Joint statement of the BULGARIAN INSTITUTE FOR LEGAL INITIATIVES FOUNDATION and THE CENTER FOR THE STUDY OF DEMOCRACY on the public consultation procedure for the protection of the persons, signaling or publicly reporting information for breaches draft bill, 21.04.2022

STATEMENT

The current joint statement expresses the stance of The Bulgarian Institute for Legal Initiatives foundation and the Center for the Study of Democracy in regards to the draft *Act for Protection of the Persons, Signaling or Publicly Reporting Data Information for Breaches*, through which the Directive (EU) 2019/1937 requirements are introduced into Bulgarian legislation. Experts from both organizations took part in the working groups, organized by the Ministry of Justice between March 2020 and September 2021.

1. With regard to the structure

With regard to the structure of the proposed *Act for Protection of the Persons, Signaling or Publicly Reporting Data Information for Breaches*, there is an obvious (and inevitable) influence of Directive (EU) 2019/ 1937. The decision of the draft's authors to follow the Directive and to name every single article of the text contradicts the well-established law making tradition, as well as the normative framework in Bulgaria.

Giving a title to every article of the text is a method used for the Codex structure in Bulgaria (argument from Art. 29, para. 1, Decree №883 OF 24.04. 1974 on the implementation of the *Law on Normative Acts*), and in the same time it is extremely rare used for structure of acts. In that regard we find it proper that the titles of the individual articles should be dropped, leaving the headings of the sections and chapters.

2. With regard to the term "related party"

In regard to the legal definition of the term "related party", which is introduced by §9 of the additional provisions of the draft bill, it can be concluded that the protection provided by the law should be considered only against "retaliatory actions in a work-related context". The latter greatly narrows the field of application of the related parties' protection, which is why we think that the definition of this concept should be clarified.

3. With regard to the persons, who can receive protection

The proposed title of Art. 5, namely "persons who may obtain protection", suggests that persons "may" obtain protection, i.e. it is conditional on the goodwill of one or other institution, not that such protection is due by the law, the primary purpose of which is precisely the protection of those persons. For this reason, we propose that, if the Bill retains the approach of giving each Article a title, the title of Art. 5 should be changed to "Persons to whom protection is granted".

4. With regard to the term "durable medium"

Considering the very wide range of entities that will be obliged to establish, maintain and operate internal whistleblowing channels, we consider it necessary to refine the concept of

"durable medium", which is introduced in Art. 9, para. 2, item 2, by creating a legal definition in the additional provisions. This will prevent the possibility of information being "lost" from future registers due to misinterpretation of this concept by obliged subjects.

5. With regard to the subjects to which "the act doesn't apply"

The text of Art. 10 of the Bill should systematically be part of the previous Art. 9. In addition to avoiding unnecessary repetition, the fact that private sector employers with fewer than 50 employees and municipalities with fewer than 10 000 inhabitants are not obliged subjects under this law does not mean that it does not apply a priori to them. We therefore propose the text of Art. 10 to be merged with Art. 9 after the necessary revision.

6. With regard to the anonymous signals

Considering the feasable and expected public controversy, we support the introduction of the possibility of anonymous whistleblowing. The Directive does not oblige Member States to create conditions for the acceptance of anonymous reporting of signals. However, it introduces a high degree of confidentiality in the handling of whistleblowing signals by those who will be authorized to do so. However, it is precisely the lack of thrust about the confidentiality during the handling of the signals, that undermines the fear of Bulgarian citizens to be more proactive in reporting, which is why the adoption of the possibility for anonymous signaling is a possible option to effectively and quickly alleviate the problem. This would revise the current double standard that allows institutions to act on unsigned, i.e. anonymous, media publications, while this is explicitly prohibited for citizens' reports. In this regard, the bill should explicitly mention that whistleblowing can also be done electronically, via email or other application.

7. Regarding support measures

In the list of possible support measures for persons who fall under the protection of this Law, regulated in Art. 35 of the Bill, no possibility for persons to receive financial and/or psychological support in the framework of court proceedings is introduced. The latter is a possibility provided for in Art. 20 para. 3 of Directive (EU) 2019/1937. Indeed, the Directive's requirement for this type of whistleblower support is not mandatory for Member States. In view of the fear [1] of citizens of the Republic of Bulgaria to report corrupt practices, as well as the possible negative material and stressful consequences, the introduction of such support measures can only have a positive effect.

8. With regard to the amendments to the Legal Aid Act

The introduction in Art. 35 of the Bill of an obligation for the National Legal Aid Bureau to provide legal aid to the persons referred to item 5 doesn't fully correspond with the amendments to the Legal Aid Act introduced by §13 of the Final Provisions.

9. With regard to the centralized body, the Counter-Corruption and Unlawfully Acquired Assets Forfeiture Commission (CCUAAFC)

We support the decision of draft's authors to provide a centralized body, which will act as

a common external channel through which citizens can report irregularities. Nevertheless, we note that the choice of the CCUAAFC to be the sole competent authority raises serious concerns. To date, the CCUAAFC hasn't overcome the high public distrust, generated by both media revelations in 2019, concerning unlawful activities of members and the Commission, and the failure of the institution to adequately respond to the expectations for more transparency and reactiveness. Also worrying are elements of the Commission's personnel policy in recent years, which can be described at certain moments as "purges", as well as the cases of senior expert appointments of persons, closely related to political forces and leaders. It is also indicative for the state of the Commission that for more than two months it has functioned without a chairperson. The latter prevents the Commission to have meet in its full members 'composition, which is also problematic in relation to the proposed Bill, in which some procedures refer directly to this highest body in the Commission's governance (Articles 22 and 46). Last but not least, the very future of the CCUAAFC is unclear. According to the coalition agreement between the current ruling political parties, there is a declared preliminary agreement for serious structural changes in the *Counter-Corruption and Unlawfully Acquired Assets Forfeiture Act*, which is also the legal basis for the functioning of the Commission.

On this occasion, we believe that giving the entire range of powers to the CCUAAFC to receive and process reports of irregularities from citizens, at a time of serious uncertainty for the Commission itself, in terms of its governance, staff, structure, and powers, is a huge risk. It is a risk both for the management of this information channel and for the citizens themselves who will report. It should be considered that the first months in which the new whistleblower protection and support institutes will be operational will also be the most important for the building of trust among the citizens in the whistleblowing protection. However, the state of the CCUAAFC shows that, at the moment, the Commission cannot be the solid guarantor of whistleblower security that our whole society needs. Whether or not the Commission will be able to be such a body in the future is an uncertain fact on which the future of whistleblower protection in Bulgaria should not depend.

10. With regard to the provision of information

By relying on the CCUAAFC as the sole authority for the external whistleblowing channel and the lead body in implementing whistleblower protection and support, the Bill fails to address the issue of the overall provision of information to potential and active whistleblowers in a sufficiently robust manner. The hypotheses of Art. 35 para. 1 and 2 oblige the CCUAAFC to provide information to citizens, but it only refers to part of the possible procedures set out in the Act, mostly related to external whistleblowing channels. In a way, such a situation could be seen as discriminatory in relation to internal whistleblowing forms, and it should not be forgotten that, according to Directive (EU) 2019/1937, internal whistleblowing channels should take priority over external whistleblowing and Member States should establish such procedures to encourage internal whistleblowing. The case is similar in the title of Art. 16 of the Bill, which declares that internal whistleblowing should be encouraged. However, it is questionable to what extent this can actually be done when the promotion and answering of specific questions by whistleblowers is left solely to the obligated subjects under Art. 9 of the Bill. Viewed through the prism of practice, the situations in which a whistleblower consults the employer on how exactly

to report against him may be bizarre to say the least. With this in mind, we suggest that the wording of the Bill, which refers to the provision of information to potential and actual whistleblowers, be clarified. In this context, consideration could also be given to empowering a specific administration, standing apart from the executive (for example, that of the Ombudsman or another), to act as an information center for whistleblowers' rights.

11. With regard to the administrative provisions

For deterrent sanctions to be effective, they must be responsive to substantive interests. For this reason, our view is that the financial penalties provided for in the draft law are not of sufficient size to have the necessary deterrent effect against potential abuses. More or less, this conclusion applies to all of the penalties in the bill, but while the reluctance of obligated persons to cooperate with whistleblowers may be overcome by the use of some of the other whistleblowing procedures, some acts of retaliation or breach of confidentiality may have a lasting and irreparable impact on the legal and privacy interests of whistleblowers. On this occasion, we believe that the amount of the fines described in Articles 42, 43 and 44 should be increased.