

Position of Transparency International Bulgaria on the process of adoption and inconsistencies in the in the secondary legislation regulating whistleblower protection in the country

Transparency International Bulgaria continues to be concerned about the opaque process of adoption of and inconsistencies in the secondary legislation to the Law on Protection of Persons Reporting or Publicly Disclosing Information on Breaches (in short Whistleblower Protection Act).

On the 27th of July 2023 the Commission for Personal Data Protection adopted with a Decision Methodological Guidance No. 1 for Receiving, Registering and Reviewing of Reports Received by Obligated Entities under the Law on Protection of Persons Reporting or Publicly Disclosing Information on Breaches.

The key issues related to the adopted Methodological Guidance No. 1 are that it could be perceived as anti-constitutional, has an ambiguous legal nature, creates rights and obligations that are not regulated by the Whistleblower Protection Act, and finally, it did not go through a public consultation procedure.

First, there are elements in the process of adoption of normative acts which were not implemented with regard to Methodological Guidance No. 1, hence it could be perceived as anti-constitutional. Art 5 (5) of the Constitution of Bulgaria postulates the following: “All normative acts shall be published. They shall enter into force three days after their promulgation, unless they specify another period.” The Guidance was neither published, nor promulgated in the State Gazette, therefore, its’ stability and nature as a normative act is compromised. It was adopted by a Decision of the Commission for Personal Data Protection on Protocol No. 28/27.07.2023 and only published on the website of the Commission after adoption with no indication of the date of publication.

Second, the legal framework in Bulgaria regulates a number of normative acts and processes for their adoption. According to the Law on Normative Acts, Art 7 (3): “An Instruction is a normative act, by which a *superior body* gives **guidance to subordinate bodies** regarding the application of a normative act, which the body has issued or whose implementation must ensure.” The Law does not regulate Methodological Guidance as a separate type of normative act, and legal interpretation and practice equate “Instruction”, “Guidance” and “Methodological Guidance”. Hence issuing a Methodological Guidance for all obligated entities under the Whistleblower Protection Act would be a normal procedure only if the Commission for Personal Data Protection was a superior body and all obligated entities were subordinate bodies. But this is not the case as obligated entities under Art 12 of the Act are: (1) 1. employers in the public sector, with the exception of the municipalities under para. 2; 2. employers in the private sector with 50 or more employees; 3. employers in the private sector, regardless of the number of employees, if their activities fall within the scope of the acts of the European Union, referred to in point B of Part I and in Part II of the Annex to Article 3, para. 1 and 3. (2) Municipalities with a population of less than 10 000 people or less than 50 workers or employees may share resources to receive reports of infringements and to undertake follow-up to them, in line with the obligation of confidentiality. The CPDP cannot be perceived and recognized as a superior body to any of the obligated entities, which makes the introduction of rules and guidelines in the form of “Methodological Guidance” problematic

in terms of implementation and enforcement as the normative act itself is not stable and could, probably should and would be attacked in front of the Supreme Administrative Court.

Third, the Methodological Guidance in numerous texts reinforces the over-authorization of the Commission for Personal Data Protection which functions as a body regulating the processes under the Law, a body that guides the processes by issuing methodological instructions to the obligated entities, a body that has the function of a central authority for external reporting of breaches, the body monitoring and controlling the implementation of the law and the one imposing sanctions to other obligated entities under the Law. It also reinforces the overburden of responsibilities for the obligated entities even further than the already problematic *Ordinance for Keeping the Register of the Reports under Art. 18 of the Law on Protection of Persons Reporting or Publicly Disclosing Information on Breaches and on the Referral of Internal Reports to the Commission for Personal Data Protection*.

What is more, disregarding best practice of publishing and providing time for consultation of a normative act, CPDP did not publish a draft, disseminate to stakeholders or organize any type of stakeholder or public consultation of the Methodological Guidance before its adoption with a Decision. This type of opaque process is regularly criticized by both academia, civil society organisations and obligated entities as it does not allow for improving the development of normative acts, nor for their effective implementation.

The concerns raised in this Position reinforce the issues with the adoption of secondary legislation shared in our previous **Position of Transparency International Bulgaria on the gaps and inconsistencies in the secondary legislation regulating whistleblower protection in the country**, and reflect the long-term efforts of Transparency International Bulgaria for the establishment of an effective system for whistleblower protection in Bulgaria.

TI Bulgaria reiterates that full transposition of Directive (EU) 2019/1937, and the establishment of a stable legal framework that could be implemented by all stakeholders can only be ensured if all gaps, inconsistencies, and legal issues with the secondary legislation are resolved in a timely and transparent manner.