

Transparency and the fight against corruption

Laura Stefan

In Europe, governmental transparency has been intrinsically connected with anticorruption policies, governmental accountability and the effective exercise of human rights.

The Council of Europe anticorruption body – **GRECO** – has adopted numerous reports featuring transparency recommendations to member states. Transparency, a sound enforcement mechanism and robust awareness at the level of the society complete a puzzle of integrity at national level. In particular, transparency recommendations covered the following topics:

- **Free access to public information** held by the state is seen as a pre-requisite to accountable government. All information held by entities using public funds should be available to the public without the need to prove “a direct and legitimate interest”. Exceptions should be clearly regulated and strictly interpreted – usually they refer to classified information or personal data.
Expert Forum has monitored public spending from the national budget for local infrastructure and was able to document the clientelistic allocation of funds to local governments throughout various political cycles: <https://expertforum.ro/harta-clientelism//>. We have also scrutinized which companies benefit from contracts funded by EU funds and correlated this data with data regarding donations to political parties and ownership information. We were able to show that the higher the political connections, the higher was the likelihood of access to EU funds: <https://expertforum.ro/banii-si-politica/>
- **Transparency and fairness in human resource management** in the public sector is another constant recommendation GRECO. This ensures that the best candidates enter and are promoted in the public sector reducing nepotism and cronyism. In the fields of the law-enforcement, the prosecution and the judiciary integrity of the human resource management systems is directly connected to the principles of independent judiciary and fair trial.
- **Transparent political financing** is essential in ensuring that the public knows who are the stakeholders behind a political party or movement. This offers an additional lens to scrutinize public policies promoted by political players and allows the electorate to make an informed decision on the election day. Timely publication of information regarding incomes and expenditures also exposes potential avenues built to circumvent the existing legislation, it raises red flags and it helps target more precisely the real problems. Expert Forum has collected data on political financing and published it online on www.banipartide.ro.
- **Conflict of interests’ management** is essential to restoring trust in the government and to build an integer public sector. Publishing assets and interests declarations

of public officials and setting up independent control mechanisms for the information provided, as well as introducing mechanisms for managing conflicts of interests when they arise are elements of a good public policy in this field. In Romania the National Integrity Agency implements PREVENT which is a system that spots potential conflict of interests in procurement procedures early on in the process, allowing for the head of the contracting agency to eliminate the problem before the procedure continues.

- **Whistleblowers protection**
- **Reducing** the scope of **immunities** against prosecution for public officials

The **European Union** has various initiatives in the field of transparency and public integrity. In **2014** the European Commission has published the first **EU Anticorruption report** and in **2020** the first **Rule of Law report** covering - national justice systems, anti-corruption frameworks, media pluralism and freedom, and other institutional issues related to the checks and balances essential to an effective system of democratic governance. The 2020 Rule of law report also covers the member states response to the COVID 19 pandemic which was labeled by the EC a stress test for rule of law resilience.

The **Directive on whistleblowers** was also adopted at EU level and is awaiting transposition in the member states by December 2021. For the first time protection is awarded not only to whistleblowers from the public sector, but also to the ones from the private sector with a very wide definition persons reporting breaches (not only employees, but also interns, candidates, self-employed, employees of a supplier, former employees, business partners or even third parties who are closely connected to a reporter such as colleagues or family members. It protects whistleblowers against retaliation and provides for the establishment of reporting channels.

The EU is also promoting open data policies and digitalization and it has adopted the **Directive on open data and the re-use of public sector information** introduces the concepts of on high-value data sets and pro-active publication of information. This presumes that at national level the culture of transparency is engrained in the social fabric and that now we can take further steps to ensure that open data acts as an engine to good governance and offers opportunities for development.

In terms of good governance, the **COVID 19 pandemic** has shown the limitations of the national responses to crisis and publicly available data on governmental actions was key to assessing the public policies implemented to counter the pandemic. Unfortunately, the practice of EU member states in providing data has been uneven.

From the economic development perspective, the Directive defines *‘High-value datasets’ means documents the re-use of which is associated with important benefits for society, the environment and the economy, in particular because of their suitability for the creation of value-added services, applications and new, high-quality and decent jobs, and of the number of potential beneficiaries of the value-added services and applications based on those datasets’*. Those datasets should be made available free of charge, in machine-readable

format and via APIs, and, where relevant, as a bulk download. All these are still work in progress at the EU level - in a study¹ produced in July 2020 the following recommendations are made:

- “1. Create intrinsic and extrinsic incentives, like additional resources, for data providers to enable and foster their active engagement in the process of specifying potential high-value datasets.*
- 2. Set clear expectations around roles, responsibilities, and resources relevant for data providers.*
- 3. Standardise HVDs assessment and specifications across borders.*
- 4. Provide expert guidance that supports a consistent process and is aware of differences in language, culture, politics, perceptions of impact.*
- 5. Work in iterative rounds to allow incremental progress and different stakeholders to reach alignment and mutual consent.*
- 6. Beyond data providers, experts with sector / industry / subject-specific re-user experience must be involved to reach a robust definition of potential HVDs and their specifications.”*

The sanctioning policy during the state of emergency linked with the COVID 19 pandemic (Expert Forum case study)

Expert Forum analysed the legal framework regarding the application of sanctions to individuals or legal entities in breach of legal obligations during the state of emergency. Furthermore, we have requested information relating to the penalties imposed from the Romanian Police and from the Gendarmerie, and where the information was incomplete, we have initiated court actions on the basis of FOIA. We have asked for the following data: the value and number of civil penalties imposed, broken down per (a) the period when they were imposed: 15-31 March 2020, 1-15 April 2020, 15-21 April 2020; (b) the location where they were imposed (rural and urban); (c) type of violations of restrictions enforced by means of the military ordinances for which they were imposed. We have also asked how many penalties were fines and how many warnings.

1. The legal frame governing the state of emergency is obsolete and not adjusted to the medical crises. The Constitutional Court² invalidated, in April 2020, the legal provisions that allowed for the application of penalties in a state of emergency, because the legal act did not provide sufficient guarantees for accessibility, clarity, accuracy, and predictability. In the absence of such guarantees, the enforcement officers are allowed to freely select penalties from a too wide margin of discretion. The data we collected and shows that
2. The Police only offered partial data stating that it is impossible for them to broke down the aggregated figures into fines and warnings, that it does not hold data on the location where the penalty was imposed (rural or urban) and the reasons why the penalty was imposed. This is the only way in which we could see whether the penalties were indeed imposed predominantly where violations were serious or if they were rather directed

¹ <https://op.europa.eu/en/publication-detail/-/publication/5b20f52a-db7e-11ea-adf7-01aa75ed71a1/language-en>

² Decision no. 152/2020

against vulnerable groups, whether warnings and fines depended on the severity of offences, whether the various law-enforcers imposed fines around the same average value, or if there were discrepancies. The replies received from the Romanian Police reveal that no such data are collected in the day-to-day practice, at this level of detail, unlike the Romanian Gendarmerie, from which we received broken-down data for all counties. Where we could acquire comparative data after court proceedings, we were able to conduct an analysis of the manner in which the Police and Gendarmerie acted at the level of the same county.

3. We have gone to court against the Police under the 20 years old FOIA and now have 42 trials with quasi-identical object throughout the country. The difference of opinion among the courts of law is major (before the court of first instance, EFOR won 21 cases, and the Police 20 cases; in the appeal, EFOR won 8 cases, and the Police 12 cases – the other cases are still pending). We even have diverging solutions at the level of the same appeal court, from different panels of judges. The above data clearly reveal that there are various interpretations of Law No. 544/2001 not only at the level of the administration – as already illustrated, two law enforcement authorities (the Police and the Gendarmerie) have different outlooks on the access to information – but, moreover, the differences of opinion extend to the court system, thus generating an environment of major legal uncertainty.

Conclusion

The culture of transparency is not something that appears overnight, but a heavy-load endeavor that takes constant long-term effort from all stakeholders. While international standards help in raising the profile of transparency at national level, these standards need to be internalized and made part of every-day processes if they are to have real impact. All stakeholders need to understand and appreciate the benefits of transparency for the society in order for the transparency culture to settle in. Missing any one of these ingredients the reversibility remains a serious threat.

Last but not least digitalization is not a panacea. Digitalizing bad administrative procedures will not make the system work better or less permissive to misconduct and corruption. Defining the problems we are attempting to solve properly, designing streamlined administrative procedures to address it and making sure each player understand its roles and responsibilities should come first.