

The Committee on Financial Services

Hearing “Capital Loss, Corruption, and the Role of Western Financial Institutions”

May 19, 2009, 10 AM

- Monica Macovei

Measuring corruption.

Surveys on individuals', groups' and companies' experience and perception have been regularly used to measure corruption. Corruption Perception Index, Global Corruption Barometer, World Bank Doing Business Reports, Freedom House - Nations in Transition are among the best known instruments.

In addition to measuring the perception of the public or the business communities, corruption can be identified and its dimension measured by scrutinizing those areas with high potential or risk of corruption, such as: (i) privatizations and public procurement (some of the indicators could be: the avoidance of public tenders and the direct attribution of contracts, a price much higher than the market price or the highly imbalanced parties' contractual duties and rights); (ii) the transfer/sale of real estate property from the public property to the private property or the public/private property partnerships (one indicator of possible corruption/fraud in this area being a grossly sub-evaluated price or value for the public property to be transferred and/or the existence of conflict of interest); (iii) the level of transparency and the control over the public spending (a poor transparency and a superficial and late control are possible signals raising questions); (iv) the funding of political parties and electoral campaigns (where the control is not sound and the sanctions are not deterring); (v) the control of the public officials' declarations of assets and statements of interests (where such control fails to be sound and/or impartial), or; (vi) the existence of the so called „laws with destination”.

Sources of corruption

The sources of corruption I have indentified are strongly linked with the areas identified as having a high risk of corruption: illegal behavior in privatizations, public procurement and where transferring the state/public property by the central or local administration or other public bodies; incomplete transparency of the public spending and lack of control and accountability; a poor legal and institutional framework for the financing of political parties and electoral campaign; the failure to institute and exercise a sound control over the declarations of assets of the public officials and civil servants and the lack of deterring sanctions where unjustified assets are proved; the existence and the failure to sanction the conflict of interest and the incompatibilities; poor, not-unified and unequal enforcement of legal provisions; instable legal and institutional framework, etc. Under this item, I would like to refer to the finding of the UNODC 2008 report (focusing on the organized crime in Balkans), on the “wide-spread and enduring collusion between politics, business and organized crime. To break this nexus, fighting corruption should be priority number one”.

As regards the circumstances which, taken together, favored corruption, in particular the political corruption (corruption influencing the decision-making process and actors), in some of the post communist countries, I would refer to: the dimension of the state property to be transferred from the state to private hands during the transition to the market economy; the need of building or re-building the infrastructure, involving large amounts of funds (first two seen as “unique” opportunities; the poor and changing legal framework on public procurement; the weak and in-transition law enforcement and judiciary at the beginning of 1990s; the low level of accountability in fragile democracies.

Problems encountered in discovering, disclosing and deterring corruption in Romania

Corruption has been investigated and prosecuted by the Romanian law enforcement in particular since 2005/2006, by the Anti-Corruption National Directorate, a law enforcement unit with jurisdiction over medium and high level corruption and fraud, formed of specialized and trained prosecutors and police, who also benefited of technical support from the US State Department. Approximately 20 ministers and parliamentarians (“sitting” and “former” at the time of the prosecution) were indicted for corruption or fraud in the last three years, along with many other high officials in the central and local administration, police or members of the judiciary, as well as heads and administrators of companies. These prosecutions have been a premiere in Romania.

However, deterring sanctions did not come. Once before the courts, the high political corruption cases in particular have not received solutions on the merits. Instead, they have been postponed for months and even years, for a variety of reasons: (i) the reluctance of some judges to take decisions on the merits in such cases (although their independence is fully guaranteed, for instance they all enjoy life tenure, and can only be disciplined by a judicial council formed of their peers); (ii) the 2007 intervention of the Constitutional Court which decided, for instance, that the rules of procedural immunity apply to former ministers as well as ministers in office¹, and stated the retroactive application of this ruling; as a result, some of the court cases returned to the law enforcement for missing the decision on the immunity lifting; (iii) while in those cases where these approvals fall into the jurisdiction of the President of the country, they were issued quite rapidly, in the cases where the Parliament had to decide (for former ministers but current MPs), it took long periods of time, sometimes over a year, for a decision to be taken; in addition, many MPs claimed they had to analyze all the “evidence”, acting like courts; (iv) in the corruption cases where the courts convicted the defendants, 80% of the sentences have been suspended prison sentences, indicating that corruption is not seen by the judiciary as a serious offence.

In parallel to the law enforcement investigations in high level political corruption cases, the legal stability and efficiency of the anti-corruption (and anti-crime in general) framework was endangered by a Chamber of Deputies’ 2007 decision which amended, at its own initiative, the criminal procedure code, introducing, for instance, the rule that interceptions could only be possible after the person under investigation had been informed that an investigation takes place. This and other provisions constituting strong obstacles against criminal investigations (and international police and judicial cooperation in cross border organized crime) did not enter into force following the President’s decision to return the law to the Parliament and request its re-examination. Among others, the then US Ambassador and the European Commission also sent public signals on the danger of adopting such provisions which would at least hamper the efficiency of international cooperation in criminal cases. Those provisions are not in force, but the attempt to take away important instruments in the fight against corruption and organized crime was clear.

At present, new drafts of the criminal and criminal procedural codes are under debate.

¹ As found by a 2007 Peer Review Report issued by an independent expert in the context of the Cooperation and Verification Mechanism established jointly with the European Commission for the post EU accession period for Romania, “this decision does not seem very logical. The procedural immunity for ministers derives from the need to protect ministers in office against criminal investigation based upon politically motivated complaints and to avoid that political decision-making at the highest level would be influenced in this way. Once a minister is no longer in office, political decision-making can no longer be influenced in this manner, so there is no longer any need for procedural immunity.”

Pressures/dangers faced “on the ground” by the anti-corruption advocates and watchdogs

While there have not been examples of people being in “danger”, I could point out to the pressure exercised, through public statements or attempts to change the legal and institutional anti-corruption framework by the politicians under investigation and their party colleagues. However, I have to say that I find this predictable, as well as being a proof of the seriousness and partially successful attempt to fight corruption starting from the top.

If I look at myself as an “anti-corruption advocate” (and I do), I would say that I was fired - through a reshuffle of the Government, eliminating the party which supported me in the position of justice minister- following the anti-corruption measures I have adopted and promoted. This took place shortly after January 1st, 2007, when Romania joined the European Union due, among others, to the results (prosecutions and legislation) in the fight against high level corruption.

The Slovenian Commission for Prevention of Corruption, entrusted with control of conflicts of interests of elected politicians, was saved by the Constitutional Court, as MPs after accession promptly voted for its closing down. In Latvia, a success story for anticorruption in the EU accession years, the public had to rally to defend the anticorruption agency head from being fired by the Prime Minister. However, the second attempt, in 2008, was successful.

To what extent did the change of regime in Romania represent a true change from a corrupt regime to a regime with higher ethical standards?

If one refers to the change of regime in 1989, the changes are tremendous, even if obtained through a long transition process and even if we are still struggling for real and profound reforms in areas such as health, education or judicial systems. Among others, the independent judiciary (even if still lacking efficiency, predictability and sometimes integrity), investigative media, civil society, have all contributed in time to disseminating higher ethical standards. However, the transition favored and produced corruption, in the circumstance I explained previously. I believe that the main challenge ahead is the reform of the political class and the establishment of a solid good governance.

Does growing corruption in the political elite transfer to changes in the ethical climate in society as a whole?

The brief answer would be yes, in particular under the circumstances where the society does not see a quick process and deterring sanctions for corruption. In addition, the feeling shared by many that, for instance, quality and timely services need more than a correct request is not helping to reach a general ethical climate. Once again, I believe that the challenge we have for building a sustainable ethical climate is the reform of a large part of the political class.