

New trends in multi-faced corruption - a continuing obstacle for fair business in Bulgaria: our response

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Abstract

The focus of this paper is the corruption in economic and business relations in Bulgaria and the registered new trends. This type of corruption impedes economic development, causing distortions and inefficiencies, hence the necessity of an adequate response. The current meta-analysis of the available literature and the researched practice in a chronological and structured way is trying to explore the latest developments of the theory, legislation, institutional decisions and social attitude towards corruption and to present new approaches and ideas for a solution to the problem. Special attention is paid to the relatively new phenomenon "private-to-private" corruption, the new Bulgarian Act on Counteracting Corruption and on Seizure of Illegally Acquired Property 2018 and the best practices for fighting corruption and investigating fraud with EU funds. Some extra proposals for improvement of business climate are offered with a recommendation for probation. If all that is successful, it could be extrapolated in other fields, countries, etc.

Keywords: *corruption, business environment, anticorruption legislation and mechanisms, European dimension.*

JEL classification: K14

1. Introduction

Lately, corruption has become a global threat to the economic development of many countries but also for the world economy and politics in general. The different forms of abuse of power for personal or collective profit to the detriment of the public interest are particularly relevant to countries in transition, so called "new democracies", but also for those countries trying to develop market economy and to establish healthy business climate. As a complex phenomenon, corruption is a denial of the honest competition in the economic sphere, it demotivates entrepreneurship, stimulates the shadow economy and economic crime, worsen public services and exacerbates the social burden on citizens. In this way, corruption contributes to widen the gap between the poor and the rich and become a direct threat to the democratic foundations of society. That is why this subject enjoys privileged attention from international organizations, national politicians, civil society, research community etc.

The current meta-analysis of the available literature and the researched practice in a chronological and structured way is trying to explore the latest developments of the theory, legislation and social attitude towards corruption and to present new approaches and ideas for a solution to the problem.

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2. Briefly about the "dark history" of corruption in Bulgaria

Bulgaria has never been a vanguard in free of corruption public services and business relations. The rather complicated history of the state, even the newest one, starting from the socialist times, passing through a long and painful transitional period of building democratic institutions and market economy, and the first difficult decades of membership to the European Union, is marked with many corruption scandals, court cases and political turbulences. The very fact that we are located in South-Eastern Europe and on the Balkan Peninsula seems that it pre-determines the corruptive practices and hidden economy. We have experienced all types of corruption - individual and institutional, organized and non-organized, petty, grand and systemic, corruption at the low and high levels of authorities, political, police and judicial corruption, corporate, local and on borders, etc. Although the situation in general is not very optimistic, there are some positive signals (to be discussed later in this paper).

It is a well-known fact but it deserves to be mentioned as an illustration of the said before: On November 25, 2008, with an unprecedented action by the European Commission against a member state in the history of the European Union, Bulgaria missed the opportunity to request 220 billion Euros of suspended funds from European pre-accession funds because of corruption problems. For the first time in the history, an EU member state has suffered such a huge loss for its scale by permanently withdrawing the accreditations of two PHARE paying agencies to the Ministry of Finance and Ministry of Regional Development. Bulgaria is giving away this grant for infrastructure at a time when the government says EU funds are among the country's main reserves in the face of a global financial crisis, and that it is relying on these investments to sustain economic growth and employment.

Furthermore, in the most of the Reports of the European Commission to the European Parliament and the Council on Bulgaria's progress under the Cooperation and Verification Mechanism, including the last one for 2018², the still existing corruption and not enough effective counteraction are mentioned as the key factors for keeping the mechanism alive.

3. Current state of affairs

According to Transparency International - Bulgaria's International Corruption Perceptions Index 2018³ the relevant index of Bulgaria in 2018 is 42 points, with the country scoring 77th in the world ranking. Within the EU Member States' regional ranking, our country continues to be the last (the EU average is 64.6). It is accepted that index values below 50 points are indicative of a systematic

² The document is available online at https://ec.europa.eu/info/sites/info/files/progress-report-bulgaria-com-2018-850_bg.pdf, last accessed 14 October 2019.

³ The document is available online at <http://transparency.bg/en/news-en/bulgarias-cpindex-stagnation-in-the-fight-against-corruption-continues/>, last accessed 14 October 2019.

problem with corruption and ineffective fighting. Moreover, in 2018 year's ranking, Bulgaria gives up six positions back in the world ranking (from 71 place in 2017 to 77 place in 2018), which is an indicator of a retreat in comparison with a number of other countries. It is explicitly mentioned: "The results for the period 2012-2018 give critical assessment – there is a stagnation in the fight against corruption in comparison to positive developments in a significant part of the other EU Member States, Bulgaria is seriously lagging behind. The data show that despite the relative political and economic stability, the main weaknesses in the seven-year period are related to the efficiency of the use of public resources, the functioning of the supervisory institutions and the justice system in the country."⁴

The focus of this paper is the corruption in economic and business relations. This type of corruption impedes economic development, causing distortions and inefficiencies. In the private sector, corruption increases costs by the value of the illicit payments themselves, the value of negotiations with government officials and the risk of disclosure. Although corruption is thought to reduce business costs by circumventing regulations, the overwhelming number of researchers today believe that bribes are pushing public officials to create new rules and delays. By increasing costs, corruption at the same time distorts the environment by protecting link companies while maintaining their relative inefficiency. Corruption creates economic deformations in the public sector as well, diverting public investment into projects that have more opportunities for bribes and commissions. Civil servants can complicate public project procedures to disguise such transactions, further vitiating the investment process. Corruption also leads to less compliance with construction, environmental and other regulations, reduces the quality of public services and infrastructure and increases budget spending. It is especially relevant to Bulgaria today. As it was largely and repeatedly announced the government is (finally) trying to build transport infrastructure adequate to the contemporary business requirements and appropriate for an EU member state. The Cabinet is very proud with rehabilitations of the roads and autobahns built recently. But, first of all, they do not encompass the whole country yet and the progress is very slow. Second, according to numerous calculations, our autobahns are much more expensive (3-4 times) than those in many other European Union countries, even in Norway. Third, due to non-observance of the rules and standards, and poor quality of many lots, a number of traffic accidents occurred. The worst example was the huge catastrophe happened in August 2018 near Svoge city with more than 15 died and 3 ministerial resignations. The court case has not been finalized yet and any conclusions would be premature and uncertain. However, there are many other finalized and non-finalized cases against civil servants and leaders of the "Road Infrastructure Agency" convicted or prosecuted for conflict of interest, nepotism, favoritism, trading in influence, abuse of functions and other forms of corruption while granting public procurements. The award of large road and energy infrastructure

⁴ *Idem.*

development projects in Bulgaria are reportedly heavily affected by political patronage.⁵

In Flash Eurobarometer 457 Report "Businesses' attitudes towards corruption in the EU"⁶, published in December 2017, some interesting new trends that have been found. On the European level:

"Nearly four out of ten companies consider corruption to be a problem when doing business, but it is not considered to be the main problem.

- Companies are much more likely to mention tax rates (63%), fast-changing legislation and policies (61%) and the complexity of the administrative procedures (60%) as a problem when doing business. Of the problems tested, corruption is the least often mentioned (37%) and it has decreased by three percentage points since 2015 and by six points since 2013" (p.4)

The decrease of the general level of corruption on a European scale, although quite minimal, is definitely good news, no doubt. But according to the same survey:

"Three in ten companies that have participated in a public tender say corruption prevented them from winning.

- The proportion of companies that say they were prevented from winning in a public tender has decreased since 2015 (-3pp).

- In only three countries do a majority of companies say this: Romania (62%), Bulgaria (62%) and Greece (52%)" (p.4).

Of course, this is not the best attestation for the situation in Bulgaria.

The next important finding in the same report is that the corruption appears to be a problem mainly for smaller companies - 38% of companies with 1-9 employees vs. 15% of companies with 250 or more employees.⁷ This is absolutely applicable to Bulgaria due to the prevailing small scale business. Corruption has a greater than the average significance with regard to small companies - 85,7%.⁸

Bulgaria's Corruption Report from December 2017, published by GAN Business Anti-corruption portal⁹ identifies a high risk of corruption in many sectors. It is explicitly pointed out that investment disputes are lengthy and often require intervention from the highest level of government. Investors report that jurisprudence is inconsistent and that legislation is used to deter competition from foreign investors¹⁰. Enforcing a contract in Bulgaria takes longer than elsewhere in

⁵ See also: Center for the Study of Democracy. Anti-Corruption Policies revisited - *The Bulgarian Public Procurement market: Corruption risk and dynamics in the construction sector*, 2015.

⁶ The document is available online at http://data.europa.eu/euodp/en/data/dataset/S2177_457_ENG, last accessed 14 October 2019.

⁷ *Idem*, p.5

⁸ Стоянов, Александър. *Корупцията в частния сектор в България*. Център за изследване на демокрацията (Stoyanov, Alexander. *Corruption in the private sector in Bulgaria*, Center for the Study of Democracy), 2018, p. 8.

⁹ The document is available online at <https://www.ganintegrity.com/portal/country-profiles/bulgaria/>, last accessed 17 October 2019.

¹⁰ See also US Department of State. *Investment Climate Statements: Bulgaria*, 2017.

the region. Starting a business takes more steps and more than double time. Obtaining a construction permits takes a few more steps than the regional average.¹¹ According to a survey from 2013¹² three-quarters of businesses pay "tax security" in Bulgaria. These data are pretty old, there is some improvement, but, regrettably, the problem is not totally solved. Corruptive practices, affecting business initiatives, exist in land administration, tax and customs administration, etc.

What is "the latest and greatest" in Bulgarian practice and research is the relatively new phenomenon of corruption in the private sector. While the prevailing opinion associates corruption with relations between the administration and the private sector and misuse with public power, the so called "private-to-private" corruption, already known in Europe, is nowadays on Bulgarian stage. The possibility of a given type of action within the private sector to be considered as corruption stems from the particular structures of firms as collective actors. In most cases, the employees of companies receive discretionary power from their managers; often, some employees take advantage of this to conclude transactions for themselves to the detriment of the company¹³.

It is largely and repeatedly confirmed in public that the Bulgarian companies are working in an uncertain environment, without observance of the basic rules and ethical standards. Some widely spread practices of "private-to-private" corruption are well described in the above mentioned paper, analyzing the results of a specially launched survey "Barometer of private corruption". One of these practices is the elimination of market principles through illegitimate agreements for non-competition. This inevitably distorts the market environment.

At the same time the survey quoted shows that many of private companies' leaders are keen on corruption, especially if they could profit from this and only 46,3% from the interviewed would reject it. Moreover, some extreme utilitarians estimate corruption as useful (totally or partly), contributing to the acceleration of the business. Of course, different measures are also undertaken - so called "soft" anticorruption measures as Codes of ethics (in 32% of the companies) or "hard" measures - termination of offender employment contracts - in many others¹⁴. Despite the mixed effect produced, their wider usage could be recommended.

The key element in corruption in private sector seems to be the balanced intervention of the state and especially the regulation that could help or interfere the business development. From one side, if the intervention through law, standards, etc. is excessive, it reduces business activities as it requires, as a rule, extra expenses, hence the risk of corruption for "optimization" of relations with the state. From the other side, too less regulation creates opportunities for misuse with market and fair competition. That is why the right proportion is essential.¹⁵

¹¹ See also World Bank Group. *Doing Business*, 2018.

¹² The World Bank. *Enterprise Survey 2013-* Bulgaria.

¹³ Stoyanov, Alexander, *op. cit.*, 2018, p. 7.

¹⁴ *Ibid.*, p. 9.

¹⁵ *Ibid.*, p. 21.

4. Latest developments of anti-corruption legislation and mechanisms in Bulgaria

It has to be admitted that many Bulgarian governments, especially the latest ones, are investing a lot of efforts for combating corruption in all spheres. Bulgaria has ratified the UN Convention against Corruption 2003, the Council of Europe Criminal Law and Civil Law Conventions on Corruption 1999, the OECD Anti-Bribery Convention 1997 and many other international instruments. Bulgaria's Criminal Code 1968 criminalizes many corruption-related offences - active and passive bribery, including bribery of foreign officials, extortion, trading in influence, money laundering, abuse of office, and with every amendment new activities are incriminated. Penalties for corruption offences vary, but reach in heaviest cases 30 years imprisonment, fines up to EUR 15,000 as well as confiscation of the whole or part of the property of the convicted person and deprivation from rights. It should be emphasized that the late tendency is to increase the penalties. At current situation maybe this is a way, but in a long perspective we have to think for other state and social response as well. It is axiomatic that the over punishment is not a panacea, something more - the criminal law is the "last resort" instrument.

There is no corporate liability for corruption offenses in Bulgaria; only individuals can be prosecuted as the criminal responsibility is personal. However, there is a long-lasting debate should we introduce liability for legal persons which I find particularly applicable in corruption cases.

Money laundering is addressed in the Measures against Money Laundering Act (the first one from 1998, the new one from 2018). The Civil Servants Act 1999, Protection of Competition Act 2008 and the Public Procurement Act (the first one from 2004, the new one from 2016) also address corruption. The Law on Political Parties 2005 provides for anti-corruption measures that guarantee transparency and accountability of political party funding. The Code of Administrative Procedure 2006 is aimed at limiting opportunities for corruption and establishing an efficient system of administrative justice. Almost all of these acts have been periodically amended and supplemented in order to improve anti-corruption regulation and mechanisms. Many soft law acts, ethical codes, etc. have been developed. However, it has been officially recognized that enforcement of anti-corruption legislation suffers from a weak institutional framework and a corrupt judicial system. The existing anti-corruption body in each branch of the government was defined as susceptible to political influence and having limited power¹⁶. The legislation itself was found quite fragmented and dispersed. Searching adequate decision to the constant critics coming from the European Commission, business and citizenry, the Council of Ministers by Decision No. 230 of April 9, 2015 adopted the National Strategy for Prevention and Combating

¹⁶ GRECO: Fourth Evaluation Round- Evaluation Report Bulgaria, 2015.

Corruption in the Republic of Bulgaria (2015-2020)¹⁷. One of the main tasks set by the Strategy, is the prioritization of the state policy for prevention and combating corruption by building an effective system of anti-corruption bodies and units, strengthening the capacity of the institutions and improving the inter-institutional interaction. In addition, in January 2015, the National Assembly adopted an Updated Strategy for Continuing the Reform of the Judiciary¹⁸ (Council of Ministers Decision No. 825 of 18 December 2014, approved by the National Assembly Decision of 21 January 2015), at which an important point is the prevention and counteraction to corruption.

Finally, a **new Act on Counteracting Corruption and on Seizure of Illegally Acquired Property**, setting up a comprehensive regulation and a single, unified, anticorruption authority, was adopted after a wide social discussion, in early 2018.¹⁹ The law gives a legislative expression to the strategic guidelines, responds to the need to create a more effective mechanism to counter organized crime, and outlines mechanisms for combating high-level corruption. It regulates the procedure for identifying and seizing illegally acquired property as a way of protecting the interests of the community and restoring justice regardless of the criminal proceedings against the inspected person or related persons. In the motives of the bill it is stated that the government's anti-corruption policy is not about retribution, but about restoring justice in society. In the event that as a result of the activity of the new single independent anticorruption body corruption data are identified, the data will be investigated by the competent authorities through the means of the criminal process.

The novelty of the law - civil confiscation - does not constitute a punishment for the person. Criminal liability is realized through prosecution but in many cases, however, it is difficult to gather enough evidence sufficient to reach a conviction in criminal proceedings. In these cases, the inexplicable wealth can be established and its "fruits" traced and taken away. Civil confiscation is a new institute in European Union law, too. This prevents the possibility of getting rich from illegal sources, which undermines the foundations of the free market. In such way both individual and general prevention - fundamentals of criminal law - could be realized.

The Anti-Corruption Act aims to protect the public interest by effective counteraction; ensuring that senior public officials fulfill their powers or duties in a fair and respectful manner, in compliance with the Constitution and laws of the country; and by preventing the possibilities for illegal acquisition and disposal of property. The most important statutory provisions are:

- The number of persons obliged to file property declarations is widening, involving a large range of senior public officials; this guarantees publicity of the

¹⁷ The document is available online at <https://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=956>, last accessed 18 October 2019.

¹⁸ The document is available online at <http://www.strategy.bg/StrategicDocuments/View.aspx?Id=957>, last accessed 18 October 2019.

¹⁹ State Gazette No 7/19 January 2018...last amended SG No. 79/8 October 2019.

wealth of the persons with increased corruption risk; the range of declared circumstances is widening, too, the rules for declaring are stricter;

- A new single independent high-profile anti-corruption body has been set up - Commission for counteracting corruption and for seizure of illegally acquired property, unifying established in different, already abolished laws, structures which chronically suffered from lack of coordination, hence the lack of efficiency in their work;

- After a heated debate it was envisaged that anyone who has data on corruption and a conflict of interest for senior public official can report to the Commission, as well as a relevant protection for this person. At the same time, it was fixed that anonymous alerts are not considered and forwarded by jurisdiction. However, a doubt remained about these stipulations, as the protection is not always effective in our small country and in such a way we preclude the opportunity for receiving important signals, which, of course, should be dully checked;

- Relations between the Commission and other competent institutions - national and international - are clearly regulated as well as the state policy on prevention of corruption through many channels;

- At least 30% of the value of the seized property in favour of the state shall be used for social purposes, where the conditions and procedure shall be determined by a Council of Ministers act;

- Efficiency in the seizure of illegally acquired property is increasing. The "significant non-compliance" legislative decision is the amount of the discrepancy between the property and the net income exceeding BGN 150,000 (75 000 EUR approximately). It is envisaged that the Commission will adopt a decision to carry out a screening of the assets of high-level public officials, in the event of a discrepancy between the declared facts and the actual situation of not less than BGN 20,000 (10 000 EUR approximately).

- Checking the financial status of persons holding high public positions is provided for, the regulation about conflict of interest is improved; the statutory reporting system extends to other categories of persons, in correlation with other legislative acts.;

- Both the composition of the administrative offenses and the penalties provided for have been refined, allowing greater individualization of the penalties depending on the particularities of each case;

- In order to have higher efficiency nowadays most of the corruption offences are investigated by an investigating magistrate, etc.

This law is functioning less than 2 years. It is too early for evaluation but there are signals that it works. Some deficiencies also have been discovered, part of them corrected. New scandals arose, too. But, if not revolutionary, the new act is in pace with the European standards and I wish to believe it is leading in the right way.

In addition, in Bulgaria two more **good practices** for fighting corruption and investigating fraud with EU funds are developed and theoretically grounded. The first is so called "scan of horizon" and represent a systemic approach for

discovering potentially important events and particularly frauds in corporations. They can be weak (or early) signals, trends, hidden future threats, persistent problems, etc. Horizontal scan data includes both "soft data" (views, collective insights or intelligence) and "hard data" (structured transaction data, usually from system records).²⁰ The second is the stimulated large use of e-evidence, which are quite applicable to corruption related offences.²¹ Of course, to make use of the practices, provided they are adequately instrumentalized, highly educated and trained specialists are necessary.

5. Instead of a conclusion

Corruption is "the enemy within", not only for Bulgaria. But for us it has a special meaning - it seems it is a part of the Bulgarian and the Balkan mentality - we are used to living in a corrupting environment. The challenge today is whether the new rather comprehensive measures will produce a good result or we have to wait for a new generation, with a different way of thinking? But do we have time?

Corruption has many faces and dimensions. This paper, on the base of large scale research, offers some legislative and institutional decisions which have to be probated firstly. In addition to efficient prosecution of corrupted politicians, senior servants and why not private companies' managers and corporations (if they commit corruption-related crime) direct engagement of civil society organizations makes sense. They could guarantee (or at least control) the accountability of governments. Stronger and independent anticorruption monitoring mechanisms could integrate both corruption diagnostic and anticorruption policy evaluation. If all that is successful, it could be extrapolated in other fields, countries, etc.

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²⁰ Center for the Study of Democracy, *Good Practices for Combating Corruption and Fraud Investigation in EU*, 2019, p. 41.

²¹ *Ibidem*, p. 47.