# New anti-corruption concept and challenges before the Bulgarian legal system

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***Abstract***

Corruption is a very serious danger for any civilized society, democratic state, and legal subjects as a whole. The biggest threat is in its feature to vitiate normal functioning of public institutions – mostly the legislative, executive and judicial bodies.

The EU legal framework on combating corruption is well organized and creates a strong base for the national legal systems of the member states to take appropriate measures in this field, with regard of national legal traditions and particularity.

However, the transformations in the world in the last few years call for the need for a new legal framework in the area of anti-corruption. There is Proposal for a Directive of the European Parliament and of the Council in this regard. This is precisely why it is important for the legal certainty already at the preparatory stage to mark the challenges before the Bulgarian legal system, when the Directive will be adopted and the transposition period in national legislation will occur.

***Key words:*** legal certainty, anti-corruption, legal system, public institutions, legislation.

## *Introduction*

Considering the need for updating existing EU legal framework on combating corruption, on May 3, 2023, the European Commission published in the Official Journal of the European Union the Proposal for a Directive on combating corruption (Proposal for a Directive of the European Parliament).

This stems from the importance of this legal matter, and not without reason Article 83, Para 1 of Treaty on the Functioning of the European Union (Consolidated versions of the Treaty on European Union) identifies corruption as one of the crimes *inter alia* with a particular cross-border dimension. It enables the European Parliament and the Council to establish the necessary minimum rules on the definition of corruption by means of directives adopted in accordance with the ordinary legislative procedure.

It should be noted that in process of work on this legislative proposal, the European Commission asked Member States to provide information in the anti-corruption matters in some questionnaires. Especially for the questionnaire about corruption bribery in the public and private sector, misappropriation by a public official or in the private sector, trading in influence, abuse of functions, illicit enrichment and obstruction of justice, Bulgaria did not reply to the questionnaire (according to the text in the sub-part 'Collection and use of expertise' from the Part 'Results of ex-post evaluation, stakeholder consultation and impact assessment' in the Proposal for a Directive).

Nevertheless, the process of upgrading of European legislation of in anti-corruption matter is continuing. For this reason, the Bulgarian legislators, academics and scientists, and all public officials have to be prepared for the future legislation. This is the main aim of this analysis.

## *Results and Discussion*

### Reasons for and Objectives of the Proposal

The new Proposal for a Directive renders on account the necessity of preventive, legislative and

cooperative measures as part of the fight against corruption, i.e. the process must be complex and systematic.

Moreover, some phenomena such integrity, undisclosed conflicts of interests or serious breaches of ethical rules, still considered by public officials as clichés, must be taken on account seriously.

By definition, the Democracy expects public trust in government and clear view on the acts, activities and conduct of public officials. The legislative framework must describe all of these dimensions in prompt manner.

The main objectives for the Proposal are firstly the need for development of the legal base with purpose to ensure a more coherent and effective response to the risk of corruption, and second to eliminate the enforcement gaps at national level in combating corruption.

**Basic Normative Drafts in the Proposal**

The text of Article 1 of Proposal for a Directive records that the future Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of corruption, as well as measures to better prevent and fight corruption.

There is a need here to emphasize explicitly that in Bulgarian legal system there is an inconsistent understanding of corruption from the point of view of criminal law and administrative law. The Bulgarian legislator uses different terminology, but also treads on different concepts. The reasons for this situation are different – historical, theoretical but also – political will to create consistent legal base in anti-corruption area.

Anyway, the willingness in the Proposal to create minimum rules concerning the definition of criminal offences and sanctions in the area of corruption will see difficulties in Bulgarian legislation.

For example, the clearest definition of corruption is found in Article 3, Para 1 of Law on Combating Corruption and for Confiscation of Illegally Acquired Property (Law on Combating Corruption). The normative texts explain that corruption within the meaning of this law is present when, as a result of the high public office held, the person abuses power, violates or fails to fulfill official duties with the aim of directly or indirectly extracting a material or immaterial benefit for himself or for other persons.

The problem is that Bulgarian Criminal Code (Criminal Code) arranges many types of corruption crimes, they are best described in the section on bribery. But the contemporary understanding of corruption sights not only bribery in this meaning.

Thereat, as a minimum, the Bulgarian legislator must unify the criminal and administrative legal understanding for corruption.

In Article 2 of Proposal for a Directive, which gives some definitions, most of them are quite similar to Bulgarian legislation, and the problems here should not be expected.

But two definition are very unclear and foe sure will create challenges before the Bulgarian legislator. The first one is in Article 2, Point 6 – 'breach of duty' covers as a minimum any disloyal behaviour constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions, which apply within the business of a person who in any capacity directs or works for a private sector entity. On the manner of grammatical interpretation of legal norm, it seems that this dimension of corruption applies only and exclusively to the private sector, because of word 'business'. The Proposal for sure means both public and private sector, because of use of word combination 'breach of a statutory duty'. As we know, the law concerns everybody.

The second problem may derive from Article 2, Point 7 – 'legal person' means any entity having legal personality under the applicable national law, except for States or public bodies in the exercise of State authority and for public international organizations. For example, the according to Article 7, Para 3 of Law on Combating Corruption and for Confiscation of Illegally Acquired Property (Law on Combating Corruption) the Commission for combating corruption and confiscation of illegally acquired property is a budget support legal entity with headquarters in Sofia. The discrepancy between the Bulgarian law and the draft directive is obvious. The seriousness of the problem is exacerbated by the fact that most collective authorities in Bulgaria have an identical legal status according to national legislation.

As per Article 3, Points 2, 3 and 4 of Proposal for a Directive member states shall take measures to ensure the highest degree of transparency and accountability in public administration and public decision-making with a view to prevent corruption and that key preventive tools such as an open access to information of public interest, effective rules for the disclosure and management of conflicts of interests in the public sector, effective rules for the disclosure and verification of assets of public officials and effective rules regulating the interaction between the private and the public sector are in place, as well shall adopt comprehensive and up-to-date measures to prevent corruption in both the public and private sectors, adapted to the specific risks of an area of activity. Such measures shall at least include actions to strengthen integrity and to prevent opportunities for corruption. This measures for prevention of corruption have already place in Bulgarian legislation, but most of them do not work properly in practice.

Accordingly Article 7 member states shall take the necessary measures to ensure that the following conduct is punishable as a criminal offence, when committed intentionally the promise, offer or giving, directly or through an intermediary, of an advantage of any kind to a public official for that official or for a third party in order for the public official to act or refrain from acting in accordance with his duty or in the exercise of that official's functions (active bribery) and the request or receipt by a public official, directly or through an intermediary, of an advantage of any kind or the promise of such an advantage for that official or for a third party, in order for the public official to act or to refrain from acting in accordance with his duty or in the exercise of that official's functions (passive bribery). The Bulgarian Criminal Code (Criminal Code) have similar legal provisions.

In Article 8 there are expecting necessary measures to ensure that the following conduct shall be punishable as a criminal offence, when committed intentionally and in the course of economic, financial, business or commercial activities the promise, offer or giving, directly or through an intermediary, an undue advantage of any kind to a person who in any capacity directs or works for a private-sector entity, for that person or for a third party, in order for that person to act or to refrain from acting, in breach of that person's duties (active bribery) and the request or receipt by a person, directly or through an intermediary, of an undue advantage of any kind or the promise of such an advantage, for that person or for a third party, while in any capacity directing or working for a private-sector entity, to act or to refrain from acting, in breach of that person's duties (passive bribery).

The doctrinal inconvenience for the Bulgarian legislator will arise from it, that Bulgarian law on the whole does not separate corruption in public and private sectors. The penal interpretation from pure legal point of view is all in all the same. But articles 7 and 8 from the Proposal for a Directive state for different Bribery in the public sector and Bribery in the private sector. Let us hope that the normative architectonics of the transposition will not be problematic in the implementation of the legislation.

In line with the above reasoning, it is surprising that in Article 9 (Misappropriation) it is approached by enumeration, but concerning both the public and the private sector. Perhaps such an approach will be successful in the future. The text states, that member states shall take the necessary measures to ensure that the following conduct is punishable as a criminal offence, when committed intentionally the committing, disbursing, appropriation or use by a public official of property whose management is directly or indirectly entrusted to him contrary to the purpose for which it was intended and the committing, disbursing, appropriation or use, in the course of economic, financial, business or commercial activities, by a person who directs or works, in any capacity, in a private sector entity, of any property whose management is directly or indirectly entrusted to him contrary to the purpose for which it was intended.

One of the most widespread acts of corruption is trading in influence. In Article 10 clearly is visible that this concerns the cases when the promise, offer or giving, directly or through an intermediary, of an undue advantage of any kind to a person or a third party in order for that person to exert real or supposed influence with a view to obtaining an undue advantage from a public official and the request or receipt, directly or through an intermediary, of an undue advantage of any kind or the promise of such an advantage to a person or a third party in order for that person to exert real or supposed influence with a view to obtaining an undue advantage from a public official.

Abuse of functions according Article 11 is the performance of or failure to perform an act, in violation of laws, by a public official in the exercise of his functions for the purpose of obtaining an undue advantage for that official or for a third party or the performance of or failure to perform an act, in breach of duties, by a person who in any capacity directs or works for a private-sector entity in the course of economic, financial, business or commercial activities for the purpose of obtaining an undue advantage for that person or for a third party. The Proposal demands the same to be punishable as a criminal offence.

Only from terminological point of view we stand on the position that Abuse of Functions is identical with Abuse of Power. The Bulgarian legal doctrine has already noted that in the criminal and penal context may be noticed that „Currently, in the positive Bulgarian criminal law *ex abuso potestatis* exists in the face of the crime of excess of power. At present, its normative basis in its main composition is spelled out in the third hypothesis of art. 282, paragraph 1 of the Criminal Code, and the text refers to an official who violated or failed to fulfill his official duties, or exceeded his authority or rights by purpose to procure for himself or for another benefit or to cause harm to another, and this may result in significant harmful consequences. That is, the crimes under Art. 282, para. 1 of the Criminal Code can be carried out with several executive acts, and the excess of power is only one of them. In other words, common to all four hypotheses referred to in the legal text, it concerns the general concept of "crime on duty". The specific crime "exceeding authority" has its brothers and sisters in taxonomic code criminal nature in the form of "violation of official duties", "failure to fulfill official duties" and "exceeding rights". These executive actions – through actions and inactions – are classified in the so-called "forms of executive act". The four criminal forms of this family should lead to the same severe repressive consequences on the part of the state in relation to the perpetrator, under the rules of criminal law and process. From a formal-juridical criminal law point of view, there is a single official crime, expressed in its four possible criminal forms (or in the combinations between them). For the purposes of this thesis, below, only one of them will be considered – the excess of power, and it will be treated as an independent crime in its nature" (Mladenov, M. 2021, pp.67-68).

It is unacceptable Enrichment from corruption offences to be tolerate from the national authorities. That is why Article 13 of the Proposal provides member states shall take the necessary measures to ensure that the intentional acquisition, possession or use by a public official of property that that official knows is derived from the commission of any of the offences set out in Articles 7 to 12 and 14, is punishable as a criminal offence, irrespective of whether that official was involved in the commission of that offence. In Bulgarian Law on Combating Corruption and for Confiscation of Illegally Acquired Property, (Law on Combating Corruption) the text of 107 provides that The Commission for combating corruption and confiscation of illegally acquired property initiates proceedings for confiscation of illegally acquired property when it can be reasonably assumed that a given property has been illegally acquired. A reasonable assumption is present when, after an inspection, a significant discrepancy is found in the property of the inspected person. In Article 108 lay the legal base for this – the inspection begins with an act of the director of the relevant territorial directorate, when a person is accused of a crime. Here the legislator counts many types of crimes and among them there are some corruption crimes as well.

Article 15 arranges Penalties and measures for natural persons – necessary measures to ensure that the criminal offences referred to in Articles 7 to 14 are punishable by effective, proportionate and dissuasive criminal penalties. In the same way, member states shall take the necessary measures to ensure that the criminal offences referred to in Article 7 and 12 are punishable by a maximum term of imprisonment of at least six years; the criminal offences referred to in Article 8 to 11 are punishable by a maximum term of imprisonment of at least five years; and the criminal offence referred to in Article 13 is punishable by a maximum term of imprisonment of at least four years. In general, Bulgarian legislation fits within these frameworks.

Most problematic will be requirement where a criminal offence referred to in Article 9 (Misappropriation) involves damage of less than EUR 10 000 or an advantage of less than EUR 10 000, Member States may provide for sanctions other than criminal sanctions. Historically, Bulgarian

Penal Law punish the criminal activity *per se*, not the scale of damage of this activity. Moreover, replacing of penal sanction with administrative one will be confusing for the legislator as normative approach in his pure appearance.

It seems that are more compatible with the Bulgarian legislation the proposals that state Member States shall take the necessary measures to ensure that natural persons who have been convicted of committing one of the criminal offences referred to in Article 7 to 14 may be subject to sanctions or measures imposed by a competent authority and that are not necessarily of a criminal nature, including fines; the removal, suspension and reassignment from a public office; the disqualification from; holding a public office; exercising a public service function; holding office in a legal person owned in whole or in part by that Member State; the exercise of commercial activities in the context of which the offence was committed; deprivation of the right to stand for elections, proportionate to the seriousness of the offence committed; and withdrawal of permits or authorizations to pursue activities in the context of which the offence was committed, also exclusions from access to public funding, including tender procedures, grants and concessions.

Article 16 of Proposal for a Directive hopes that there are legal provisions for Liability of legal persons and member states shall take the necessary measures to ensure that legal persons can be held liable for any of the criminal offences referred to in Articles 7 to 14 committed for the benefit of those legal persons by any natural person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on one or more of the following – power of representation of the legal person; the authority to take decisions on behalf of the legal person; or the authority to exercise control within the legal person. Also member states shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person has made possible the commission, including by any of the persons under his authority, of any of the criminal offences referred to in Articles 7 to 14 for the benefit of that legal person. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the criminal offences referred to in Articles 7 to 14.

The measures above are incompatible both with Bulgarian legislation and legal doctrine strictly in penal point of view. In Administrative law they are such sanctions, not for crimes, but for administrative offences. Bulgarian legal system still supports the idea, that only natural persons shall be punished by penal law for their criminal activities.

From the standpoint of the Bulgarian legal system, measures of administrative coercion are rather acceptable in the series of Article 17 of the Proposal – Sanctions for legal persons. In short, member states shall take the necessary measures to ensure that a legal person held liable for criminal offences pursuant to Article 16 are punishable by effective, proportionate and dissuasive sanctions. Moreover, member states shall take the necessary measures to ensure that sanctions or measures for legal persons liable pursuant to Article 16 include: criminal or non-criminal fines, the maximum limit of which should not be less than 5 percent of the total worldwide turnover of the legal person, including related entities, in the business year preceding the decision imposing the fine; the exclusion of that legal person from entitlement to public benefits or aid; the temporary or permanent exclusion from public procurement procedures; the temporary or permanent disqualification of that legal person from the exercise of commercial activities; the withdrawal of permits or authorizations to pursue activities in the context of which the offence was committed; the possibility for public authorities to annul or rescind a contract with them, in the context of which the offence was committed; the placing of that legal person under judicial supervision; the judicial winding-up of that legal person; and the temporary or permanent closure of establishments which have been used for committing the offence.

**Protection of Whistleblowers**

Article 22 of the Proposal for a Directive writes the matter about Protection of persons who report offences or assist the investigation. In this meaning, member states shall take the necessary measures to ensure that Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, (Directive (EU) 2019/1937) is applicable to the reporting of the offences referred to in Articles 7 to 14 and the

protection of persons reporting such offences. In addition to the measures referred to in paragraph 1, Member States shall ensure that persons reporting offences referred to in this Directive and providing evidence or otherwise cooperating with the investigation, prosecution or adjudication of such offences are provided the necessary protection, support and assistance in the context of criminal proceedings.

As we know, Law on Protection of Persons Signaling or Publicly Disclosing Information regarding Breaches (Law on Protection of Persons Signaling) prohibits any form of bullying of whistleblowers, as: temporary suspension, dismissal or application of any other grounds for termination, are prohibited of the legal relationship under which a person performs hired work; demotion or delay in promotion; a change in the place or nature of work, the length of working hours or a reduction in remuneration; refusal to provide training to maintain and improve the professional qualification of the worker or employee; negative evaluation of work, including in a job recommendation; application of pecuniary and/or disciplinary liability, including imposition of disciplinary sanctions; coercion, rejection, threat of retaliatory action or action, expressed physically, verbally or in any other way, which aim to harm the dignity of the person and create a hostile professional environment; direct or indirect discrimination, unequal or unfavorable treatment; taking away the possibility to switch from a fixed-term employment contract to an employment contract for an indefinite period of time, when the worker or employee had a legal right to be offered a permanent job; premature termination of a fixed-term employment contract or refusal to re-conclude it, when such is permissible by law; damages, including to the person's reputation, in particular on social networks, or financial losses, including loss of business and loss of income; inclusion in a list drawn up on the basis of a formal or informal agreement, in a sector or in an industry, which may result in the person not being able to start working or not being able to supply a good or service in that sector or industry (blacklist); early termination or cancellation of a contract for the supply of goods or services when the person is a supplier; termination of a license or permit; directing the person to undergo a medical examination, etc.

The legal doctrine maintains that “Legal certainty definitely implies intolerance to any type of offence, not only on the part of state bodies and other public institutions, but also on the part of every single citizen. In its basic aspects – consistency and predictability of legally significant acts and actions of legal entities – legal certainty is ensured both by the law-abiding behavior of the authors of legal acts and perpetrators of legal acts, and by the reaction of other legal entities to deviations from legal prescriptions behavior of these authors and perpetrators…the citizens, in their legal capacity as natural persons, make a major contribution to the investigation of offenses of any kind and type. The statistical probability that they first, and not a single state body, becomes a witness to an offense is a thousand times exponentially higher, which is why a reasonable legislator, with a view to the policy of prevention, detection, proof and punishment of offenses, should long ago have shifted the emphasis to the active participation of citizens in the implementation of this basic policy for every rule-of-law state. However, civil participation in the detection of offenses is highly debatable, due to numerous historically superimposed stereotypes in relation to whistle-blowing, as well as due to erroneous academic interpretations of the functionality of the state apparatus, and also as a result of the long-term, intentionally or unintentionally, pathological legislative policy built on the illusion of quick and positive expected results to fight crime by creating new and new state institutions or by adding superpowers to already existing ones” (Mladenov, M. 2023, pp. 34-35).

Hence, it can be noted with satisfaction that the Bulgarian legislation is in harmony both with Directive (EU) 2019/1937 and with here considered Proposal for a Directive.

## *Conclusions*

In connection with the new Proposal for a Directive on combating corruption on the territory of member states and in European Unison as a whole, there must be emphasize the following:

First, some Bulgarian legal principles and provisions are quite different to texts in the Proposal. Anyway, the Bulgarian legislator, as well the Bulgarian legal doctrine must find the appropriate manner to bring closer them, because member states shall bring into force the laws,

regulations and administrative provisions necessary to comply with this (Proposal of a) Directive by [18 months after adoption] at the latest. They shall forthwith communicate to the Commission the text of those provisions. Here will be some challenges from the legislative point of view, but they cannot be dramatical.

Second, the other legal provisions in Bulgarian legislation already exists and they are in compliance with the Proposal.

Third, let us remain that the Proposal describes only minimum rules concerning the definition of criminal offences and sanctions in the area of corruption. This means that Bulgarian legislator may establish more severe measures against corruption. The challenge here is not to choose disproportional legislative manner.

Finally, the Bulgarian legal tradition considers the realities both in our society and state. The transposition of any Directive of European Union must key to this starting point. Yet, the Republic of Bulgaria must be pro-active in early phases of drafting EU-legislation, including fulfilling questionnaires and giving statistical data.

Anti-corruption legislation is the base for all measures and activities in the field of combating corruption. Although corruption is one among the greatest threats to modern states and societies, opposing it through coercion must be done only by legal means. The other way is ethical one – through integrity of the members of the society. Both are in the arsenal of the Rule of Law and also ensure legal certainty.

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