RiskMonitor

Policy Brief

The Paradox of Anti-corruption Institutions

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For the last ten years, Bulgaria has been trying hard to convince its NATO and EU partners of its resolute determination to reduce the level of corruption that has been poisoning the country. The current government in power, political party GERB, has proven itself the most fervent and ambitious in this respect – it has declared an all-out campaign against high-level corruption and organized crime, as the over-arching priority of its entire policy. At mandate's mid-term, there isn't much the government can put on the table as tangible results: a number of highly publicized special operations with provocative code names, made-for-TV public arrests, *ad hoc* press conferences…The sequel included nothing but failed pre-trial investigations and dismissed court cases. The media presence of the institutions is strong, but the conviction rate for organized crimes and corruption is far from satisfactory.

One easy answer would be to say that the reasons for this state of affairs are "complex"; but the cliché is usually given to camouflage the lack of an answer or the lack of efforts to find an answer. The reasons are easy to spot and they concern the government's principal decisions and choice of penal policy.

The establishment of specialized anti-corruption institutions has the adverse effect of strengthening corruption. The public environment would benefit more from reducing the institutional spill-over, rather than from multiplying them.

The strategic choice of the recent governments has been wrong and will not lead to any positive results.

The government's key decision has been the establishment of new institutions – in the usual case, typical state bureaucracies – camouflaged as critical instruments for the reduction of corruption. The new breeds have come true to their name only on paper. Glaring examples are the State Agency for National Security (SANS), the so-called "Kushlev Commission", and it is my prediction that the same fate awaits the new bill for civil asset forfeiture, as well as the latest newcomers, the institution oddly named BORKOR, and the new specialized court and prosecution.

I admit, the creation of SANS was a very ambitious undertaking for a body supposed to have a key role in the reduction, and future elimination, of organized crime and high-level institutional corruption. SANS was even dubbed the "Bulgarian FBI", which is nothing but a misnomer. One should be careful creating institutions like these: they aggregate too many functions, which makes them hard to manage and even harder to control.

SANS is a perfect example: merging intelligence with police functions gave birth not just to a rare breed, but to a functional eclecticism which was not simply defective but also paradoxical. The institution had at once too many powers but very low functional/administrative capacity.

Concentrating too much power in a controversial and non-functioning institution speaks license to arbitrary and random acts.

The powers of SANS have been misused and abused from the very beginning. Eventually (that is, inevitably), the government of GERB decided to restructure and redefine the mandate of SANS, stripping it off of its investigative and mainly, police functions, and has thus managed to contain the intra-institutional chaos.

Among the reasons given for shrinking the scope of powers of SANS in 2009 the most important were the accusations that this super-institution has itself turned into an instrument of organized crime. The allegations were followed by the arrest of a chief advisor to the director of SANS for allegedly [participating] in an organized crime group. Regardless of the fact that these allegations were not supported by enough evidence and will probably fail in a court of justice, one key fact has remained: the institution deemed the eliminator of high-level corruption crumbled under the accusations that it itself is a breeding ground of corruption and illegitimate spending of taxpayers

money, that it has been infiltrated, at all levels, by criminal elements.

This scenario may not transpire as described, but corruption in the broad sense of institutional failing has certainly spread to all levels inside SANS. The principal issue in this case is the approach itself: to reduce corruption in the state a new institution is invested with extraordinary powers, whereas this act itself increases the corruption risk. Apart from this, another question is nagging: is this a case of implosion by capturing the institution from the inside and subjecting it to criminal undertakings, or a problem of state failure, in the sense of isolated lack of control, management failure, abuse of power by the police, etc. Either way, the corruptibility of the already corrupted state bodies and state powers is thus expanded. In hindsight, there is no doubt that SANS is more than another failed attempt to curb corruption; its own excessive powers spell risks for more corruption.

The Commission for establishing of property acquired from criminal activity (CEPACA), was created five years ago, with a similar mandate and mission. So far it has not been able to fulfill its mission and tasks, and the criminal property established by the commission is in the range of 6-7 million leva, a negligibly small amount which cannot be considered an effective tool in the fight against crime.

According to GERB and the Minister of justice, the lack of effectiveness is due to the legal provisions, which stipulate conviction-based asset forfeiture. Critics of the current legislation argue that this soft version of confiscation has to be replaced by a more authentic civil asset forfeiture, which is seen as the rationale behind such legislation to begin with. In the case of civil asset confiscation, there is no requirement for a conviction in force. The issue is to what extent the forfeiture injunctions should depend on a successful court verdict. This is why the ruling party prepared a new bill to usher in non-conviction based asset forfeiture. The bill failed at first reading in the national assembly, but it is likely to be approved the second time around.

Here we find another paradox: while strictly tied to the penal procedure, confiscation simply duplicates a function of the prosecution. This argument has given rise to many criticisms, namely, that both the current law and the administration called to implement it are nothing but unnecessary spending of the tax payers' money. In other words, in its current constitution, CEPACA has not only failed to carry out its mission, it is simply not needed as a body. The alternative, as stipulated in the new bill, will suddenly invest it with too much power and grant it too much independence from the prosecution. It will become possible to order asset forfeiture without enough evidence for criminal activity but simply based on the circumstance of having assets over the legal threshold of 150,000 leva (whereas so far this threshold was 60 000 leva).

In this case, approximately 20-25% of the Bulgarian families may become the target of the law (according to a survey of the Open Society Institute of November, 2010). Eliminating the requirement for an effective conviction will give CEPACA almost a free reign to target, unrestrictedly, any individual citizen, families or groups. Inevitably, this non-traditional method to fight corruption and organized crime will stand the risk of more corruption inside the state. In the end, the idea for a new body of this type faces the dilemma of either being ineffective and redundant, or of working under heavy corruption risk, entailed in the very notion of having a powerbroker of such magnitude, equal to its own task.

The third novelty in the line of institutional new breeds is the specialized court which will handle organized crime and corruption cases. This was a project of GERB, strongly supported by the embassies of several European countries. Such courts are not an ordinary practice; typically, they are established in extraordinary circumstances, which are not present in Bulgaria at the moment. Despite the delay, it is expected the new court to start functioning in the beginning of 2012. Once again, we face up a paradox.

If the court is "specialized" simply because its personnel is better prepared, there is really no need to set up a new structure; the Sofia City Court, for instance, has the capacity to try high-profile cases of this type and has in the past successfully done so. Not to mention the option of improving the qualification and skills of the judges in Sofia City Court. The reason for this new specialized institution is different.

Provisionally, it seems that the government's secret hope was to be able to influence the new court, in ways that have so far been impossible with the traditional court system. We are speculating here, but the principal concerns stay: either the new specialized court is not needed or it is created to function relatively independently from the pre-trial phase, which has proven to be the weakest link of the prosecution so far. Regardless of what lies hidden in the conception for the new specialized bodies, one must assume that it entails an apparent or not so apparent deviation from the standards for impartiality and strict adherence to the rule of law of the traditional institutions of the judicial.

Whatever the case, it is inadmissible to use the creation of new bodies to hide the inability to improve the effectiveness of the police and prosecution in tackling organized crime and corruption.

Otherwise, we will fall in the trap of an indefinite institutional spillover, duplicating any existing institution, including even the mother of them all, that is, the National Assembly...

Let us mention the last of the new breeds: the national institution for the fight of corruption with the funny name BORKOR. Since it is not quite clear, as yet, what will be its mandate, I will stick here to what has been released publicly. The institution was built on the model of German such bodies; it will perform analytical and information services, and it will develop specific anti-corruption policies.

Thus described, BORKOR resembles a government think-tank. This itself means a ticket to fail. Simply because the new body is built according to a German model does not guarantee its success on Bulgarian turf; such body may indeed be successful in a well-organized western European country, where everyone is interested in reducing corruption to a minimum.

Germany is a textbook case for an institutional environment resistant to a very high extent to any form of corruption, which guarantees the successful work of an anti-corruption body as described. In Bulgaria we see the flip side of the coin; here, institutional corruption is very high, and the business, politics, and crime are intertwined for mutual reinforcement and gain. This vicious circle of political interaction dominates the public space in Bulgaria, Romania and other countries in SEE.

If I am right in my claim, then again we are facing an impasse: whether the new government think-tank will survive as a harmless, useless and unneeded structure, or, the other way around, it will assume some specific functions – executive, police, investigative, intelligence, etc. In case the latter transpires, then the new body faces the same challenge of increased corruption risk, as described above.

Let me conclude with the following observations concerning the four cases presented here:

First, any government enlargement contradicts the intrinsic for the national state functional simplicity and precaution in breeding more institutions; I would even go as far as claiming that this is in principle (inevitably), a hidden accumulation of conditions enabling corruption.

Second, the new institutions are created to duplicate or to circumvent the traditional ineffective institutions, but any such policy will by default produce more of the same, an institutional chaos that will simply lead to more corruption practices inside the institutional system.

Third, any non-traditional practice or office, engaged in implementing the state penal policy, raises questions concerning the oversight of that office, which again opens the gates wide for potential corruption inside.

Fourth, in all of the cases discussed above, noticeable is the possibility of exerting influence over the penal procedures; this generates an environment of inequality and abuse of power, and, ultimately, of various forms of corruption.

Fifth, the spillover effect of more and more administrative systems generates risks for their inside takeover (or, “hacking”) by illegitimate, unknown or openly criminal elements.

These five points reveal a common structural paradox that I will call a reflexive institutional paradox. It concerns directly the policies related to building institutional capacity, needed to overcome the vicious circles of corruption. In what was described above, we see a case of quantitative enlargement of institutional systems and policies for extensive increase of capacity. The paradox here is that the more a given institutional system, which we assume is corrupt, is strengthened extensively (by building up its institutional capacity), the more its structure becomes rigid and its own corruptibility capacity expands. What is more, the “tipping point” is exactly the moment of adding more power in the hope to overcome the existing corruption forces.

In such situation, all efforts must go to breaking out of the cycle, instead of adding more institutional “pounds” on top of a crumbling system, already weakened by corruption. What is needed is a bold decision-making, resolute and inventive.

What is needed is a new type of solution, not more of the same. In the overall case, within the limits of the modern constitutional state, that means fixing some fundamental elements of the institutional structure. Such changes though cannot be done following the tried and true, rather sluggish and seemingly safe pattern of multiplying the institutions. What is required is authentic political (and policy) decisions, which are typically outside of the mainstream inertia of the corrupt institutional environment; they interrupt its functional linear continuum and

reproducibility, and bring about genuine transformation in the basic parameters of that same environment.

Only such decisions will reach to the core of the issue, and no, I do not mean the cliché for strong “political will“, which is itself only a meaningless tautology, but a systematic work directed at a concrete segment of the institutional web.

In the case of Bulgaria, there are several main lines for streamlining the policies for the reduction of organized crime and corruption. These are as follows:

First, constitutional reform, which should restructure the judicial power, removing the prosecution from it, and delegating its oversight to the executive and to the Parliament.

Second, a follow-up sweeping reform of the prosecution, with the clear goal that it should acquire more aggressive functions, delimited only by the penal procedural rules.

Third, all of the above described institutional novelties should be tied to this reform, conceived in this perspective and built as an added asset of the new prosecution.

If we want a radical and far-reaching change in the institutional environment, not simply another cameo appearance, this is the policy we must follow. Any other approaches are simply palliative and bound to fail. Of course, there are no guarantees that the policy proposed here will work out (especially if it is carried out half-way). In the worst case scenario, when every attempt at change has failed, Bulgaria will face the following dilemma: either continue to fall in its own swamp, dragging on the bottom of the EU or have these changes implemented by some type of educated dictatorship. Any government that calls itself responsible must come to terms with this dilemma and once and for all put an end to the pretense of reforming the penal policy system.