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GOOD GOVERNANCE AGENDA FOR SOUTHEAST EUROPE: THE ROLE OF CIVIL SOCIETY, NATIONAL AND EUROPEAN INSTITUTIONS

Policy Brief No. 2, November 2014

Introduction

In November 2014, the Southeast Leadership for Development and Integrity (SELDI) initiative presented its flagship *Regional Anti-Corruption Report Anti-Corruption Reloaded: Assessment of Southeast Europe*. Given the major significance of the good governance and anti-corruption issue in Southeast Europe and the prospects of the countries from the region of joining the EU, the SELDI initiative aims to contribute to promoting the civil society-state dialogue in identifying effective counter-measures and possibilities for future collaboration among all stakeholders.

Western Balkans citizens and stakeholders have seen the enlargement "freeze" as a drag on motivation and drive for further reforms. In that respect, the report charts the next steps in tackling one of the worst outstanding challenges in the region – high level political corruption and state capture, and encourages the countries not to lose the gained momentum of implementing the EU membership recommendations, as well as their will for reforms in the next five years.

KEY POINTS

➢ Administrative corruption is a mass phenomenon in SEE countries.

➢ There is compromised autonomy of the oversight and law enforcement bodies.

➢ Anticorruption reforms are not consolidated, corruption among elected politicians and judges remains mostly unchecked, and enforcement of legislation is haphazard.

➢ There is a shift of attention from petty to grand corruption, and criminalisation of a wider array of abuses of public office.

➢ The role of civil society is crucial to lead the public pressure for change. NGOs are, however, still a long way from translating public demands into effective policies.

➢ *SELDI's Regional Anti-corruption Report* provides three key recommendations:

   o Effective prosecution of corrupt high-level politicians and senior civil servants.

   o Independent corruption and anti-corruption monitoring mechanism needs to be introduced on national and regional level.

   o Critical sectors with high corruption and state-capture risks, such as the energy sector, should be addressed with priority.

![CSD — Center for the Study of Democracy]

1. Corruption Pressure and Involvement

The *Regional Anti-corruption Report* underlines that despite some important achievements – mostly with respect to the stabilisation of democratic institutions, the adoption of laws in key anticorruption areas, a reduction in petty bribery and growing public intolerance of corruption in the region – anticorruption and good governance reforms are not consolidated, corruption among elected politicians and judges seems unchecked, and the enforcement of anticorruption legislation is haphazard. The experience with corruption (in other words, the involvement of citizens in corruption transactions) in SEE is very high. Even in Turkey and Croatia, where levels of administrative corruption are lowest in the region, about 8-9% of the population reports having given a bribe in the last year. Such levels of experience with corruption are well beyond the average levels registered by the Eurobarometer surveys in the EU. This shows that administrative **corruption is a mass phenomenon** in SEE countries, and cannot be confined to single cases of corrupt officials.

**Figure 1. Corruption pressure and involvement in corruption**
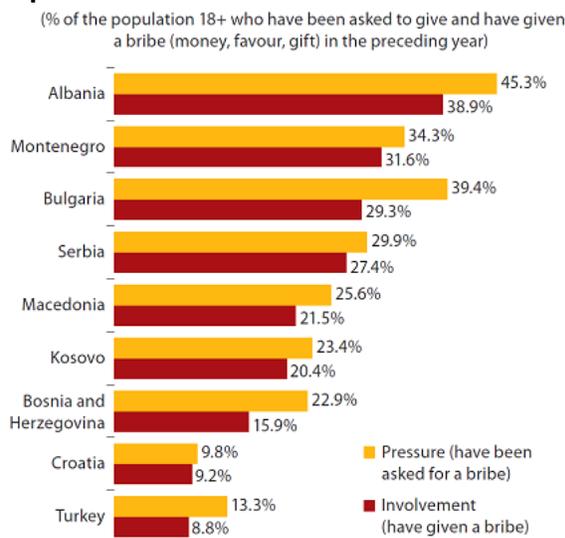
Source: Regional Anticorruption Report/SELDI Corruption Monitoring System, 2014.

Corruption pressure from officials is the main factor that influences the level of corruption involvement. Most of the countries where both involvement and pressure are high are also characterised by **low resilience to corruption pressure** (most of the respondents who were asked for a bribe gave one). Although resilience could not be considered the main factor to reduce involvement in corruption, it reflects the prevailing social attitudes to integrity and is largely a result of the efforts of civil society and the authorities in increasing anticorruption awareness. In this respect the role of civil society is crucial as it is in a position to lead the public pressure for change.

As regards **policy priorities**, there have been two significant changes in the approach to anticorruption – a shift of attention from petty (that of traffic police or public sector doctors) to grand corruption (that of members of parliament or ministers), and criminalisation of a wider array of abuses of public office. Achieving impact in terms of punishing grand corruption though remains limited at best. The key challenge for anticorruption policies in the region is to close the **implementation gap,** and keep up with the shifting manifestations and forms of corruption while maintaining regulatory stability and avoiding overwhelming the judiciary with frequent changes.

Figure 2. Resilience to corruption pressure
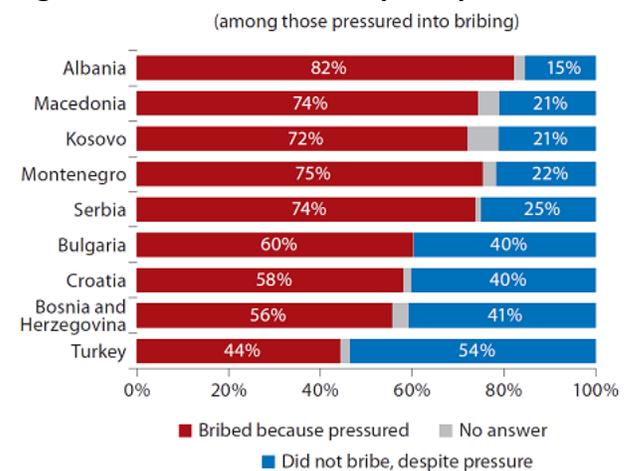
Source: SELDI Corruption Monitoring System, 2014.

The findings of SELDI monitoring emphasise the **significance of public support for the success of anticorruption policies.** Trust by the public in government and the effectiveness of policy are joined in a kind of virtuous circle: higher shares of people who are optimistic about the feasibility of anticorruption success are correlated with lower corruption levels. Conversely, more prevalent corruption goes hand in hand with increased pessimism about the prospects of anticorruption.

Figure 3. Feasibility to policy responses to corruption: public estimates
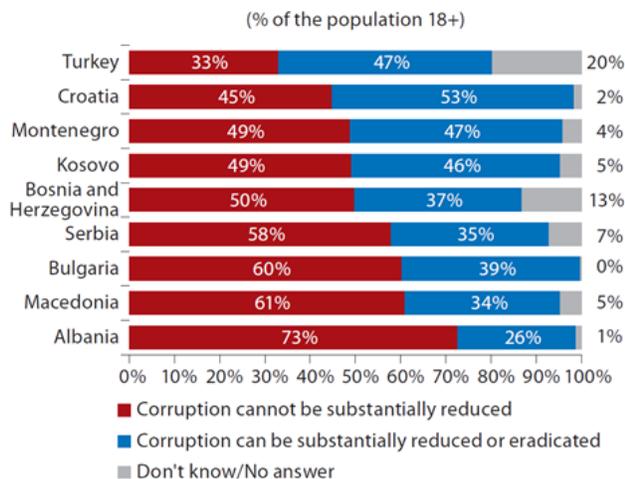
Source: SELDI Corruption Monitoring System, 2014.

2. Institutional Practice and Enforcement of the Law

Overall, the SELDI countries have adopted the better part – more importantly the logic and approach – of international anticorruption standards in their national legislations. Statutory quality, however, continues to be a problem. **Frequent and inconsistent changes to laws** have resulted in procedural and statutory complexity and contradictory interpretation by courts.

A shortcoming that is common to all SELDI countries is the **compromised autonomy of the various oversight and law enforcement bodies**. Some degree of interference by elected politicians – members of parliament or government ministers – in the work of the civil service is typical. Further, none of the SELDI countries has an adequately functioning complaints management mechanism in the public administration. Most have instituted an anticorruption body that is expected to receive complaints from the public. Another deficiency that is shared is the shortage of reliable and publicly accessible data on the performance of government institutions, especially as relates to anticorruption. Information and statistics are either not collected, not available to the public, or gathered so haphazardly as not to allow monitoring and analysis.

A key issue related to the design of **specialised national anticorruption institutions** in the region is how to combine preventive and repressive functions. Typically, the SELDI countries[1] have tried to have their anticorruption institutions do both, although repression is by far the lesser aspect of their work. Most of the tasks of these bodies are related to some form of supervision and control, usually of the national anticorruption strategies and there is little evidence that they have had any significant influence on the governments' legislative agenda. The establishment and functioning of such institutions has been plagued by a number of difficulties:

- High as corruption might have been on the governments' agendas, it was not feasible to create institutions with extraordinary powers that would somehow affect the established balance of power. The typical

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[1] The *Regional Anti-Corruption Report* includes analysis of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo, Republic of Macedonia, Montenegro, Serbia and Turkey.

compromise is for these agencies to be attached to the executive branch and given supervisory powers which, however, are usually limited to requiring other government agencies to report on the implementation of the anticorruption tasks assigned to them.

- Such agencies had to be careful not to duplicate powers already conferred to other oversight bodies (e.g. national audit institutions or law enforcement agencies).
- Most were provided with limited institutional capacity – budget, personnel – despite declared intentions to the opposite.

The **anticorruption role of law enforcement agencies** in the region needs to be understood against the background of the constantly expanding range of incriminated corruption-related practices which risks channelling a disproportionate number of cases to law enforcement and the prosecution. The anticorruption role of law enforcement agencies in Southeast Europe is further compromised by their **high vulnerability to corruption, especially by organised crime**. The police forces in most SELDI countries have units specialising in countering organised crime operations; these units are also expected to work on anticorruption. Accommodating these two functions into one body is warranted mostly by the use of corruption by organized crime but also by the need for special investigative methods in uncovering sophisticated corruption schemes – expertise that is usually vested in the antiorganised crime departments. These units are, however, typically embedded in the larger police force or the ministries of interior which deprive them of the institutional autonomy that is required for a specialised anticorruption institution.

As regards the **legislature**, parliaments in the region do not rank high in the public trust and this unenviable position is not without its reasons. Codes of ethical behaviour are rare and unenforced; lobbying regulation is even rarer; only recently have procedures for lifting immunity from prosecution started to be introduced, albeit timidly; wherever there is an anticorruption body in parliament, it is typically to supervise some executive agency, rather than deal with corruption among members. An issue of significant concern in the SELDI countries is the financing of political parties and electoral campaigns.

3. The Judiciary in Anticorruption

In Southeast Europe the strong focus on ensuring judicial independence has not been balanced by equally strong requirements for accountability. Without adequate checks and balances judicial self-governance has spiralled out of control, and has turned into corporatism with all the associated corruption risks. An overemphasis on formal electoral independence became a typical example of the cure turning into the disease – instead of ensuring a balance to the executive power, self-governance perpetuated clientele-type relations between magistrates and special interests. Today, **the judiciary in SEE has been** as **effectively captured** as the other branches of power. Once emancipated from public scrutiny and the political factors that brought about such arrangements, there are today few checks on the rent-seeking by magistrates.

Not surprisingly, the public does not hold the judiciary in particularly high esteem. *SELDI's Corruption Monitoring System* finds that **magistrates are considered among the most corrupt public officials** in the region. The absence of transparency and accountability is arguably a significant factor in such assessments. In all SELDI countries, there has been a tangible deterioration of the assessment of the spread of corruption among magistrates since 2001.

The capacity of the judiciary in the region to enforce anticorruption legislation, especially as regards

political corruption, has been undermined by a number of problems that have exerted their influence cumulatively:

- Constitutional issues, primarily related to restoring the balance between independence and accountability of the judiciary;
- The complexity of the criminal prosecution of perpetrators of criminal offences of corruption, especially at the political level;
- Overall insufficient capacity and the related issues of low professionalism, excessive workload, and resulting backlog of cases, case management, facilities, etc.

Figure 4. Estimates by the public of the corruptness of courts, judges, lawyers and administration officials in the judiciary
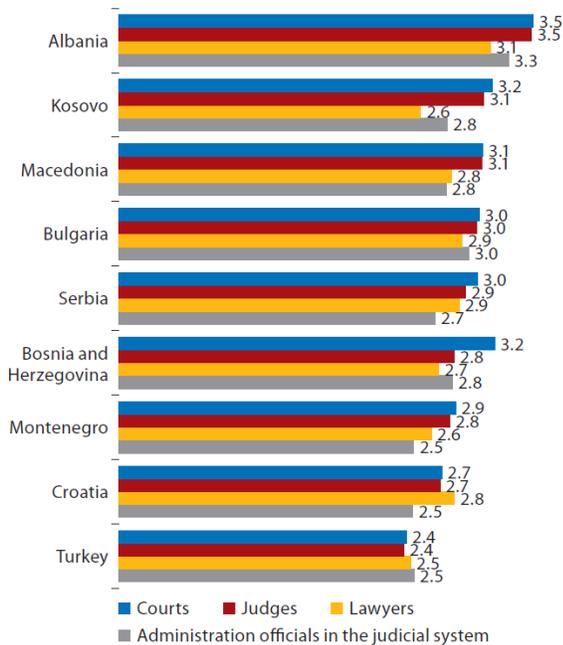
Source: SELDI Corruption Monitoring System, 2014.
Note: For public officials the scale is from 1 to 4, where 1 is "Almost no one is involved" and 4 is "Almost everybody is involved". For institutions the scale is from 1 "Not proliferated at all" to 4 "Proliferated to the highest degree".

An important finding of this SELDI round of corruption monitoring that is relevant to the judicial role in anticorruption is the **lack of feedback mechanisms** that allow the public and policy makers to evaluate both the integrity of the judiciary and its effectiveness in applying criminal anticorruption laws. In none of the SEE countries is there a reliable, systematic and comprehensive mechanism for collecting, processing and making publicly available statistics on the work of the courts and the prosecution, in particular on corruption cases.

4. Corruption and the Economy

The variety of circumstances that occasion corruption in the interactions of business and public officials illustrate the difficulty anticorruption policies face as they need to take a multitude of factors under consideration. When initiated by business, corrupt practices can be divided into **two main categories – avoiding extra costs** and **gaining unfair advantage**. In the first group are the kickbacks necessitated by poor or excessive regulation, individual or institutional incompetence, etc.; in the second are various types of fraud – tax evasion, VAT fraud, smuggling, non-compliance with health and safety standards, etc.

In Southeast Europe, government **procurement is one of the main channels through which corruption affects the economy**. Corruption risk in this area is associated with a number of deficiencies: insufficiently transparent procedures, large share of non-competitive procedures, weak oversight and ineffective judicial review (given judicial corruption), etc. Although more than a decade ago a SELDI study found that the countries in the area had made recent progress in strengthening the legal framework of the process and its harmonisation with the EU acquis, public procurement continues to be among the weakest aspects of public governance. Realities have not changed much since as well-conceived rules are circumvented by corrupt politicians and well connected businesses. Institutional fragmentation does not allow effective implementation of public procurement rules.

Figure 5. Share of Various Types of Public Procurement Procedures in Four SELDI Countries, 2012
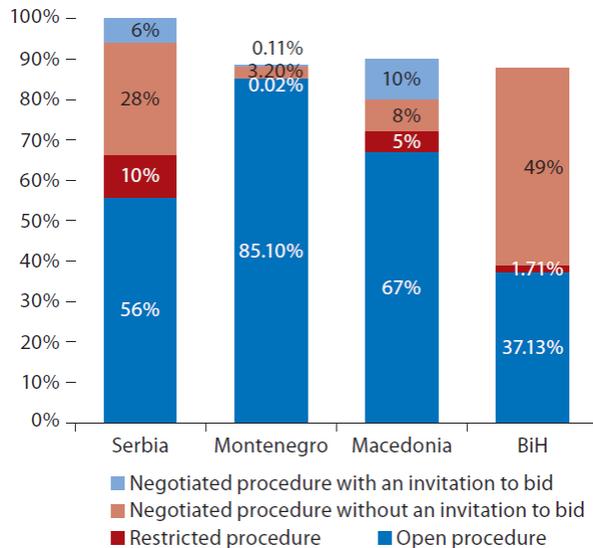
Source: Balkan Tender Watch, 2013, p. 14.

5. Civil Society in Anticorruption

Non-governmental organisations in Southeast Europe are among the most important driving forces in anticorruption. They are, however, still a long way from translating public demands into effective advocacy for policies, and from standing up to corruption due to a number of shortcomings. Their contribution depends in no small measure on being capable of both serving as watchdogs and engaging government in anticorruption reforms. Still, there is a lack of formal mechanisms for engaging civil society by national governments in the region, as well as lack of administrative capacity and clear vision and understanding of the potential of CSOs in the field of anticorruption. Over-reliance on international, including European financing, and the lack of national policies for nurturing vibrant civic sectors in Southeast Europe, compromise the sustainable impact of local anticorruption champions.

The effectiveness of NGOs in addressing the issues of good public governance in SELDI countries depends to a great extent on their capacity to maintain their own governance in order. The **risk of capturing of NGOs by special interests** and corrupt public officials or elected politicians stems from the opportunity to exploit a number of vulnerabilities of the non-profit sector in the region:

- absence of mandatory procedures for transparency;
- ineffective control of compliance with financial regulations;
- lack of auditing culture;
- low level of self-regulation and coordination of efforts.

6. Key Recommendations for the SEE Region

Policies hoping to upset entrenched special interests cannot be delivered through traditional bureaucracies alone. High level of partisanship in SEE prevents reformist politicians from mustering the type of public support needed to make anti-corruption efforts successful. For this to happen, **broad public coalitions** need to be formed both within the countries, and region-wide. It is often wrongly assumed that anticorruption efforts would be opposed only by corrupt politicians and bureaucrats but somehow automatically supported by the general public. Corruption flourishes – or diminishes – not just because of the legal framework or government law enforcement but also in a social and cultural environment the informal rules and sanctions of which are sometimes more effective than those of law enforcement. Any anti-corruption programme in the SEE countries needs to ensure that it is **tailored to these local social networks** in a way that makes them receptive to reformist policies.

The experience of SELDI countries in tackling corruption since 2001 demonstrates that solving the corruption challenge in the region would require sustained efforts on many fronts and the involvement of all local and international stakeholders over the long term. *SELDI's Regional Anti-corruption Report* provides a number of recommendations, among which three key areas need to be prioritised by countries in the region and at the European level in order to achieve breakthrough in the mid-term:

- **Effective prosecution of corrupt high-level politicians and senior civil servants** is the only way to send a strong and immediate message that corruption would not be tolerated.

- **An independent corruption and anti-corruption monitoring mechanism** needs to be introduced on national and regional level in order to provide robust data and analysis and integrate both corruption diagnostics and anticorruption policy evaluation. The mechanism should be implemented through national and/or regional civil society organisations and networks, and should be independent of direct national government funding. In this respect international partners, and primarily the European Commission, should engage directly civil society organisations in the region, which is already happening.

- **Critical sectors with high corruption and state-capture risks, such as the energy sector, should be addressed with priority.** The other priority measures include: increasing competition in public procurement; improving the corporate governance of state owned enterprises; transparent management of large-scale investment projects; enhancing the accountability and independence of energy regulatory authorities.