

**MONITORING THE IMPLEMENTATION OF ANTICORRUPTION REFORMS  
IN BOSNIA AND HERZEGOVINA**

**SUMMARY**

**DECEMBER, 2016**

***Monitoring the Implementation of Anticorruption Reforms provides an overview of legislative activities in the fields relevant to the fight against corruption and analysis of the effectiveness of key anticorruption laws.***

***This publication is a summary of individual monitoring reports in the fields of: access to information, whistleblower protection, public procurement, conflict of interest, political party financing, and asset forfeiture.***

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## **TABLE OF CONTENTS**

**ACCESS TO INFORMATION**

**WHISTLEBLOWER PROTECTION**

**PUBLIC PROCUREMENT**

**CONFLICT OF INTEREST**

**POLITICAL PARTY FINANCING**

**ASSET FORFEITURE**

# ACCESS TO INFORMATION

## IMPORTANCE OF THE RIGHT OF ACCESS TO INFORMATION AND CURRENT TRENDS

The right of access to information is recognised in such major international instruments as the *Universal Declaration of Human Rights*, which is considered an integral part of international law, adopted and proclaimed by the General Assembly of the United Nations:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>1</sup>

It is obvious that the right of access to information is recognised as an integral part of the right to freedom of opinion and expression, which means that it is established as a fundamental human right. Specifically, at the time of the adoption of the Universal Declaration the right of access to information was not understood in all its complexity and importance as today<sup>2</sup>, or seen as a separate human right, but the quality of this right has changed over time along with the development of political processes in favour of open government. This is confirmed by the 2004 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, relating to access to information and data confidentiality.

“The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.”<sup>3</sup>

International case law confirms that the value change has taken place, i.e. the *right of access to information* has been included in the catalogue of human rights and is rightly valued as the right that enjoys special protection as an integral part of the right to freedom of expression, which has in its subsequent development been further protected as a separate value. In its judgement in the case of *Youth Initiative for Human Rights v. Serbia*, the European Court of Human Rights held:

“As the applicant was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression.”<sup>4</sup>

The above quote shows that the Court established a link between the right of access to information and freedom of expression, expounding the importance of gathering information for the public, based on which the Court reached a conclusion on its inextricability with freedom of expression, which in turn is inconceivable without access to information and valid information. However, there are differing views on this subject, namely a warning that a somewhat different, narrower formulation of the right to freedom of expression, one that

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<sup>1</sup> <http://www.un.org/en/documents/udhr/>

<sup>2</sup> “Although the concept of the right to information, as currently understood, was not yet recognised when the UDHR and ICCPR were adopted, subsequent developments have led to the recognition of this right as being encompassed within the language of international guarantees of the right to freedom of expression, and specifically the rights to ‘seek’ and ‘receive’ information and ideas.” Michael Karanicolas, Toby Mendel, *Entrenching RTI: An analysis of Constitutional Protections of the Right to Information*, Centre for Law and Democracy (CLD) Halifax, 2012, p. 2. [http://www.rti-rating.org/docs/Const%20Report\\_final.pdf](http://www.rti-rating.org/docs/Const%20Report_final.pdf)

<sup>3</sup> Quoted in Michael Karanicolas, Toby Mendel, *Entrenching RTI: An analysis of Constitutional Protections of the Right to Information*, Centre for Law and Democracy (CLD) Halifax, 2012, p. 3. [http://www.rti-rating.org/docs/Const%20Report\\_final.pdf](http://www.rti-rating.org/docs/Const%20Report_final.pdf)

<sup>4</sup> European Court of Human Rights (ECtHR), *Youth Initiative for Human Rights v. Serbia*, 25 June 2013

fails to explicitly emphasise the *right to request information*, can be an obstacle to recognising the *right to know what government is doing on the behalf of the public*.<sup>5</sup>

### Proactive transparency as a new paradigm

The latest trends in the field of access to information are reflected in the insistence on proactive transparency as the only necessary standard that can provide effective and full access.<sup>6</sup> Proactive concept envisages disclosure of all information defined under the law on public authorities' websites. Proactive disclosure obligation applies to a very broad range of information<sup>7</sup>, including primary and secondary legislation, financial reports, individual administrative decisions and public procurement contracts.

Civil society and professional community rightfully insist on the new paradigm, calling for the adoption of a proactive, rather than reactive, approach (the latter still being dominant in BiH), i.e. the establishment of mandatory disclosure of all important information, which will reduce the need for reactive segment (acting on requests for access to information) to a minimum. Advocating unprompted transparency is associated with technological developments and their impact on the storage and presentation of the material stored. Thanks to the Internet, public authorities can, in a simple way and with the use of guides and instructions, make all information falling within their purview available to the public via their websites. Not a few countries have established a single Internet portal where the information subject to mandatory disclosure is grouped under classes of information. For example, the UK created a portal<sup>8</sup> which uses the most recent technical advances to encourage the public to access, in the easiest way, all the information of interest to them in different areas and from different levels of government. The information is posted on the portal even if it is already available through other individual websites, with the aim of bringing all information together in one easily accessible and searchable website. Explaining the purpose of the portal, the government said on its official website that "*the disclosure of information is important for the understanding of the policies being made and the work of public authorities*".

### **Controversial legislative provisions in Bosnia and Herzegovina**

The first Freedom of Access to Information Act (FOIA) was adopted by the Parliamentary Assembly of Bosnia and Herzegovina in 2000, and entity-level acts were adopted a year later. The Act was passed upon an explicit initiative of the international community representatives

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<sup>5</sup> This is discussed in more detail on pages 10 and 11 (Canada's example, author's note.) Michael Karanicolas, Toby Mendel, *Entrenching RTI: An Analysis of Constitutional Protections of the Right to Information*, Centre for Law and Democracy (CLD) Halifax, 2012, p.3 [http://www.rti-rating.org/docs/Const%20Report\\_final.pdf](http://www.rti-rating.org/docs/Const%20Report_final.pdf)

<sup>6</sup> Alen Rajko, *Proactive Transparency in Bosnia and Herzegovina - Status and Perspectives in Light of International Standards and Comparative Solutions*, Sarajevo 2014, p.14

<sup>7</sup> The proposed standard of proactive transparency according to Helen Darbishire, *Proactive Transparency: The Future of the Right to Information?: A Review of Standards, Challenges and Opportunities*, Washington: World Bank Institute, 2011, pp 21-22; quoted in Ibid.: institutional information (including information on internal regulations and powers), organisational information (including information on personnel and their contacts), operational information (policies, procedures, reports, etc.), decisions and other formal acts (with supporting documents), public services information (including guides, forms, etc.), budget information, open meetings information, information about decision-making and public participation, subsidies information, public procurement information, information on lists, registers and databases held by public authorities, publications and their price list, information about appeal procedures and mechanisms for resolving disputes, information about the right of access to information, minutes of parliamentary sessions, and judicial decisions.

<sup>8</sup> <http://data.gov.uk/about>

in BiH<sup>9</sup>, who formed a working group made up of national and international experts tasked with drafting the law. The initiative for passing the FOIA did not come from the local civil society sector, which is seen as a drawback by some commentators because it indicates that the opening of the government did not happen as a result of internal political processes and inside pressure<sup>10</sup>.

In recent years, the lack of proactive provisions has been cited as the biggest drawback of the current access to information legislation. All three currently existing FOIAs (BiH, FBiH, RS) failed to make a large amount of information subject to mandatory disclosure,<sup>11</sup> which would reduce the workload of public authorities when deciding on disclosure of information on a reactive basis. The proactive transparency provisions in the current legislation are inadequate and extremely modest, in particular those requiring explicit proactive disclosure. They are reduced to mandatory appointment of information officers or setting up an indexed register with a list of available information held by a public authority.<sup>12</sup> Proactive provisions can be found, albeit piecemeal, in secondary legislation such as instructions, rules or other implementing regulations of limited scope.<sup>13</sup>

Another common objection refers to the FOIA RS which, unlike the BiH and FBiH FOIAs, has not yet changed the provision stipulating that the decision rejecting the request for access to information is delivered in the form of a notice<sup>14</sup>. This is manifestly inadequate because the party seeking access to information is left to the mercy of arbitrary interpretations by public authorities regarding the choice of form. This hampers the appeals process under the Law on Administrative Procedure, which provides that appeals can be lodged only against administrative decisions and not notices. It therefore seems more appropriate to explicitly provide that the decision should be delivered in the form of an administrative decision (as is the case at the levels of BiH and FBiH) as this would remove any doubt as to the availability of legal redress.

Inconsistency in the country's legal system relating to FOIA, which affects access to information, exists in that, contrary to the legislative provisions<sup>15</sup>, laws are passed which limit the rights and obligations under the FOIA<sup>16</sup>, even though the FOIA is a *lex specialis* which takes precedence over other equivalent regulations and despite the explicit provision that other legislation cannot restrict the rights and obligations set forth in the FOIA. Some commentators cite this lack of harmonisation as the most serious problem,<sup>17</sup> because the

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<sup>9</sup> Amer Džihana, *Monitoring Democratic Development in Bosnia and Herzegovina / Accessibility Index of Public Institutions, Organisations and Agencies*, Sarajevo 2006, p. 18

[http://www.media.ba/mcsonline/files/shared/Monitoring\\_Bos\\_170306.pdf](http://www.media.ba/mcsonline/files/shared/Monitoring_Bos_170306.pdf)

<sup>10</sup> For more information see *ibid*, p. 18

<sup>11</sup> Alen Rajko, *Proactive Transparency in Bosnia and Herzegovina - Status and Perspectives in Light of International Standards and Comparative Solutions*, Sarajevo 2014, p. 40

<sup>12</sup> For more information see *ibid*, p. 40

<sup>13</sup> For more information see *ibid*, pp. 42-43

<sup>14</sup> Freedom of Access to Information Act of RS, "Official Gazette of RS", No. 20/01, Article 14

<sup>15</sup> "Legislation passed subsequent to this Act that is not specifically aimed at amending this Act, shall not restrict the rights and obligations contained herein", Freedom of Access to Information Act of RS, "Official Gazette of RS", No. 20/01, Article 25. Similar provisions exist in the FOIA FBiH and FOIA BiH (Article 25 item 3, and Article 26, item 4).

<sup>16</sup> Ena Gotovuša, *Analiza Zakona o slobodi pristupa informacijama BiH: nacrt, izmjene i dopune (ZOSPI BiH)* [Analysis of the Freedom of Access to Information Act of BiH: draft and amendments (FOIA BiH), Fondacija Centar za javno pravo, [http://www.fcjp.ba/templates/ja\\_avian\\_ii\\_d/images/green/Ena\\_Gotovusa7.pdf](http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Ena_Gotovusa7.pdf)

<sup>17</sup> Mehmed Halilović and Amer Džihana, *Media Law in Bosnia and Herzegovina*, Sarajevo 2012, p. 111  
<http://www.internews.ba/sites/default/files/attachments/Medijsko%20pravo%20u%20BiH%20bos.pdf>

inconsistency between the laws directly affects the scope of the rights guaranteed under the FOIA.

It is noticeable that the legislator failed to precisely regulate the appeals process. Thus, the FOIA RS has no provisions on appeals procedure whatsoever, while the FOIA BiH was only recently amended such to include a provision that explicitly defines the appeals procedure as the second-instant procedure before a second-instance authority<sup>18</sup>. Even though the law does not provide how the appeals procedure is carried out, this procedure should, through subsidiary application of administrative regulations, be conducted before the appropriate appellate body. However, it seems more appropriate that this issue be regulated in the FOIA in order to avoid confusion or deliberate misuse.

Journalists, who are versed in the area of access to information due to the nature of their profession, mainly object to the 15-day statutory period<sup>19</sup> given to the authorities to respond to requests, as it hampers quick access to requested information.

The 2009 amendments to the FOIA BiH introduced penalty provisions applying to both the public authorities and the responsible persons in cases where, for example, a public authority/civil servant fails to issue an administrative decision refusing a request for information, as well as in other cases provided by law<sup>20</sup>. Four years later, those penalty provisions achieved their true purpose as the amendment to the Act<sup>21</sup> established the Administrative Inspectorate of the Ministry of Justice of BiH as the authority to perform inspection and which consequently may issue a penalty charge notice, which means that before the said amendment penalty provisions could not be applied. The 2013 amendments introduced harsher penalties against the responsible person, which was welcomed, but the fine range (from BAM 1,000 to BAM 10,000 for the responsible person) appears to be too broad, leaving disproportionately large discretionary powers. The aforementioned amendments were only made at the state level.

Another criticism relating to inspection concerns the efficiency of the relevant inspectorate, because not only is it not supported by the existing legislative provisions, but the current provisions postpone the issuance of the penalty charge notice, because attempts will be first made to remedy the deficiencies over “a certain time period”<sup>22</sup> that remains imprecise. This constitutes a departure from the provisions of the Law on Misdemeanours of BiH and it certainly does not contribute to the proper and lawful implementation of the FOIA. Correction of shortcomings over “a certain time period” by way of an administrative decision that is referred to the authority in question will diminish the quality of inspection, thus rendering the adopted amendments meaningless<sup>23</sup>.

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<sup>18</sup> “An appeal against the decision referred to in paragraph 3 of this Article shall be submitted to the head of the competent second-instance public authority”, Freedom of Access to Information Act of BiH, “Official Gazette of BiH”, Nos. 28/00, 45/06, 102/09, 62/11, 100/13, Article 14, paragraph 4.

<sup>19</sup> Mehmed Halilović and Amer Džihana, *Media Law in Bosnia and Herzegovina*, Sarajevo 2012, p. 108 <http://www.internews.ba/sites/default/files/attachments/Medijsko%20pravo%20u%20BiH%20bos.pdf>

<sup>20</sup> For more information see Article 22 of the Law Amending the Freedom of Access to Information Act of BiH, “Official Gazette of BiH”, No. 102/09. [http://www.mpr.gov.ba/web\\_dokumenti/102\\_09\\_BJ.pdf](http://www.mpr.gov.ba/web_dokumenti/102_09_BJ.pdf)

<sup>21</sup> For more information see Article 22b of the Law Amending the Freedom of Access to Information Act of BiH, “Official Gazette of BiH”, No. 100/13. [http://www.mpr.gov.ba/biblioteka/zakoni/bs/100\\_13\\_ZOSPI\\_BJ.pdf](http://www.mpr.gov.ba/biblioteka/zakoni/bs/100_13_ZOSPI_BJ.pdf)

<sup>22</sup> For more information see Article 22b, para. 4 of the Law Amending the Freedom of Access to Information Act of BiH, “Official Gazette of BiH”, No. 100/13 [http://www.mpr.gov.ba/biblioteka/zakoni/bs/100\\_13\\_ZOSPI\\_BJ.pdf](http://www.mpr.gov.ba/biblioteka/zakoni/bs/100_13_ZOSPI_BJ.pdf)

<sup>23</sup> For more information see Ena Gotovuša, *Analiza Zakona o slobodi pristupa informacijama BiH: nacrt, izmjene i dopune (ZOSPI BiH)* [Analysis of the Freedom of Access to Information Act of BiH: draft and amendments (FOIA BiH)], Fondacija Centar za javno pravo, pp. 12-13 [http://www.fcjp.ba/templates/ja\\_avian\\_ii\\_d/images/green/Ena\\_Gotovusa7.pdf](http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Ena_Gotovusa7.pdf)

## IMPLEMENTATION OF THE FOIAS

Past practice has shown that a considerable number of public authorities at all levels misinterpret and misapply the provisions of these Acts. In addition to using the FOIAs in its daily work, TI BiH regularly conducts surveys into how the FOIAs are implemented in practice, by sending requests for information to a large number of public authorities, and monitors how these requests are handled. TI BiH conducted one such survey again in 2016. The survey included 371 public enterprises in BiH, of which 190 in the Republika Srpska and 181 in the Federation of BiH. The enterprises were asked to provide copies of public procurement contracts concluded in 2015, copies of the rules on internal organisation and staffing, and a list of all employees.

The survey findings were as follows:

- Only **39.4%** of the enterprises in RS and **27.6%** of enterprises in FBiH responded to TI BiH's request within the statutory period. A total of 246 public enterprises (**66.3%**) failed to respond within the statutory 15-day period.
- For **36.6%** requests the procedure took longer than a month, not counting the appeals procedures, while the law stipulates that the 15-day period may be extended only in certain situations.
- Only a quarter of the enterprises surveyed (**24.5%**) decided on the request for access to information in the statutory form of an administrative decision. This is either a result of misinterpretation of the legal provisions or of erroneous conclusion that access to information is decided not by an administrative act, but by a non-appealable notice.
- The number of reminder notices (237) and appeals against 'administrative silence' (136), as well as the fact that **53 companies failed to respond to the request altogether**, indicates the avoidance on the part of public enterprises to provide access to the requested information and deliberate omission to provide the requester with means of legal redress.
- The number and content of rejected appeals and complaints (65) points to a misapplication of the provisions of the FOIAs and arbitrary decisions with no legal basis.

Analysis of the responses received from the public enterprises indicates a general disregard for the purpose and scope of the law, as well as the public interest as the main guiding principle for public authorities. The most commonly cited reasons for not providing the requested information are as follows:

- The public authority was of the opinion that the requested information included extensive documentation;
- The public authority stated that it was not a public authority as defined under the FOIA RS;
- Determination of an exemption for confidential commercial information (usually a trade secret between contracting authorities);
- Determination of an exemption for the protection of privacy (personal information and invoking the Law on Personal Data Protection);
- Stating that the information was published on the website;
- Allowing access to requested information only in person, without sending the information to the requester's address;
- The public enterprise was of the opinion that the requested information is not of public interest (without applying the public interest test).



The survey findings show that there is still a high degree of legal uncertainty in the process of seeking and obtaining information held by public authorities. Failure to comply with the deadlines and provisions of the law results in a long-drawn and complex procedure, which can ultimately deter the requester from persevering in his/her intention to exercise the right of access to information.

## **Recommendations**

- Taking into account the recent achievements and the paradigm shift in the field of access to information, laws that regulate free access to information in BiH are outdated and should be amended or a completely new Freedom of Access to Information Act should be adopted.
- The current legislation contains few proactive provisions requiring mandatory disclosure of information by public authorities aimed at ensuring proactive transparency. The amended FOIA or a new FOIA should explicitly provide for mandatory disclosure of a great amount of information of public interest (budget data, budget execution data, judgements/rulings and other public documents, etc.), which is expected to reduce the number of requests for access to information and enhance transparency of public authorities.<sup>24</sup>
- Freedom of access to information acts in Bosnia and Herzegovina are not harmonised and it is necessary to harmonise the legal provisions modelled on the state-level law, which contains provisions on inspection and fines.
- All freedom of access to information acts need to precisely define the stages in the process of exercising the right of access to information, in order to avoid possible confusion in the process.
- It is necessary to strengthen the institutional framework for the implementation of the current legislation or consider its complete overhaul in terms of introducing a new independent institution to act as a second-instance body, as defined by the principal international recommendations. If the legislator opts for keeping the current framework, it is necessary to ensure that the inspection authorities have the necessary capacity, in order to ensure proper enforcement of the laws.

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<sup>24</sup> In the manner as indicated above in the section “Proactive Transparency as a New Paradigm”.

# WHISTLEBLOWER PROTECTION

## INTERNATIONAL STANDARDS AND RECOMMENDATIONS

The importance of ensuring legal protection of persons who report irregularities in their working environment, popularly called whistleblowers, has been recognised in international conventions and documents concerning corruption, which also constitute guidelines encouraging national legislations to specifically regulate this area. The following are the relevant provisions from two such conventions:

Article 9 of the **CoE Civil Law Convention on Corruption**<sup>25</sup> provides:

“Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.”

Article 33 of the **UN Convention against Corruption**<sup>26</sup> explicitly states:

“Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”

This report analyses the model of legal protection for whistleblowers in BiH, comparing it to international best practices and recommendations, while taking into account the institutional framework and the overall national context and the existing arrangements in BiH. Analysis of the existing legal framework and its implementation is based primarily on:

- **Recommendation of the Council of Europe (CoE) CM/Rec(2014)7 on the protection of whistleblowers**<sup>27</sup>
- 2013 report/analysis by **Transparency International (TI): Legal Protection for Whistleblowers in the European Union**<sup>28</sup>

## LEGAL FRAMEWORK FOR PROTECTION OF WHISTLEBLOWERS IN BIH

### DEFINITION

Article 2, Paragraph 1, item b) of the Law on Whistleblower Protection in the Institutions of BiH defines the whistleblower as follows:

“Whistleblower shall mean a person employed in the institutions of Bosnia and Herzegovina and legal entities established by the institutions of Bosnia and Herzegovina, who due to **justified suspicion or circumstance** indicating the existence of corruption in any of the institutions of Bosnia and Herzegovina reports **in good faith** to the authorised persons or institutions any suspected acts of corruption in accordance with this law.”

International recommendations of the CoE and TI state that the whistleblower is any person who discloses information from their work environment, i.e. more precisely “any person who reports or discloses information on a threat or harm to the public interest in the context of

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<sup>25</sup> For more information about the Convention see:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f3f6>

<sup>26</sup> For more information about the Convention see: [https://ti-bih.org/wp-content/uploads/2011/03/konvencija\\_un\\_protiv\\_korupcije\\_en.pdf](https://ti-bih.org/wp-content/uploads/2011/03/konvencija_un_protiv_korupcije_en.pdf)

<sup>27</sup> Recommendation was adopted by the Committee of Ministers at its 1198<sup>th</sup> session held on 30 April 2014.

<sup>28</sup> Report by Transparency International (2013): Whistleblowing in Europe: *Legal Protection for Whistleblowers in the EU*

their work-based relationship, whether it be in the public or private sector". It is interesting that this definition is not associated with corruption and/or irregularities but the public interest. Here also appears the level of suspicion required of whistleblowers, in the form of "reasonable doubt" as a legal institute which is not recognised in the criminal procedural legislation in BiH. The Criminal Procedure Code of BiH recognises the concepts of "grounds for suspicion" and "grounded suspicion". The former term appears in a total of fourteen places but is nowhere defined, even though it is obvious that it implies a lower degree of suspicion because it is associated with suspects and the investigation phase of the procedure<sup>29</sup>. "Grounded suspicion" in criminal procedural legislation is expressly defined as "a higher degree of suspicion based on collected evidence leading to the conclusion that a criminal offence may have been committed".<sup>30</sup> Synonyms used for the concept of "grounded suspicion" are "sufficient suspicion", "strong suspicion" and "reasonable suspicion"<sup>31</sup>, so the degree of suspicion implied under these terms could be taken to mean the same as the one implied under the term "justified suspicion", which is used in the legal definition of whistleblowers. But the second part of the definition provides for an alternative option, stating that a whistleblower shall be considered any person who brings to attention the **circumstances** of corruption, thus extending the definition.

Another qualifying term appearing in the definition of the whistleblower is **good faith**, which the law defines as "the whistleblower's stance based on facts and circumstances of which the whistleblower has knowledge and which he or she deems to be true".<sup>32</sup>

To conclude, the definition of the whistleblower in the BiH Law, provided that the category of persons to which it applies is excluded, is broad and inclusive enough as it applies to all persons who report the circumstances of the existence of corruption, i.e. they are not required to provide the evidential quality of justified suspicion which is specifically mentioned in the definition.

## TYPES AND QUALITY OF WHISTLEBLOWER PROTECTION

Analysis of the provisions relating to the role of and the protection afforded by the Anticorruption Agency of BiH (APIK) indicates that the APIK affords the whistleblower status based on the corruption report, which is evaluated in accordance with the law. In particular, corruption report must be filed in good faith, this being the most important requirement as it is given special emphasis. The protection afforded by the APIK is significant, because the possibility of eliminating adverse action is dependent on it, but only after the person with a recognised whistleblower status gives a notification that adverse action has been taken against them. The APIK is not under an obligation to conduct an *ex officio* investigation into the circumstances relating to the report and the whistleblower, as well as whether the whistleblower is threatened by the adverse action. By not providing for an *ex officio* investigation, the legislator failed to strengthen the role of the AKIP and increase the degree of legal protection afforded under the Law. Protection in the form of identification and elimination of adverse action taken against the whistleblower is possible only after the whistleblower notifies the APIK thereof. This acts as a "trigger" for the specialised body to further establish the existence of adverse action. An important element of protection is contained in the fact that if the manager of the institution claims that adverse action would

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<sup>29</sup> "The term 'suspect' refers to a person with respect to whom there are grounds for suspicion that the person may have committed a criminal offence." Article 20 of the Criminal Procedure Code of BiH

<sup>30</sup> Article 20, paragraph 1, item m) of the Criminal Procedure Code of BiH

<sup>31</sup> For more information see "*Krivično procesno pravo: uvod i opšti dio*" [Criminal Procedural Law: Introduction and General Part], Prof. Miodrag Simović PhD, Bihać, 2009

<sup>32</sup> Article 2, paragraph 1, item h) of the Law on Whistleblower Protection in the Institutions of BiH

have been taken against the whistleblower even if they had not reported corruption, the legislator places the burden of proof on the employer.

In summary, the importance of whistleblower protection is reflected in the following three things:

- 1) **recognition of whistleblowers as a category of persons warranting special legal protection** – an act that has both symbolic and preventive character;
- 2) the distinctive quality of protection consists in the **power given to the specialised body to investigate and rectify any adverse action reported by the whistleblower**; and
- 3) the onus of proving that the adverse action is not linked to corruption is on the employer, i.e. the reported institution, which facilitates the whistleblower's position.

#### **LEGISLATIVE ACTIVITIES AT THE ENTITY LEVEL**

In 2013 the Parliament of FBiH conducted a public consultation on the Draft Law on Whistleblower Protection of FBiH, but the Law has not been adopted yet. TI BiH sent its comments,<sup>33</sup> criticising the Draft in particular for its non-compliance with the proposed provisions at the state level as well as the deficient definitions of basic terms (“protected reporting”, “public interest”, “damage”, etc.). TI BiH further remarked that the Draft did not envisage a special type of protection in terms of a separate process to recognise protected whistleblowers.

The Republika Srpska is considering introducing a judicial protection model, meaning that the whistleblowers would be guaranteed, primarily through urgent procedure and some departures from the civil procedure (mostly in terms of the deadlines in the legal protection procedure), the possibility of instituting separate civil proceedings. TI BiH participated in the consultation regarding the preparation of the preliminary draft, insisting that the basic concepts, terms and definitions be made clearer (“report in good faith”, which degree of suspicion is required of the whistleblower, etc.), as well as that any inconsistencies between the Preliminary Draft and the current Civil Procedure Code be corrected in order to remove obstacles to the implementation of the proposed provisions.

#### **IMPLEMENTATION OF THE LAW ON WHISTLEBLOWER PROTECTION IN THE INSTITUTIONS OF BIH**

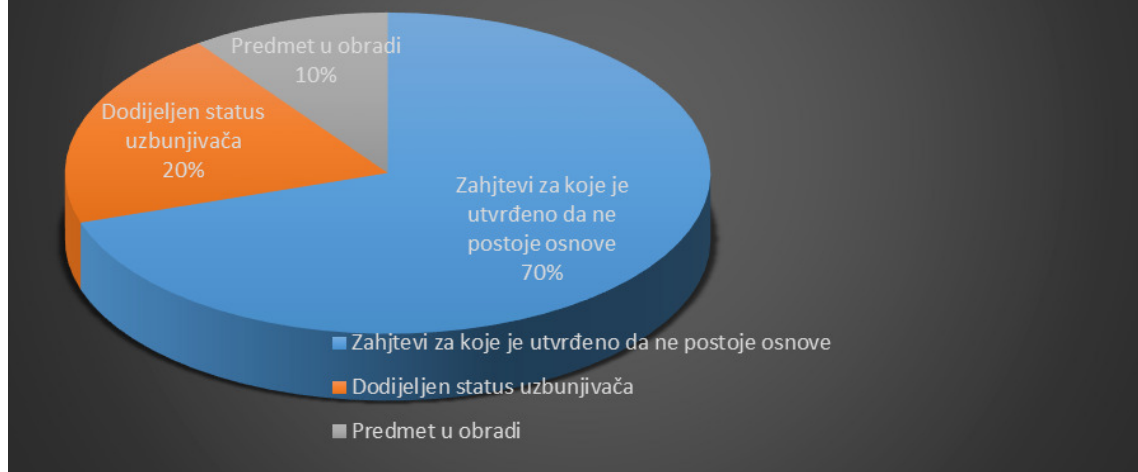
According to APIK's 2015 Annual Report,<sup>34</sup> a total of **ten** requests for the protected whistleblower status were filed from the date when the Law came into force until the end of 2015. In seven of the 10 requests it was found that there were no grounds for granting the status, while **the status was granted in two cases**.

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<sup>33</sup> <https://ti-bih.org/ti-bih-apeluje-na-parlament-fbih-da-osigura-potpunu-zastitu-prijaviteljima-korupcije/>

<sup>34</sup> <http://apik.ba/izvjestaji/izvjestaji-agencije/default.aspx?id=919&langTag=bs-BA>

## Zahjetevi za dodjelu statusa uzbunjivača prema APIK-U



### Requests for the whistleblower status filed with the APIK

Blue – Requests denied; Orange – Requests granted; Gray – Case pending

APIK issued only one instruction to eliminate the adverse action taken against the protected whistleblower, in the case of Danko Bogdanović who had had his employment in the Indirect Taxation Authority terminated. The whistleblower was returned to work following the issuance of the instruction. The case garnered considerable media publicity<sup>35</sup>. Specifically, Bogdanović, in his capacity as the head of a customs office, had reported some of his colleagues for bribery and abuse of office<sup>36</sup>. Based on his report, the Prosecutor's Office of BiH launched an investigation into cases that caused multimillion damage to public funds. The "Bogdanović" case shows how important the influence of APIK can be, because the whistleblower suffered adverse action for having reported corruption, which even resulted in suspension, and upon issuance of the instruction the whistleblower was returned to work.

It is interesting to note the difference between the number of requests for the whistleblower status and the number of corruption reports that the APIK acts upon, in terms of their processing and forwarding to competent authorities.<sup>37</sup> APIK's Annual Report provides a tabular overview of submitted corruption reports along with the description of the indicia of criminal acts, offences or irregularities.<sup>38</sup> The reports most commonly concern the following: abuse of office, complaints against superiors, irregularities, complaints against public servants, etc. A total of **124** corruption reports were filed with the APIK, the majority of which concern state-level institutions, which are subject to currently the only whistleblower protection law. One could assume that some of the reports may have been submitted by persons who could be recognised as whistleblowers, but they did not complete the legal formalities and sought protection in the statutory manner, and therefore could not be recognised as protected whistleblowers. This raises the question of whether it would be appropriate to amend the current Law such to enable the APIK to independently grant the

<sup>35</sup> <http://www.avaz.ba/clanak/181338/prijavitelj-korupcije-danko-bogdanovic-vracen-na-posao?url=clanak/181338/prijavitelj-korupcije-danko-bogdanovic-vracen-na-posao>

<sup>36</sup> <http://ba.n1info.com/a60936/Vijesti/Vijesti/Da-li-se-isplati-prijaviti-korupciju-u-BiH.html>

<sup>37</sup> According to Article 10, paragraphs h) of the Law on the Agency for the Prevention of Corruption and Coordination of the Fight against Corruption

<sup>38</sup> For more information see: <http://apik.ba/izvijestaji/izvijestaji-agencije/default.aspx?id=919&langTag=bs-BA>

whistleblower status when it finds that this is warranted and when, based on the available information, this can be inferred from the corruption reports filed.

## **CONCLUSIONS AND RECOMMENDATIONS**

1. The current whistleblower protection legislation in BiH provides legal protection to employees in the institutions of BiH and in legal persons established by these institutions, and thus only partially covers the public sector, because the protection does not apply to employees at other levels of government.

**RECOMMENDATION:** Legal protection for whistleblowers needs to be ensured at all levels of government. There is an urgent need to expand the applicable legal framework to other levels of government, but also the danger that the newly created regulatory framework will not be harmonised, i.e. that it will differ in many ways, which will result in uneven levels of whistleblower protection. In the preparation of new legislative provisions, due regard should be taken to ensure that newly prepared laws are harmonised with the state-level Law.

2. If one was to evaluate the currently only applicable whistleblower protection law in the country against principal international recommendations, the overall conclusion would be that it is a moderately advanced piece of legislation or one that only partially complies with international standards on provision of comprehensive protection, in terms of both protected persons and protection mechanisms.

**RECOMMENDATION:** The range of persons eligible for special legal protection needs to be extended to also include private sector employees, as well as individual contractors, other persons who perform work outside of employment terms or have direct knowledge about the employer (associates, consultants, volunteers, participants in open job competitions, etc.), encompassing in the law all possible situations that may give rise to corruption reports.

**RECOMMENDATION:** The Law should contain a provision enabling the APIK to grant the whistleblower status *ex officio* and on the basis of its knowledge (in situations when it has such knowledge) as well as to issue, *ex officio* and upon examining all the circumstances, an instruction for elimination of adverse action taken against whistleblowers. Given that the APIK receives reports with indicia of corrupt behaviour, which may not necessarily be the reports filed by whistleblowers, but could relate to potential whistleblowers, such reports could be grounds based on which to ascertain, on an *ex officio* basis, when it is necessary to grant the whistleblower status. In other words, the APIK should be able to do this on its own initiative, not only on the basis of the report.

3. In addition to all the above objections concerning the current Law, even more worrying is its inadequate implementation. Indeed, the fact that from the date the Law came into force until the end of 2015 the APIK received only 10 requests for the whistleblower status raises questions about the purposefulness of current provisions and the adequacy of the existing institutional framework.

**RECOMMENDATION:** It is necessary to develop activities aimed at promoting the Law on Whistleblower Protection in the Institutions of BiH (developing a manual, organising media campaigns, cooperation with CSOs, etc.). Also, in the development of entity-level legislation special regard should be paid to defining the basic terms and concepts such as “adverse action”, “report in good faith”, “corruption”, etc., because the extent and application of the Law will depend on the quality of these definitions, regardless of which protection model is chosen.

## PUBLIC PROCUREMENT

### LEGAL FRAMEWORK

The current Public Procurement Law of BiH<sup>39</sup> (PPL) came into force on 27 May 2014, and its implementation started six months later, on 27 November 2014. In addition to the Law, the public procurement legislation consists of a series of implementing regulations that further define specific issues.

The Law was passed as a result of accumulated need for comprehensive reform in this area, both in terms of harmonisation with the 2004 EU *acquis*, and in order to eliminate numerous problems in practice. According to the Public Procurement Agency (PPA), the Law is also the result of the desire to eliminate bottlenecks and streamline procedures.

The Law (and its accompanying implementing regulations) divided the contracting authorities into classical and sectoral contracting authorities, modified exemptions from the application, encompassed the entire procurement cycle including contract execution, established the public procurement portal, but also weakened the legal protection system, failed to fully apply the principle of non-discrimination, and failed to ensure respect for the principle of value for money.

Given that a significant part of infrastructure projects and projects of wider public interest in the country are happening in the context of international grants, loans and other arrangements, whereby they are exempt from the PPL, **TI BiH recommended that these provisions be revised such that the information about procurement in such projects, while respecting their specific nature, be incorporated in the PPL and, thus, disclosed on the Public Procurement Portal.**

The civil society sector had great expectations of the new Law, primarily in terms of addressing the procurement practices that had been identified as prone to corruption and political pressure. The most common forms of abuse included: implementation of procurement procedures in contravention of legal requirements; misapplication and misuse of the exemption for protection of privacy; poor planning or lack of transparency in public procurement plans or complete absence thereof; splitting the value of purchases to avoid the application of transparent procedures; ill-founded choice of the negotiated procedure without publication of notice; defining technical specifications in a manner that favours certain tenderers; unauthorised subsequent addition of further annexes to contracts, increasing the value of contracts multifold; insufficient capacity and inadequate coordination between the institutions in the system, etc.

The new Law, however, addressed these issues only partially.

Public Procurement Strategy of Bosnia and Herzegovina 2016-2020 recognises public procurement as one of the most important areas of activities to be implemented under the Reform Agenda in BiH, with a view to improving accountability in the spending of public money, as well as creating a positive climate for foreign and domestic investors.<sup>40</sup> European Commission's 2016 Bosnia and Herzegovina Report notes that more efforts are needed to

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<sup>39</sup> Public Procurement Law, "Official Gazette of BiH", No. 39/14

<sup>40</sup> Public Procurement Strategy of BiH 2016-2020



prevent corruption during the procurement cycle as procurement is particularly vulnerable to corruption.<sup>41</sup>

According to the Report, BiH has some level of preparation in this area. Some progress has been achieved in the field of public procurement with the adoption of further implementing regulations under the new Public Procurement Law<sup>42</sup> (with the exception of the Rules on the Training for Public Procurement Officers, whose adoption is still pending) and the adoption, in October 2016, of the new Strategy and Action Plan for the Development of the Public Procurement System of BiH 2016-2020.

The Strategy is an extremely important document consisting of five pillars of development: 1) Public Procurement Legal Framework (harmonisation with the aforementioned EU directives and elimination of technical errors in the PPL is envisaged by the end of 2017); 2) Monitoring (upgrading of the PP Portal is to be done in accordance with the 2014 directives); 3) Training Capacity and Education (for contracting authorities, trainers, judges and prosecutors); 4) Legal Protection; and 5) E-procurement.

According to the European Commission, in the coming year, **Bosnia and Herzegovina should in particular: further align the public procurement legislation with the 2014 EU *acquis*; further strengthen the monitoring role of the Public Procurement Agency by implementing the new rulebook on monitoring, and make the procurement process more transparent by improving the use of the e-procurement system; establish a specialised procurement function within contracting authorities** (and staff it with public procurement officials who have the relevant skills and capabilities).

Further, the European Commission mentions some other problems that TI BiH had already warned about, relating to procurement planning, conflict of interest and legal protection. Regarding the contracting authorities' capacity to implement and enforce public procurement processes, the Report notes that the Public Procurement Law's provisions on more detailed planning, preparation and publication of public procurement activities remain to be applied. The Report further states that **there has been no improvement in implementation of the provisions on integrity and conflict of interest in public procurement procedures**. The new remedies system is also not satisfactory.

According to TI BiH, provisions relating to conflict of interest are among the most problematic ones in the PPL as they are imprecise and refer to other conflict of interest regulations in BiH which are still unharmonised and almost never implemented (with the exception of a few cases in RS, as allowed under this very liberal Law).

## TRANSPARENCY

Establishment of the central Public Procurement Portal can be regarded as the single most far-reaching effect of the new Law. The Portal contains various kinds of information allowing for closer scrutiny of procurement procedures by all stakeholders. Also, publication of tender documents on the Portal has contributed to a significant reduction in the relevant costs, which used to be quite high in the past. However, **tender documents can be accessed only by registered bidders**, while good practice from other countries is to ensure that all interested parties can have access to and download these documents, which enables better

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<sup>41</sup> European Commission, Bosnia and Herzegovina 2016 Report

<sup>42</sup> Rules on Conditions and Usage of E-auctions, #Official Gazette of BiH", No. 66/16, and Rules on Monitoring Public Procurement Procedures, "Official Gazette of BiH", No. 72/16



public control. The deficiencies that TI BiH has warned about, concerning the need for **linking procurement plans and contract execution reports**, have been recognised by the relevant authorities and, according to plans, they are to be remedied in the course of 2017. The plan also envisages upgrades to the Portal aimed at enhancing functionality and maximising searchability, in particular by criteria relating to abuse and corruption risks (i.e. red flags – procurement value, negotiated procedure without publication of notice, etc.). **Disclosure of full-length versions of procurement contracts is still absent.**

As at 30 November 2016, a total of 557 decisions of the Public Review Body (PRB) and the Court of BiH were published on the Portal, and even those few decisions were not accessible all the time. All relevant documents, including the Reform Agenda, say that the disclosure of decisions on appeals is essential for ensuring transparency in procurement procedures, ruling on appeals, and ensuring public access to decisions made by the procurement review bodies.

## **IMPLEMENTATION OF THE LAW**

According to the Annual Report on Contracts Concluded in Public Procurement Procedures in 2015, which was prepared by the PPA, of the total number of contracting authorities in BiH which are under an obligation to apply the PPL, as at 31 December 2015, 2,053 contracting authorities were registered for submission of reports to the “e-procurement” information system (compared to 1,539 contracting authorities in 2014, an increase of 33.40%). Of these, 104 contracting authorities were registered at the state level, 1,099 in the Federation of BiH, 841 in the Republika Srpska and 9 in the Brčko District. The PPA confirmed that **still a large number of contracting authorities were not registered in the system and did not disclose all of the required information, which affects the precision of statistics on public procurement procedures.**

The share of public procurement in the total nominal GDP in 2015 was 4.48%, which is a significant decrease on 2014, when the share was 8.14%.

In 2015 there were a total of 95,465 public procurement procedures, of which 3,822 open procedures, 5 restricted procedures, 12 negotiated procedures with publication of a procurement notice, 881 negotiated procedures without publication of a procurement notice, no competitive dialogue procedures, 8,691 competitive requests for quotations, and 82,054 direct agreements. **It is clear that opaque procedures make up the overwhelming majority in the overall structure of procurement procedures performed.**

The **share of individual types of public procurement procedures in the total value of executed contracts** looks as follows: open procedure – 51.67% (a decrease of 40.46% on 2014), restricted procedure – 0.16% (a decrease of 94.27%), negotiated procedure with publication of a procurement notice – 0.11% (a decrease of 18.02%), negotiated procedure without publication of a procurement notice – 21.38% (a decrease of 66.15%), competitive request for quotations – 9.75 % (a decrease of 60.32%), and direct agreement – 6.19% (**an increase of 17.21%**).

The foregoing shows that the definition of special rules for sectoral contracting authorities has reduced the number of negotiated procedures without publication of a procurement notice, which were previously used by these authorities for in-house procurement (contracts awarded to an associated enterprise) because the regulations did not contain provisions of the so-called sectoral directive. On the other hand, **direct agreement as the least transparent procedure is the only procedure that has seen an increase in the overall share.**

The total number of contracts awarded in 2015 was 105,412, of which 103,553 (98.24%) to domestic bidders and 1,759 (1.76%) to foreign bidders.

The PPA compiled a report on the monitoring of public procurement procedures for year 2015, which identified the following most common irregularities: 22.47% of all irregularities concern provisions of Article 21 (Conditions for Application of Negotiated Procedure without Publication of Notice), followed by Article 40 (Regular Time Limits for Submission of Requests for Participation and Bids – 20.22%), Article 88 (Competitive Request for Quotations – 17.98%), Article 41 (Shortened Time Limits for Submission of Bids – 17.98%), etc.

**In the 20 highest-value contracts awarded<sup>43</sup>, negotiated procedures without publication of notice continue to be the most represented among sectoral contracting authorities.** Thus, it can be concluded that a certain number of these authorities still use this method unduly. The second most common procedure is open procedure, which is a positive development.

Other common irregularities that are repeatedly highlighted in audit reports include the persistently inadequate planning in terms of the efficient use of public funds and inefficiency of the public procurement process, resulting in frequent repetition of procedures, high number of complaints and appeals, the resultant failure to sign contracts in a timely fashion, and **procurement of unnecessary supplies**. Contracting authorities are advised to do market research before initiating a public procurement procedure.

## **REVIEW AND REMEDIES SYSTEM**

The amended PPL provided for the establishment of two new organisational units (branches) of the Sarajevo-based PRB, one in Banja Luka and the other in Mostar, which will decide, based on which entity the contracting authority belongs to, on procurements below the domestic threshold values (below BAM 800,000).

Despite the indisputable need for employing more staff in the PRB, given the large number of appeals and resultant heavy workload, which result in breached deadlines and decisions of questionable quality, the establishment of the two branches has brought many problems which TI BiH had warned about from the outset. All relevant international and domestic reports in the area of public finance in BiH have confirmed that the **review and remedies system has become the weakest link in the public procurement system in BiH**. Apart from the lack of coordination between the PRB headquarters and its branches, which is noted even in the PRB's 2015 Annual Report, reports also confirm the lack of capacity to address the many and complex cases of appeals, especially in the branch offices. This is not surprising considering the very questionable selection of branch offices' members and the fact that candidates with the most extensive experience in public procurement were not selected.

The Public Procurement Strategy cites the following facts, which largely confirm previous TI BiH analyses:

- a) The number of appeals is still high;
- b) The existence of different approaches to resolution of identical or similar cases;
- c) During the implementation, the existing legal framework indicated certain problems that PRB faced in its work pertaining to the number of staff providing support to PRB members;
- d) Insufficient financial resources for hiring experts in complex cases;
- e) Inadequate technical equipment;

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<sup>43</sup> Annex I to the Annual Report on Conducted Public Procurement Procedures, PPA

- f) Lack of training of PRB members and associates who directly handle cases following appeals;
- g) Partial application of the Law on Administrative Procedure that was not defined by the PPL;
- h) Lack of efficiency with regard to reimbursement of commencement of appeal procedure fees in cases where the appeal was upheld;
- i) Insufficient level of transparency of PRB decisions.

In 2015 PRB received 2,011 appeals, an increase of 77.65% (879 appeals) compared to 2014, when it received 1,132 appeals. In 2015 PRB resolved 1,820 appeals, of which 125 from 2014. The total number of appeals received in 2015 that have remained unresolved is 316.

Of the total number of appeals received in 2015, the Sarajevo-based PRB headquarter received 1,595 and resolved 1,522.

Members of the PRB branches were appointed only on 19 October 2015, as late as two years after the Law established the branches. During that period, the functioning of the remedies system at the entity level came to a temporary standstill until the controversial provisions on shared competences were amended and precisely defined.

From 19 October 2015 to 31 December 2015, the branches received 416 appeals and resolved 173. Specifically, the Banja Luka branch received 148 appeals and resolved 67, and the Mostar branch received 268 appeals and resolved 106. The fact that the Mostar branch received far more appeals does not automatically mean that the contracting authorities in FBiH are less efficient in implementing the Law, but reflects the fact that, due to its complex administrative structure, FBiH has a greater number of contracting authorities, which further suggests that there is a disproportionate division of labour among the PRB branches, with each having the same number of members.

## **PUBLIC PROCUREMENT AGENCY**

PPA is still understaffed to be able to perform tasks within its scope of operational competence. Reports prepared by the PPA on the implementation of the new Law are of better quality and provide more useful information than was previously the case.

The PPA director's term of office expired more than a year ago and an open competition was advertised to fill the position. That competition was cancelled based on very suspicious and weak arguments, and a new competition was advertised in late 2016. Bearing in mind the widespread practice of using political patronage in selecting and appointing people to managerial positions, there is a reasonable concern that the new management of this important institution will be appointed in the same way.

## **PUBLIC PROCUREMENT IN THE HEALTH CARE SECTOR**

In this year TI BiH also analysed the state of public procurement **in the health care sector**, where the situation is particularly worrying considering that corruption in this sector can mean the difference between life and death. Due to the strained financial situation in the sector, suppliers act as borrowers to medical institutions as they wait for up to a year to collect the payment or submit bids with payment period of almost a year. A consequence of this is that the prices of medicinal products, medical devices and equipment are significantly higher in BiH than in the neighbouring countries. Also, some of the disgruntled bidders decide not to participate any longer in calls for bids advertised by some medical institutions,

which reduces competition and affects the quality of medicinal products and medical devices thus procured. Analysis of PRB decisions relating to contracting authorities in the health care sector shows that here too one of the biggest problems are the technical specifications that favour certain bidders. The low quality of medical devices goes to the detriment of patients, who sometimes even pay with their life.

The data of the Agency for Medicinal Products and Medical Devices show a slight increase in the number of reports of adverse effects of medical devices, as shown in the table below.

Year	2010	2011	2012	2013	2014	2015
Number of adverse event reports associated with medical devices	5	9	17	40	48	68

This number is alarmingly low and is far from the number of reports received in countries with more developed markets, greater public confidence in institutions, and far better health care compared to BiH. Concealment of errors, malfunctions and other anomalies by medical personnel is yet another in a series of “public secrets” that is characteristic of the health care sector.

Most relevant documents make recommendations for improving the area of procurement of medicinal products; however, analyses, interviews with representatives of institutions and numerous media reports warn that the area of procurement of medical devices and equipment needs to be regulated further as a matter of urgency. **This is to be done through drafting and adopting the Rules on Medical Devices, developing standard bidding documents along with detailed and precisely defined technical specifications, training the procurement staff in how to develop scoring sub-criteria (product life cycle, etc.).**

## GENERAL RECOMMENDATIONS

- Further align the public procurement legislation with the 2014 *acquis* (procurement planning, conflict of interest, e-procurement, contract award criteria, etc.);
- Amend the PPL in order to eliminate technical inconsistencies;
- Continue developing the system towards improved planning and linking procurement plans with annual and multi-annual budgets, and develop the concept of purposeful procurement;
- Strengthen the provisions on conflict of interests of all participants in the procurement process and provide further training to all participants in the system on integrity, conflict of interest and corruption;
- Address the problem of corruption within the business sector as the supplier (collusive arrangements among bidders, unfounded bid withdrawal, cartelisation, etc.);
- Revise the organisational model of the review and remedies system;
- Strengthen coordination between the PRB headquarters and branches and strengthen their capacity to handle complex cases;
- Make the review and remedies system more transparent – continue publishing the decisions of the PRB headquarters and branches and the Court of BiH and continue developing the system towards establishment of an electronic database that will contain all previous decisions;
- The system of high fees for the lodging of appeals has not solved the problem of the high number of appeals and therefore needs to be revised;
- Strengthen the capacity of the PPA to perform all statutory tasks, especially public procurement monitoring.

# CONFLICT OF INTEREST

## LEGISLATIVE AND INSTITUTIONAL FRAMEWORK

### STATE LEVEL

Amendments to the Law on Conflict of Interest in Governmental Institutions of BiH adopted in late 2013 have fatally weakened the institution of conflict of interest and rendered it senseless, primarily through the politicisation of the body responsible for implementing the Law. It is important to note that the earlier amendments to the Law had gradually narrowed down the range of public offices and officeholders to whom the law applies, as well as the situations that give rise to conflict of interest. Bearing in mind the country's obligations in the areas of the rule of law and anticorruption combat, which are arising from its European integration commitment, there is a compelling need for the implementation of changes geared towards improving and harmonising the conflict of interest legislation at different levels of government in BiH. This is emphasised in the fourth evaluation report by the Group of States against Corruption (GRECO)<sup>44</sup> and the 2016 Bosnia and Herzegovina Report of the European Commission, which note that legal and institutional framework relating to conflict of interest remains inadequate and that amendments to the relevant laws are necessary.<sup>45</sup>

Amendments to the Law have weakened this institute for a number of reasons, of which the most problematic are as follows:

- The responsibility for the implementation of the Law was taken away from the Central Election Commission (CEC), and a new nine-member Commission was formed, composed of three members from the House of Representatives of the Parliamentary Assembly of BiH and three members from the House of Peoples of the Parliamentary Assembly of BiH (at least one third of whom must comprise delegates from opposition parties), serving a term which coincides with that of the Parliamentary Assembly (PA), and three members from the management of the Agency for Prevention of Corruption and Coordination of the Fight against Corruption (APIK). For any decision to be taken, it requires the votes of at least two commission members from each constituent people, i.e. at least six votes. This arrangement introduced the qualified majority system (rather than the commonly used simple or absolute majority system) and ethnic consensus in decision making, reducing conflict of interest to a matter of 'vital ethnic interest'. As a result of such arrangements, the Commission is under the direct control and influence of political parties represented in the PA. Furthermore, the status of the Commission is not precisely defined, which has led to a number of administrative barriers in the Commission's work;
- Amendments introduced non-binding sanctions in the form of proposal for removal from office or a call to an official to resign office, as well as a fine, i.e. suspension of a portion of salary payment from 30% to 50% of the net monthly salary for a maximum period of 12 months (which may be exceptionally extended), which is incommensurate with the extent of potential damage caused to society and proceeds of crime of high value. The Law provides that the sanctions can be avoided if the reasons leading to a conflict of interest are eliminated in the course of the procedure within a specified period, wherein the Commission can stay or complete the procedure, recognising the elimination of reasons as an mitigating factor. Furthermore, even after it imposes a sanction, the

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<sup>44</sup> [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4Rep\(2015\)2\\_Bosnia-and-Herzegovina\\_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4Rep(2015)2_Bosnia-and-Herzegovina_EN.pdf)

<sup>45</sup> [http://ec.europa.eu/enlargement/pdf/key\\_documents/2016/20161109\\_report\\_bosnia\\_and\\_herzegovina.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_bosnia_and_herzegovina.pdf), p. 17

Commission may give a public official an additional 30 days to eliminate the reasons leading to a conflict of interest.

Because of the above shortcomings, as well as the fact that the implementation of this Law and the laws at lower government levels has been blocked for years, TI BiH drafted a new Law on Conflict of Interest in Governmental Institutions of BiH in consultation with relevant institutions, and presented it in May 2016. This was followed by a consultation process with decision-makers in order to table the Draft Law for debate and passage in parliament.

Amendments proposed by TI BiH include provisions to expand the range of public officeholders who are subject to the Law – from the currently narrow circle encompassing only elected officials, executive officeholders and advisors, to all public officeholders, including all elected and appointed officials in all institutions, organisations, companies and bodies established by the Government.

TI BiH also proposed that the responsibility for the implementation of the Law be transferred from the Commission for Deciding on Conflicts of Interest of BiH (CDCI) to an independent body – either the Agency for Prevention of Corruption and Coordination of the Fight against Corruption (APIK) or an independent commission composed of members who are neither representatives of political parties nor have held any important public office. In the long run, this would remove obstacles and problems in the implementation of the law resulting from the formation of the CDCI, which has not yet found a single case of conflict of interest.

Other amendments proposed by TI BiH include the following:

- Expansion of restrictions on involvement of public officeholders in private enterprises, in order to prevent the current practice where public officials are owners of or have a financial interest in enterprises doing business with the government
- Prohibition on holding multiple offices, regardless of the level of government
- Mandatory submission of personal financial reports and asset declaration forms on an annual basis, as well as the establishment of verification of the accuracy of the reports and publication of the register of officeholders and their assets
- Increased fines and the introduction of additional sanctions, such as removal from office and the annulment of the act resulting from violations of the law.

TI BiH considers that, if this Draft Law is adopted at the state level, the same provisions should be introduced into the entity-level laws in order to ensure their alignment.

### **Federation of Bosnia and Herzegovina**

The law of the Federation of BiH is not fully aligned with the state-level law in that the two laws define 'close relatives' in strikingly different ways. Unlike the state-level law, the FBiH law does not count relatives in the indirect line among 'close relatives', and distinguishes between relatives and close relatives along this particular line. Further, the amendments to the state-level law, which took away the responsibility for deciding on conflict of interest from the CEC, effectively repealed the FBiH Law, which provides that the CEC is still responsible for its implementation. In October 2015 the House of Peoples of the FBiH Parliament adopted amendments to the Law on Conflict of Interests in Government Institutions of FBiH which provided that the Law shall be implemented by the state-level CDCI, but the law was never considered by the House of Representatives.



## **Brčko District of BiH**

The legislation of the Brčko District of BiH (BD) suffers from similar deficiencies as that in the Federation of BiH. The Law on Conflict of Interest in the Institutions of Brčko District of Bosnia and Herzegovina also contains provisions that differ from those contained in the state-level law. Thus, for example, no sanctions are envisaged for violations of provisions relating to associations and foundations, or the law provides that elected officials, executive officeholders and advisors shall not act in the capacity of an authorised person for a foundation or association, or serve on the management board, steering board, supervisory board, executive board, or management, or act in the capacity of an authorised person for any private enterprise that contracts, or otherwise does business, only with the District, instead of the budget-financed government authorities at any level, as stipulated under the state-level law. Also the BD law does not provide for mandatory disclosure of gifts and no sanctions are envisaged for violations of provisions relating to associations and foundations. Following the transfer of responsibilities away from the CEC, which was also responsible for the implementation of the BD law, in February 2015 amendments to the Law on Conflict of Interest in the Institutions of Brčko District were adopted, transferring the responsibility for deciding on conflict of interest to the Election Commission of Brčko District. However, this law will have to be amended again as it is contrary to the Election Law of BiH, which explicitly sets out the mandates of all commissions along the vertical line.<sup>46</sup>

## **Republika Srpska**

The current Law on Prevention of Conflict of Interest in Government Institutions of the Republika Srpska<sup>47</sup> is much more permissive and liberal than the other counterpart laws in the country, and was designed such that it practically legalises conflict of interest, which makes it difficult for the competent authorities to validly identify and efficiently sanction conflict of interest.

Also, the 2013 amendments to the state-level law affected the implementation of the RS law, because the transfer of responsibilities away from the CEC, and the revocation of sanctions in the form of ineligibility to stand for elected office, which remains in the RS law, has left a void whereby the Commission cannot impose the ineligibility sanction or revoke the mandate, because the CEC, which is the only authority that could have a mandate to enforce this sanction, does not act on the CDCI decisions on the grounds that it does not have a mandate to do so.

Law on Prevention of Conflict of Interest in Government Institutions of RS is contrary to the state-level law in other respects too. This results in different legal norms and legal practice in RS and BiH, and puts public officials at different levels of government at a disadvantage.

The differences in legal provisions can be summarised as follows. The RS Law provides for:

- A narrower circle of persons that are subject to the Law and narrower range of institutions in respect of which public officials can get into potential conflict of interest, as well as a narrower range of incompatible offices (only for members of supervisory boards and directors of public enterprises in RS);
- Shorter prohibition on assuming the duties of an incompatible office upon termination of office (only 3 months versus 6 months, as envisaged by the state-level law);

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<sup>46</sup> <http://www.bdcentral.net/index.php/hr/vijesti/3446-razgovarano-o-mogunostima-harmonisacije-propisa-i-prakse-u-oblasti-sukoba-interesa->

<sup>47</sup> Law on Prevention of Conflict of Interest in Government Institutions of RS, "Official Gazette of RS", No. 73/08

- Less restrictive ban on the provision of personal services (higher value of allowable contracts or transactions between public enterprises and local government institutions – BAM 30,000 in the RS law vs BAM 5,000 in the state-level law);
- A ban on involvement in associations and foundations which are financed from the budget or by the local government in excess of BAM 100,000 per year. Also, there are no formal obstacles for membership in the governing bodies of associations or foundations financed from other sources at lower levels of government, with the exception of the RS budget;
- Higher value of gifts (BAM 300 in RS vs BAM 200 in BiH);
- Significantly lower fines, amounting to only BAM 500 to 1,500. The RS law also kept the ‘ineligibility to stand for an elected office’ sanction, which was repealed in the state-level law.

In 2010 the Commission for Deciding on Conflict of Interest in the Government Institutions of RS launched an initiative to amend the Law<sup>48</sup>. The initiative was submitted to the competent authorities of the RS National Assembly. The prepared exposure draft was released for public consultation in early 2013, but the amendments have not yet been adopted. In its rationale for the initiative, the Commission indicated that it was necessary to amend the law in order to make it enforceable and less susceptible to skilful manipulation, by ensuring that, in addition to having a preventive purpose, the law must result in an appropriate sanction.

The most recent amendment to the RS law was introduced in 2014. It provides that the prohibition against elected officials, executive officeholders and advisors serving as members of the bodies, presidents or directors of associations or foundations which are financed from the RS budget or the local government does not apply to membership in the bodies of the Solidarity Fund for the Reconstruction of the Republika Srpska.

### **Implementation of the conflict of interest laws**

Ever since the adoption of the most recent amendments to the state-level law in late 2013, the implementation of the conflict of interest laws at the level of BiH, FBiH and BD has been virtually nonexistent due to administrative barriers that have completely paralysed the work of the newly formed CDCI, which has brought about a complete collapse of the system, left a lot of room for abuse, and caused incalculable damage. As mentioned above, the amendments also blocked the implementation of the law at the level of FBiH, because the transfer of responsibilities away from the CEC has left FBiH without a body responsible for its implementation, whereas the provision of the BD Law which stipulates that the implementation of the law is the responsibility of the Election Commission is also unenforceable.

With a view to removing obstacles to the implementation of the state-level law, in May 2016 an amendment was adopted providing that the Commission for the Verification of Acts shall use the stamp of the Agency for Prevention of Corruption and Coordination of the Fight against Corruption. TI BiH promptly warned that the amendment which allows the acts of one institution to be verified by the stamp of another institution cannot provide a long-term solution to the issue of the Commission’s work, and that it was not based on the relevant

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<sup>48</sup> [http://www.sukobinteresa.rs.org/index.php?option=com\\_content&view=article&id=4%3Arijepredsjednice&catid=1&Itemid=3&%20lang=sr-YU](http://www.sukobinteresa.rs.org/index.php?option=com_content&view=article&id=4%3Arijepredsjednice&catid=1&Itemid=3&%20lang=sr-YU)



regulations and represented an extremely unusual and unprecedented practice.<sup>49</sup> However, the amendment unblocked the work of the Commission, albeit only formally.

In 2015 the state-level CDCI met four times and adopted one decision to initiate the procedure, 33 decisions not to initiate the procedure, issued three opinions as to whether a certain act of commission or omission constituted a violation of the conflict interest laws, and adopted three conclusions following receipt of requests for access to information.<sup>50</sup>

In 2015 the Commission for Deciding on Conflicts of Interest in the Government Institutions of RS issued 36 decisions, of which conflict of interest was found in 14 cases. It issued an opinion in 13 cases, adopted 71 conclusions, and completed 24 cases by issuing other forms of acts (reply to the letter, information memorandum, etc.). Of the total number of 163 cases handled, the Commission completed 132 cases.<sup>51</sup>

### **Conflict of interest in the judiciary**

Prevention of conflict of interest is not regulated by a single piece of legislation. Instead, the relevant provisions may be found partly in the applicable entity-level procedural laws, partly in the Law on the High Judicial and Prosecutorial Council (HJPC), and partly in the judicial and prosecutorial codes of ethics, while some provisions remain completely unregulated.

Separate rules that arise from the Law on HJPC govern the prevention of conflict of interest only for members of the HJPC.<sup>52</sup> Prevention of conflict of interest for judicial officeholders is regulated in a relatively piecemeal fashion in multiple legislative provisions and is not governed by a single piece of legislation. Instead, it is contained in the existing procedural laws as part of the provisions on exemption. The Law on HJPC, on the other hand, regulates incompatibilities with the judicial office and prohibition on carrying public and other duties.

In July 2016 the HJPC adopted Guidelines for the Prevention of Conflict of Interest in the Judiciary, which represent a set of recommendations and measures that should help judicial officeholders understand conflict of interest and recognise the risks to the performance of their duties which are inherent in the simultaneous existence of public and private interests and which may lead to the abuse of office or obtaining illegal benefits for oneself and/or another person<sup>53</sup>. However, since the HJPC cannot, by means of an internal regulation, impose statutory duties on the rest of the judicial community, these guidelines are not binding and there are no sanctions in place for misconduct under these Guidelines. Therefore, this issue will have to be resolved by amending the Law on HJPC, through introduction of oversight and punitive measures.

### **Conclusions and recommendations**

When it comes to legal adjustments, it is necessary first and foremost to upgrade the state-level Law on Conflict of Interest in Government Institutions of BiH, in accordance with the recommendations given, and then harmonise the entity-level laws accordingly. To that end, it is necessary to:

- Establish an independent body to be responsible for enforcing the law at the levels of BiH, FBiH and BD (APIK or an independent commission);

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<sup>49</sup> <https://ti-bih.org/izmjene-zakona-o-sukobu-interesa-hitne-ali-moraju-biti-sveobuhvatne/>

<sup>50</sup> 2015 Annual Report of the CDCI

<sup>51</sup> <http://www.sukobinteresa-rs.org/attachments/article/236/godisnji%202015.pdf>

<sup>52</sup> Rules on Conflict of Interest for Members of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, No. 08-02- 1949/2014, 29 May 2014

<sup>53</sup> [http://pravosudje.ba/vstv/faces/docservlet?p\\_id\\_doc=35081](http://pravosudje.ba/vstv/faces/docservlet?p_id_doc=35081)

- Harmonise the legal framework for the prevention of conflict of interest with the aim of eliminating the differences in respect of persons to whom the laws apply and situations leading to conflicts of interest;
- Expand the circle of persons to whom the laws apply, i.e. include all elected or appointed officials in the bodies, authorities and enterprises established by the state;
- Amend the provisions relating to the performance of other duties and incompatibility of other functions such to include all public officeholders;
- Introduce clear and uniform rules limiting the performance of multiple functions, regardless of the level of government;
- Introduce provisions which would establish a distinction between the performance of a public office and holding a function in a political party, given that this issue is not adequately regulated in other laws;
- Clearly and precisely define restrictions in the performance of offices, provision of services and employment for public officeholders for a period of two years following the expire of the term of office, with a view to preventing the customary practice of using the influence that the officeholder might still have in government authorities to achieve a personal gain;
- Merge the provisions on financial reporting and declaration of assets by officeholders, which detail the reporting deadlines and collection, disclosure and verification of the reports/forms, into the existing conflict of interest legislation; make asset declaration forms available to the public; introduce mandatory submission of asset declaration forms on an annual basis; establish a system to verify the accuracy of the reports and declaration forms; make the register of officeholders and their assets publicly available;
- Define in more detail the restrictions on the involvement of public officeholders in private enterprises, with the aim of preventing public officeholders who own or have a financial interest in enterprise from doing business with the government;
- Increase fines and impose additional sanctions, such as removal from office and the annulment of the act resulting from violations of the law

#### **Recommendations for prevention of conflict of interest in judiciary**

- Rules on Conflict of Interest in the HJPC should be expanded to include the entire judicial community, with the aim of introducing uniform rules for all judicial officeholders
- Clearly define the methods and deadlines for submitting personal financial reports and asset declaration forms by judicial officeholders, make them publicly accessible and introduce verification of their accuracy;
- Amend the Law on HJPC and adopt implementing regulations to establish a body within the HJPC which will carry out comprehensive and effective oversight of asset declaration forms/personal financial reports and conflict of interest; or, transfer part of the authority for oversight and detection of conflict of interest in the judiciary to another, independent body outside the justice system.

## Political party financing

### Legislatorial activities

In October 2015 the Parliamentary Assembly of BiH set up an Interministerial Working Group to Draft Amendments to the Electoral Legislation and charged it with preparing the Draft Law Amending the Law on Political Party Financing, with the aim of implementing the GRECO recommendations issued in May 2011.

Amendments to the Law were adopted in May 2016,<sup>54</sup> just before the expiration of the deadline for calling the 2016 Local Election. Work of the Interministerial Working Group was marked by disagreements over the necessary amendments to the Election Law, and very little attention and activities were dedicated to efficiently and substantially implementing the GRECO recommendations through amendments to the Law on Political Party Financing. Thus, five years after the issuance of the GRECO recommendations the country missed yet another opportunity to significantly improve the transparency and accountability of political parties. Instead, cosmetic changes to the law merely created an appearance of fulfilment of recommendations.

The amendments included: revocation of party financing through bank loans, introduction of mandatory internal financial control procedures for parties, reporting income from related parties, mandatory online disclosure of information on parties' financial operations, the introduction of the obligation for the CEC that all to report all suspected offences to the competent prosecutors, and changing the amount of fines for violation of certain legal provisions.

However, the amendments altogether failed to address four of the nine recommendations, while other recommendations were implemented only superficially or partially, and not a single recommendation was fully addressed by the amendments to the Law. Also, the amendments did not resolve the need for clear and unambiguous definition of the CEC's mandate regarding the audit of parties' expenditure, nor promoted the use of unique bank accounts for political parties' transactions, which are the two most important criteria for establishing effective control over political party financing. Even though political parties are now required by law to disclose their expenditures and revenues on their websites, the amendments did not prescribe the form of and dates for the disclosure. Fines were increased in part for breach of certain statutory provisions, but the fine of up to BAM 10,000 is still too low to motivate parties to comply with the Law because the gains that can be potentially obtained through a breach of its provisions are many times bigger. Finally, the amendments failed to introduce provisions to increase the CEC Audit Department's independence and capacity for effective law enforcement.

In July 2016 GRECO released the Third Interim Compliance Report on Bosnia and Herzegovina, which looks at incriminations and the transparency of political party financing.<sup>55</sup> The report stated that there had been no changes since the Second Interim Report when it comes to political party financing, which suggests that they were not incorporated in its findings.

The European Commission's Bosnia and Herzegovina 2016 Report also noted that there was still no track record of effective control of political party and electoral campaign financing

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<sup>54</sup> "Official Gazette of BiH", no. 41/16

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[https://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3\(2016\)7\\_Third\\_Interim\\_BiH\\_BA.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3(2016)7_Third_Interim_BiH_BA.pdf)

and some of the GRECO recommendations had not yet been incorporated into the legal framework governing political party financing.<sup>56</sup>

Given that certain provisions of the Election Law also govern the transparency of political party financing, in particular Chapter 15 which relates to election campaigns, in January 2016 TI BiH appealed to the Interministerial Working Group to take advantage of the initiated process of amending the BiH Election Law to introduce mechanisms for the prevention of misuse of public funds, public offices and public institutions during election campaign, given that the existing provisions of the Law did not thoroughly define the ban on the use of public offices and public institutions for the purpose of electoral promotion. TI BiH proposed introduction of a ban on paid advertising by state, entity and local administration bodies and public enterprises, institutions and funds that may in any way favour political actors during election campaigns, as well as the prohibition of the use of premises of public authorities and enterprises for the preparation and implementation of campaign activities. One of the proposals concerned the introduction of restrictions on government spending, such to ensure that the spending in the pre-election period should not be much higher than on average, while at the same time ensuring greater transparency of public expenditures in the same period. It is also necessary to impose restrictions on the employment in public administration, public enterprises and funds, in order to prevent vote buying through employment.

TI BiH also proposed that clear rules be introduced to prohibit the use of official cars and helicopters for the purposes of election campaigning (attending rallies, etc.) and that clear demarcation lines should be put in place between public office and party duties, by introducing restrictions on public appearances of public officeholders for the purposes of electoral promotion, or imposing a hiatus on the performance of high public offices during election campaigns.

TI BiH has also stressed the need for more detailed provisions prohibiting vote-buying and pressure on voters, which would include prohibition of any form of monetary or in kind donation or even a promise of benefit, whether financial or in the form of employment, appointment, promotion, etc., in exchange for a vote. In the same way it is necessary to define and prohibit pressures on employees in public institutions, threats and ultimatums, for the purpose of garnering votes based on the candidate's influence or position in a public institution.

Unfortunately, the Law Amending the Election Law has not even touched upon these aspects and, yet again, an opportunity was missed to improve measures and strengthen mechanisms to prevent abuse of public resources for election campaigns, as well as pressure on voters and other forms of abuse, which have become a frequent occurrence due to vague provisions.

### **Implementation of the Law**

Implementation of legislation on political party financing is the responsibility of the Central Election Commission (CEC), which in turn has a very limited mandate when it comes to audit and control of party financing, particularly in the field of expenditure auditing. Stemming from the deficient legal framework, all these problems result in inefficient and ineffective implementation of the Law, i.e. leave room for diverse forms of abuse that part can be neither promptly detected nor adequately penalised. In addition, TI BiH, as well as GRECO, have already been warning about the limited resources of the Audit Department, especially in terms of understaffing.

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<sup>56</sup> [http://europa.ba/wp-content/uploads/2016/11/20161109\\_report\\_bosnia\\_and\\_herzegovina.pdf](http://europa.ba/wp-content/uploads/2016/11/20161109_report_bosnia_and_herzegovina.pdf)

In 2016, the CEC published the Report on the Audit and Review of Financial Statements of Political Parties for 2014, for 118 political parties. Of that number, 112 parties submitted their statements by 31 March 2016, which was the deadline for the submission of parties' 2015 financial statements.<sup>57</sup> The CEC Department for Auditing Political Party Financing has an average of only 5 to 6 auditors, making it understaffed given the high number of political entities whose statements (annual, pre-election and election statements) are subject to audit.

Due to deficiencies in terms of ill-defined mandates, lack of capacity, and lack of statutory deadlines for conducting audits and disclosing audit reports, audits are carried out on a sample basis, which means that they do not include all organisational units of parties but only a few of them. Furthermore, the disclosure of audit reports takes almost two years. Thus, for example, the audit reports for 2014, which included the election and post-election statements for the 2014 General Election, were disclosed just before the start of the electoral campaign for the 2016 Local Election.

Besides obstacles in terms of lack of capacity and vague mandate for auditing parties' expenditures, another major obstacle to thorough audits is the fact that parties do not conduct transactions via single accounts, although they are under obligation to report all transaction accounts and all transactions conducted through them. However, audit reports show that parties often fail to report all accounts. Therefore it is very difficult to verify the veracity of the reports and the CEC cannot find out the details of the transactions based on such deficient reports. Thus, audits often come down to mere identification of excessive donations, donations from prohibited sources or improper filling of forms, without getting into the crux and nature of transactions and the issue of proper spending of funds.

According to the 2015 Report on the Implementation of Laws within the CEC's Scope of Purview, the control and audit of financial statements of political parties for 2013 found the following: no violations of the Law on Political Party Financing in 27 political parties; infractions of accounting rules, failure to maintain a proper record or erroneous recording of revenues and expenditures, errors in completing financial statements, and failure to submit financial statements within the statutory deadline in 46 political parties; minor infractions (failure to report in-kind donations of small value, failure to issue certificates for the received membership fees) in five parties; and infractions punishable by fines under the Law on Political Party Financing in 23 political parties.<sup>58</sup> The Report reveals that **the number of parties found to have violated the applicable regulations, whether it be accounting rules or the Law on Political Party Financing, is by far higher than the number of those that acted in compliance.**

Sanctions imposed by the CEC in 2015 include:

- a) 21 fines in the aggregate amount of BAM 65,200.00 for infractions of the Law on Political Party Financing, ranging from BAM 500.00 to BAM 33,000.00;
- b) six political parties that failed to submit annual financial statements and provide access to their premises were barred from standing for the next elections.

It should be noted that there was only one fine to the tune of BAM 33,000, and it was imposed on the Social Democratic Party of BiH. Other fines include BAM 7,100 levied on the

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<sup>57</sup> [http://izbori.ba/Documents/documents/revisija/2015/Spisak\\_PS\\_GFI\\_2015-547.pdf](http://izbori.ba/Documents/documents/revisija/2015/Spisak_PS_GFI_2015-547.pdf) and <http://izbori.ba/Default.aspx?CategoryID=658&Lang=3>

<sup>58</sup>

[http://izbori.ba/Documents/documents/2015/Izvjestaji/Izvjestaj\\_o\\_provodjenju\\_zakona\\_iz\\_nadleznosti\\_CIK\\_BiH\\_u\\_2015-bos.pdf](http://izbori.ba/Documents/documents/2015/Izvjestaji/Izvjestaj_o_provodjenju_zakona_iz_nadleznosti_CIK_BiH_u_2015-bos.pdf)

Alliance of Independent Social Democrats, BAM 3,000 levied on the Party of Democratic Progress and BOSS Mirnes Ajanović each, and other fines ranging from BAM 500 to BAM 2,000.<sup>59</sup>

In summary, regardless of the increased range of fines compared to earlier reports, **the majority of fines imposed for violation of the Law on Political Party Financing do not exceed BAM 2,000.** Fines were imposed for violations of provisions relating to: sources of funding, prohibited contributions, the obligation to report contributions, the obligation to maintain the records of revenues and expenditures, and the obligation to submit a financial statement for each calendar year. Comparison of the fines imposed and the nature of the infractions committed reconfirms TI BiH's findings that the fines available under the Law and imposed on political parties are not commensurate to the gravity of the infractions or the gain that parties can make by infringing the Law.

The most recently published reports on the audit of political parties, relating to 2014<sup>60</sup>, also show numerous examples of misuse and violations of the Law. These include:

- Funds were spent for purposes that are not related to the achievement of party's objectives;
- Party did not maintain a record of the receipt of membership fees and voluntary contributions, and did not issue certificates of the receipt of contributions;
- Funds from membership fees and donations that were received in cash were not paid to the party's bank account;
- Funding from prohibited sources;
- Failure to report donations, especially in-kind donations, which most commonly take the form of the use of business premises owned by municipalities;
- Mutual payments between different political parties, and even payments to civic associations associated with political parties;

Financial statements for 2016, which will provide information about the financing and expenditure related to the 2016 Local Election, will not be made available until mid-2017, while the associated audit reports will be published in 2018.

However, TI BiH observed a number of irregularities before and during the election campaign for the Local Election, and reported some of them to the CEC.

These irregularities primarily relate to the misuse of public funds for the purpose of electoral promotion, and examples include:

- Pressure on private and public companies for the purpose of collecting donations;<sup>61</sup>
- Holding party rallies and events in the premises or courtyards of public institutions and agencies;
- Using events organised by public institutions to promote a political party (the opening of roads, buildings, etc., in particular the opening of the '9 January' freeway, where the invitation letters sent out to the media contained a letterhead with the logo of SNSD);<sup>62</sup>
- Using the referendum campaign in the Republika Srpska, which was financed from the budget, for the promotion of a political party, and vice versa;
- Using public office to show public support to a political party;<sup>63</sup>

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<sup>59</sup> Ibid.

<sup>60</sup> <http://izbori.ba/Default.aspx?CategoryID=658&Lang=3>

<sup>61</sup> <http://www.zurnal.info/novost/19988/sda-od-direktora-javnih-preduzeca-trazi-donacije-za-kampanju>

<sup>62</sup> <http://www.6yka.com/novost/113143/auto-put-darovali-dusanka-majkic-i-snsd>

- Abuse of office to put pressure on voters;<sup>64</sup>
- Using institutional resources (official vehicles, helicopters, employees) for the purpose of election activities;<sup>65</sup>
- Pressure on voters and vote-buying through offering employment in public institutions and public enterprises.<sup>66</sup>

## Conclusions and recommendations

The legal framework governing political party financing still contains substantial deficiencies that hinder adequate supervision and enforcement of applicable laws. Some of the key shortcomings are:

- The Law does not encourage the use of bank accounts for all transactions of political parties, and allows for the use of multiple bank accounts, which results in the use of cash and hampers financial control;
- The Law still does not provide for mandatory disclosure of entire financial statements, while at the same time reporting forms, especially those for post-election financial statements, are outdated and do not provide detailed insight into and proper classification of expenditures;
- Insufficient transparency of the accounts and activities of actors that are associated, directly or indirectly, with political parties – or otherwise under their control;
- Inadequate resources of the CEC's Audit Department, which oversees the financial statements of the parties;
- Lack of control over the expenditure of the parties;
- Inadequate sanctions that are not commensurate to the gravity of the infractions committed;
- By law, there is no clear distinction between the expenditures that should be considered campaign expenses and regular, operating costs of political parties during campaigns, which hampers independent verification of campaign costs;
- The regulations do not delimit party functions and functions in public institutions and enterprises, which puts heads of institutions in a privileged position, particularly in the pre-election period.

In view of these shortcomings as well as the fact that a number of recommendations – both by international institutions and organisations and by civil society – have not yet been fulfilled, in particular the GRECO recommendations, it is necessary to make new amendments to the Law on Political Party Financing and the Election Law as soon as possible, while ensuring that the amendments are genuinely aimed at substantial improvement, rather than mere cosmetic changes, such as has been the case so far. The Parliamentary Assembly of BiH announced that the Interministerial Working Group would continue to work, which is a good opportunity to ensure that the recommendations are implemented, provided that there is consultation with the public and that the amendment process is not geared towards serving the interests of political parties, whose representatives make up the Interministerial Working Group, which remains the most serious, and often the only obstacle to improving the overall anticorruption legislation in the country.

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<sup>63</sup> <http://podlupom.org/v2/bs/clanak/saopstenje-izborna-kampanja-prljava-i-usmjerena-na-manipulaciju-biraca/222>

<sup>64</sup> <http://www.blic.rs/vesti/republika-srpska/predizborni-mobing-teraju-zaposlene-na-partijske-skupove/p93tkrl>

<sup>65</sup> <http://www.faktor.ba/vijest/helikopter-vlade-voza-vladajue-u-rs-u-na-stranake-skupove-214103>

<sup>66</sup> <http://mojahercegovina.com/stranacka-zaposljavanje-u-het-u-stav-rukovodstva-zakon-je-tu-da-bi-se-krsio/>



## Asset forfeiture

The United Nations Convention against Corruption<sup>67</sup> (UNCAC) defines ‘freezing’ or ‘seizure’ as “temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority”<sup>68</sup>, whereas ‘confiscation’, which includes forfeiture where applicable, is defined as “permanent deprivation of property by order of a court or other competent authority”.<sup>69</sup> In the legal system of Bosnia and Herzegovina, these terms are encompassed under the principle that “nobody shall be allowed to retain property gain obtained by commission of a criminal offence” and the legal instruments of temporary and permanent confiscation of property gain obtained through commission of a criminal offence.

### Legal and institutional framework in BiH

Bosnia and Herzegovina has taken a number of steps to harmonise its criminal legislation with the UNCAC. The criminal legislation establishes the basis and method of forfeiture of assets and proceeds of crime, protection of the injured party, and the general principle that “nobody shall be allowed to retain property gain obtained by commission of a criminal offence”, as well as that the gain may be forfeited by the court decision which established that the criminal offence has been committed.

Under the criminal procedure codes, the acting prosecutor has a very important role in establishing the facts necessary to decide on the forfeiture of proceeds of crime. It is the prosecutor’s role that determines how effective the process of identification and forfeiture of proceeds of crime is going to be. The prosecutor has many powers at their disposal, which include, for example, issuing orders to banks or telecommunications operators, as well as other measures, such as special investigative measures.

Furthermore, the laws on forfeiture of proceeds of crime in the Republika Srpska, the Federation of BiH and Brčko District further emphasise the prosecutor’s active participation in the investigation phase. This particularly applies to the financial investigation phase which is undertaken when it is necessary to comprehensively determine the actual origin, value and structure of property gain for which there are grounds for suspicion that it was obtained through commission of a criminal offence. It is extremely important that, following the adoption of these laws, financial investigation has become a formal phase in identifying and forfeiting proceeds of crime, and prosecutors as the key drivers of these activities should initiate financial investigations.

A particular challenge and bottleneck is posed by the fact that there is no similar procedure at the state level as there is at lower levels of government.

One of the aims of the laws on forfeiture of proceeds of crime is to ensure management by the competent authorities of frozen, seized or confiscated property referred to in paragraphs 1 and 2 of Article 31 of the Convention. The RS law provided for the establishment of an Agency for Confiscated Property Management as an administrative organisation operating within the Ministry of Justice of RS, whereas the FBiH Law established the FBiH Agency for Confiscated Property Management as a special administrative body. At the state level, for procedures carried out in accordance with the state-level criminal legislation, there is no body in place to manage the temporarily or permanently seized assets. In July 2016 Brčko

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<sup>67</sup> Adopted on 31 October 2003 at the UN General Assembly, Resolution No 58/4 and Decision Approving Ratification of the United Nations Convention against Corruption (“Official Gazette of BiH”, No. 3/06)

<sup>68</sup> Article 2, paragraph (1), item (f)

<sup>69</sup> Article 2, paragraph (1), item (g)



District passed a law that assigned this role to the existing Office for Public Property Management.

Based on the relevant regulations, these bodies have mandates that meet the requirements of the Convention, but it is not possible to fully assess whether they have adequate capacity to carry out their mandates.

### **Summary of court decisions ordering asset forfeiture issued in the 2013-2015 period**

For the purposes of this analysis, TI BiH sent a request to the High Judicial and Prosecutorial Council of BiH for access to statistical data on court decisions ordering asset forfeiture issued in the 2013-2015 period, as well as the amount (value) and the type of assets temporarily or permanently forfeited, and the number and amount of fines.

The HJPC issued a Decision<sup>70</sup> stating that they could only provide data on the number of final court judgements ordering asset forfeiture as well as the value of the assets obtained by commission of a criminal offence. They also provided data on the number of fines and the amounts thereof, in both criminal and misdemeanour cases. These figures do not necessarily indicate that these judgements were actually executed and that the assets were ultimately forfeited, but only indicate decisions arising from final judgements.

Data relating to cases conducted in separate proceedings on asset forfeiture and the type of assets to be forfeited by a legally binding decision is not statistically processable. Also, the Case Management System (CMS) does not support the option to input and process data relating to the number, type and value of the temporarily forfeited assets. The table below shows the trends of available data before the courts at all levels of the judiciary, for the period 2013-2015.

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<sup>70</sup> Decision No. 01-07-10-24-138 / 2016 of 17 October 2016

COURT	Number of cases in which assets were forfeited			Total value of forfeited assets			Number of cases in which a fine was imposed			Total amount of fines		
	2013	2014	2015	2013	2014	2015	2013	2014	2015	2013	2014	2015
<b>Court of BiH</b>	27	26	20	552,871	429,788	915,205	22	24	23	166,500	166,400	221,600
<b>Supreme Court of FBiH</b>	N/A	N/A	N/A	0	0	0	N/A	N/A	N/A	0	0	0
<b>Supreme Court of RS</b>	N/A	N/A	N/A	0	0	0	N/A	N/A	N/A	0	0	0
<b>Appeals Court of BD</b>	N/A	N/A	N/A	0	0	0	N/A	N/A	N/A	0	0	0
<b>Cantonal courts (FBiH)</b>	6	3	0	16,355	69,799	N/A	27	9	15	85,800	197,700	125,700
<b>District courts (RS)</b>	3	1	5	24,220	740	22,750	12	13	11	44,800	43,500	61,000
<b>Municipal courts (FBiH)</b>	10	21	42	68,772	984,597	389,836	109	106	155	140,500	94,000	148,152
<b>Basic courts (RS)</b>	1	1	1	176	352	675	1,250	1,299	1,286	1,988,149	1,982,974	1,763,692
<b>Basic Court of BD</b>	N/A	1	N/A	0	33,049	0	40	41	37	68,750	60,100	65,600
<b>Total</b>	<b>47</b>	<b>53</b>	<b>68</b>	<b>662,394</b>	<b>1,518,325</b>	<b>1,328,466</b>	<b>1,460</b>	<b>1,492</b>	<b>1,527</b>	<b>2,494,499</b>	<b>2,544,674</b>	<b>2,385,744</b>

*Comparative review of statistical data on the number of cases and the amounts of forfeited assets and imposed fines*

## Review of asset forfeiture practice of courts in BiH

Analysis of the available statistical data provided by the High Judicial and Prosecutorial Council of BiH shows that during the 2013-2015 period there was no satisfactory and significant progress in asset forfeiture ordered by final court judgements. More to the point, the CMS does not allow for statistical processing of all important data on forfeited assets. Thus, the data on special procedures resulting in decisions ordering permanent forfeiture of assets are not available and statistically processable. The same is true of the data on the type of assets that are permanently forfeited, as well as those on temporarily forfeited assets (number of cases, type and value of temporarily forfeited assets). These data should be very important for the police and the judiciary in further planning and analysis of the results in combating corruption offences, as well as all other offences aimed at obtaining illegal profit, and their availability would be of multiple benefit.

Analysis of all indicators on asset forfeiture during 2013-2015 and the comparison of these indicators between different levels of the judiciary in BiH shows the following:

- The Court of BiH ordered the forfeiture of assets of the highest aggregate value compared to the rest of the judicial system in BiH, although the number of cases in which asset forfeiture was ordered in 2015 was the lowest compared to the previous two years with only 20 final judgements ordering it.
- The courts in FBiH (cantonal and municipal courts) delivered the most final judgements ordering asset forfeiture. Particularly encouraging is the fact that in 2015 the municipal courts delivered the largest number of final judgements ordering asset forfeiture (a total of 42). Such an increase may be accounted for by the fact that the FBiH *lex specialis* on asset forfeiture came into force in March 2015. Since the *lex specialis* came into effect in 2015, the number of final court judgements and the value of forfeited assets are expected to increase considerably in the coming years.
- The courts in RS (district and basic courts) delivered very few final judgements ordering asset forfeiture. In 2015 they passed only six final judgements ordering asset forfeiture, whereas in the previous years the number of final judgements had been even lower. Considering that the Law on Confiscation of Proceeds of Crime has been in force for several years now, the inescapable conclusion is that it has been ineffective. However, the courts in RS imposed the largest number of fines and the highest-value fines, but this does not necessarily mean that the fines were related to assets acquired by commission of a criminal offence.
- Over the three-year reference period the Basic Court of Brčko District delivered only one final judgement ordering asset forfeiture. It is a very disappointing result. However, once the newly adopted Law on Confiscation of Proceeds of Crime comes into effect, the trends in the Brčko District are expected to improve drastically.