Reporting breaches/misconduct and corruption in Bulgaria

Legal framework

Whistleblowing and reporting breaches/misconduct — similarities and differences

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INTRODUCTION

The rules laid down in national law on the possibilities for reporting breaches of law/misconduct, abuse and conflict of interest or, simply, corruption lack homogeneity and are poorly organised. The provisions are scattered across multiple statutory acts (both laws and bylaws) many of which governing specific sectoral issues. In practice, citizens can report irregularities and misconduct to any public institution, including regulatory and other bodies with control functions, local government bodies, the ombudsman, specialist agencies such as the SANS and the KPKONPI, the inspection services of various ministries and the Council of Ministers, etc.[1] This being so, the extent to which the fragmentation of legislation contributes to the ineffectiveness of the procedures for investigating and acting on such reports, as well as the protection of the whistleblower, where such protection is needed, is a separate matter altogether.

This study is not intended to provide a detailed overview and analysis of all legal possibilities for citizens to report misconduct and irregularities. It is prompted by the need to enact timely legislative amendments in order to implement Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law.[2] In this context, the analysis focuses on an overview of the main provisions of the Directive and a comparison between them and the whistleblowing framework procedures that already exist in Bulgaria. In doing so, it seeks to facilitate future dialogue on possible strategies available to Bulgaria to transposing the new EU standards on reporting breaches (the so-called whistleblowers) and their protection.

According to Article 1 of the Directive, its purpose is to '*improve the application of European Union law and policies in specific areas by setting minimum standards to ensure a high level of protection of persons reporting breaches of Union law*'.' In order to properly define the limits of future legislative changes, two key concepts to be explored in relation to currently applicable

[1] See also http://www.bili-bg.org/cdir/bili-bg.org/files/2018-06-14_public.pdf

[2] The full name of the legal act is DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2019 on the protection of whistleblowers, and in the following the text will mainly use only its short nomenclature, namely Directive 2019/1937.

national law, i.e. the understanding of the concept of **'whistleblowers'** in Bulgaria and whether '**minimum standards for their protection'** have been put in place and, if yes, what these standards are.

In English, the term used for **persons reporting breaches** is **whistleblowers**. In Bulgarian, the literal translation of the term **whistleblowers**, or **whistleblowing**, poses a certain challenge that goes beyond purely linguistic boundaries. There is no direct translation equivalent, meaning that only an explanation of the term **whistleblowing** can be used. Of course, it is possible to use the word **denunciation**. It is, however, well know that the term has a strongly negative connotation and perception by Bulgarians because it reminds them of socialist regime and the extensive network of the then secret services, inundated with **'signals'** (as a literal translation would have it) **or (denunciations)** from hundreds of thousands of full-time and unpaid collaborators who volunteered their services. Moreover, the concept of 'denunciation' itself has also been borrowed (or has its origins in a foreign language), albeit from Russian[3]. For this reason alone, the official use of the term in Bulgaria is unacceptable. Hence the reluctance of the national law-making body to use **denunciation**. However, parallels have been suggested between whistleblowing and snitching, as a phenomenon o []f the recent past. These have been used as an argument in the public discussions preceding the adoption of the **Law on Combating Corruption and Confiscation of Illegally Acquired Property (ACCCIP) to justify the** provisions according to which anonymous whistleblowing alleging corruption on the part of persons holding high office is impracticable.

It is a fact that currently applicable legislation in Bulgaria uses the term **reporting** [or signalling, in a literal translation, in respect of] (a breach/irregularity/misconduct) or an explanation of the term **whistleblowing.** The same translation approach has been adopted in the transposition of Directive 2019/1937, where **whistleblowers** is translated as '**persons reporting breaches**'. However, the difficulty of correctly perceiving the direct parallels between the two concepts remains. **Particular care should be taken not to conclude that since reporting irregularities/misconduct is currently regulated in Bulgaria both under general administrative law**

and under special procedures laid down in dedicated statutory acts, the instruments regarding public entities set out in Directive 2019/1937 already exist. Such an assumption simply does not correspond to reality.

PART ONE

OVERVIEW OF RELEVANT LEGISLATION

Constitution of the Republic of Bulgaria

In Bulgaria, the right to report [breaches/irregularities/misconduct] to the competent institutions is established in the Constitution. According to **Article 45 of the Constitution of the Republic of Bulgaria**, *'citizens have the right to lodge complaints, submit proposals and petition State institutions*". At the international level, the cited provision corresponds to the right to report misconduct, as an element of the **right to freedom of expression and information**, enshrined in **Article 11 of the Charter of Fundamental Rights of the European Union**.

Administrative Procedure Code

In the broadest sense, the filing of reports in respect of irregularities in the activities of central government institutions and local authorities is governed by **Chapter Eight, Section III of the Administrative Procedure Code (APC)**. Pursuant to **Article 107(4) of the APC,** *'reports may be filed in respect of abuse of power, corruption, mismanagement of state or municipal property or other unlawful or inappropriate acts or omissions of administrative bodies and officials in the respective administrative bodies, which affect State or public interests, and the rights or legitimate interests of other persons'*. **Article 108 of** the **APC** stipulates the obligation of the authorities *'to examine and adopt decisions on submitted proposals and reports within the established time limits in an objective and lawful manner."*

According to **Article 109 of the APC, there is no requirement for the persons reporting breaches to have a legal interest** in doing so, meaning that *'any citizen or organisation, as well as the Ombudsman, may submit a proposal or report a breach'.* However, breaches/misconduct may only be reported to the competent administrative body, i.e. the body that is directly responsible for the management and supervision of the authorities and officials whose unlawful or inappropriate actions or omissions have been reported (**Article 119(1) of the APC**). The latter may be either be done directly to the higher-ranking authority or via the body against which a report

has been lodged. However, the party reporting the breach does not have standing in the administrative procedure. For this reason, the provision of Article 124(2) of the Civil Procedure Code expressly excludes the decisions adopted by public authorities on reported breaches/misconduct from the scope of judicial review.

Thus, in practice, although under an obligation to adopt decisions on submitted reports in accordance with the procedure set out in Chapter Eight of the APC, the authorities to which the report in addressed are in no way bound to act on the report. This is further demonstrated by the fact that both breaches of law and misconduct may be reported. Furthermore, in a number of cases the seized authority may also invoke a special law to justify its refusal to verify the information alleged in the report. Finally, even if the authority does initiate an investigation, it may choose to act under conditions of operational autonomy, meaning that it is not bound by the specific request made in the report. Pursuant to Article 110 of the APC, the procedure for handling proposals and reports alleging breaches/misconduct are governed by the rules on the structure and organisation of each administrative body.

Another important feature of the legal institute of reporting breaches, as regulated in the APC, is that according to Article 111, paragraph 4 anonymous reports are dismissed without consideration. The same Article introduces a special, short limitation period (two years) in which infringements can be reported under the APC through the requirement that no proceedings on the basis of reports alleging breaches/misconduct may be initiated in respect of irregularities that occurred more than two years ago.

All of the above contribute to ineffectiveness due to the non-usability, in practical terms, of the institution of whistleblowing provided for in the APC. This is particularly true when it comes to reporting serious breaches. The inability of the persons reporting breaches to remain anonymous is further compounded by the traditionally high mistrust in the impartiality of public institutions in Bulgaria. The short two-year statute of limitations for reporting breaches/misconduct can also be problematic in some cases — the current social and political situation is cumbersome resistant to change, so more time is needed for whistleblowers to gain trust in public institutions.

Regarding the protection of whistleblowers, the APC is concise: *"No person shall be prosecuted solely for alleging or reporting a breach/misconduct under the terms and procedure of this Chapter"* (Article 108(2)). In the case of reporting breaches in accordance with the procedure laid down in the APC, a claim for damages, within the meaning of Article 45 of the Obligations and Contracts Act, may be brought against the whistleblower, solely if the wrongful conduct of the person responsible for the damage is proven. In this sense, there is no obligation for citizens to submit only well-founded reports as doing so would restrict their constitutionally guaranteed right. It should also be pointed out that citizens cannot know in advance, before the court or other competent government body has given its decision, whether their report is well-founded or not.

The lack of provisions enabling anonymous reporting of breaches, the short time limit for reporting and other limitations in the procedure described above naturally make sense as an attempt to prevent the institutions from being inundated with false or irrelevant reports from citizens, thus introducing uncertainty in societal and administrative relations. On the other hand, many of the serious cases of irregularities involve persons in holding high office against whom reports can be filed under the special procedure described in the CPCIPA. In certain cases, these may also be addressed to the prosecution service. However, when comparing the pros and cons of the different procedures, we should not forget that the persons implicated in reported breaches are not always on the formal list of high-ranking public officials — a condition precedent for initiating the procedure under the CPCIPA. Moreover, not every breach can be directly equated to a criminal offence - such a causal link is subject to examination by a prosecutor within the preliminary proceedings.

Code of Criminal Procedure

The provisions of the Bulgarian Criminal Procedure Code (CPC) have a direct bearing on the right to report breaches/misconduct, albeit as a special case. This is so because the breaches/misconduct reported by citizens may, in some cases, indicate that a crime has been committed. More specifically, in the cases envisaged in Article 205, paragraph 1 '*when becoming aware that a general prosecutable offence has been committed, citizens have a duty to report it immediately to the competent authority responsible for pretrial proceedings or another*

government body'. In other words, in these cases, the persons who have the right to report a breach become obligated to do so. They have a choice in that they may do so either to the competent pre-trial bodies, and more specifically the prosecution service or the investigating authorities, or to another competent authority. In the latter case, the alerted officials must immediately notify the pre-trial authority (Article 205(2)).

The provision laid down in the Criminal Procedure Code (CPC) evidently presumes that citizens have sufficient familiarity with national law, i.e. the ability to determine whether or not a crime has been committed. In practice, it is not always easy to determine whether an administrative authority and officials in the relevant administration can be held liable for an act or omission that conforms to the elements of the offences incriminated by the Criminal Code. In any event, the report, or *'communication', as* Article 208(1) refers to it, sent to a pre-trial body is considered to legitimate grounds for initiating an investigation. In criminal law, as well as in administrative law, anonymous reports (signals) are dismissed. More specifically Article 209 paragraph 1 stipulates as follows: *'A report submitted in respect of a crime must contain information enabling the identification of the person from whom it originates.* However, the hypothesis of Article 208, paragraph 2, of the CPC stipulates that information about a crime, disseminated through the mass media, also constitutes grounds for *initiating an investigation.* In practice, this means that there is no obstacle to launching an investigation on the basis of information disclosed through an unsigned publication. A similar discrepancy with regard to the anonymity of persons reporting breaches is also observed in the proceedings initiated under the CPCIPA, which is why the matter will be revisited later.

Law on Combating Corruption and Confiscation of Illegally Acquired Property

Chapter Six of the CPCIPA sets out the special regime for reporting breaches which, within the framework of current Bulgarian legislation, comes closest to the concept of whistleblowing. Chapter Seven lays down rules on the protection whistleblowers.

According to Article 47, paragraph 47, subparagraph 1 of the CPCIPA "*Any person who has evidence of corruption or conflict of interest within the meaning of this Law in respect of a person*

holding a senior public office may file a report'. The addressee of these specific reports is the Commission for Combating Corruption and Confiscation of Illegally Acquired Assets (CCCIPA) whose activities are governed by the same law. One of the special features of this specific case of whistleblowing is that under the CCIPA, the information provided by the whistleblower is only considered if it contains information about persons who hold a senior public office[4]. Persons who fall within the category of senior public officials are exhaustively listed in Article 6 of the CPCIPA. However, the Law does not allow the CPKONPI to examine reports of conflict of interest or corruption against magistrates, although they are also considered to hold high public office within the meaning of the same Law (Article 6(1)(7)). Article 47 paragraph 7 of the CPCIPA stipulates as follows: '*Allegations of conflict of interest or corruption within the meaning of this Law, submitted to the Commission against a judge, prosecutor or investigator, containing evidence of actions that undermine the reputation of the judiciary and the independence of judges, prosecutors and investigators shall be referred for investigation to the Inspection Service of the Supreme Judicial Council*'. *This* important exception in the anti-corruption law can be seen as an expression of the legislator's will to follow the constitutional principle of separation pf powers enshrined in Article 8 of Bulgaria's Constitution according to which *State power shall be divided into three branches — legislative, executive and judicial*. The same principle, however, does not preclude the possibility for filing reports against Members of Parliament, meaning that the substratum of the other of the three independent powers — the legislative power — can still be investigated by the CPCIPA.

When reporting breaches in accordance with the rules laid down in the CPCIPA, the lawmaker has followed the general principle adopted in both administrative and criminal proceedings, notably that anonymous reports are not allowed (Article 47, paragraph 6). During the public consultation that preceded the adoption of the CPCIPA, a number of opinions for and against were expressed. At the same time, however, Article 47(2) of the same Law allows publications in the mass media to be accepted as reports of breaches (signals). These must satisfy the conditions laid down in

[4] More about the concepts of public office, conflict of interest and possible approaches to the regulation of this negative social phenomenon in *"Conflict of Interest in Contemporary Constitutional Discourse"*, *Assoc. Dr. Natalia Kiselova, in 130 Years of Bulgarian Constitutionalism - Problems and Trends, Volume II. C., 2009*

Article 48 paragraph 1(2)(4) of the CPCIPA, but not those set out in subparagraph 1 of the same paragraph. The latter means that the publication must indicate the name and title of the person about whom information is reported, specific details of the alleged violation, reference to documents or other sources providing information about the violation, without, however, an explicit requirement for the article to be signed by a person who can be identified. Here again, as mentioned in relation to the CPC, the same lack of consistency is present. It is difficult to fathom the rationale of such a legislative solution. In light of this discrepancy, during the public consultation prior to the adoption of the CPCIPA in 2017, the Bulgarian Institute for Legal Initiatives Foundation published an opinion that is still relevant today: '*There is no established culture in Bulgaria for protection of the so-called whistle-blowers. This will make it very difficult for persons of good faith to put themselves and/or their families at risk by disclosing information that they may be in their possession. The lawmaker should leave open the choice of how whistleblowing operates and focus on the validity of the allegations made. There is a further contradiction which could be interpreted as an attempt to introduce a double standard: it is envisaged that a publication in the media could be considered an instance of whistleblowing, without requiring that it has an identifiable author and is published by a media outlet with a known owner and following journalistic ethics and standards. It is imperative to introduce minimum standards for the media whose alerts the Commission will accept.*"[5]

Indisputably, when it comes to whistleblowing implicating to the most senior representatives of government, the anonymity of the whistleblower can be an important factor for deciding whether or not the whistleblower refers the matter to the relevant competent authority. Bearing this in mind, in Article 49(1) of the CPCIPA the lawmaker nevertheless introduced the explicit obligation for the Commission's officials tasked with examining the information received:

- not to disclose the identity of the whistleblower;
- not to disclose any facts and particulars which have come to their knowledge in connection with the examination of the report;

[5] http://www.bili-bg.org/12/737/news_item.html

- protect the written documents entrusted to them from unauthorised access by third parties.

Officials shall be held liable under administrative law where they fail to comply with the requirements for confidentiality, both with regard to received reports (signals) and the identity of whistleblowers. In such cases, they a liable to a fine of BGN 5 000 up to BGN 20 000 (Article 176 of the CPCIPA), unless their conduct constitutes a criminal offence, in which may also be indicted under criminal law. The latter is provided for in Article 176 of the CCIPA, which corresponds to Article 24, paragraph 8a of the Criminal Procedure Code, which stipulates as follows: '... *no criminal proceedings shall be initiated, and initiated proceedings shall be terminated, when the act constitutes an administrative offence in respect of which the administrative penal proceedings have concluded'.* Article 24, paragraph 8a was introduced by the amendments to the CPC (published in State Gazette No 67/2017), which determined specialisation with regard to the investigation of crimes committed by persons holding certain (senior) offices. According to the provision concerned the examination of these cases should be carried out through existing independent specialist bodies - the Specialist Prosecution Service and the Specialist Criminal Court (Article 411a, paragraph 4)[6] . The cumulative interpretation of Article 176 of the CPCIPA and Article 24(8a) of the CCP warrants the conclusion that cases may arise where the final determination of whether information disclosed in relation to a report (signal) lodged with the KPKONPI may be left solely to the discretion of the Chairperson of the Commission or officials expressly designated by the Chairperson.

The above-mentioned hypotheses outline the scope of protection enjoyed by persons who report a breach under the procedure envisaged in the CPCIPA. To this, we may add the possibility for *'... measures preventing actions by which psychological or physical pressure is*

[6] See *Decision No. 235 of the Council of Ministers of March 19, 2021* on the adoption of the Analysis of the Implementation of the National Strategy for Preventing and Countering Corruption (2015-2020) and on the adoption of the National Strategy for Preventing and Countering Corruption (2021-2027) and the Roadmap for the Implementation of the National Strategy for Preventing and Countering Corruption (2021-2027).

exerted on the person reporting a breach' being taken (Article 49(2)), as well as the possibility envisaged in Article 50 *'... in special cases, at the request of the Chairman of the Commission, assistance from the authorities of the Ministry of the Interior may be sought for taking additional measures to protect the person reporting a breach'.*

The final element of whistleblower protection is the right to claim compensation for pecuniary and non-pecuniary damage in the event that the whistleblower is dismissed or prosecuted for the information they have provided.

Judiciary Act

For the sake of completeness of the analysis, it is necessary to mention the special regime that exists with regard to reporting and inspections of magistrates - judges, prosecutors and investigators. The 2007 amendments to the Constitution of the Republic of Bulgaria established the Inspectorate of the Supreme Judicial Council (SJC), which generally checks the activities of the judicial authorities without affecting the independence of the magistracy. With the recent amendments to the Constitution of December 2015, the powers of the IACJ have been extended to carry out integrity and conflict of interest checks on judges, prosecutors and investigators. The Inspectorate carries out its activities both through planned and extraordinary inspections and on the basis of reports submitted to it. The inspector who, assisted by experts from the Inspectorate of Internal Affairs, carries out a whistleblowing inspection is selected at random.

In the context of the expanded powers of the Inspectorate and the fact that anonymous signals are not accepted, the Inspectorate has developed Internal Rules to protect the identity of persons who have submitted a signal for a conflict of interest and/or integrity check. [7]Article 3 of the rules explicitly stipulates that *"A whistleblower shall not suffer adverse consequences solely on this ground."* According to Articles 4 and 5 of the rules, identity protection measures are limited to the following:

- non-disclosure of the person's identity;

[7] http://www.inspectoratvss.bg/bg/page/123

- non-disclosure of the facts and particulars which have come to light in connection with the examination of the alert;
- protection of written documents from unauthorised access by third parties.
- The information gathered during the examination of the alert is official secrets.
- A specialised registry is established;
- A special procedure for the submission and registration of alerts shall be established;
- A dedicated fax and email (e-mail) facility is set up for the submission of alerts;
- A special entry and exit register shall be established;
- The range of persons who have access to the information on alerts and their specific duties related to the procedure for filing, circulation and examination of alerts shall be defined;
- A model alert shall be established in which the sender may additionally indicate an appropriate correspondence option that protects his or her identity;

The regulation does not include specific mechanisms to provide protection to whistleblowers against retaliatory activities. In the context of the forthcoming transposition of the Directive, consideration could also be given towards the establishment of such protection mechanisms. Specifically related to the work of the IJB, it could consider addressing forms of retaliation specific to the judiciary and/or the provision of protection and support. Guidance in this respect can also be sought in the case law of the ECtHR [8].

[8] See Guja v Moldova https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-2266532-2424493%22]}

PART TWO

DIRECTIVE (EC) 2019/1937 BASIC PROVISIONS AND TRANSPOSITION

Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of Union law was published in the Official Journal of the European Union, L305 of 26 November 2019. At the time of preparation of this analysis[9], one meeting (on 06.03.2020) of a working group at the Ministry of Justice was held in relation to the harmonisation of the Bulgarian legislation, where the organisation of the sectoral analysis was discussed. The activity of the working group coincides with the first months of the state of emergency, and later the situation, in Bulgaria. Therefore, without additional meetings of the working group, taking into account the responses of 14 institutions, the Ministry of Justice prepares a preliminary analysis and a table of compliance between Directive (EU) 2019/1937 and Bulgarian legislation. Without being exhaustive, the report is a good reference point for future discussions. It is deficient in that, due to the limited mandate and the impossibility of real discussions, it does not take into account the views of a number of entities that will be affected by the harmonisation of Bulgarian legislation with the Directive. This number includes representatives of the private sector, employers' organisations and trade unions. Secondly, the information on which the analysis is based takes into account the submissions and opinions of only 14 institutions and agencies.

On 14 April 2021, the Ministry of Justice will proceed with the formation of a new interdepartmental expert working group to draft the necessary amendments to the legislation in relation to Directive (EU) 2019/1937. At this time, it has not yet been formally constituted and has not yet commenced work. In view of the political situation in Bulgaria, it seems unlikely at the moment that the transposition of Directive (EU) 2019/1937 will become a priority topic for Bulgarian legislators by the deadline for this, namely 17.12.2021. Even if such an assumption were to be refuted by future Bulgarian legislators, it should be borne in mind that they will necessarily be faced with a significant amount of work, as the Directive requires amending and

[9] May 2021.

rethinking a number of legislative acts. For the above reasons, a delay in the harmonisation of Bulgarian legislation with Directive (EU) 2019/1937 seems a very real hypothesis.

It should be borne in mind, however, that although any directive binds a Member State in terms of result only after it has been transposed (argument from Article 288 of the Treaty on the Functioning of the EU), the CJEU has held in its case law that a directive which has not been transposed may also produce certain effects directly in the following cases:

- transposition into national law has not been done or has been done incorrectly;
- the provisions of the Directive are unconditional and sufficiently clear and precise;

Scope

Directive (EU) 2019/1937 establishes common minimum standards for the protection of whistleblowers in the following areas listed in Article 2(1):

- public procurement;
- financial services, products and markets and the prevention of money laundering and terrorist financing;
- product safety and compliance;
- transport safety;
- environmental protection;
- radiation protection and nuclear safety;
- food and feed safety, animal health and animal welfare
- Public Health;
- consumer protection;
- privacy and data protection and security of networks and information systems;
- infringements affecting the financial interests of the Union;
- internal market-related infringements, including of EU competition and state aid rules and corporate tax rules;

Art. 3 of the Directive also explicitly mentions that should be excluded from its substantive scope, notably:

- the responsibility of Member States to safeguard their national security, [which] does not apply to reports of breaches of procurement rules involving defence or security aspects;
- the protection of classified information;
- protecting the privilege of the legal and medical profession;
- the confidentiality of the proceedings;
- the rules of criminal procedure;

The following activities are excluded from the scope of the Directive because they relate to the protection of fundamental legal principles on which the statehood of the Member States, the Union, and the fundamental rights of citizens operate, which take priority over the protection of the financial and economic interests of European society. At the same time, Article 2(2) gives Member States the discretion to extend the protection under their national law to areas or actions not covered by it. The latter is a good legislative approach, in this case, since the harmonisation of the law of different subjects, as is the aim of secondary European legislation, of which the directive is a part, should not shrink the limits of national institutions if their regulations contain more than the minimum requirements laid down in the directive.

In cases where matters forming part of the material scope of the Directive are regulated by Union sectoral acts, the sectoral rules in question shall apply.

The personal scope of the directive is interesting when viewed through the prism of the current legislation in Bulgaria. The procedures and protections it introduces should *'... apply to whistleblowers who work* ***in the private or public sector*** *and have received information about wrongdoing in a work context' (Article 4(1)).* Thus, the Directive introduces the requirement that whistleblowers must be internal to the system to which they will blow the whistle. The general whistleblowing procedures under the APC and the CPCIPA, discussed above in the text, do not make such a distinction between internal and external whistleblowers.

In this sense, persons 'reporting breaches' within the meaning of the Directive can only be natural persons (Article 5(7), argument set out in Article 4(1)). In order to further clarify which persons are to be considered as 'insiders', they are explicitly mentioned (Art. 4):

- workers;
- workers with a terminated employment relationship, in cases where they report violations that became known to them within its scope before it was terminated;
- workers whose employment is about to start, in case the information they report was obtained during recruitment or in other pre-contractual relations;
- government officials;
- self-employed;
- shareholders and persons belonging to the administrative, management or supervisory body of undertakings, including non-executive members as well as volunteers and paid or unpaid trainees;
- persons working under the supervision and direction of contractors, subcontractors and suppliers;

As regards the protection measures provided for in the Directive, in addition to the categories of persons listed, it may also extend to:

- third parties related to whistleblowers and who may be subjected to retaliatory actions in order to retaliate (colleagues, relatives, assistants);
- legal entities (legal persons) owned by whistleblowers, such as those for which they work or are otherwise associated, in a work context;

Anonymity and protection conditions

As to whether anonymous whistleblowing can be accepted, the Directive is not prescriptive: *'Without prejudice to existing obligations to provide for anonymous whistleblowing under Union law, this Directive shall be without prejudice to the power of Member States to decide whether private or public sector entities and competent authorities are obliged to accept and follow up anonymous whistleblowing' (Article 6(2)).* In practice, Directive (EU) 2019/1937 cannot be a

reason to change the currently accepted principle in Bulgarian law, notably the prohibition to accept and consider anonymous reports. Whether this approach is the most appropriate for a country like Bulgaria is a separate question. The imminent legislative changes that will precede the introduction of the directive in our country are a good reason to once again conduct the debate for and against anonymous whistleblowing at a professional level, taking into account the needs that the fight against corruption requires.

A survey conducted by the Bulgarian Institute for Legal Initiatives Foundation in 2018 [10]shows that Bulgarian citizens are not very active in reporting corruption. The main reason for this is the lack of trust in the institutions, which leads to a negative attitude in their will to fight this negative social phenomenon. The study, conducted through the tools of the Access to Public Information Act (APIA), sought to answer the question of how many corruption reports were filed in a calendar year with 19 state bodies that at the time had a leading role in anti-corruption policies in Bulgaria. For the year 2016, the total number of signals received was 265, with 6 of the authorities not receiving any signals and one (the NRA) refusing to provide information.

The Directive does not oblige Member States to create conditions for the acceptance of anonymous alerts. However, it introduces confidentiality in the handling of alerts by those who will be authorised to do so. *"Member States shall ensure that the identity of the whistleblower is not disclosed to anyone other than the officials authorised to receive or follow up the alert without the express consent of that person. This shall also apply to any other information from which the identity of the whistleblower may be known, directly or indirectly" (Article 16(1)*) . This is an essential element in the protection of whistleblowers. Currently, in Bulgarian law, this principle of confidentiality is also the most important feature of the protection of whistleblowers, regulated in Article 49 of the CPCIPA.

An additional element of the explicit protection introduced by Directive (EU) 2019/1937 is the prohibition that Member States must introduce on any form of retaliation against whistleblowers. This includes both active actions against them and threats of such action being taken. The forms of such retaliation are explicitly listed in Article 19 of the Directive:

[10] http://www.bili-bg.org/cdir/bili-bg.org/files/2018-06-14_public.pdf

- suspension, dismissal, dismissal or equivalent measures;
- demotion or delay in promotion;
- transfer of duties, change of job location, reduction in pay, change of hours;
- refusal of training;
- a negative performance evaluation or a job recommendation;
- the imposition or application of a disciplinary measure, reprimand or other penalty, including a financial penalty;
- coercion, intimidation, harassment or rejection;
- discrimination, unequal or unfair treatment;
- removing the possibility of moving from a temporary to a permanent contract where the worker had a legitimate expectation of being offered a permanent job;
- non-renewal or early termination of a temporary contract of employment;
- damage, including to the person's reputation, particularly on social networks, or financial loss, including loss of business and loss of income;
- blacklisting on the basis of a formal or informal agreement in the sector or industry as a whole which may result in the person not finding work in that sector or industry in the future
- early termination or cancellation of a contract for goods or services;
- termination of a licence or permit;
- psychiatric or medical referrals.

In national law, these requirements of the Directive are met by the requirement of Article 108(2) of the APC, which states that *"No person shall be prosecuted solely for submitting a proposal or a signal under the terms and procedure of this Chapter (i.e. Chapter Eight Proposals and Signals)"*. There is also a statutory prohibition on retaliatory prosecution in the Labour Code and the Protection against Discrimination Act. However, there is no explicit prohibition in the CT against discrimination, unequal or unfair treatment, or denial of training due to whistleblowing within the meaning of the Directive.

Alongside these protection measures, the Directive also introduces measures to support whistleblowers, which according to Article 20 are:

- comprehensive and independent information and advice, easily accessible to the public and free of charge, on the procedures and legal remedies available against retaliation;
- effective assistance from the competent authorities;
- legal aid in criminal and cross-border civil proceedings;
- financial assistance and support measures, including psychological support, for whistleblowers in the context of judicial proceedings (optional for Member States);

Articles 21 and 22 of the Directive provide crucial measures to support whistleblowers and protect against retaliation. Currently, Bulgarian legislation does not have such a coherent system of measures, which are an important element of its effectiveness. Texts that prohibit the prosecution of whistleblowers for corruption and conflict of interest existed in one of the versions of the CPCIPA. In the course of the legislative procedure, however, these legal protections were removed from the final version of the law.

To benefit from the protection and support measures under Directive (EU) 2019/1937, whistleblowers must cumulatively meet two important conditions. First, they must " ... *have had reasonable grounds to believe that the information about the breaches reported was correct at the time it was reported and that such information falls within the scope of this Directive*" (Article 6(1)(a)). Next, whistleblowers should *" ... have reported or made public the information about the infringement in their possession"* [11](Article 6(1)(b)).

Under the Directive, Member States are required to have three types of whistleblowing procedures:

- internal signal channels
- external signaling
- public disclosure

[11] According to Article 5(2), "information about violations" means information, including reasonable suspicion, about actual or potential violations that are being committed or are likely to be committed in the organization where the whistleblower works or has worked, or in another organization with which the whistleblower is or has been in contact during the course of his or her employment, and about attempts to conceal violations;

Internal signaling

"Internal whistleblowing" means the communication of information, either orally or in writing, about wrongdoing within a private or public sector entity (Article 5(4)). Under the Directive, this type of whistleblowing channel takes priority over external whistleblowing and Member States should establish procedures to encourage internal whistleblowing. Naturally, the judgement on whether to use an internal whistleblowing channel rests with the whistleblower, and primarily with a view to the effectiveness of the procedure and its future safety.

The obligation to establish internal whistleblowing channels applies to both public and private sector entities.

As regards the public sector in Bulgaria, the possibility of whistleblowing through internal channels is currently not fully regulated. Depending on the quality of the whistleblower, whether or not they are part of a particular institution, the inspectorates of the ministries established under Article 46 of the Law on Administration can be formally regarded as such. In these cases, the internal whistleblowing procedures follow the rules under which the respective inspectorates operate. Internal whistleblowing may also be submitted to the Chief Inspectorate in the administration of the Council of Ministers. By the same logic, municipal inspectorates can also be considered internal whistleblowing channels. However, in the cases listed, neither the quality of the whistleblower is a condition for whether it will be dealt with in a certain way (i.e. internally), nor its protection is regulated in detail.

The requirement to establish internal whistleblowing channels applies to all public sector entities as well as those in the private sector. For the vast majority of the latter, this will be an absolute legislative novelty. At present, the requirement for internal whistleblowing procedures exists more as an exception in the Bulgarian legal world and affects the following economic entities operating in the financial and market regulation sector:

- banks (Article 74 of the Credit Institutions Act)
- persons active in the field of financial services (Article 9(2) of the Market Abuse of Financial Instruments Act)

- investment intermediaries (Art. 65, par. 15 of the Markets in Financial Instruments Act (MiFIA)
- market operators (168, par. 1, item 7 of the MIFID Act)
- the operators of the publication mechanism
- reporting service providers (Article 219(6) MiFID)
- consolidated data providers (Article 223(5) MiFID)
- Reporting mechanism operators (Article 226(4) MiFID)
- Investment companies (Article 10a of the Act on the Activities of Collective Investment Schemes and Other Undertakings for Collective Investment (UCITS Act))
- depositaries of collective investment schemes (Article 37 of the UCITS Act)
- management companies (Article 104, paragraph 1, point 6 of the UCITS Act)

Another example in the current legislation in Bulgaria for internal reporting channels, but with a very narrow scope compared to the idea set out in Directive (EU) 2019/1937, is the obligation of persons under Article 4 of the Anti-Money Laundering Measures Act (AMLA) to adopt internal rules to control and prevent money laundering and terrorist financing. Pursuant to Art. 101 para. 101(1) in conjunction with Article 101(2)(16) of the AML/CFT Act, they must " ... *adopt internal rules for the control and prevention of money laundering and terrorist financing."*

Directive (EU) 2019/1937 allows an exception, i.e. the possibility not to create internal whistleblowing channels, for two types of entities:

- for enterprises with fewer than 50 workers (argument from Article 8(3));
- for municipalities with less than 10 000 inhabitants;

The explanation in both cases is the limited administrative resources of both small enterprises and small municipalities.

External signaling

"'External whistleblowing' means the communication of information about infringements, either orally or in writing, to the competent authorities" (Article 5(5)). According to Article 11, Member States are obliged to designate authorities to have the following competences:

- create independent and autonomous channels for external signals;
- to receive and consider information on infringements;
- acknowledge receipt of the alert in all cases within seven days of its submission (unless this puts the whistleblower at risk)
- take appropriate action on the alert;
- provide feedback to the whistleblower within a reasonable time (up to 3 months, and exceptionally up to 6 months);
- communicate the final results of the alert to the whistleblower;
- transmit the information contained in the alert, as appropriate, to the competent Union institutions, bodies, offices or agencies for the purpose of further investigation, where this is provided for in EU or national law.

Directive (EU) 2019/1937 brackets out the need for external alerting channels to be independent and autonomous. An argument for this is Article 12(1), which sets out the cumulative conditions that external channels must meet:

- are designed, created and operated in a manner that ensures the completeness, integrity and confidentiality of the information;
- prevent access to them by unauthorised members of the competent authority's staff;
- allow for the permanent and confidential storage of information so that further investigations can be carried out.

The Directive does not define how the institutions that can act as external whistleblowing channels should be organised, but only frames the conditions they must meet. It can be inferred that one possible approach is to adopt the idea of a centralised body acting as a general channel for external whistleblowing. In this line of thought, the Anti-Corruption and Asset Forfeiture

Commission comes closest to this approach at present, although its remit is strictly regulated and narrower than the scope of the Directive.

Another possible approach to regulate the external reporting channels is the decentralised (sectoral) one. With considerably fewer legislative changes, existing sectoral channels, i.e. regulatory and supervisory bodies, which, alongside their other powers, can also receive signals from citizens, could be explicitly charged with the functions required by Directive (EU) 2019/1937. The above-mentioned inspectorates, in addition to acting as internal whistleblowing channels, may also act as external ones in cases where the whistleblower does not have a service or employment relationship with them. Other examples of institutions that can play this role are regulatory commissions - the Energy and Water Regulatory Commission, the Financial Supervision Commission, the Communications Regulation Commission, the managing authorities of programmes financed by the European Structural and Investment Funds, etc.

The existing external channels for reporting on certain issues are the National Ombudsman, the Inspectorate of the Supreme Judicial Council, the Bulgarian National Bank, the State Agency for National Security.

Adopting a decentralised approach to external whistleblowing channels has the advantage of requiring much less legislative effort to reciprocate. Secondly, it will also require much less additional resources compared to the creation of a completely new body with a corresponding administration if the centralised option is adopted. Under the decentralised approach, however, there remains the problematic issue of the effectiveness of whistleblower protection and, above all, of maintaining confidentiality, which seems much easier to control under a single body to collect whistleblowing from citizens.

Public disclosure

According to Article 5(6) of Directive (EU) 2019/1937, "public disclosure" means the public provision of information about infringements. Persons making public disclosures are entitled to the same protection as other whistleblowers. However, they must meet the following requirements (Article 15):

- to have undertaken internal and external whistleblowing (in certain cases, only external whistleblowing is sufficient) without the relevant entity or competent institution having taken appropriate action in a timely manner;
- have reasonable grounds to believe that the offence they are publicly announcing may pose a danger to the public interest;
- have not blown the whistle through an external channel because there is a risk of retaliation or the breach is unlikely to be dealt with effectively.

In the current Bulgarian legislation there is no direct analogue of the institute of public disclosure. The closest approach to this whistleblowing opportunity are the hearings of citizens on their reports, conducted by the *Ad Hoc Committee for the Investigation of Abuses and Irregularities in the Spending of Funds by the Council of Ministers, Ministries, State Bodies, State Enterprises and Companies with More than 50 Percent State Participation in the Last 10 Years*[12], which worked within the 45th National Assembly. With no explicit legal basis, the committee's meetings, and especially the revelations made by the whistleblowing businessman Ilchovski, have shown graphically what the public response to such a whistleblowing tool can be. However, in the above example, due to the lack of a legal procedure, the whistleblower (in this case Ilchovski) cannot enjoy any adequate protection. It is the same argument - i.e. the lack of protection and trust in the institutions - that he puts forward as a reason for not blowing the whistle for years to the competent, law enforcement, enforcement and regulatory authorities.

Network of European Integrity and Whistleblowing Authorities (NEIWA)

In the context of the Directive, this network was established in May 2019 on the initiative of the Whistleblower Protection Institution of the Kingdom of the Netherlands. To date, the relevant institutions of 21 Member States have joined it, some of them with 2 authorities. [13]The aim of the network is to bring together all such bodies within the EU and to provide a platform for the exchange of information and good practice in the framework of the transposition and implementation of the Directive. One of the important documents adopted by the network is the

[12] https://www.parliament.bg/bg/parliamentarycommittees/2842

[13] A list of the Member States participating in the network as well as other relevant documents can be found at https://www.huisvoorklokkenluiders.nl/samenwerking/internationaal/europees-netwerk

so-called Rome Declaration of 26.06.2020. In it, NEIWA member states agree on several important elements related to the effective implementation of the Directive, including:

- ethics, integrity and whistleblowing culture to be among the top priorities of decision-makers in both the public and private sectors;
- Ensuring that competent institutions have the authority and capacity to adequately follow up on reports through investigations and prosecutions, with an established threshold for initiating investigations and prioritising the action to be taken;
- Create the ability to impose penalties on individuals and organizations that act in a way that discourages whistleblowing or undermines whistleblower protections;
- Create the conditions to harmonise the existing legal regimes for whistleblower protection in Member States so as to ensure that whistleblowers are afforded the same minimum level of protection against retaliation;
- Ensuring a standard regarding the protocols related to the reception of alerts, their processing and the conditions under which their information can be made available and/or shared with other competent institutions;
- Harmonising, as far as possible, the provisions relating to the liability of the whistleblower under criminal, civil and labour law and ensuring that the whistleblower is fully compensated for the damage and harm suffered, etc.

PART THREE

GUIDELINES FOR REFLECTION ON THE TRANSPOSITION OF THE DIRECTIVE

This analysis and the fact that Bulgaria has not yet transposed Directive 2019/1937 give us the opportunity to provide some guidance that we believe will be useful in the upcoming work of the working group and the institutions that are or will be directly involved in the implementation of the Directive:

1. Concerning anonymous alerts

Directive (EU) 2019/1937 cannot be a reason to change the currently accepted principle in Bulgarian legislation, notably not to accept and consider anonymous signals. Whether this approach is the most appropriate for a country like Bulgaria is a separate question. Bulgarian citizens are still not very active in reporting irregularities, although there is an upward trend in this direction. A study conducted by BIPI in 2018 showed that in the whole of 2016, the 19 state bodies that at the time had the lead role on anti-corruption policies in Bulgaria received only 265 reports. Six of the institutions did not receive a single one. The number of reports of conflict of interest to the CPCOPI over the years is as follows.

Alongside this positive trend, however, fear of whistleblowing among citizens remains high. A poll commissioned by BIPI in 2021 showed that nearly two-thirds of respondents said they would be afraid to some extent to report to the authorities if they witnessed corruption. Only 8.1% said they would feel no fear. 73% of the respondents believe that there should be a possibility to report anonymously in cases of corruption or conflict of interest at work.

The Directive does not oblige Member States to create conditions for the acceptance of anonymous alerts. However, it introduces a high degree of confidentiality in the handling of alerts by those who will be authorised to do so. It seems that it is precisely the lack of trust in the confidentiality of the handling of whistleblowing that is at the root of the fear of citizens to be more proactive in whistleblowing, which is why the adoption of the possibility of anonymous whistleblowing is a possible option to effectively and quickly put an end to this problem.

The double standard that allows the institutions to take action on unsigned, i.e. anonymous, publications in the media should be revised, while this is explicitly prohibited for citizens' reports.

2. Regarding protection and types of support

In the event that the possibility of anonymous whistleblowing is not adopted, the most important part of the protection of whistleblowers remains the confidentiality of the information they provide and the preservation of the confidentiality of their identity. The extent to which 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 non-compliance.

With regard to the other elements of the general nature of protection and support for whistleblowers - the prohibition on retaliation (Article 19 of the Directive), the measures to support whistleblowers (Article 20) and the measures to protect against retaliation (Article 22) - all the mechanisms provided for in the Directive need to find explicit regulation in Bulgarian law, as there are currently no direct parallels for many of them. This implies a broad process of harmonisation of general and sectoral legislation.

3. Regarding an independent whistleblower protection body

Currently, it is a challenge for every Bulgarian citizen to exhaustively list all the institutions that have, or could have, a role in dealing with whistleblowing, fighting corruption and its prevention. Practice shows that such a situation is rarely workable. With a view to strengthening 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.

4. Regarding whistleblowing channels

The obligation to establish internal whistleblowing channels applies to both public and private sector entities. According to the Directive, internal whistleblowing channels should take priority over external whistleblowing and Member States should establish procedures to encourage internal whistleblowing. With regard to the public sector in Bulgaria, the possibility of whistleblowing through internal channels is currently not comprehensively regulated, but some entities perform such a role, depending on the quality of the whistleblower - i.e. whether they are part of the designated institution or not.

As for private sector entities - for the vast majority of them, the requirement to establish internal whistleblowing channels will be an absolute legal novelty. Currently, such legislative requirements are rather an exotic exception for entities in only a few sectors of the economy.

With regard to external whistleblowing channels, the pros and cons of establishing a centralised whistleblower protection body apply. The Directive does not define how the institutions that can act as external whistleblowing channels should be organised, but it does frame the conditions that they must meet. One possible approach is to adopt the idea of a centralised body to act as a general channel for external whistleblowing.

The decentralised approach is a second option. It requires considerably fewer legislative changes than the centralised approach, as a number of existing institutions (regulatory and control bodies, inspectorates, funds, the National Ombudsman, the Inspectorate of the Supreme Judicial Council, the Bulgarian National Bank, the State Agency for National Security, etc.) perform similar roles.

Whichever of the two approaches is adopted, it should be borne in mind not the legislative economy, but above all the fact that, according to the Directive, external whistleblowing channels should be independent and autonomous.

5. On whistleblower protection arrangements in the private sector

The requirement to establish internal whistleblowing channels will be a legislative novelty for most private entities in Bulgaria. Therefore, consultations with the social partners

(representative employers' organisations and trade unions), as also required by Article 8 of the Directive, should start as soon as possible.

The current statutory prohibitions on retaliatory retaliation in the Labour Code and the Protection against Discrimination Act should be extended to the extent required by the Directive. Particular attention should also be paid to support options (see point 2)

6. With regard to the development of whistleblowing standards

Standardisation and the development of common protocols for whistleblowing would be a step towards greater harmonisation of procedures between Member States. The directive itself also requires the introduction of minimum standards of protection, which is why it is useful to look at existing good practices and experiences when transposing it.

7. Regarding participation in the network

The network provides a platform for the exchange of experience in transposing the Directive and in its implementation. Insofar as some of its provisions are new for Bulgaria, it is useful to include the country in this network. It should be considered which institution will represent us. Of the Member States participating in the network, the institutions represented are the Ministry of Justice, a specialised body for combating corruption and/or protecting individuals, and also the national ombudsman.

8. Regarding interaction with the civil sector and the media

The Directive introduces the possibility of public disclosure of information on infringements. There is currently no direct analogue of the public disclosure in Bulgarian legislation. The requirement for the right to protection of the persons who use these channels requires that the role of the media and the NGO sector, which are the natural tribunes for this type of whistleblowing, be reconsidered. The possibility of retaliation against the media and NGOs for retaliating against them in the event that they provide a platform for citizen whistleblowing, and in particular the possibility of tort suits, should be considered.

9. Regarding the liability of whistleblowers

Legislative changes are needed to implement the Directive's requirement for Member States to provide for effective, proportionate and dissuasive sanctions applicable to whistleblowers where they are found to have knowingly submitted or made public false information. The latter is also the main method by which whistleblowing abuse can be prevented if the possibility of anonymous whistleblowing is adopted.

10. With regard to the extension of the range of protected persons

The Directive provides for an extended personal scope of persons who may benefit from protection. Insofar as the protection arrangements in our country are extremely minimalist, it is imperative to consider the possibility of applying the measures and tools introduced by the Directive to the widest range of whistleblowers. This should also apply to the relevant sectors of the economy, even if they are not explicitly mentioned in the directive.