OPINION OF TRANSPARENCY INTERNATIONAL BULGARIA ON THE BILL ON THE PROTECTION OF PERSONS WHO REPORT OR PUBLICLY DISCLOSE INFORMATION ABOUT BREACHES

This Bill has been long awaited by the Bulgarian society and European institutions as it needs to ensure additional instruments of protection for the persons who are ready to combat corruption and maladministration.

As part of the anti-corruption organisation Transparency International which has a leading role in initiating measures to protect persons who report corruption, Transparency International Bulgaria is part of the Whistleblowing International Network which is committed to monitoring the implementation of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who reports breaches of Union Law. Furthermore, as part of the international network of Transparency International, we have had the opportunity to take part in the development of the Directive both in terms of concept and specific texts.

In this regard, we voice our concern about the way in which it is implemented:

1. As a process of consultation (or, rather, the absence of one) with stakeholders. It should be taken into account that the scope is such that it practically affects the whole society – the Directive lists as subjects not only the numerous government institutions but also municipalities, businesses, trade unions, journalists and media, judicial institutions and, practically, any Bulgarian citizen capable of becoming aware of a breach.

2. As elaboration of the Bill to be presented for a public discussion.

   The process of public discussion itself also merits a comment. On 21 April 2022, the Ministry of Justice published the Bill on the Protection of Persons Who Report or Publicly Disclose Information about Breaches and its motivation giving a deadline for the submission of opinions until 23 May 2022. This perpetuates the vicious practice of having public discussion during long holidays. Such a bureaucratic approach is applied when it is necessary to “squeeze” silently in uncomfortable texts. In practice, there are little more

than 10 working days to get acquainted with the text and prepare opinions despite the presence of numerous stakeholders.

3. The inaccuracies in the Bill begin as early as the setting of its title – it does not correspond to the meaning and content of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 (the official Bulgarian translation also inaccurately renders the concept of "protection" as "защита" rather than "закрила") while it also fails to correspond to the content of the Bill. Instead of the Bulgarian "закрила", the title uses the concept of "защита" which entails that the Bill aims to ensure legal protection for rights which have already been breached. The Directive itself has other purposes – to achieve the result of creating mechanisms to restrict the possibilities for breaches of the rights of a whistleblower. The very first recital notes that "whistleblowers are often discouraged from reporting their concerns or suspicions for fear of retaliation".
   The Bulgarian legislator needs to provide legal mechanisms of advance protection of whistleblowers as this has been done for the protection of children and vulnerable groups of workers and employees (see also recital 36). Recital 94 of the Directive expressly lists the necessary protection mechanisms to be included among the means chosen by every State and clearly differentiates them from those laid down before which encompass the protection against action taken in retaliation.
   Furthermore, the inclusion of those publicly disclosing information in the title of the Bill is contrary to recital of the Directive which lays down that "Internal reporting is also the best way to get information to the persons who can contribute to the early and effective resolution of risks to the public interest." Public reporting is an auxiliary means of reporting and it is not necessary to focus on it as early as the title. Moreover, this is not the purpose of the Directive as its title does not include it either.

These issues are essential in as much as they affect the administration of justice, the interpretation of the law and the examination of the will of the legislator. They concern its application and scope.

4. The text provided the accompanying "motivation" – in essence, a retelling of the texts proposed in the Bill – do not make it clear why a certain solution has

been chosen. This holds true to the highest degree for those left within the discretion of the Member States.

This group of critical comments may refer to the category of "general" deficiencies.

Examples of such are:

1. Why do we not apply the transitional period which allows for such report processing systems to be used in large enterprises only?

2. It is not clear what arguments have been adduced to define the application scope of the Directive also with respect to the national legislation and not only the application of EU norms. It is a situation which will result in legal dualism – submission, procedure for processing, protection of whistleblowers.

3. Although the Directive leaves the decision as to the scope of breaches in the discretion of individual Member States (Article 2 (2) of the Directive), Bulgaria does not take this opportunity even though many of the breaches as per the Bulgarian law do not constitute criminal offences and the penal catalogue is taking a long time to be updated. The justification for such an approach to take a broader substantive scope is also reasonable from the perspective of the experience of other Member States in the implementation, for example Germany whose bills envisage that the subject matter of a report may be any offence subject to sanction, i.e. a criminal offence or an administrative violation. This solution is also in the spirit of the Directive which leaves such a decision in the discretion of the individual Member States (Article 2 (2) of the Directive). Even if it does not take this approach where any offence of the domestic law could be the subject matter of whistleblowing, the legislation could still expand the substantive scope with respect to the matters in which whistleblowers would have protection, e.g. energy and other sectors of special public significance.

4. The exclusion of municipalities with fewer than 10,000 inhabitants leaves more than ½ of the municipalities in Bulgaria outside the scope of the law. The criteria for this are not clear and they have not been discussed. No alternatives are given either such as different forms of association to perform the activities or use of

external assistance. Businesses with 50 workers turn out to have a greater capacity than a municipality with 10,000 inhabitants.

5. Measures to encourage whistleblowing through certain incentives – an option the Directive envisages – have not been discuss in the motivation; such are not present in the proposed text of the Bill either. No incentives are set out for the significant life changes whistleblowers may face, especially when it comes down to serious breaches which often affect material interests and may result in significant life transformations for the person reporting the information and taking part in the whole stage of complete disclosure and punishment. Such changes may include the need to change one's place of residence, to seek to practice another profession, etc. The rejection of such measures has not been touched upon in the motivation of those tabling the Bill.

6. No measures are envisaged to encourage businesses which introduce and maintain functioning systems of report management, which also imply protection of the persons making the reports, such as, for example, facilitating access to public resources, more advantageous treatment in the exercise of control over them, etc. This circumstance also remains outside the options discussed by those tabling the Bill.

7. The choice of a centralised system of report submission is not justified in the motivation of the Bill. The proposed text does not demonstrate an understanding of the nature of the reports – they are about "irregularities" related to breaches in different areas regulated by law which, in addition, are strictly specialised in certain fields – fisheries and aquaculture, food safety, personal data, etc. How and why those tabling the Bill have chosen a specific commission currently in existence to handle, in its strict specialisation, all possible reports of irregularities in all possible areas remains completely unclear. What existing capacity of this authority is reliance placed on?

8. The text of those tabling the Bill and the accompanying motivation do not make it clear what arguments have been discussed and what arguments have been chosen in resolving the matter as to whether our legislation will accept anonymous reports. There is no practical response to the question how protection will be provided to a person who is officially unknown (an

anonymous person) in the cases when the person, after all, becomes known; how the obligation to communicate the development of the report to the whistleblower will be fulfilled. No comments are provided as to how the proposed text manages to respond to the imperative requirement of the Directive – enshrined at the levels of text and philosophy – that persons who make untrue and/or even malicious reports are to bear liability in the case of anonymity.

9. Also among the general deficiencies but of exceptional importance sometimes the wording of the texts does not comply with the rules for the formulation of legal norms in the national legislation but is a literal copy of the Directive text. This means that, in practice, these are not legal norms – rules of conduct, but direction for the legislator which direction to take in providing for certain matters! If the text is inapplicable due to these reasons, this would be separate grounds for liability of the State (Bulgaria) before the CJEU.

Regarding specific proposals of the Bill:

1. The provision for the Commission for Combating Corruption and Illegal Asset Forfeiture (CCCIAF) as a competent authority does not take into account:
   - the stated intention to restructure the authority;
   - the activity of this authority under the effective legislation which is very different and aimed at checks of property and conflicts of interest. The addition of powers to check reports for irregularities is not related to them and is essentially different;
   - the lack of administrative capacity for the additional activity. It will be necessary to increase the number of staff and to strengthen the administrative capacity (conduct training, introduce procedures, possibly implement a report management software, etc.) and it is not clear how the law will be applied until this has been completed because the process of strengthening is a lengthy one.

2. The said circumstances related to creating new capacity and restructuring CCCIAF mean that the current statement of those tabling the Bill that no additional funds from the State budget are necessary is untrue. An expanded financial justification of the Bill is needed as well as additional funding.

3. The Commission is a collective authority; yet, it is proposed that only the Chair will render opinions on reports. It is proposed that the collective authority will control only certain decisions of the Chair.

4. There is also no mention since when the CCCIAF will be competent. Article 22, paragraph 1, item 2 of the Bill provides for "referral within one month as of receipt of the report to another authority if it is necessary for it to take action within its competence". This is to be interpreted in the sense that CCCIAF will preserve competence in the check of the report while the authority it refers to will simply assist by performing specific actions within its competence. Does this mean that all reports from all control authorities will need to be referred to CCCIAF in view of ensuring protection for the whistleblower? The question is reasonable in view of the requirement of Article 6, paragraph 1 of the Bill. Such lack of clarity results in legal uncertainty and hampers the achievement of the goals set by the legislator.

5. The proposed provisions are not complete in key areas:
   - training is envisaged only for Commission staff;
   - no obligation is envisaged for the subjects under Article 9, paragraph 1 of the Bill to inform the Commission about the purposes of statistics. Thus, in order to fulfil its obligation to submit such information annually, the Commission will need to take into account only the signals it has.
   - there are no rules to preserve the identity of a reporting person. The provisions of Article 29, paragraph 1 are general and pose a risk of diverse practice.

6. The proposed provisions do not correspond to the requirements of the Directive in certain cases such as:
   - the protection for a whistleblower is tied to additional conditions missing in the Directive (Article 7 of the Bill). The proposal also fails to take into account that the additional conditions are only in cases of public disclosure.
   - the obligation to disclose how reports are submitted and what the protection measures are is envisaged solely for the Commission (Article 27).

7. Regarding the personal scope: the exclusion from the personal scope of civil servants, magistrates and others in Article 5, paragraph 1, item 1 of the Bill is

contrary to the requirement set out in recital 38, last proposition and Article 4 (1) (a) of the Directive that all workers are to enjoy the rights offered by the Directive if they make reports. This leaves the impression that the Bulgarian legislation specifically excludes important groups of persons with access to information about breaches from the application of the Bill;

8. The substantive scope of the Bill excludes whistleblowers in relation to the national legislative provisions which gives one a reason to think that the Bulgarian legislation encourages violations of the domestic law and, if reports are made about irregularities concerning such violations, it is not necessary to provide the whistleblower with protection under this law;

9. It is inadmissible for the proposed legal definition of employer to include an appointing authority. This is a flagrant misconception about our labour law and labour law science;

10. The definition of “enterprise” is new and contrary to both the Labour Code and the Commerce Act as well as the case-law in their application;

11. The Bill also fails to offer a flexible solution with respect to the obligated subjects of private law which are to introduce an internal reporting system. In principle, the Directive sets out such obligations for enterprises with more than 50 workers but allows Member States to deviate from this minimal harmonisation. In view of the fact that, in Bulgaria, some large foreign companies are represented with small structures which correspond to the scale of the local market, the Bill should envisage that companies which are part of a group of enterprises should also be obligated to establish internal reporting channels. This holds true for enterprises which fall within the scope of obligated persons with obligations related to the regulatory framework for financial services, products and markets, preventing money laundering and financing of terrorism.

12. There is not provision that actually encourages internal reporting and this is clearly contrary to the text, logic, spirit and purpose of the Directive which requires it expressly; moreover, not only at the declarative level. The

compliance with this requirement means the creation of a system of legal mechanisms at the legislative level;

13. The requirements for the actions of an administrator after the submission of a report are presented very generally – the report is to be registered, to be anonymized, etc. The lack of specifics undermines the application of the measures laid down in the Bill.

14. The creation of internal rules for reporting is envisaged only for the Commission (Article 28).

15. As regards Article 29 of the Bill, "Obligation of Confidentiality":

    1. The wording of Article 29, paragraph 1 as regards the part about "taking respective protection measures" does not correspond to the provisions in Regulation (EU) 2016/679 and Directive (EU) 2016/680. Pursuant to Article 17 of Directive (EU) 2019/1937, any processing of personal data carried out pursuant to this Directive shall be carried out in accordance with Regulation (EU) 2016/679 and Directive (EU) 2016/680. Article 29 of the Bill provides for the protection of the information related to reports and for the protection of the identity of reporting person. In this context, the identity of a reporting person is definitely personal data and its processing needs to use appropriate technical and organisational measures to ensure a level of security taking into account the risk for the individuals' rights and freedoms. The phrase "respective measures" used in the Bill is inaccurate as it does not clarify what the measures need to correspond to. Account should be taken of Article 32 of Regulation (EU) 2016/679 and Article 59 *et seq.* of the Personal Data Protection Act (which implement Article 19 *et seq.* of Directive (EU) 2016/680) which require appropriate technical and organisational measures.

    2. The wording of Article 29, paragraph 4 of the Bill is inaccurate as it allows information to be disclosed under paragraph 1 (not only the identity of the reporting person) "only with the explicit consent of the reporting person". If the information includes the identity of the person against whom a report is made, it will turn out that the disclosure of this information is possible upon

the explicit consent of the reporting person. This renders Article 29, paragraph 3 of the Bill meaningless as it provides that paragraph 1 and paragraph 2 are also applied to protect the identity of the persons against whom a report has been made.
It should be taken into account that Article 16 (1) of Directive (EU) 2019/1937 envisages the explicit consent of the reporting person when the person's identity is disclosed or "any other information from which the identity of the reporting person may be directly or indirectly deduced". The derogation laid down in Article 16 (2) also covers this information.

3. The provision of Article 29, paragraph 7 of the Bill does not correspond to Article 16 (4) of Directive (EU) 2019/1937 as the obligations it sets out are addressed to the "Commission and the administrators" and not to all competent authorities. It should be taken into account that the term "administrator" as laid down in Article 11, paragraph 1 of the Bill does not include the obligated subjects under Article 9, paragraph 1 but the individuals designated by them or the specialised units in their structure which accept and register reports of irregularities. In this context, the term "administrator" used in the Bill (in addition to Article 11 also in Articles 12, 17, 18 and 29) does not encompass the employer but its workers. This narrows down the addressees of the obligation under Article 29, paragraph 7 of the Bill contrary to the Directive which addresses the obligation to all competent authorities. Furthermore, the term "administrator" also deviates from the meaning attributed to it in the legislation for personal data protection (Article 4 (7) of Regulation (EU) 2016/679 and Article 3 (8) of Directive (EU) 2016/680). As a result, Article 30, paragraph 2 of the Bill uses the term "administrator" in the meaning as per the provisions for personal data protection (an administrator here is the Commission and the obligated subjects under Article 9, paragraph 1) while in all other cited provisions of the Bill the term "administrator" encompasses only the individuals designated by them or the specialised units in their structure. This ambiguity will certainly come to the fore in the application of the requirements for personal data protection; moreover, not to the advantage of the direct effect of Regulation (EU) 2016/679 because it will replace the content of a term with a legal definition in the said Regulation.

16. As regards Article 30 of the Bill, "Personal Data Processing":

The wording of Article 30, paragraph 2 and paragraph 3 of the Bill obligates the Commission and the subjects under Article 9, paragraph 1 to establish rules for personal data protection; to introduce "written technical and organisational measures"; in the event of breach of security, to inform not only the supervisory authority for data protection and the affected individuals but also any other authority from which the data have been received. In this regard, account should be taken of the provision of Article 17 of Directive (EU) 2019/1937 which requires compliance with Regulation (EU) 2016/679 and Directive (EU) 2016/680 for any processing of personal data. In this context, Article 30, paragraph 2 and paragraph 3 of the Bill need to be reconsidered in view of the following aspects:

1. Article 30, paragraph 2 envisages that the rules for personal data protection need to contain "at least the strictly necessary set of data for the proceeding of a report". It is not clear what this refers to as Article 13 of the Bill sets out the content of a reporting in writing. It can hardly be expected of internal rules to derogate a legislative provision or to define up front the categories of personal data which would be necessary take action upon the report.

2. Pursuant to Article 30, paragraph 2, the rules need to contain "the terms for the exercise of the rights of data subjects before the respective administrator". The terms for the exercise of the right of data subjects under Regulation (EU) 2016/679 are laid down in Chapter III, Section 1 "Transparency and Modalities" of the said Regulation which makes it inadmissible for internal rules to provide for them. In an analogous way, the rights of data subjects under Directive (EU) are laid down in Chapter III implemented through Chapter Eight, Section II of the Personal Data Protection Act. In view of this, the re-providing for the terms to exercise the rights of data subjects in relation to the processing of their personal data by means of internal rules should be reconsidered.

3. Article 30, paragraph 3 of the Bill obligates the Commission and the subjects under Article 9, paragraph 1 "to introduce also written technical and

organisational measures to preserve the completeness and inviolability of personal data". The wording is inaccurate; as noted, the measures for personal data protection need to be appropriate to the risks for the rights and freedoms of individuals, not written. They need to be provided for in writing to observe the principle of accountability related to the processing of personal data but the measures cannot be written. The measures need to be targeted not at the completeness and inviolability of personal data but at the integrity and confidentiality of personal data guaranteeing an appropriate level of security, including protection against unauthorised processing and against incidental loss, destruction or damage.

4. Article 30, paragraph 3, proposition 2 of the Bill provides for the following: "In the event of a data breach, the authority which finds it shall notify, within the terms under Article 33 of Regulation (EU) 2016/679, not only the supervisory authority for data protection and the affected individuals but also any other authority from which it has received the data".
As a whole, the rule is unnecessary because there is no clarification as to why it is laid down in addition to the obligations arising not only from Article 33 and Article 34 of Regulation (EU) 2016/679 but also from Article 67 and Article 68 of the Personal Data Protection Act when the processing in in line with Directive (EU) 2016/680 implemented by means of Chapter Eight of the Personal Data Protection Act which includes the cited provisions.
If it is decided that a special rule in the Bill is necessary, then account should be taken of the fact that it deviates from the applicable requirements for personal data protection in several aspects:
First, there are no clear provisions for the case in which Article 30, paragraph 3, proposition 2 of the Bill is applied, namely "personal data breach", a term defined in Article 4 (12) of Regulation (EU) 2016/679, respectively Article 3 (11) of Directive (EU) 2016/680;
Second, Article 30, paragraph 3, proposition 2 of the Bill refers to the terms under Regulation (EU) 2016/679 (the term to notify the supervisory authority is one and it is in Article 33 (1) – 72 hours of becoming aware of the personal data breach) but no account is taken of the fact that Article 68 of the Personal Data Protection Act envisages a 7-day term to notify the data subject. There is also a 7-day term to notify the personal data breach to an administrator from another EU Member State from which the data have

been received but this obligation is laid down only in Directive (EU) 2016/680 – Article 30 (6) (with provisions for notice without delay) and in Article 67, paragraph 6 of the Personal Data Protection Act which envisages the term of 7 days. In this sense, an obligation to notify another authority from which the data have been received in the case of a data breach is set only for the processing of personal data within the scope of Directive (EU) 2016/680 and not for the processing within the scope of Regulation (EU) 2016/679. Article 30, paragraph 3, proposition 2 of the Bill sets out that the notification to the other authorities from which the data have been received is in the context of the obligations under Regulation (EU) 2016/679 which deviates from its requirements. In addition, it is not clear what effect is sought and there is still an open issue as to why the specifics under Directive (EU) 2016/680 are missing.

Legal-technical

The legal-technical issues should not be overlooked because they lie at the foundation of the practical ability to apply the future law.

1. The provisions are not structured; they obviously follow strictly the text of the Directive without taking into account the rules for structuring of statutory instruments of our domestic law.

2. The wording of the legal norms does not correspond to the rules for formulating legal norms in the national legislation but it is a literal copy of the text of the Directive which, in places, results in a lack of formulated legal norms as a rule of conduct or in purely declarative texts. In practice, this hampers the implementation of Directive 1934/2019.

3. The idea behind the list of European Parliament acts as appendices is clear – to facilitate application. The result is that the law will need to be amended with every new EP act because the appendices will be a part of it. A question arises about the domestic acts in the respective areas where the listed Directives are introduced: will they need to be listed as well? This “method” turns the law into a manual.

4. The proposals for support of reporting persons are purely general. They remain empty statements with no actual mechanisms to be implemented. Even the legal aid to be provided is set out in a manner which renders it meaningless. Persons will obtain an *ex officio* counsel who they will need to reimburse later for the fees paid by the State.

5. The way the Bill is constructed transfers all ambiguity related to the creation of systems to accept and respond to reports about irregularities and the protection of reporting persons to businesses. The State preserves for itself the right only to penalise the same businesses for not complying with its ambiguous requirements. In essence, it not only sets requirements for businesses but also makes them incur costs related to them without saying precisely what it wants done.

In conclusion, it should be noted that the Bill is a very important statutory act not only because it is to create the legal basis in an area related directly to combating corruption and breaches in different areas but also because it affects the work organisation of all legal entities which are employers of more than 50 workers and employers. This Directive is exceptionally complex to transpose not only because it is new and unknown in terms of philosophy but also because it practically affects all legal branches.

While refusing to accept the manner of work in relation to the Bill, Transparency International believes that two essential prerequisites need to be in place in order to adopt an adequate legislation in this area:

1) An actual broad discussion with all stakeholders, including local governance, businesses, trade union, journalists – they are all directly involved in the application of the future law.

2) Follow-up sufficient period for discussion (it should be noted that the term for the current public consultations formally corresponds to the statutory requirements; however, such a period has been chosen that they will not be effective).

This is the reason why we insist that the Bill put forward for discussion should be withdrawn and intense expert work should be performed to ensure an improved proposal.

The hasty adoption of a translation of texts from the Directive in the form of national legislation does not constitute a process of implementation and introduction.

Transparency International Bulgaria believes that no subject will benefit from legislation which could render this good idea meaningless while, at, the same time, it will turn into yet another administrative burden for businesses without yielding any practical advantages.

As part of the anti-corruption organisation Transparency International which has a leading role in initiating measures to protect whistleblowers in relation to corruption, Transparency International Bulgaria represents that it will continue its active work in relation to the implementation of protection for whistleblowers and will actively monitor the process of adoption of legislation in this area.

TRANSPARENCY INTERNATIONAL BULGARIA

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