

SEMINAR ON “HIGH LEVEL CORRUPTION AND JUDICIAL SANCTIONS”

BUCHAREST, NOVEMBER 19, 2007

SUMMARY OF DISCUSSIONS

Introduction

This report summarizes participants’ discussions during the seminar on “High Level Corruption and Judicial Sanctions” that took place on November 19, 2007 at the Hotel Novotel in Bucharest. The seminar was co-sponsored by ABA/CEELI with financial support from the Stability Pact Anticorruption Initiative (SPAII) and the Rule of Law Program South East Europe of the Konrad Adenauer Foundation, and involved the participation of the French Embassy in Romania and the National Institute of Magistrates (NIM). Participants included 14 judges from the criminal sections of the Tribunal and Court of Appeal in Bucharest and of the High Court of Cassation and Justice (See Annex I - list of attendees). In addition, representatives of the National Institute for Magistrates and the Superior Council of Magistrates attended the meeting, as observers.

Judge Raluca Moroşanu (Bucharest Court of Appeal) moderated the seminar. Two foreign experts shared their professional experience with the participants: Judge Marie Leclair (French magistrate detailed to the Romanian Ministry of Justice) and Judge Andrea Venegoni (Italian magistrate detailed to the European Anti-Fraud Office/OLAF).

The European Commission had reported in June 2007 that sentences awarded to date in Romania for high level corruption cases “do not have dissuasive effect and fail to fulfill their preventive function”. Drawing on this observation, the one-day seminar format proposed to invite a thoughtful discussion with Romanian practitioners on sentencing practice of corruption cases, rather than to debate the Commission’s comments (See Annex II - excerpt EC Report). Romanian judges were asked to reflect on practical difficulties encountered by Romanian magistrates when dealing with high level corruption cases, on questions of appropriate sanctions and deterrence, and on the overall impact of corruption on the justice system in Romania.

Organizers proposed that three problematic questions be addressed: 1) what obstacles may exist in Romania that prevent vigorous action against high level corruption?; 2) to what extent can dissuasive messages be sent within the Romanian legislative context?; 3) what is the impact of perceived impunity on the credibility of the justice system?

Obstacles preventing vigorous action against high level corruption

Prior to the seminar, attendees were asked to respond to a questionnaire and list the main obstacles to determining guilt or imposing serious sentences, at any stage of the procedure (from law enforcement to prosecution, trial and sentencing). Responses to the questionnaires showed both technical (substantive procedures) and operational (general shortcomings) difficulties that are to be considered when attempting to establish a typology of potential dysfunctions in the area of corruption cases.

These include: overall incoherence of the legislative framework¹; excessive use of constitutionality exceptions and nullities by the defense – a practice which courts are unable to disallow given the absence of criminal procedures sanctions for procedural abuses²; lack

¹ Participants mentioned the multiple and constant amendments to the current criminal procedures and to various laws, such as those governing the activity of DNA and DIICOT.

² Such provisions exist only in civil procedures.

of routine, effective witness protection during trial causing changes in testimonies; lack of documentation for the rejection of defense counsel motions; lack of clear provisions on wiretaps approval and ORNISS clearance³; overlapping jurisdiction between DNA and DIICOT⁴ calling for clear criteria to prioritize substantive jurisdiction; practical difficulties faced by courts when elements of evidence are absent, due to a splitting of cases among separate investigations; scarcity of experienced criminal investigation professionals specialized in financial crime⁵; procedural and operational confusion over the requirement that indictments be approved by the head prosecutor⁶; routinely flawed documentation of "*flagrante delicto*" situations or operations; lack of clear definition of "corruption" offenses in the criminal code.

Sanctions and deterrence

Participants discussed factors that influence differing types of sentences in corruption cases. Most addressed the issue of deterrence in view of the Romanian general principle of 'individualized sanctions', thus challenging the notion and applicability of a national criminal justice policy on corruption in Romania.⁷

The discussions centered on the rationale behind applying suspended sentences in cases of high level corruption. They showed that corruption offenses tend to be viewed as less dangerous to society than other criminal offenses (aggravated theft, violence etc.). Some participants represented that, by the time a corruption case reaches the court (following lengthy investigations), a prison sentence is not justified because the threat to society is no longer imminent. Also, in the process of individualization of the sentence, offenders convicted of corruption often benefit from their social status (they generally belong to the higher social class, have no priors, are employed, have strong family ties, are educated, and can afford good attorneys who can mount a skilful defense). Some judges suggested that a national criminal justice policy in this area would require explicit prohibition of suspended sentences for crimes of corruption, while others stressed that such measure would represent a serious breach of judicial independence.

The question of proportionate and diversified sanctions for corruption offenses was much debated as attendees discussed comparative legislative provisions in other countries (See Annex III⁸). Several expressed reservations about the imposition of fines, because they might nurture public perception that freedom 'can be bought', and facilitate the creation of "risk funds". Attendees did not challenge the appropriateness of seizure of proceeds of crime; but viewed the confiscation of assets (as a sanction) as a problematic procedure in Romania, principally because of the constitutional presumption on the licit acquisition of property⁹.

³ ORNISS (National Registry Office for Classified Information) clearance is required for access to classified documents. Current clearance procedures are ambiguous, and since many judges do not have access to classified data, they must consult with a fellow-judge who has clearance in order to be privy to such information. This practice raises difficulties in the case, creating confusion and delays. A number of Romanian magistrates have commented in separate seminars that, given their oath upon access to the magistracy, clearance should not be required (cf. "Fighting Corruption – A Priority of the Reform Program", final report on five seminars held by ABA/CEELI with sponsorship from SPAI).

⁴ DNA has jurisdiction over high level corruption cases; DIICOT over organized crime. Some cases involve both aspects – for example corruption along with organized money laundering schemes – leading to jurisdictional confusion that requires clarification for purpose of effective prosecution.

⁵ Shortcomings in the indictment are one of the main reasons for which judges use the provisions of art. 332 CPC which stipulate the possibility to send the case back to prosecutors who must then conduct the investigation all over again (except for elements of the investigation that cannot be replicated and which remain valid).

⁶ The courts give a different interpretation to this legal requirement: some interpret this as a simple administrative procedure; others view it as a verification of legality and strength of the case, holding the head prosecutor responsible /accountable for the indictment (as stipulated in art. 264 paragraph (3)).

⁷ According to art. 72 of the Criminal Code, all sentences must be "individualized", taking into account the personal profile of the offender.

⁸ "A comparative review of sentencing practices and norms for crimes of corruption: France, Germany, Hungary, Ireland, United Kingdom and United States", written by ABA-CEELI fellow, Meagan Condrey.

⁹ Art. 44 paragraph 8 of the Romanian Constitution – "Legally acquired assets shall not be confiscated. Legality of acquisition shall be presumed".

The French and Italian magistrates introduced participants to aspects of the criminal law practice on seizure and confiscation of property in France and Italy, and spoke to the gradual legislative improvements consistent with International and European legislation¹⁰. These international and European norms are also applicable to Romania.

- In France, the criminal code was amended in March 2007 in compliance with the EC Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (2005/212/JHA)¹¹ which provides for increased powers of confiscation. Thus, the amendments expanded the possibility to seize the proceeds of any crime sanctioned with more than one year in prison so that, for the more serious offenses¹², assets can be confiscated whether acquired licitly or through crime. Further, the new law stipulates that assets can be confiscated if their origin cannot be substantiated, if the crime resulted in profits for the offender, and if it is sanctioned by prison terms of 5 years or more. Since corruption offenses committed by public officials are punishable in France with more than 10 years in prison, the burden of proof is shifted from the prosecution to the defendant, who must justify the licit origin of the profit in cases when a direct or indirect benefit was visibly obtained. As this mechanism entails an exception to the presumption of innocence, it has to offer guarantees that the sanction for the crime committed is higher than 5 years in prison and that the offender is allowed to offer evidence to rebut charges of alleged illicitness. The same principle of reversed burden of proof applies to cases where the individual has a lifestyle that cannot be explained by declared revenues, especially when he/she consorts regularly with offenders (drug traffickers etc.). When applying these procedures, French courts must observe specific international and European guidelines, encourage the specialization of judges in this type of cases, and permit access to relevant information (fiscal, land registries etc.).
- In Italy, criminal laws were also influenced over the past 10 years by anti-corruption international and European developments. Currently, seizure of assets is used as a provisional measure, in order to prevent recurrence or perpetration of crime, guarantee final confiscation or payment of restitution¹³ and ensure that elements related to the commission of the crime are preserved as evidence. The Italian law makes a distinction between the "price", "result" and "profit" of the crime. For instance, in a corruption case, if a public official asks for a bribe of 50.000 €, but obtains only 10.000 € and shares half of this amount with another person, the "price" of the crime is 50.000 €, the "result" is 10.000 € and the "profit" for each is 5.000 €. Even though the law allows the temporary seizure of either the profit or the price of the crime (as previously defined), the Italian Supreme Court ruled in some cases that temporary seizure is possible only within the limits of the obtained profit, even if the price of the crime was higher. Confiscation, on the other hand, is regarded as a definitive measure imposed when the court judgment becomes final. The term "corruption" is defined in a narrow sense as facilitating or promising a benefit to a public official in exchange for a favour (bribery) and in a broad sense as a set of acts resulting in damages to the public budget of the State or of the EU (including misappropriation/misuse of public money, fraud etc.). For this type of crimes, aside from prison sentences, alternative sanctions exist, such as prohibition to accede to official positions (either temporary, if the person is sentenced to more than 3 years in prison or indefinitely, if the person is sentenced to more than 5 years in prison); apply for business management positions; and engage in any type of business related to the public administration. In Italy, as in most European law

¹⁰ United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime (1990); United Nations Convention against Transnational Organized Crime (2000); United Nations Convention against Corruption (2003); Council of Europe Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (February 24, 2005).

¹¹ "Art. 2 - Each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds".

¹² The category of "serious crime" includes: drug crimes, traffic in person, organized crime, money laundering.

¹³ This kind of seizure is allowed only after the prosecutor has filed the indictment, NOT during the pre-trial investigation.

systems, the burden of proof is generally on the prosecution (if only to show that the seized items belong to the suspect); the reversal of the burden of proof is possible in some limited cases, such as organized crime, money laundering etc., when confiscation of the profits may be ordered. With regard to legal entities, sanctions can involve confiscation of shares or company assets, unless the company can demonstrate prudent management.

Impunity and credibility of the justice system

The issue of impunity was addressed in view of the overall negative impact that corruption has on a country, for it affects the credibility of the political system and the transparency of the national economy (driving away honest competitors and potential foreign investors) and facilitates the spreading of illegal practices.

Participants indicated that according to current Romanian legislative framework judges can only reach a decision based on submitted evidence; and when the evidence does not substantiate compellingly a finding of guilt or harsh sentencing, judges must acquit or impose suspended sentences. Several opined that, despite persistent pressure from media and civil society, the credibility of the justice system requires clarity and precision of the arguments formulated in the court decisions on complex cases of corruption.

Conclusions

The session concluded with several remarks on possible future follow-ups to the issue of effective sanctioning of high-level corruption. In the short term, given current efforts to draft new criminal codes (both substantive and procedural), it was agreed that judges associations should be involved in regular discussions of the proposed changes, and that provisions on seizure and confiscation of proceeds of crime as well as on delimitation of jurisdiction (especially DNA and DIICOT) should be carefully analyzed. The desirability for judges and prosecutors to work together was also emphasized, because it can help foster powerful, consistent and dissuasive messages to both the offenders and the general public.

Other important aspects to be considered in the long term are the need for harmonization of the legislation with international and European provisions that prescribe extended tools for fighting corruption effectively and efficiently¹⁴ as well as for an increased specialization of judges, prosecutors and police to handle complex crime affiliated with corruption offenses.

¹⁴ CEELI distributed to the participants a report drafted in 2007 by prof. Guillermo Jorge, detailing recent international developments in the area of criminal law for prosecuting and/or preventing corruption crimes. The report includes a review of how other countries have approached the prosecution of such crimes and implemented new legal tools and strategies such as the reversal of the burden of proof (See Annex IV - "The Romanian Legal Framework on Illicit Enrichment").