliation.

7. Other suggestions and comments beyond the topics set out in the document