6. LEGISLATIVE DEVELOPMENTS

Adoption of special anticorruption legislation

As a major follow-up step to the adoption of the *National Strategy for Prevention and Countering Corruption for 2015 – 2020* (9 of April 2015) a draft *Law on Preventing Corruption among Persons Occupying High Public Offices* was submitted to Parliament. Although it was widely publicized and publicly debated, the draft did not receive the necessary majority in parliament and at the beginning of September 2015 was rejected at first reading, temporarily precluding further debates on the law, and effectively blocking the anticorruption policy of the executive for the whole 2015. In 2016, a second attempt to initiate a new debate on an amended version of the Draft was undertaken but is not yet adopted.[36] This development from the very beginning of the process showed obvious reluctance by MPs to contribute to improving and adopting a law on anticorruption measures that could be directed also against themselves.

The draft law retains essential provisions of the current *Public Disclosure of Senior Public Officials Financial Interests Act* and the *Conflict of Interest Prevention and Ascertainment Act*, offers some new solutions. In its most important points the draft provided for: a definition of corruption conduct; the establishment of a single anticorruption body – the National Bureau of Preventing Corruption and Forfeiture of Illegally Acquired Assets that should unite four existing bodies – the Commission for Prevention and Ascertainment of Conflict of Interest, the Asset Forfeiture Commission, the Center for Prevention and Combating Corruption and Organized Crime (known as BORKOR) and unit of the National Audit Office which receives and verifies assets declarations; periodic external audit of the Bureau and integrity checks for its inspectors; new regulations on declaring assets and conflicts of interest for a larger scope of circumstances and a wider range of public officials,[37] as well as full property checks and proceedings on conflicts of interest, including such based on anonymous complaints; protection of whistleblowers of conflicts of interest or unjustified wealth, etc.

One of the main deficiencies of the draft law is the definition of corruption conduct covering conflict of interest and unlawful enrichment. This leaves many forms of unlawful private gain and types of abuse of power out and thus substantially limits the countering of corruption.

Some powers of the proposed new body are subject to discussion or criticism (such as the power to request disclosure of bank secrecy, insurance and tax secrecy, to have access to the database of the Central Credit Register, etc.). Among the most disputable points is also

[36] The draft is available at: http://www.parliament.bg/bills/43/602-01-18_Proekt_na_ZPKONPI.PDF

[37] The draft law covers a wide range of positions – senior government and other officials, persons with authority in public spending, and several categories of persons in administrations with increased corruption risk.

the expanded scope of the obligation to declare assets and income, including in cases of cohabitation of conjugal principals, which has lasted more than two years, the proposed lower amount of "significant discrepancy" between assets and net income (BGN 120,000, not as far – BGN 250,000) to initiate a procedure for confiscation of illegally acquired property, anonymous whistleblowers (or anonymous complaints), the constitution of the new body, and the mechanisms which could enable effective oversight over it.

The adoption of an improved special anticorruption legislation would help to overcome a number of deficiencies in the implementation of the current legal framework (some of which have become notorious cases), through creating a single regulation and a consolidated anticorruption body.

The merging of several existing bodies with relatively different functions into a new institution creates certain risks, especially when done without a proper impact analysis. Furthermore, such a law would have limited value if not backed up by corresponding enforcement capacity, both in terms of the integrity of government institutions and in terms of resources available to institutions to enforce adequate anticorruption controls in different areas. In order to adopt legislation that would be effective it should provide for a clear and transparent procedure for establishment of such an anticorruption body and guarantees that the election of the director, vice-directors, directors of territorial units and the selection and appointment of all civil servants would be based on objective criteria (professional skills, experience and integrity, lack of political affiliation, etc.), enshrined in law, and not the result of political appointments and tacit deals. This will be also one of the prerequisites for its political independence.

Missing Legislative reforms in critical areas

As repeatedly noted in the previous Corruption Assessment Reports, in the process of EU accession Bulgaria brought its criminal law in compliance with the main international standards and requirements in the field of anticorruption: the main forms of corruption have been incriminated, most corruption-related offences have been made grave crimes that can be investigated using surveillance techniques.[38] However, persistently high levels of corruption and unpunished corrupt behavior (low number of opened cases and even fewer cases ending with conviction, lenient sanctions and no successfully completed high-profile cases) indicate problems in the legislation and its ineffective enforcement both at the pre-trial stage and the subsequent trial proceedings.

An adequate penal foundation for preventing and combating corruption requires reconsidering and updating of main provisions in the *Criminal Code* that refer to different forms of corrupt behavior. Among them are out-of-date provisions, for instance as regards communist era "economic crimes" (which are inadequate for successfully countering serious economic

[38] See: CSD, *Anti-Corruption Policies against State Capture*. Sofia: Center for the Study of Democracy, 2014, p. 47, and other previous Corruption Assessment Reports, available at: www.csd.bg

crime), the provisions incriminating malfeasance in office (not relevant or effective and prone to misuse).[39]

Placed under discussion for more than 10 years, the provision envisaging criminal liability for **provocation to bribery** (the premeditated creation of an environment or conditions which provoke offering, giving or receiving a bribe with the aim of causing damage to the individual who gives or receives such bribe)[40] still provokes search of reasonable alternatives. Making provocation to bribery legal under strict conditions, especially in terms of the potential preventive effect it may have, could be considered as a matter of a separate penal act. The proposal, which should be submitted to a broad public discussion, is the introduction of a new technique **– the use of an agent provocateur** while minimizing any risks for abuse. This can be done through judicial control, which must ensure that the provocation would be allowed only to persons for whom there is sufficient operational information that they are corrupt, though no concrete evidence. **Only a court** should be able to assess and decide whether to allow the use of this tool.[41] This technique would differ from the use of undercover agents by security services and the police.

Furthermore, when using this tool judicial control must be continued after the operation. If there are gaps in the work of the agent the court should not approve the results and the operation would remain without any consequences. If the court finds that the operation had taken place lawfully, it would approve the results and terminate the term of office, labor or service contract of the person against whom the operation was conducted. This kind of legalized provocation does not lead to criminal liability and does not contradict established democratic legislative standards and the jurisprudence of the ECHR. There are grounds to expect that this would be an effective tool that would lead to greater restraint for corrupt officials to accept bribes, as well as to easier removal of such officials from positions that make them susceptible to bribery.

In Bulgaria, there is neither a specific legislation on **lobbying** nor an explicit obligation for registration of lobbyists or reporting of contacts between public officials and lobbyists. Every new government in office has put forward proposals but no such law has yet been adopted. Eventually such legislation is likely to be adopted but, similarly to the legislation on conflicts of interest, this will take time and, most likely, some form of external pressure, since incumbent governments do not have an interest in adopting such legislation. In Bulgaria, the term "lobbyist" has already acquired negative connotation as it is often associated with corrupt practices, public scandals of alleged immoral and/or undue influence of private interests on public policies and legislation as well

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[39] CSD, *On the Eve of EU Accession: Anti-corruption Reforms in Bulgaria*. Sofia: Center for the Study of Democracy, 2006, p.64, and other previous Corruption Assessment Reports, available at: www.csd.bg

[40] Ibid.

[41] This tool would not be applied to persons whose office is established by the Constitution – MPs, the president, constitutional judges, senior magistrates and the Ombudsman.

as with expedited preparation and adoption of laws, behind which are seen lobbyist interests. The lack of legislation on lobbying in Bulgaria has made it even more difficult to differentiate between positive and negative lobbying, which has contributed to the largely distrustful public attitude towards lobbyism.

Effective **arrangements for encouraging whistleblowing** are not yet in place. The *Administrative Procedure Code* and the *Prevention and Ascertainment of Conflict of Interest Act* contain provisions on the protection of whistleblowers' identities, while the *Criminal Procedure Code* requires members of the public – and specifically public officials – who have come across information about the commitment of a crime to inform the competent authorities. However, no adequate steps have been taken to strengthen the protection of whistleblowers.