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REPORT OF TRANSPARENCY INTERNATIONAL BOSNIA AND HERZEGOVINA

MONITORING OF IMPLEMENTATION OF ANTI-CORRUPTION REFORMS IN BiH



**NORWEGIAN MINISTRY
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TABLE OF CONTENTS

ABOUT THE PUBLICATION	3
CONTENTS	7
ABBREVIATIONS AND ACRONYMS.....	9
EXECUTIVE SUMMARY.....	11
PROGRESS OF THE LEGISLATIVE AND EXECUTIVE AUTHORITY IN THE IMPLEMENTATION OF ANTI-CORRUPTION ACTIVITIES	18
PROCESSING CASES OF CORRUPTION BEFORE THE COURTS AND PUBLIC PROSECUTORS IN BIH	40
MONITORING OF AMENDMENTS TO THE LEGAL FRAMEWORK AND OF THE IMPLEMENTATION OF THE LAW ON CONFLICT OF INTEREST, FINANCING OF POLITICAL PARTIES AND OF THE ELECTION LAW.....	59
MONITORING OF FUNCTIONING OF THE PUBLIC SECTOR AUDIT OFFICES ...	91
MONITORING OF AMENDMENTS TO THE LAW ON PUBLIC PROCUREMENT	85
CONCLUSIONS OF THE MONITORING REPORT.....	99
BIBLIOGRAPHY AND REFERENCES	107

ABBREVIATIONS AND ACRONYMS

BiH - Bosnia and Herzegovina
CEFTA - Central European Free Trade Agreement
CIK BiH – Central Election Commission of BiH
CL – Criminal Law
CoE – Council of Europe
EU – European Union
FBiH – Federation of Bosnia and Herzegovina
GDP – Gross Domestic Product
GRECO – The Council of Europe's Group of States against Corruption
ICVS - International Crime Victim Survey
KM – Convertible Mark
NGO – Non-governmental organization
OECD - Organization for Economic Cooperation and Development
OSA – Intelligence and Security Agency of BiH
PRB – Procurement Review Body Claims
R Croatia – Republic of Croatia
R Serbia – Republic of Serbia
RS - Republika Srpska
SAI – Supreme Audit Institution
SIPA – State Investigation and Protection Agency
SSA – Stabilization and Association Agreement
TI – Transparency International
TI BiH – Transparency International Bosnia and Herzegovina
UN – United Nations
UNCAC – UN Convention against Corruption

EXECUTIVE SUMMARY

Dramatic level of corruption in Bosnia and Herzegovina has not been in decline over the last few years. Although three strategic documents related to the fight against corruption were adopted since the end of the war, and the relevant international conventions have been ratified, no significant results in their implementation and eradication of corruption have been achieved so far. Advocacy towards defining a strategic document for the reduction of corruption, which should be adopted by the Parliamentary Assembly of BiH remains to be the key priority, as well as the adequate enforcement of the already ratified documents and commitments. Development of systematic solutions to combat corruption, which will be based on the data and which will allow continuous monitoring of the work of authorities is *conditio sine qua non* of any progress in this area. In March, the Council of Ministers of Bosnia and Herzegovina issued a decision on the establishment of Inter-Departmental Working Group for Drafting the Strategy and the Action Plan for Combating Corruption and of the Law on Anti-Corruption Body. In August the first working materials of the Law, the Strategy and of the Action Plan were drafted. These documents should be sent to the parliamentary procedure in September. The adoption of these documents also represents a requirement from for BiH of the road map for liberalization of visa regime in block 3 which refers to the prevention and fight against organized crime, terrorism and corruption. Based on this document BiH shall, among other things, implement the national Strategy for Combating Corruption and the Action Plan which were adopted in 2006 and shall adopt and implement measures to strengthen institutional capacities, coordination between agencies ensuring sufficient human and financial resources to fight corruption and implement relevant legislation on confiscation proceeds of criminals (including the provisions concerning cross-border aspects).

The efforts of Bosnia and Herzegovina in implementing anti-corruption reforms so far have been assessed as very limited. With respect to the application of the UN Convention against Corruption (UNCAC) no progress was achieved, and according to the analysis which the Ministry of Security submitted to the Council of Ministers of BiH in December 2008, no activities have been undertaken towards the harmonization of domestic legislation with the UNCAC. The report of GRECO (The Council of Europe's

Group of States against Corruption), states that three quarters of its recommendations were not implemented and that their implementation so far is unsatisfactory. The report of the European Commission on the progress of BiH towards European integration¹ states that BiH has not progressed in ensuring the full implementation of the Anti-Corruption Strategy and the Action Plan from 2006.

According to all relevant indicators in surveys conducted by Transparency International of Bosnia and Herzegovina (TI BiH), which systematically monitors the work of government institutions in implementing anti-corruption reforms and analyzes the results achieved through qualitative and quantitative research with the participation of experts from various fields, a significant lagging of reforms is manifested in BiH compared to other countries in the region and Europe. According to the current Corruption Perceptions Index 2008, BiH is positioned between the 92nd and 95th place on the world scale, far behind other countries of the region. The 2009 results of the Global Corruption Barometer, which examines the public opinion on corruption and citizens' experiences when they encounter bribery, show that in BiH private sector there are evident practices of using bribery to influence the decision-makers and regulators within the state, a phenomenon in theory often called "a nation in captivity". Based on the analysis of various researches conducted by TI BiH this year, monitoring of implementation and advocacy for anti-corruption standards such as the Monitoring, and survey of the public opinion and citizens' experiences with corruptive practices in the Quarterly Survey on Corruption Perceptions of Citizens, it is evident that corruption affected all layers of BiH society and that its eradication is the task that requires mobilization of the whole community. All surveys show that political corruption and a very close relationship of senior officials with organized crime threaten to become a very serious problem next to the already identified illegal privatization processes and non-transparent operation of public enterprises.

Within the Monitoring of the Implementation of Anti-Corruption Reforms in BiH, TI BiH follows anti-corruption activities in the most sensitive areas reflected through the

¹ Bosnia and Herzegovina 2008 Progress Report Brussels, 05.11.2008.
(http://ec.europa.eu/enlargement/pdf/press_corner/keydocuments/)

Monitoring of Progress of the Legislative and Executive Authorities in implementation of anti-corruption activities, processing of corruption in the courts and prosecutors' offices, changing the legal framework and the implementation of the Law on Conflict of Interest, Law on the Financing of Political Parties and the Election Law, functioning of public sector audit agencies as well as of the police and intelligence and security agencies, and amending the Law on Public Procurement. Based on surveys of the public opinion in BiH about citizens' perceptions and experiences with corruption, TI BiH analyzes how citizens assess the government efforts in certain areas and how effective are its anti-corruption activities and what impact they have on the citizens of BiH in their everyday lives.

Progress of the legislative and executive authorities in implementing anti-corruption activities has not been recorded. Prerequisite to efficient and effective implementation of anti-corruption activities is the existence of social consensus on the necessity of combating corruption, which multiply stems from already mentioned commitments in the signed and ratified international treaties and conventions, particularly the UN Convention against Corruption from 2003 and the Stabilization and Association Agreement (SAA), as well as the road map for visa regime liberalization. For a country trapped in corruption, the fulfillment of obligations from strategic documents represents the first step that should lead to creation of special anti-corruption policy as a separate segment of state policy or as a complex of methods within other policies, which in their totality have anti-corruption effect. Lack of a strategic document and the lack of a central body to fight corruption postpones the possibility of an effective action and, although steps forward in implementing anti-corruption activities do occur, they are still uncoordinated and, without any real political will, disoriented in reducing the scope of this negative phenomena, so that the only way to successfully combat corruption is a systematic approach. The citizens of BiH are extremely skeptical towards the progress of BiH authorities in the eradication of corruption. The recent study of TI BiH, the second quarterly survey on citizens' perception of corruption says that *45% of BiH citizens do not believe at all that the authorities in BiH want to sincerely, fairly and*

decisively cope with the fight against corruption in BiH. Assessing the efficiency of individual institutions in BiH in the fight against bribery and corruption during the past year, respondents still think that the media are most efficient and *the Parliament and the executive authority the least efficient institutions in the fight against corruption.* In the view of citizens, the level of corruption in the executive authority of the state and entities is quite high (the Government of the Federation BiH was assessed with 3.93, the RS Government 3.91, the Council of Ministers of BiH, 3.89, and the Government of Brčko District 3.83 - estimating on a scale from 1 (very low level of corruption) to 5 (very high)).

Processing corruption before the courts and prosecutor's offices in BiH is somewhat difficult and has no strong effect in society. Corruption related criminal offences, including the cases when it comes to convictions, mostly end with a suspended sentence (62%). Confiscation of illegally obtained proceeds was conducted in only five cases last year in a total value of only 10,540.44 KM. The complexity of the political system and organization of the BiH state is reflected through the *legal and institutional overregulation and deficiencies of the reporting systems.* Obligations of BiH to develop and adopt a separate strategy only for the fight against corruption and to establish a specialized and independent agency to combat corruption have not yet been fulfilled. Currently in BiH there are only two prosecutor's offices with specialized departments for the fight against corruption, although conventions provide for mandatory specialization of departments to fight corruption in prosecutor's offices. Due to their basic functions, establishment and maintaining legality, judicial institutions play a particular role in the fight against corruption. Citizens of BiH, as two cycles of Quarterly Survey proved, believe that judicial institutions are "very" corrupt. Citizens say that the amount of 2 049 KM is the average bribery paid to a judge or a court officer "in order to get things done".

Amendments to the legal framework and the implementation of the Law on Conflict of Interest, the Financing of Political Parties and the Election Law should close loopholes and fill in the gaps that leave room for manipulation and corruption activities. *The Election Law provides inadequate mechanisms for timely detection of illegal enrichment of elected officials* and it lacks *specific mechanisms that would control the accuracy of data on the property status submitted to the CIK BiH.* The Law on the

Financing of Political Parties has not yet been adopted in the Federation BiH, and the RS Law *does not treat at all many of the important issues such as defining the categories of expenditures which the parties can cover from the budget funds*. The Law on Conflict of Interest does not meet the expectations, and although it stipulates sanctions in case of law violations, it *allows officials who have violated the law to be in public office throughout the election period*. The citizens are generally *poorly informed* about the manner of financing of political parties. In the Quarterly Survey 44% of respondents in the stressed that they know very little and 28% said that they know little on the subject.

Functioning of police and the intelligence and security agencies has been slowed down by the poor and insufficient regulation within the legal framework which does not address the functional relationship between the police agencies and prosecutor's offices. These bodies are only connected by the Law on Criminal Procedure. Some progress in the police reform in BiH has been achieved by adopting the Law in April 2008 which stipulates the establishment of four new police agencies at the state level as well as three police supervisory bodies. These institutions have not been fully established, nor staffed, and the cooperation and exchange of information between law enforcement agencies is still weak. The improvement of mechanisms for inter-institutional cooperation, active communication and mutual coordination, as well as the complete de-politicization and professionalization of these institutions are the basic conditions for their effectiveness. As far as the committed crimes of corruption are concerned, the police agencies of BiH have not submitted a single report in 2008, nor have the courts at the state and entity levels processed any case of criminal offence of this type. The police and security and intelligence agencies still enjoy the trust of citizens. Two-thirds of respondents in the Quarterly Survey (65%) *trust the work of SIPA*, the majority of who trust it to a certain extent rather than fully (53% to 12% respectively). Respondents of both survey cycles (the first and second quarter of 2009) assess SIPA as an institution which is the least corrupt.

Functioning of the public sector audit agencies is largely influenced by the overall situation in the country, which among other things resulted in stagnation of development of audit institutions. A key prerequisite for the functioning of the supreme audit institutions, being *independence*, is *compromised by adoption of the law on salaries*

which derogated lex specialis Law on Audit, while the process of appointing management in audit institutions is non-transparent. In most audit reports there are findings related to the violation or inconsistent application of the Law on Public Procurement as well as findings about irrational spending of public money, which are the *consequences of the lack of adequate regulation.* Specific problems are the sanctioning of responsible persons, which is more of declarative nature, and the unregulated cooperation between audit institutions and prosecutor's offices. Sensitivity of public procurement sector to corruption has also been noted to a great extent by the citizens of BiH in the Quarterly Survey. The existence of corruption in public procurement matters (state purchases) is, according to respondents, equally spread in the state-owned enterprises, municipal, cantonal and entity authorities, as well as in the area of public works and health. There are certain differences in the perception expressed by members of different nationalities so that Bosniak respondents think that corruption is most present in public procurement in the state-owned enterprises, citizens of Serb nationality think that it is in the entity government, while the Croats believe that corruption in public procurement matters is most widely spread in municipalities. The assessment of corruption in the second quarter of 2009 is, however, slightly higher than in the first.

Amendments to the Law on Public Procurement will not eliminate the previous confusion and legal gaps. Instead they will rather additionally enable bypassing the legal procedures in public contracting processes. According to the draft amendments to the Law, the direct agreement threshold increased from 3000 to 6000 KM, while the amount for the procurement of goods and provision of services, under conditions when the publication of notice is not foreseen, from 30,000 to 50,000 KM. The new rules thus allow non-transparent procurement to much higher limits and more frequently. Discretionary decisions of civil servants will increase and thus likely lead to larger frauds and damages to the budget. By extending the provisions which relate to exemptions from the application of the Law, even greater abuse and manipulation of tender procedures becomes possible, as well as the continuation of semi-legal funding of suppliers, all of which was noted in numerous audit reports on the work of public entities at all levels of government in BiH. The private sector will be particularly affected by this expansion of non-transparent procurement practices and the continuation of providing protection for

large companies owned by powerful political background. All these changes can only undermine the already extremely unfavorable business climate which will affect the small and medium enterprises. Citizens of BiH think that public procurement procedures are particularly affected by corruption. In both previous cycles of the 2009 Quarterly Survey of public opinions, the respondents believe that corruption is widespread in the public procurement in all areas with a tendency of growth.

PROGRESS OF LEGISLATIVE AND EXECUTIVE AUTHORITIES IN IMPLEMENTING ANTI-CORRUPTION ACTIVITIES

Introduction

Fight against corruption is a global trend. There is an almost undivided agreement on how harmful corruption is, which is on the global financial plan measured in trillion dollar amounts (according to some, 2-4% of the world GDP [Kregar, 2005]), and on national levels it supports non-productive public investments, impoverishes countries and undermines overall societies (Rose-Ackermann, 2002). Therefore, it is clear that there should be a consensus regarding the necessity of its suppression, and that corruption should be considered a part of global debate on governance and growth (Rose-Ackermann, 2008).

In this context, European and world leaders paid special attention in recent decades to different aspects of corruption, its forms, political, economic, legal and other consequences, and to adoption of strategies for suppressing it and establishing various bodies and agencies to combat corruption. The consensus of the international community about its harmfulness is perhaps best reflected in the position expressed in the Preamble of the 2003 United Nations Convention against Corruption, which states that the state parties recognize that corruption is a transnational phenomenon associated with other forms of crime, which poses a threat to the stability and security of societies, and threatens sustainable development and the rule of law.

Corruption in our country has also been recognized as a significant problem and is treated as one of the key obstacles to progress of BiH towards the European Union. The severity of the situation is also reflected in the 2008 Report of the Commission of the European Communities on the Progress of Bosnia and Herzegovina: "corruption is widespread and remains a serious problem, especially within the power structures" (p. 15).

It is difficult to measure the extent of corruption in a country. One of the measures is certainly the official statistics of unlawful conduct. However, it is often said that the

statistics of national entities, and this is especially true of corruption as a types of illegal transaction, only reflects the efficiency of the prosecution authorities and not the actual picture of scope and structure of the socially harmful behavior. With crimes such as corruption, where it is in the interest of both parties for the illegal activity to remain undetected, it is realistic to expect that the unregistered delinquency is much higher. The situation with corruption crime in the Federation of Bosnia and Herzegovina, for example, from the standpoint of the official statistics of crime, is better than in the neighboring Croatia, which certainly does not have the image of a nation captured by corruption like our country. Thus, based on data of the Federal Police Administration it can be calculated that the Federation BiH in 2007 notes a rate of 12 reported corruption related criminal offences (per 100 000 citizens, over 19 years of age), while in Croatia this rate is significantly higher, and it amounts to 28 (in this regard ref. also to Datzer, 2006).

But these are not the sole measures of corruption. Even the famous Quetelet (thanks to whom statistics was established as a scientific discipline) noted that official statistics may not include all crime and that there is the so-called dark figure or the unregistered crime. Widely applied research in which data on crime and related phenomena are collected are based on interviews and surveys. They are often said to have better measures of corruption than state entities for statistics (Woltring & Shinkai, 1996, cited in Zvekić, 1998). Thus, the research of the Association of Graduates in Criminal Sciences in Bosnia and Herzegovina (2006) pointed to much higher rates of corruption offences than those which are officially registered. According to this study, about a quarter of all respondents stated that they found themselves in a situation of giving bribery², whereas from the standpoint of official statistics this percentage would be much lower (below 1%). Research conducted by van Dijk, van Kesteren and Smith (2007) indicated that in average only about 2% of people in the world experienced this type of victimization. According to the findings obtained in our country, BiH would be on the very top of victimization studies, by far above the European average.

² 2008 Transparency International Survey provided similar results, indicating a figure of 22% respondents who were in a situation of bribery, and about one tenth of those who actually paid a bribe. 2009 Survey shows a bit lower percentage of citizens affected by corruption (about 14%).

Standards in measuring corruption were set by the Transparency International through its continuous follow-up of the situation with corruption around the world in the last fifteen years. According to the TI Corruption Perceptions Index³ Bosnia and Herzegovina in 2007 was ranked among African and Asian countries, far behind the developed European countries (84th place [of 180 countries in the analysis], and the 92nd place in 2008.). Our ranking in comparison with the countries in the region shows that the neighboring Serbia is constantly ahead of us, and Croatia is some twenty places ahead.

Another "measure" of corruption, also produced by Transparency International, the Global Corruption Barometer (which measures the extent of corruption from the standpoint of an ordinary citizen), published for 2009, indicates somewhat lower percentages of victimization by corruption in our country (about 9%).

The World Bank also continuously measures the situation of corruption and places Bosnia and Herzegovina in its Governance Indicators for 2007 in the upper part of the scale of the countries that have poor control corruption, below the European average. Based on the above, Bosnia and Herzegovina is a country characterized by a high rate of corruption present in all pores of social life. Both professional and ordinary members of the public, unfortunately, expect no improvements in the coming years (cf. Transparency International BiH 2009, and Transparency International 2009). Bosnia and Herzegovina has been making some efforts to combat corruption. One of the important efforts certainly is the *meting of obligations from strategic documents for the fight against corruption*. Thus, the international obligations stemming from signing various conventions and similar documents established a comprehensive framework for the fight against corruption. Domestic authorities have addressed this issue in their own strategic documents, such as the Mid-Term Development Strategy 2004-2007, which stipulated the improvement of the legislative framework (conflict of interest and criminal), the establishment of a special agency to combat corruption, and the like. Similar obligations and many other obligations have been established by the 2006 Strategy of Bosnia and

³ Whose great value lies in the very fact that it is an index, i.e. a complex indicator which is calculated on the basis of more than ten data sources. The value of the Corruption Perception Index is also shown by a high rate of correlation with other measures of corruption, such as the International Crime Victims Survey (ICVS), which, on other hand,

Herzegovina for the Fight against Organized Crime and Corruption. Since our country is also formally committed through international obligations and strategies to improve the fight against corruption, it is particularly important to mention the most important responsibilities in this regard.

Bosnia and Herzegovina is a signatory of a number of international conventions in the field of the fight against corruption, which reflect the generally accepted anti-corruption standards. At the level of the Council of Europe those are the Criminal Law Convention on Corruption, Civil Law Convention on Corruption, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and at the level of the United Nations the United Nations Convention against Transnational Organized Crime and the famous Convention against Corruption. Council of Ministers of the Council of Europe also provided several recommendations for the effective fight against corruption (the common rules against corruption in the financing of political parties and electoral campaigns of 2003, and the rules and conduct for public servants in 2000), and Bosnia and Herzegovina, as a member of the Council of Europe, should monitor the fulfillment of obligations from the evaluations of the Group of States against Corruption (GRECO) and realize the cooperation envisaged by the Treaty of Cooperation in Preventing and Combating Cross-Border Crime (SECI). Our country has not yet signed the Additional Protocol to the Criminal Law Convention on Corruption.

The list of things that Bosnia and Herzegovina should undertake in order to fulfill the assumed obligations, which relate to a more efficient fight against corruption, is quite long. Particularly important commitments are: preventive measures, which include the promotion of integrity in public and private sectors, and among the citizens; incriminating individual forms of corruption; establishment of special bodies to combat corruption (out of which one could have a central role), their independence, training and financial support; confiscation of proceeds obtained from corruption; protection of witnesses, victims and persons who cooperate with the judiciary; compensation of damages incurred from corruption related activities; international cooperation; return of

represents "the largest international comparative project in the field of crime prevention and the criminal justice system "(Alvazzi del Frate, 1998).

property. The following text gives an overview of the situation in achievement of the above-mentioned activities.

Progress Monitoring

Preventive measures

The principle position that corruption is a phenomenon which, due to its specific traits (widespread in the society and lack of awareness about its harmfulness), needs to be prevented before it appears rather than combated, with special attention dedicated to the participation of all segments of society, is addressed in quite detail by an entire chapter of the Convention against Corruption. That is why this international agreement is called the most comprehensive legal instrument at the international level, which deals with fight against corruption. *The existence of a special anti-corruption policy as a separate segment of the state policy or rather, the complex of methods within other policies which in their totality have anti-corruption effect, is a conditio sine qua non* of all systematic efforts to combat corruption. Currently, our country *has no strategic document for the fight against corruption*, which is an absurdity in the country which, as indicated, is characterized by a high rate of corruption: the activities should, if the country wishes to take at least some serious steps in its efforts towards the European integration, be intensified and expedited instead of regressive, as some indicators suggest. Developments in the implementation of anti-corruption activities do exist but they are still uncoordinated and without a real political will to be directed towards reducing the extent of this negative phenomenon. Lack of a central body⁴ which would coordinate anti-corruption efforts in the country still seems to be the essential limitation that needs to be solved. Such a body could certainly achieve much in coordinating and creating a systematic approach to combat corruption.

In terms of public administration, there is some progress regarding access to publicity of work, civil servant appointment procedure, raising awareness of civil servants about the harmfulness of corruption, etc. The public administration is in the slow process of

⁴ See more in the section *Establishment and training of the authorities responsible for combating corruption* in this paper.

reform. Thus in late 2008, according to the report of the Public Administration Reform Coordinator's Office, one third of the planned activities have been implemented, although this figure should have been achieved at the beginning of last year.⁵ The 2006 amendments to the Law on Free Access to Information improved the legislative framework of access to information that is in the control of public authorities. Codification of conduct of civil servants requires special attention, and in this sense, there are already well-established international standards, such as the UN International Code of Conduct for Civil Servants from 1996 and the Code of Conduct for Civil Servants of the Council of Europe from 2000. Activities within individual institutions, such as the Civil Service Agency of Bosnia and Herzegovina, the Agency for Civil Service of the Federation of Bosnia and Herzegovina, Agency for State Administration of Republika Srpska and the Authority for Indirect Taxation⁶ are valuable and should be continued and they should involve all civil servants. However, code of ethics for civil servants at the national level does not exist, and Republika Srpska has not met Recommendation X of the Group for States against Corruption (GRECO) that refers to limiting the transition of civil servants into private sector⁷. Recent amendments to the Law on Prevention of Conflict of Interest in the authorities of Republika Srpska led to certain changes but the restrictions apply only to elected representatives, holders of executive positions or advisors who, after a public function, get appointed to positions of directors, members of managerial and supervisory boards of commercial companies, which is inadequate to address all categories of civil servants. This, of course, requires further changes. The undefined status, in relation to inspections of property cards of the legislative and executive government officials⁸ makes the efforts to establish integrity in the work of these officials inefficient. Particularly valuable in this regard is the provision about the necessity to incriminate unlawful enrichment mentioned in this paper (see *infra*). The legal framework for access to information under control of public

⁵ See the Center for Human Policy (2008). *A report on the process of monitoring the public administration reform in the first half of 2008*.

⁶ See the Report on the implementation of GRECO recommendations of the Ministry of Security of Bosnia and Herzegovina from 2008.

⁷ This is specifically mentioned in Article 12/1/e of the Convention against Corruption.

⁸ See the activities in this field presented with the goal 08 of the Analysis of Implementation of the Strategy for Combating Corruption of the Ministry of Security of Bosnia and Herzegovina (2008).

administration in our country is good, but its implementation has been inadequate. Few public entities actually publish the index register of information at its disposal.

Law on High Judicial and Prosecutorial Council of BiH and the Code of Judicial and Prosecutorial Ethics regulate rather well the issue of conflict of interest of the members of our judicial system.

Private sector in our country has been and remains completely out of reach of anti-corruption efforts. Bribery in private sector is still only fragmentary regulated by the Law on Competition which is insufficient to make a generally preventive impact on reducing corruptive practices. Accounting standards remain insufficient⁹.

Society and citizens, unfortunately, rarely engage in anti-corruption activities. Although unsatisfied, only a small number of them decide to vote, and particularly small number gets involved in some other type of activity. In this sense, the Analysis on the Level Implementation of the Strategy of Bosnia and Herzegovina for the Fight against Organized Crime and Corruption of the Ministry of Security of Bosnia and Herzegovina (2008) says that the strategic goal of promoting integrity and public awareness about the harmfulness of organized crime and corruption is not achieved. The media still have a strong role in exposing corruption and alarming the public, which is confirmed by the 2009 study of Transparency International, according to which people consider the non-governmental sector as the most important. However, their activities are also only a fraction of the total commitment, and radical changes can be expected only by changing political environment, which will bring changes in the work of judicial and other state entities. We can talk about the system and the coalition against corruption only when the change of political will occurs.

⁹ See the Report of the Commission of European Communities on Progress of Bosnia and Herzegovina in 2008.

Incriminating certain forms of corruption and associated adverse effects

Criminal law is only a segment of the overall anti-corruption efforts. However, it is still a part of state activities, which cannot be renounced in a successful anti-corruption activity; in the fight against corruption the attention of the professional and ordinary public is directed mainly towards the repressive bodies and the application of criminal law (Jovašević & Gajic-Glamočlija, 2008). Based on commitments resulting primarily from the UN Convention against Corruption and the Criminal Law Convention on Corruption of the Council of Europe, Bosnia and Herzegovina is obliged to incriminate a range of conducts which can be described as corruption. Numerous crimes in the area of corruption in BiH legislation prior to its independence was regulated by Criminal Code chapter entitled "Crimes against official and other responsible duties." However, despite numerous amendments the criminal law after the war, the substrate of what the positive (criminal) law regulates in the field of corruption today still coincides with provisions of criminal codes of the Yugoslav Federation and the Federal Republic of BiH, i.e. R BiH. This, of course, does not mean that the legislative framework (at the time and today) is bad, on the contrary. However, despite the relatively good legislative framework at all levels of authorities in Bosnia and Herzegovina, there is still a number of incriminations or parts of legal descriptions of the existing offences, which should be harmonized with the new commitments.

In terms of traditional corrupt crimes (bribery) the situation is generally well regulated. However, in relation to the so-called active illegal mediation, intervention is still necessary. Namely, our legislation sanctions only the receipt (acceptance) of awards or other benefits in order to use official or influential position, while in the aforementioned Conventions stipulate punishment *for public officials who ask for* unjustified benefit in order to abuse his/her actual or presumed influence.

According to the Bosnian and Herzegovinian legislation the act of illegal enrichment, stipulated by Article 20 of the UN Convention against Corruption, is not defined as a separate criminal offence. Since as far back as the 1996 Inter-American Convention against Corruption there has been a tendency to define a significant increase of revenues of a government official, for which he/she is not able to give a reasonable explanation, as

an independent criminal offense. The UN Convention establishes the obligation, though optional, of the introduction of this important offence into the national legislation, whose value lies in reflecting global standards in the efficient fight against corruption. It is not necessary, however, to include this offence into the criminal code itself. Instead, it can be regulated by the so-called supplementary criminal legislation (e.g. within the law on conflict of interest or within the legislation on confiscation of illegally obtained proceeds).

Bribery and embezzlement in the private sector are not regulated in our legislation (state, entity and Brčko District). Obligation to regulate bribery in private sector is provided in provisions 7 and 8 of the Criminal Law Convention on Corruption, and Article 21 of the Convention against Corruption provides for its optional introduction. Optional incrimination of embezzlement in the private sector is treated in Article 23 of the aforementioned Convention.

Abuse of office, money laundering, accounting violations, fraud and concealment of offences are offences mostly well regulated by domestic legislation.

Obstruction of justice, addressed in Article 25 of the Convention against Corruption and Article 23 of the Convention against Transnational Organized Crime, is in our legislation adequately regulated by criminal offences of Prevention of proving evidence and Prevention of official person to exercise official duty, i.e. Obstruction of justice.

According to BiH laws, legal persons can be perpetrators of any criminal offence, including corruption criminal offence. Criminal sanctions can be imposed for these offences: fine, confiscation of assets, or termination of the status of a legal person. The accountability of a legal entity is in our legislation separated from the accountability of a natural person. This matter is therefore fully in compliance with the relevant articles of the Convention against Corruption, the Criminal Law Convention on Corruption and the Convention against Transnational Organized Crime. Training of the authorities for criminal prosecution is being provided for the purpose of the application of these

provisions and it certainly should be continued in the future¹⁰.

Participation in corruption (complicity, encouragement and assistance), as well as attempt and preparation of any acts stipulated in the chapter on criminal offences of corruption, i.e. the offences against official duty and other responsible duty, are punishable by domestic legislation. These offences comply correspondingly with Article 15 of the Criminal Law Convention on Corruption, Article 27 of the Convention against Corruption, and Article 5 of the Convention against Transnational Organized Crime.

Knowledge, intent and purpose, being the essential characteristics of corruption crimes, are the general institutes of our criminal law, which also applies to the limitation of criminal prosecution. This part, which is addressed in Articles 28 and 29 of the Convention against Corruption, is also adequately regulated by domestic legislative framework.

Article 19 of the Criminal Law Convention on Corruption and Article 30 of the Convention Against Corruption establish a wide range of obligations which the State Parties are obliged to introduce in their legislation in relation to criminal sanctions for natural and legal persons and the perpetrators of crimes of corruption. In respect of these provisions, the domestic legislation is quite in compliance with the above international standards. General institutes and principles that apply to other criminal offences, apply also for corruption criminal offences. A part of that is regulated by criminal law provisions (such as the part that relates to the prohibition of exercising the profession, work activities or duty), and the other part is regulated by other legislative acts (such as Article 22/1/f [ban to reemploy a person who was fired due to a disciplinary measure, including bribery and other acts of corruption] of the Law on Civil Service in the Institutions of Bosnia and Herzegovina and Article 58/1 [Preventive suspension] of the same Law).

¹⁰ See the Report on the implementation of GRECO recommendations of the Ministry of Security of Bosnia and Herzegovina from 2008 (p. 9), and the Report on the implementation of the recommendations in Bosnia and Herzegovina in the second round of assessment of the Group of States against Corruption (p. 10).

Establishment and training of authorities responsible to combat corruption

Article 20 of the Criminal Law Convention on Corruption and Article 36 of the Convention against Corruption provide the establishment of one or more specialized bodies to combat corruption. This is not a novelty: since the fifties of last century, Singapore has had the Office for investigating corruption, Hong Kong the Independent Commission against Corruption since 1974, and Australia an independent commission following the model of Hong Kong since 1987. Ever since the First conference for the staff of law enforcement agencies specializing in the fight against corruption in 1996, over the Twenty leading principles for the fight against corruption of the Council of Europe, up to the Octopus conferences, the importance of specialized training of authorities responsible to combat corruption was persistently stressed. Our country is obliged to establish such a body in accordance with the recommendation of the 6th Group of States against Corruption from 2006. The aforementioned articles address the duty to establish such a body or a number of them, which do not necessarily need to be separate bodies but may be separate parts of the existing bodies, but they need to have political and financial independence, and educated and qualified staff for the efficient fight against corruption¹¹. It is not excluded that such a body also has the role of a preventive anti-corruption body addressed in Article 6 of the Convention against Corruption. Our country, despite the activities in this field¹², does not have a central body that would have a coordinating role in anti-corruption activities.

Specialized training within the ministry of interior, prosecutor's offices and courts does exist but their activity is insufficient and uncoordinated¹³. In the Progress Report of

¹¹ Training of staff responsible to combat corruption is further addressed in Article 60 of the Convention against Corruption, Article 29 of the Convention against Transnational Organized Crime, and in the recommendations III of the Report of the Group of States against Corruption from 2006.

¹² At the beginning of the year an Intersector working group needed to be formed for the purpose of drafting the Law on the establishment of a body to combat corruption. The body, which would be established in this way, should be responsible for the development of a strategy and action plan and its monitoring, coordination of activities in combating corruption, the survey on the phenomenon of corruption, cooperation with international organizations, scientific institutions, etc. It is a story for itself about why and how the previous efforts to establish such a body were ignored. See more on <http://www.ti-bih.org / Articles.aspx? ArticleID = 7f1114eb-90a0-4e51-849a-ebc3ff64ac84>.

¹³ The Report on the Progress of Bosnia and Herzegovina towards European Integration notes that the cooperation between the police officers and prosecutors is "weak" (p. 14), which applies to the police authorities among themselves (p. 58). The situation about security structures, which certainly includes the police system, was described

Bosnia and Herzegovina towards European Integration (The Commission of the European Communities, 2008) states that our country still lacks an anti-corruption body, and that, despite the activities related to education¹⁴, there is a lack of training programs for prosecuting crimes of corruption, economic and organized crime. This is especially stressed by the Group of States against Corruption in the Report on the Implementation of the 2009 Recommendations in Bosnia and Herzegovina in the second round of assessment. Agencies are not fully staffed. Thus, the Agency for Investigation and Protection has only completed two thirds of staff recruitment¹⁵, which still does not satisfy the implementation of the recommendation V of the Group of States against Corruption.

In order to encourage persons who are involved in acts of corruption to report the offence to the competent authorities, without being put in a situation where they themselves get punished, our criminal legislation leaves a possibility, within the legal description of the active bribery, to release the person from punishment if the perpetrator of bribery reports the crime before its disclosure or prior to finding out that the crime was disclosed. In addition, the sentence reduction as a general institute of substantial law, and the plea bargain, the possibility of giving immunity to a witness who agrees to cooperate with the prosecution, all of which are the institutes which indicate that Article 37 of the Convention Against Corruption and Article 26 of the Convention against Transnational Organized Crime are adequately regulated in our legislation.

In our legal system, the prosecutor may require submission of information from government bodies, enterprises, companies and individuals, and they are obliged to notify the prosecutor of any action taken and act upon each request from the prosecutor. Also, there is a general obligation of a wide range of persons obliged to report the existence of a criminal offense, and there is a possibility for every citizen to report crime.

paradigmatically in the recent U.S. State Department report which says that Bosnia and Herzegovina has a "poor communication between the agencies and the mutually competing security structures" (2009, p. 62).

¹⁴ See the results of implementation of the general strategic goal 03 and of the special goal 17 of the Strategy against corruption presented in the Analysis of the degree of implementation of the Strategy of Bosnia and Herzegovina for the fight against organized crime and corruption of the Ministry of Security of Bosnia and Herzegovina (2008).

¹⁵ See the Report on the implementation of GRECO recommendations of the Ministry of Security of Bosnia and Herzegovina from 2008

A bank or other legal entity which performs financial operations shall provide information on bank deposits and other financial transactions and affairs of the suspect and of the persons for whom there is reasonable doubt that they are involved in financial transactions or activities of the suspect. In this way, the commitment of cooperation between government bodies, as well as of cooperation with the private sector has been regulated, as well as overcoming the obstacles which might arise from confidentiality of bank data prescribed in Articles 38, 39 and 40 of the Convention against Corruption, Articles 21 and 23/3 of the Criminal Law Convention on Corruption, and Article 4/1 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

Confiscation of property obtained from corruption

One of the principles of contemporary criminal law is that no one can keep the benefit of obtaining property from crime. It is a universal criminal law principle that this measure seeks to influence the potential perpetrators by giving them the perspective that they cannot count on keeping the proceeds from crime, by which, in addition to retributive and special preventive, a significant general preventive effect of prevention is achieved (the conviction of the individual perpetrator is stressed and it influences him/her as well as to not commit criminal offences). This principle is properly addressed by provisions in the relevant domestic legislation on confiscation of property obtained through criminal offence, the confiscation of proceeds which are used or were allocated or were incurred through committed criminal offence, including the penalty of confiscation of assets from a legal entity. The disadvantage is that, in cases when in accordance to our laws it is not possible to seize the proceeds of corruption (it has been converted in some other form, spent, destroyed, hidden, etc.), the offender can be obliged only to the payment of the counter value of the property. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime stipulates, however, the seizure of any counter value, not just monetary, which indicates the need for harmonization of our legislation with international regulations. Furthermore, the provision by which this property is seized in the judicial proceedings which determines the existence of a criminal offence is also not sufficient. The provision, according to which the property gain obtained from criminal offence is seized in a separate proceeding, is even more unsuitable. As this

process is not regulated in greater detail, the application of these principal provisions remains uncertain and merely declarative. Special agency, which would deal with issues of identification, freezing, seizure and control of property acquired by criminal activities, and which is indicated to be a part of the overall strategic goal 02 and of the specific goal 07 (strategy to combat corruption) of the Strategy of Bosnia and Herzegovina for the fight against organized crime and corruption has also not yet been established. Republika Srpska has not yet implemented the recommendation of the Group of States against Corruption on confiscation of indirect proceeds from criminal activity in connection to the situations where the verdict is not possible¹⁶.

In addition to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of the Council of Europe this issue is treated also by the Convention against Transnational Organized Crime (Article 12), and the Convention against Corruption (Article 31). The latter recommends that States Parties consider the possibility of reverse burden of proof (the transfer of responsibility to prove the legality of the origin of property in the possession of the suspect). In the conditions of widespread corruption in all pores of the society and the enormous wealth of individuals, there is no reason, other than "little matter" called the absence of political will, for our legislators not to regulate this matter in the manner provided by the aforementioned Convention. In principle, the possibility does exist in the criminal laws of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Brčko District, but, as noted, it is not regulated in detail.

The recommendation of the Group of States against Corruption on training for the purpose of a unified approach towards confiscation of property has only been partly implemented¹⁷.

Protection of witnesses, victims and persons who cooperate with the judiciary

The verified anti-corruption standard is to encourage wider reporting of acts of

¹⁶ This was confirmed in the Report on the implementation of the recommendations in Bosnia and Herzegovina of the Group of States against Corruption from 2009. Ministry of Justice of Republika Srpska made a draft Law on Verification of the Methods of Obtaining Property, the adoption of which is still expected.

corruption if the person reporting is provided protection from harassment or inappropriate treatment by work colleagues or anyone else from this person's environment. Special protection for those who *bona fide* report corruption has not been sufficiently secured by domestic legislation¹⁸. Law on Protection of Witnesses under Threat and Vulnerable Witnesses generally provides protection to particular categories of witnesses, namely, those whose personal safety or security of their family is endangered, due to their participation in the proceedings, as well as witnesses who are severely physically or mentally hurt by the circumstances of the criminal acts, and of children and minors. The Criminal Law of Bosnia and Herzegovina stipulates even a special act in Article 241/1, according to which it is punishable to use physical force, threats and intimidation to prevent testimony or presenting evidence in criminal proceedings. These and other measures, such as additional measures to ensure anonymity of witnesses referred to in the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, are harmonized provisions of domestic legislation with the provisions of the Convention against Corruption in Article 32. However, there is still no possibility of moving such a witness to other states, or the possibility of presenting issues which cause concern for the witness before the court, confronting therefore the perpetrator with his/her attempts to influence witnesses, and which are provided by the above mentioned article.

Compensation of damages resulting from corruption

Article 8 of the Civil Law Convention on Corruption provides inanity of a contract or a contract provision which allows corruption, and Article 34 of the Convention against Corruption recommends that the States Parties include in the national law the possibility of inanity or of termination of a contract, withdrawal of a concession or similar instrument or the legal remedy, if they occurred as a result of acts of corruption. This option is also provided by our Law on Competition, and by criminal laws (within a separate proceeding based on property law claim for damage compensation of the

¹⁷ See the section on anti-corruption body

¹⁸ This is explicitly stated in the report on the implementation of the recommendations in Bosnia and Herzegovina in the second round of assessment of the Group of States against Corruption.

damaged party). Public Procurement Law stipulates only in general the possibility of disqualification on the grounds of conflict of interest or corruption, but it is necessary to clearly indicate the inanity of contracts which resulted from corruption.

Damage caused by corruption can be tangible, intangible and evaded profit. To ensure adequate protection of rights and interests of those who have suffered some sort of damage through corruption, the Convention against Corruption in Article 35, and the Civil Law Convention on Corruption in a series of articles, foresees the obligation of State Parties to ensure in their domestic legislation the right to institute court proceedings. Article 4 of the Civil Law Convention on Corruption stipulates that, if the prosecutor intends to seek damage compensation, it is necessary that the defendant committed an act of corruption or approved or failed to take reasonable steps to prevent corruption, that the plaintiff suffered the damage, and that there is a causal connection between the acts of corruption and the incurred damage. Article 5 emphasizes in particular the obligation of the state to ensure through appropriate procedures the damage compensation from the state for persons who suffered damage by the acts of its officials.

International cooperation

As corruption is a phenomenon that threatens not only national values, but also affects the rule of law on a global scale, it is necessary to establish mechanisms in this "global village" which will prevent the perpetrators of acts of corruption, especially in economic and political powers, from avoiding penalties by operating from the their companies' headquarters which are situated in other states or even by escaping to another country. The chapter on international cooperation in the UN Convention against Corruption and the Criminal Law Convention on Corruption, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Council of Europe's Convention against Transnational Organized Crime, is the result of efforts towards harmonization of standards of the international cooperation in combating (corruption) crime. This matter is partly regulated by series of other convention documents which Bosnia and Herzegovina ratified, such as the European Convention on Extradition, European Convention on Mutual Judicial Assistance in Criminal Matters, the European Convention on the Transfer of Sentenced Persons, the European Convention on the

Transfer of Proceedings in Criminal Matters, etc., so that the UN Convention against Corruption, the Criminal Law Convention on Corruption and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of the Council of Europe additionally confirm and define, for the specific field of corruption, principles and forms of international criminal law cooperation which had been established previously. The essence of these provisions is the inclusion of crimes of corruption in the directory of incriminations for which it is possible to execute an extradition and to provide other forms of international criminal law assistance, such as the transfer of criminal proceedings or the execution of verdicts for criminal offences.

It is not uncommon for a state not to extradite a person suspected or convicted of corruption that is on its territory because he/she is a citizen or for some other reason. The familiar provisions from our laws on criminal procedures, which caused conflicts in our country, and which exist in the newly passed Law on International Legal Assistance in Criminal Matters that does not allow extradition of citizens of Bosnia and Herzegovina to other countries as well as similar provisions in other states (Croatia and Serbia), should be resolved by international treaties and agreements. The principle of *aut dedere aut judicare* (extradite or put to trial) of the international law, would require in such cases that the states which do not allow extradition of its citizens put to them to trial (the transfer of criminal proceedings) or to execute the criminal sanction imposed in another state (in which case it the principle of *aut dedere aut punier* applies). Otherwise, simply escaping to another state and waiting for the barring of criminal prosecution by limitation (or otherwise) such persons remain unpunished for the crime of which they are suspected or found to have committed. Obligation to define such matters arises from the provisions of Article 44/5 of the Convention against Corruption, which stipulates that signatory parties should ensure extradition or prosecution in relation to corruption crimes, either on the basis of the Convention itself or on the basis of international treaties, but the latter again in accordance with provisions which are in principle stipulated by the Convention. Thus, the obligation *aut dedere aut judicare* is once again explicitly mentioned in this Article. Agreements with Croatia and Serbia, for instance, regulate the issues of criminal law assistance fragmentarily and insufficiently, so that in Croatia one needs approval of the convicted person for the execution of court decision, which is extremely rare to get,

and along with the issues of political will to allow prosecution or enforcement of sanctions to another state, it makes the international cooperation in this regard additionally difficult, and even impossible.

Providing the so called small international assistance in the form of excerpts from records, registers and databases, communications, executions of certain procedural actions, etc., is an essential segment of the international legal assistance. For the purpose of correspondence it is foreseen to establish a central body which will handle submitting and responding to such requests. In our country it is the Ministry of Justice. However, in addition to multilateral and bilateral agreements, it was very important to adopt the Law on International Legal Assistance in Criminal Matters, which will regulate in one place not only the extradition, but also other primary and secondary forms of criminal law cooperation (small international criminal law assistance, transfer of criminal proceedings, extradition to stand trial, extradition for the execution of criminal sanctions, enforcement of the criminal conviction, and execution of monitoring over persons under suspended sentence). The adopted Law on International Legal Assistance in Criminal Matters regulated a number of things in a good way.

International police cooperation as a special form of international criminal law assistance is carried out via Interpol which performs part of activity and some small international legal assistance. Recent amendments to the laws on criminal procedure in our country provide for the use of special investigative actions to prove corruption, which meet the requirement set in Article 50 of the Convention against Corruption, Article 23 of the Criminal Law Convention on Corruption, Article 4 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and Article 20 of the Convention against Transnational Organized Crime. At the level of Brčko District, this provision has not yet been incorporated in the legislation. According to the analysis of the stage of implementation of the Strategy of Bosnia and Herzegovina for the fight against organized crime and corruption conducted by the Ministry of Security of Bosnia and Herzegovina (2008), there is no agreement on implementation of Joint Investigations, provided in Article 49 of the Convention against Corruption and Article

19 of the Convention against Transnational Organized Crime¹⁹. The situation is somewhat better with the exchange of information with other countries in the fight against corruption criminal offences addressed in Article 48 of the Convention against Corruption²⁰. Since this is a continuous activity, such efforts surely need to be encouraged and a suggestion should be made that the activities continue in the future.

Bosnia and Herzegovina is a member of the European Convention on Mutual Judicial Assistance in Criminal Matters, so that on the basis of this document, our country is obliged to submit data from criminal records to authorities in other countries. This is a general form of international assistance specifically addressed in the Law on International Legal Assistance in Criminal Matters. Hereby, the optional provision in Article 41 of the Convention against Corruption is fulfilled.

Return of property

Chapter V of the Convention against Corruption deals with international cooperation in detecting and restitution of property acquired by corruption. As it is certain that corruption is partly a transnational phenomenon, it is necessary to provide effective measures of the property return, if the offender and the damaged party come from different countries, in which case the Convention establishes new, significant standards in the process of seizure and return of property acquired by acts of corruption.

In this sense, the States Parties commit, or they are suggested to consider measures that would prevent the establishment of fictitious banks, fictional accounts, the use of bank transactions which might have something to do proceeds of corruption, keeping records on the financial situation of civil servants, the return of property gained from the committed corruption criminal offense. A number of these issues have been addressed by relevant legislation (Law on Prevention of Money Laundering, the Bank Law(s), the

¹⁹ It is generally anticipated also by the Law on International Legal Assistance in Criminal Matters, which also defines the obligation of adopting instructions on the formation of joint investigation teams

²⁰ See the list of such agreements concluded on p. 5 of the Analysis of the Degree of Implementation of the Strategy of Bosnia and Herzegovina to Combat Organized Crime and Corruption of the Ministry of Security of Bosnia and Herzegovina (2008). Beginning of the year Bosnia and Herzegovina has signed the Ministerial Declaration on Border Security in Southeast Europe, which continues to improve the police cooperation between the countries of the specified region.

State Agency for Investigation and Protection of Bosnia and Herzegovina, the relevant regulations on registration of business entities in Bosnia-Herzegovina, etc.), but some matters require further activities, such as the instructions of the Minister of Security about the criteria for suspicious transactions which need to be under stricter surveillance. Particularly important are the efforts towards harmonization of registration of business entities throughout the country, in accordance with the recommendation of the 13th Group of Countries to Fight Corruption from 2006.

According to legal regulations in our country, property gained from corruption can in principle be subject of property legal claim of the damaged party, which can be solved in a criminal or civil proceedings. As such claim may come also from abroad, it is necessary to ensure the confiscation of property when it is solved on the basis of court verdict pronounced in the foreign state, and even allow the seizure before the verdict has been passed²¹. This issue is inadequately regulated by the Law on International Legal Assistance in Criminal Matters, as there is still no possibility of confiscation of proceeds or property gain on the initiative by the state authorities. A special problem is the lack of an agency which would, upon the request of domestic or foreign government bodies, be engaged in identification, freezing, seizure and control of property acquired by criminal activities, so that the implementation of these provisions of the Convention against Corruption is made impossible.

Recommendations

Adoption of strategies to combat corruption, changing legislation and the signing of international agreements shall not *ipso facto* produce any changes. In a serious statistical analysis Rousso and Steves (2008) suggest that none of the above-mentioned types of activities individually have any significant impact on the level of (administrative) corruption. Although the multisector approach to combating corruption is almost an axiom in contemporary efforts to reduce it, it is not certain that "the development of a national program to combat corruption with a comprehensive strategy, action plan and an

²¹ This is also explicitly stated in the part of the 3rd Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

independent commission are likely to increase government commitment to a more comprehensive reform” (Rousso & Steves, 2008, p. 286). However, it is the synthesis of these activities, along with monitoring the changes in the field and constant pointing to the need for harmonization with international standards, which seem to be the right way. Therefore, although there is no (statistical) evidence on the reduction of corruption, if the state decides to apply some of the above-mentioned approaches, it is quite reasonable and only possible to expect progress through the very multisector and synergy action on several social sectors and with more institutions. In this sense, even though our country is undertaking certain activities in the field of fight against corruption, it still needs to do much more if it wants to send a message about its determination in the unacceptability of corruption practices, but also to fulfill its obligations which are being imposed in the integration processes. In this sense, it seems necessary to:

- Establish a special anti-corruption body;
- Adopt a new strategy for combating corruption, with clearly defined, achievable action plan and clearly defined mechanisms for monitoring progress;
- Continue to make efforts in the field of public administration reform, with emphasis on the ethical dimension of civil servants (codification of conduct), improve legislation on conflict of interest and access to a transparent work of state entities;
- Pay attention to combating corruption in the private sector, in particular by improving accounting standards and incriminating corruption in the private sector;
- Do more to promote integrity in the society, through campaigns, forums, consultations with the civil society in anti-corruption efforts, etc.;
- Harmonize domestic criminal legislation with international anti-corruption standards, by incriminating active illegal representation (request of illegal profits from public officials in order to abuse their actual or presumed influence), and illicit enrichment;
- Continue (both qualitatively and quantitatively) with specialized training of judicial

authorities and the implementation of the law, as well as staff recruitment in this sector;

- Improve the legislative framework of confiscation of proceeds by prescribing possibilities of seizure of any counter value of property acquired by corruption (not just in the form of money), and adopt a law on the confiscation of illegally acquired assets, which would effectively and thoroughly define the procedure and the responsibility in case of doubt that such proceeds exists;
- Adopt a special law on the protection of persons who *bona fide* report corruption, and harmonize laws on witness protection with the recommendations of the Convention against Corruption in the way to ensure the necessary evacuation of such persons to foreign countries;
- Continue activities in the field of international police cooperation, including the establishment of joint investigation teams;
- Define more efficiently, in the field of international criminal law cooperation, the execution of verdicts passed in foreign courts in cases when the perpetrators of criminal offences are domestic citizens (*and vice versa*).

Success cannot be achieved, as is often thought, by just establishing a special anti-corruption agency, which would be responsible for law enforcement across the country. If citizens believe that the public authority as a whole is corrupt, then the establishment of such an agency would contribute very little to improve the situation: it would be difficult to persuade the citizens to cooperate, which is in the case of corruption, due to the secrecy of the offence, decisive, and the culture of tolerance of corruption or defeatism regarding its suppression would not be changed. Only by promoting a climate of the rule of law and integrity in all aspects of social life it is possible to achieve stable changes.

PROCESSING CORRUPTION BEFORE THE COURTS AND PUBLIC PROSECUTORS IN BIH

Judicial institutions - the Court of BiH, the Supreme Court of the Federation BiH, the Supreme Court of Republika Srpska, the Appellate Court of Brčko District of BiH, the Basic Court of Brčko District of BiH, Prosecutor's Office of BiH, Federal Prosecution of the Federation of BiH, the Prosecutor's Office of Republika Srpska, the Prosecutor's Office of Brčko District of BiH and the High Judicial and Prosecutorial Council of BiH - were given specific enquiries to submit data on the processing of corruption before the courts and public prosecutors. Although the presented questions were simple and concrete, the received responses were inconsistent and incomplete, whereby the courts of the Brčko District did not provide any answers. The emphasis of the questions was on statistical data relating to processing criminal offences of corruption and confiscation of unlawful property gain obtained by corruption (number of applications, number of investigations, indictments, court decisions, amounts received from the confiscated unlawful property, average duration of court proceedings, costs for court and prosecution proceedings etc.).

In the criminal laws of BiH the criminal offense of "corruption" is not specifically defined, so that the criminal offences which relate to corruption in the classical sense, or where the criminal offences in which corruption (usually as bribery) is expressed in the description of the offence, are incriminated in individual chapters of the applicable criminal laws in BiH. The most important place among the laws is given to the Criminal Law of Bosnia and Herzegovina (hereinafter CL) together with the Criminal Law of the Federation of BiH, the Criminal Law of Republika Srpska and the Criminal Law of Brčko District of BiH which are harmonized with the CL of BiH²² and in which the criminal offences of corruption are defined in separate chapters (the CL of BiH, Chapter XIX – Criminal Offences of Corruption and Criminal Offences against Official Duty and Other Responsible Duty; the Criminal Law of FBiH, Chapter XXXI – Criminal Offences of Bribery and Criminal Offences against Official Duty and Other Responsible Duty; the Criminal Law of RS, Chapter XXVII – Criminal Offences against Official Duty and the Criminal Law of Brčko District of BiH, Chapter XXXI - Criminal Offences of Bribery

²² Criminal Law of Bosnia and Herzegovina, Official Gazette of BiH No. 3/03, Criminal Law of the Brčko District of Bosnia and Herzegovina, Official Gazette of BD BiH No. 10/03; Criminal Law of the Federation of Bosnia and

and Criminal Offences against Official Duty and Other Responsible Duty). Prescribed incriminations relating to criminal offences of corruption in accordance with provisions of key international documents which treat corruption, and which are signed and ratified by Bosnia and Herzegovina. Accordingly, the terms “corruption criminal offences” or “criminal offences of corruption” or “criminal acts of corruption” imply criminal offences incriminated in the aforementioned chapters of criminal laws in BiH.

Other laws which represent the basis of the legislative legal framework to combat and prevent corruption are: the Law on Free Access to Information, the Public Procurement Law of Bosnia and Herzegovina²³, the Election Law of Bosnia and Herzegovina²⁴, Laws on Conflict of Interest which were passed on the state²⁵, entity²⁶ and the level of the Brčko District of BiH²⁷, the Law on Financing of Political Parties of BiH²⁸, the Law on Civil Service of BiH, the Law on Prevention of Money Laundering, the Law on Witness Protection, the Law on Audit of Institutions of BiH and the Strategy to Fight against Organized Crime and Corruption for the Period from 2006 to 2009 which was adopted by the Council of Ministers of BiH.

The most important procedural law relevant to the fight against corruption is the Law on Criminal Procedure of Bosnia and Herzegovina, which entered into force in 2003 (along with the harmonized laws on criminal procedure of the entities and the Brčko District). The entry into force of the new Law on Criminal Procedure from 2003 fundamentally changed the concept on which the work of the body for criminal procedure in BiH had been based for decades. New procedural institutes prescribed by this Law, such as special

Herzegovina, Official Gazette of FBiH No. 36/03; Criminal Law of Republika Srpska, Official Gazette of RS No. 49/03

²³ Official Gazette of BiH” No. 49 from 02.11.2004 and Laws on Amendments to the Law on Public Procurement of BiH, “Official Gazette of BiH” No.: (19/05; 52/05; 8/06; 24/06; 70/06; 12/09)

²⁴ Official Gazette of BiH” No. 23/01. The Law went into force on 27.09.2001

²⁵ Law on Conflict of Interest in the Government Institutions of Bosnia and Herzegovina, “Official Gazette of BiH” No. 13/02-323; 16/02-404; 14/03-310.

²⁶ Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina, “Official Gazette of Republika Srpska” No. 34/02-14; 36/03-15, i.e. "Official Gazette of FBiH" No. 25/02-1049 and 1053; and 44/03 -2267

²⁷ Law on Conflict of Interest, "Official Gazette of BD BiH" No. 11/02-704; 9/03-555; i.e. Law on Conflict of Interest in the Institutions of the Brčko District of Bosnia and Herzegovina, “Official Gazette of BD BiH” No. 2/03-17 .

²³ ²⁸ Official Gazette of Bosnia and Herzegovina” No. 22/00

investigations, the possibility of concluding a plea agreement, direct and cross-examination of witnesses during the trial, all of which present modern instruments which allow the efficient fight against corruption.

The backbone of the criminal justice system of BiH consists of prosecutors' offices, courts and law enforcement agencies. Based on that, it is necessary to provide an insight into the prosecutorial and judicial system in BiH and a brief overview of the organization of law enforcement agencies which together with courts and prosecutors' offices are the main responsible bodies for the fight against corruption. Prosecution and the application of criminal and judicial sanctions for corruption offenses, including the sanctions based on which the illegally gained profits are confiscated, are the basic competencies of the criminal justice system.

Prosecutor's Offices

Bosnia and Herzegovina is a complex state, so that, besides the overregulated legal framework which regulates the field of combating corruption, a significant fragmentation of the institutional framework is also present, which is reflected in the fact that the institutions of criminal legal justice system of BiH are established in accordance with the complex administrative division of the state. Within the framework of the judicial reform in BiH in the period from 2001 to 2003 the prosecution system was restructured together with the judicial system, which resulted in the existence of four separate organizations of prosecutors with no strong functional links between them, and which are normally characteristic for a unified organization of prosecutor's offices and present one of the basic preconditions for their more effective functioning. The BiH Prosecutor's Office is a sui generis institution, responsible only for a limited number of criminal offences prescribed by the Criminal Law of BiH, so that between the BiH Prosecutor's Office and the entity prosecutor's offices there is no hierarchical relationship, separating the entity prosecutorial systems. Given the real competence and the actual number of district and cantonal prosecutor's offices, it is understandable why the district and cantonal prosecutor's offices process the largest number of criminal offences related to corruption.

Courts

The judicial system of Bosnia and Herzegovina consists of 67 "regular" courts, not including the constitutional courts. The Court of BiH and the BiH Prosecutor's Office works at the state level, and its jurisdiction is prescribed by the Law on the Court of BiH. Bearing in mind that the penalties prescribed for the criminal offences of corruption are limited to 10 years, in accordance with the entity laws on courts which are in force in BiH, the basic and the municipal courts have the real jurisdiction to decide about the criminal offences of corruption (criminal offences against official duty and other responsible duty), while the cantonal and district courts process these criminal offences in the second instance by passing decisions upon appeals against the decisions of the municipal and basic courts- second instance jurisdiction. The Supreme Court of the Federation BiH and the Supreme Court of Republika Srpska are responsible to decide on the regular legal remedies against the decisions of the cantonal and district courts.

Law Enforcement Agencies

Currently at the level of Bosnia and Herzegovina there are no police forces which are organized by the principle of the Ministry of Internal Affairs, but there are agencies within the Ministry of Security of BiH which are operative and which, among other things, are engaged in combating corruption: the State Investigation and Protection Agency (SIPA) and the State Border Police of BiH. Amongst other agencies at the state level which play an important role in the fight against corruption, there are: the Indirect Taxation Authority of BiH, the Office for Audit of Institutions of BiH, the BiH Central Election Commission, and the Public Procurement Agency of BiH. It is important to note that the Office of Disciplinary Counsel is active within the High Judicial and Prosecutorial Council of BiH, which addresses the complaints on the work of judges and prosecutors in BiH.

In addition to the institutions at the state level, the following institutions are organized at the level of entities: the Federal Ministry of Internal Affairs (FMUP), Ministry of Internal Affairs of Republika Srpska (MUP RS) and the Brčko District Police. In addition, the Financial Police of the FBiH operates in the Federation of Bosnia and Herzegovina, and each of the 10 cantons has its own Cantonal Ministry of Internal

Affairs.

Bosnia and Herzegovina is a member of all main international legal instruments to combat corruption. Some of the most important international documents in the field of fight against corruption and documents which treat the problem of confiscating the property obtained for personal gain through criminal offences are: United Nations Convention against Corruption, United Nations Convention against Transnational Organized Crime; Criminal Law Convention on Corruption of the Council of Europe, Civil Law Convention of the Council of Europe, Convention of the Council of Europe on Laundering, Searching, Seizure and Confiscation of Proceeds from Crime. Given the status of Bosnia and Herzegovina as a full member of the United Nations and its membership in the Council of Europe, Bosnia and Herzegovina has the obligation of ratification, adoption and implementation of national legislative documents adopted under the auspices of these organizations. By comparing local solutions to major international conventions related to combating corruption, you can come to certain conclusions about harmonization of domestic with international standards which relate to: the definition of criminal offences of corruption, the application of investigative actions in cases of execution of criminal offences of corruption and forming of specialized bodies to combat corruption.

Definitions of corruption in the criminal legislation of BiH is generally not in collision with the provisions of the Criminal Law Convention of the Council of Europe, but it is obvious that "active and passive bribery in the private sector" has not been regulated as prescribed by Articles 7 and 8 of the Criminal Law Convention of the Council of Europe. In relation to the United Nations Convention against Corruption (UN Convention), it is important to emphasize that the legislation in BiH is to a considerable extent harmonized with the provisions of the Convention but that the criminal laws in BiH lack incrimination of *Illicit Enrichment* (Article 20 of the UN Convention), of *Bribery in the Private Sector* (Article 21 of the UN Convention) and of *Embezzlement of Property in the Private Sector* (Article 22 of the UN Convention).

Although Article 5 of the UN Convention requires BiH to develop and implement effective anti-corruption policy and to periodically evaluate its implementation, BiH has

not yet established an effective mechanism for implementation and monitoring of anti-corruption policy. Article 6 of the UN Convention obliges BiH to establish an independent and competent body (agency) responsible for implementation and monitoring of anti-corruption policy. Strategy of the Council of Ministers for the fight against organized crime and corruption for the period from 2006-2009 anticipates the establishment of such authority, but such body is not yet operational.

Bosnia and Herzegovina is a member state of the Council of Europe's Group of States against Corruption – GRECO which was established based on the Agreement adopted by the Committee of Ministers of the Council of Europe. GRECO has the sole aim to improve the skills of its members to fight corruption by monitoring compliance with anti-corruption standards through a dynamic process of mutual evaluation. By monitoring the implementation of anti-corruption standards GRECO helps to identify deficiencies of national anti-corruption policies in order to apply the necessary legislative, institutional reforms. Anti-corruption standards, whose implementation is monitored by GRECO, are, among other things, defined and included in the Comprehensive Program of Action against Corruption of the Council of Europe, and in the Criminal Law Convention of the Council of Europe, the Twenty Leading Principles for the Fight against Corruption adopted by the Committee of Ministers of the Council of Europe etc.

Monitoring the assessment, which is implemented by GRECO, includes mainly a process based on collecting information through questionnaires, and on the spot. After the monitoring and assessment process is completed, GRECO indicates in its report at the activities which the individual states should undertake in order to improve the level of compliance of national legal and institutional framework with provisions from the key documents whose implementation is followed-up by GRECO. In this regard, after the completion of the second round of evaluation GRECO sent a series of recommendations to Bosnia and Herzegovina, such as: increase the scope of provisions of Republika Srpska about the confiscation of indirect proceeds from crime in connection with cases by which it is not possible to make a conviction; to make an analysis of the practical application of the Law on Confiscation and Seizure of Instruments and Proceeds from Criminal Offences of Corruption; promote regular coordination and cooperation between

agencies involved in detection, investigation and judicial prosecution of corruption; extend the application of the provisions on the application of special investigative actions; ensure systematic implementation and evaluation of the effectiveness of the Strategy to Combat Corruption; introduce an effective system for audit of financial statements; to introduce clear rules/guidelines and training for civil servants in regard to reporting a suspicion of corruption; establish a mutually connected system for registration of legal entities; strengthen the control functions of the courts responsible for registration of legal entities; provide specific training for judges, prosecutors, tax inspectors.²⁹

The Prosecutor's Office of Bosnia and Herzegovina received 39 applications in 2008 for the criminal offences of corruption and criminal offences against official and other accountable function, which covered a total of 68 persons. Out of this number, the citizens of Bosnia and Herzegovina filed 5 charges against 10 persons, and the authorized officials from the ministries of interior, the Financial Police of the Federation of BiH, the Indirect Taxation Authority of BiH, SIPA and BiH State Border Police filed a total of 34 charges which included 58 persons.

²⁹ Council of Ministers of BiH adopted on 29.04.2009 the GRECO Report on the Assessment of the Implementation of Recommendations for BiH Presented in the Second GRECO Evaluation Report on the Assessment of the Situation in BiH, and approved its publication, and obliged the competent institutions and agencies in BiH to join the implementation of those recommendations whose implementation was assessed as unsatisfactory in the Report.

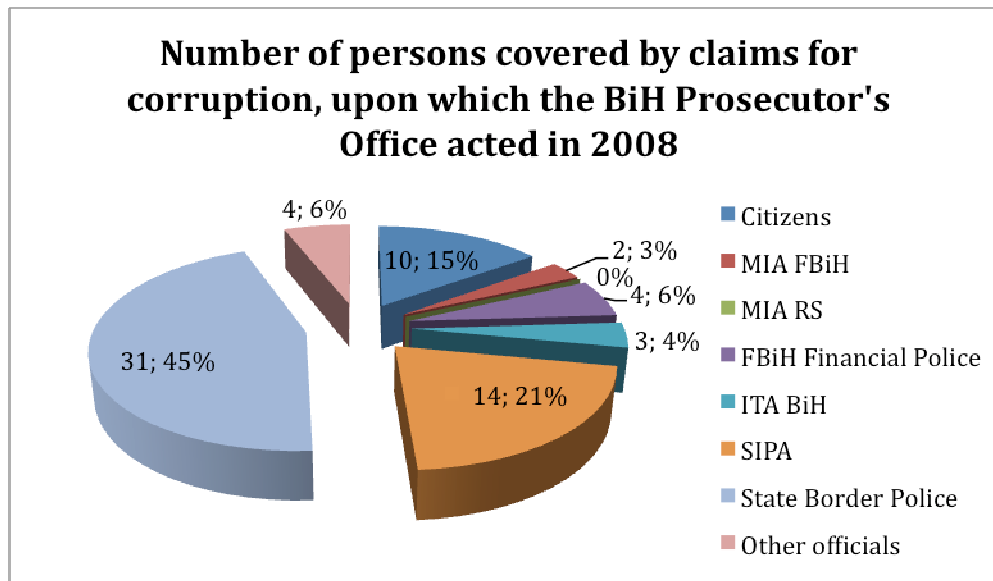


Chart 1

As can be observed from the chart above, in relation to the total number of persons covered by claims for corruption, upon which the BiH Prosecutor's Office acted in 2008, the largest number of persons, 31 persons, was reported by authorized officers of the State Border Police of BiH ex-officio. Claims filed by the BiH citizens include a total of 10 persons. By acting in the official capacity authorized officers of other law enforcement agencies reported 27 persons for corruption to the Prosecutor's Office in 2008 as follows: (SIPA 14 persons, Indirect Taxation Authority of BiH 3 persons, the FBiH Ministry of Interior 2 persons, the FBiH Financial Police 4 persons, and officials from other agencies 4 persons).

Cantonal prosecutors in the FBiH acted upon criminal charges for criminal offences of corruption which included a total of 2024 persons in 2008.

District prosecutors in the RS, including the Special Prosecutor's Office, processed the criminal offences for corruption which included 1190 persons in 2008.

The Prosecutor's Office of Brčko District of BiH included 7 persons through processed claims in 2008. Out of this number the authorized officials filed 2 claims and the officials from other bodies filed 1 claim.

Based on collected data related to criminal offences of corruption defined by criminal

laws in BiH, we can conclude that the prosecutors in BiH included 3367 persons by processing filed claims for corruption in 2008.

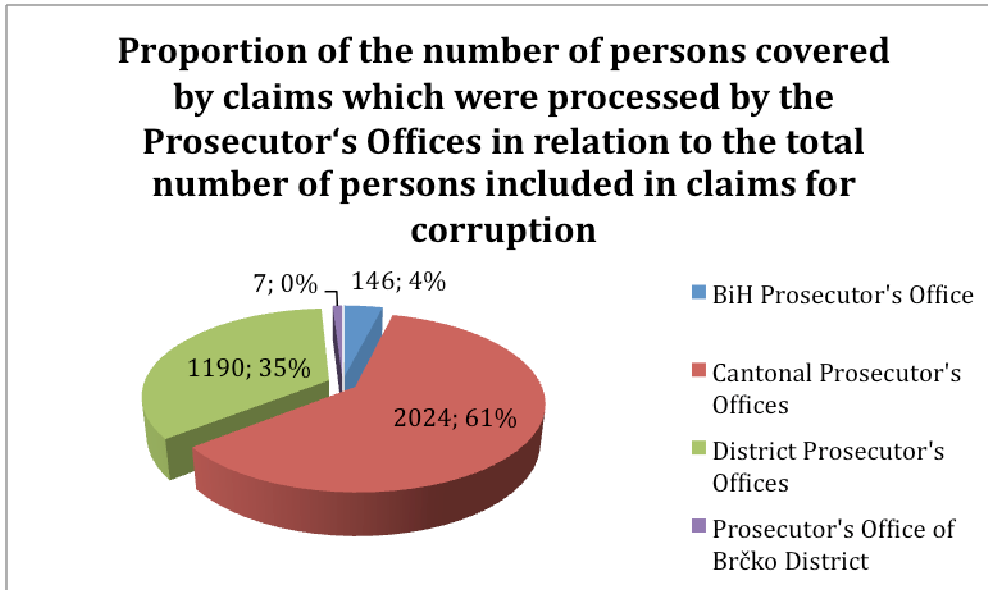


Chart 2

The chart above shows the proportion of the number of persons covered by claims which were processed by the BiH Prosecutor's Office, the Prosecutor's Office of Brčko District, the cantonal and district prosecutors in relation to the total number of persons included in claims for corruption which were processed by the prosecutors in BiH in 2008. It is clearly evident that the majority of persons is covered by claims which were processed by the cantonal prosecutors (2024 persons) and the district prosecutors (1190 persons).

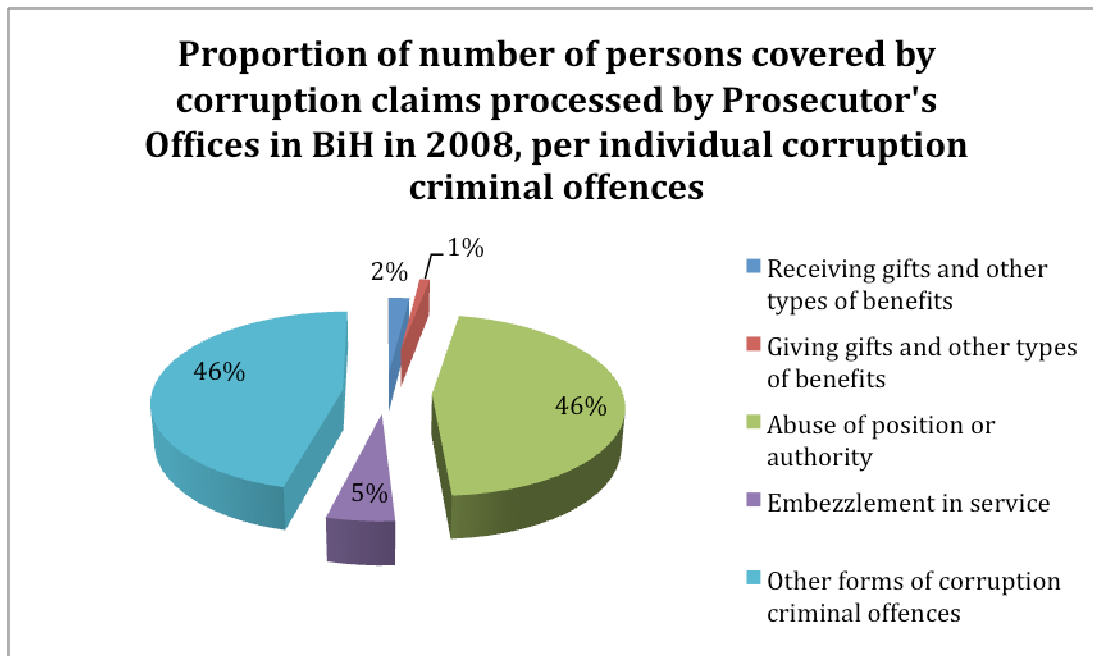


Chart 3

As can be noted from the above chart, by far the largest number of criminal charges for individual corruption criminal offences, which were processed by the BiH prosecutions in 2008 referred to the criminal offence of abuse of official position and responsibilities. The prosecutors of the BiH Prosecutor's Office led a total of 10 investigations against 20 persons in 2008, related to criminal offences of corruption. Out of this number, the investigations against 10 persons are the result of claims filed by the authorized officers of SIPA, the investigations against 9 persons are the result of processing the claims filed by the authorized officers of the State Border Police of BiH, and the investigation against one person is the result of the claim filed by the authorized officers of the MIP FBiH (see the chart below)

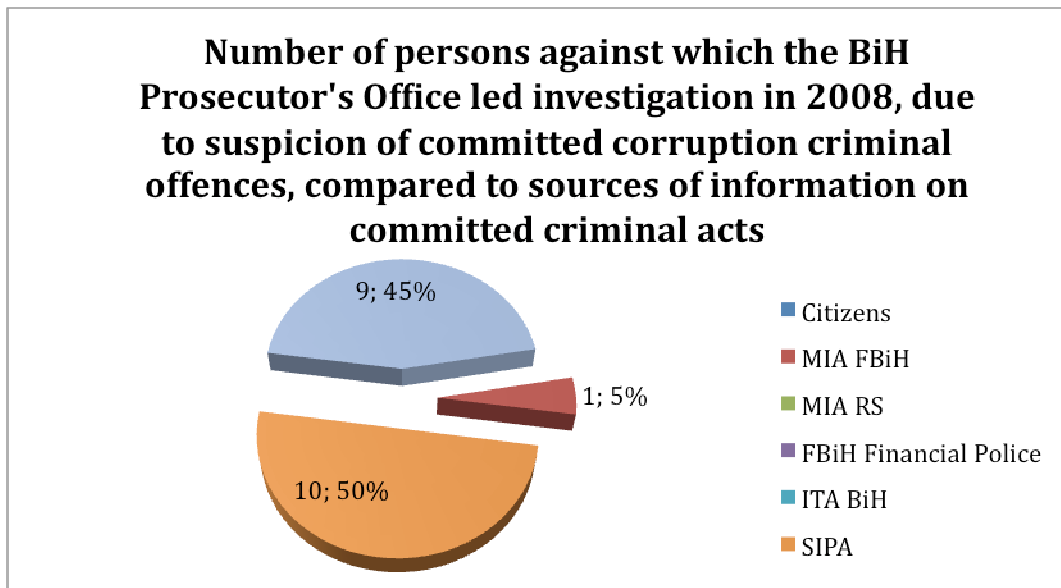


Chart 4

As it can be seen from the above chart, 95% of investigations which were led by the BiH Prosecutor's Office in 2008 for criminal offences of corruption refer to persons who were reported ex-officio by the authorized officials, specialized agencies which operate within the Ministry of Security of BiH, SIPA and BiH State Border Police. Citizens of BiH reported 10 persons under suspicion of corruption to the BiH Prosecutor's Office in 2008, but no investigation was initiated or led against persons who were reported by the citizens to the BiH Prosecutor's Office in 2008.

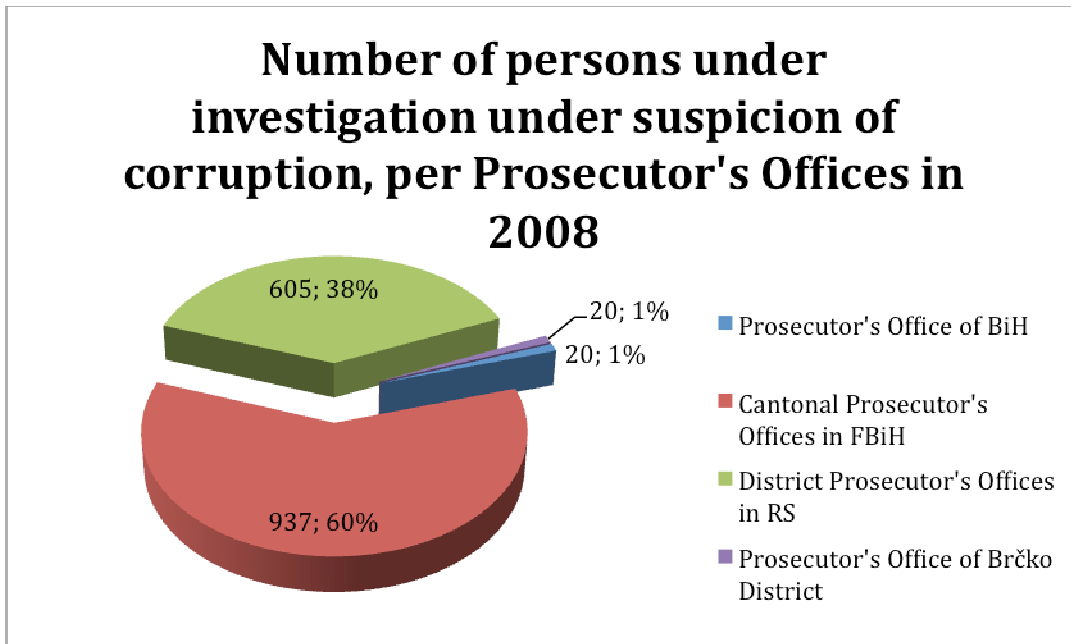


Chart 5

In 2008 the prosecutors in BiH conducted investigations for criminal offences against corruption for 1582 persons, out of which the cantonal prosecutor's offices in the Federation BiH led the investigations against 937 persons, district prosecutors in the RS, including the RS Special Prosecutor's Office, against 605 persons, while the Prosecutor's Office of Brčko District led investigations against 20 persons.

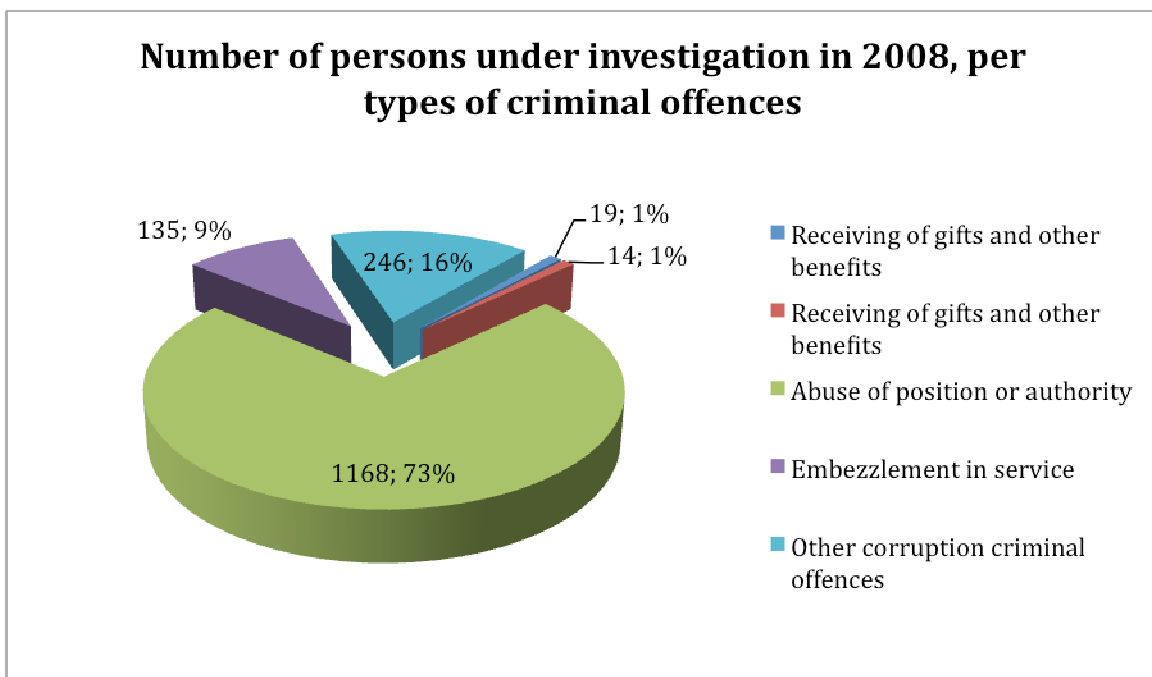


Chart 6

In relation to the individual criminal offences, the largest number of investigations that were conducted in 2008 for corruptive criminal offences were related to criminal offences of abuse of official position, i.e. (73% of the total number of investigations related to corruptive criminal offences). The prosecutors of the BiH Prosecutor's Office raised charges against 6 persons in relation to criminal offences of corruption in 2008, the cantonal prosecutors against 170 persons, the district prosecutors against 144 persons, while the prosecutors of the Prosecutor's Office of Brčko District raised charges against 5 persons.

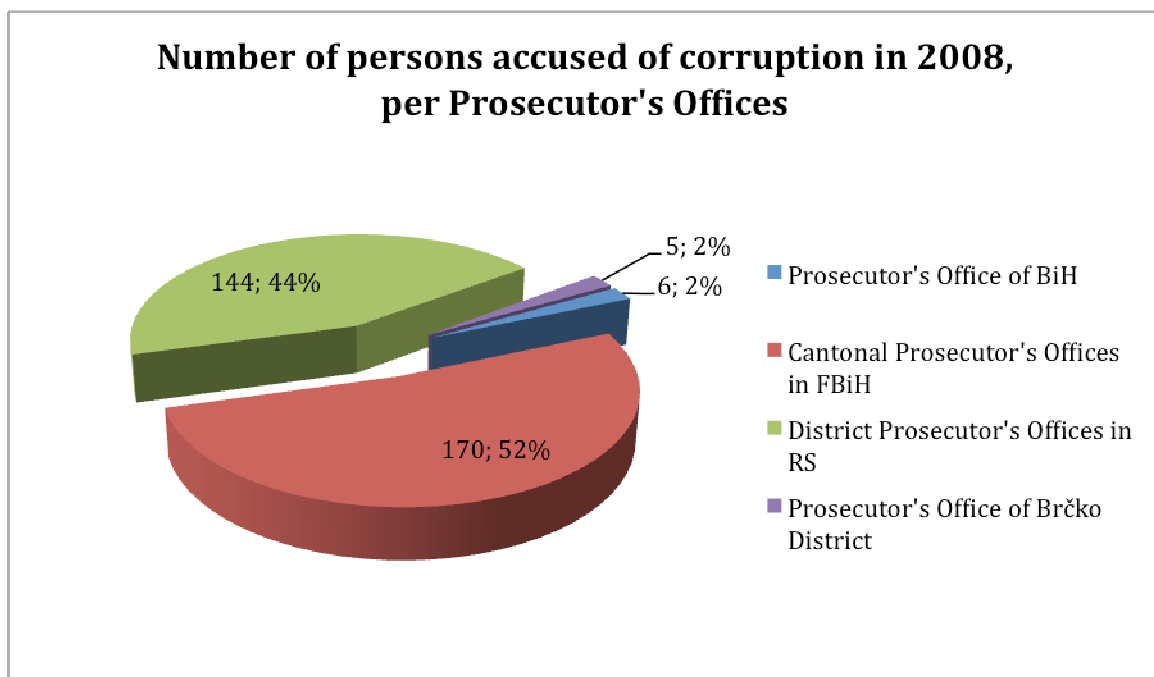


Chart 7

From the above chart it can be concluded that the prosecutors in BiH raised charges against a total of 325 persons in 2008, and that 96% of persons accused of corruptive criminal offences in BiH in 2008 are the result of investigations conducted by cantonal and district prosecutor's offices.

By passing the decisions based on charges for corruption criminal offences, the Court of

BiH passed 46 convictions in 2008, 2 verdicts of release and 3 acquittals.

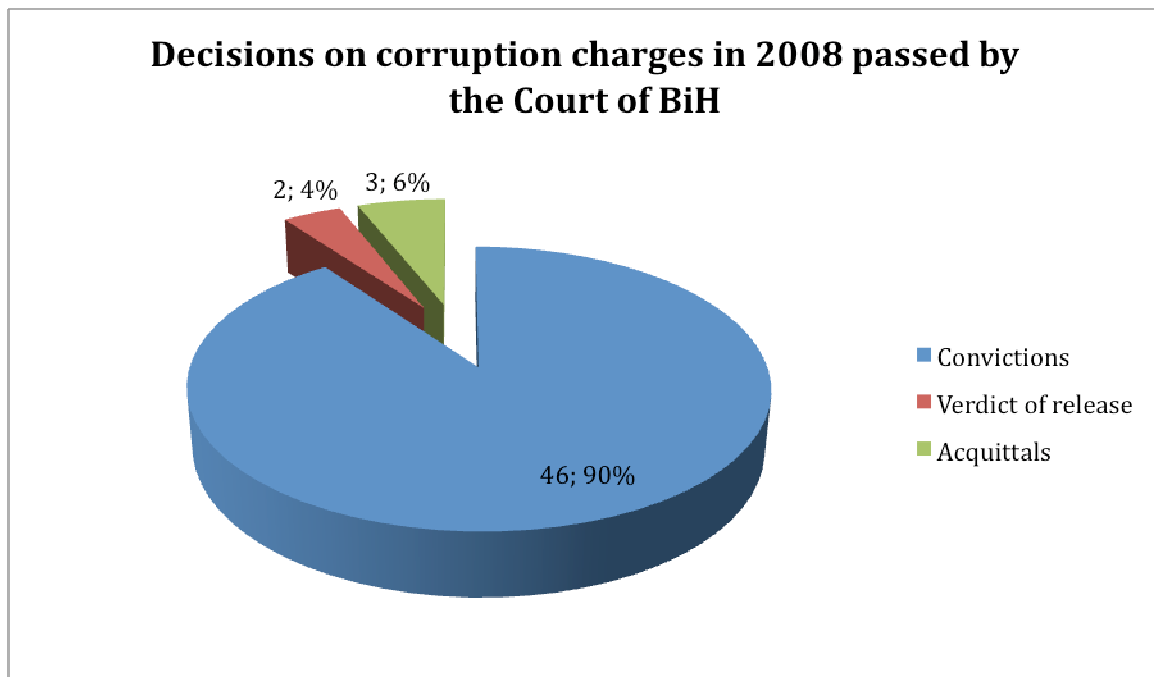


Chart 8

In relation to convictions for criminal offences of corruption, the Court of BiH pronounced prison sentences in 9 cases, out of which only the writing-office of the Department III of the BiH Court (General Crime Department) submitted information on the amount of pronounced sentence (one year and 10 months in prison), in one case the ruling was pronounced as a minor penalty of a fine, while in 25 cases the pronounced rulings were suspended sentences.

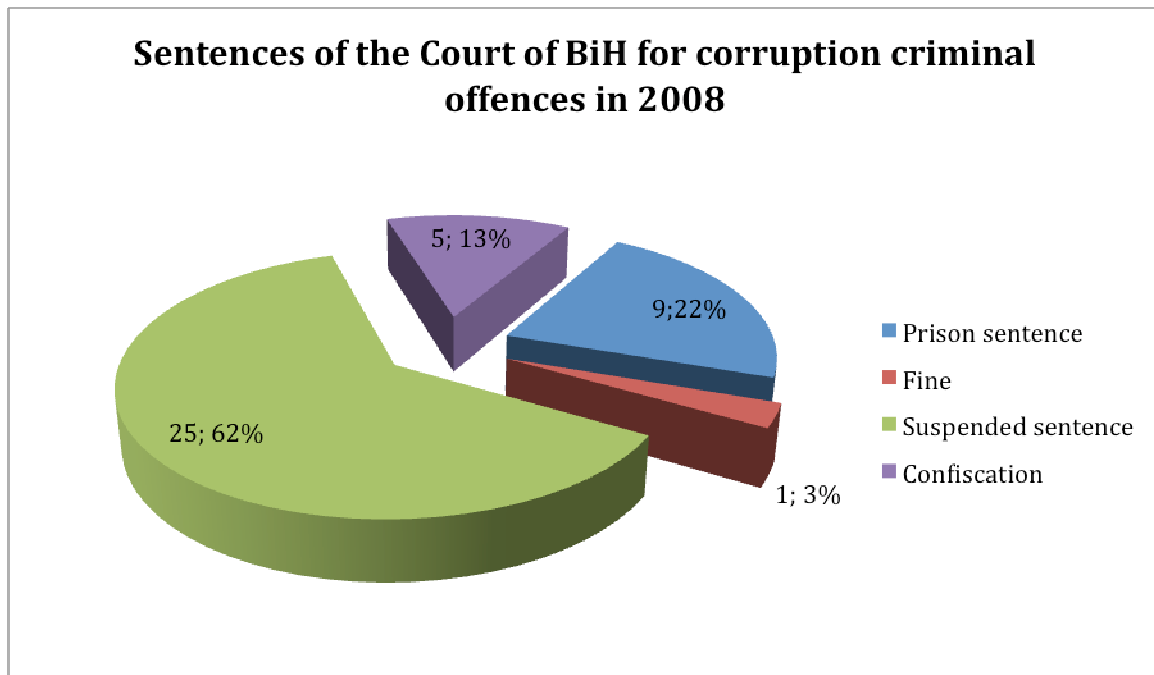


Chart 9

As can be seen from the chart above, most convictions for corruption criminal offences refer to suspended sentences: 62%. In cases of corruption criminal offences the Court of BiH rendered a measure of seizure of unlawfully gained proceeds from property in a total of 5 cases, and the total value of confiscated unlawfully gained proceeds from property is only 10,540.44 convertible marks and 60 euros. In 2008 the BiH Court pronounced a sentence of a fine, as a minor penalty, for corruption criminal offences in one case in the total amount of 10,000 KM. As a result of passed decisions of the Court of BiH on the seizure of illegally gained property and the pronounced penalties in cases relating to corruption, a total of 20.540, 44 KM and 60 EUR were paid in the budget in 2008. The average duration of court proceedings before the Court of BiH in 2008 in matters relating to criminal offences of corruption was 9 months and 7 days.

The Supreme Court of the Federation of BiH convicted 5 persons in 2008 for corruption criminal offences, out of which one person was sentenced to imprisonment for 3 years and 6 months. The FBiH Supreme Court acquitted six persons in 2008.

The Supreme Court of Republika Srpska. In cases of criminal offences which relate to corruption, the third instance Chamber of the Supreme Court of Republika Srpska

pronounced three verdicts in 2008, based on the claims from district courts, by which the claims of the accused were rejected and the district court verdicts were confirmed, according to which one persons is sentenced to imprisonment for a period of 7 months, one person to a suspended sentence, and one person has received a fine in the amount of 1500 KM.

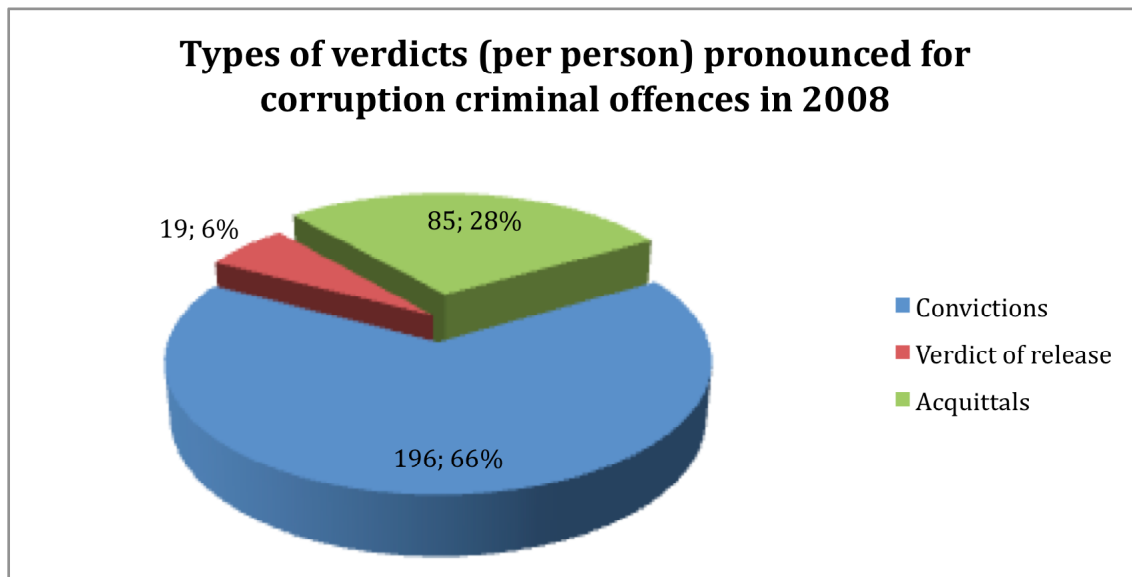


Chart 10

As it can be seen from the above chart, and based on the cases for corruption criminal offences, the courts in BiH pronounced verdicts for the total of 300 persons in 2008, out of which the most convictions (related to 196 persons), acquittals (related to 85 persons) and verdicts of release (related to 19 persons).

Although 66% of the pronounced verdicts relates to convictions, only 16% of verdicts pronounced prison sentences. The largest percentage of convictions (73%) refers to the verdicts of suspended sentences which were pronounced to the accused.

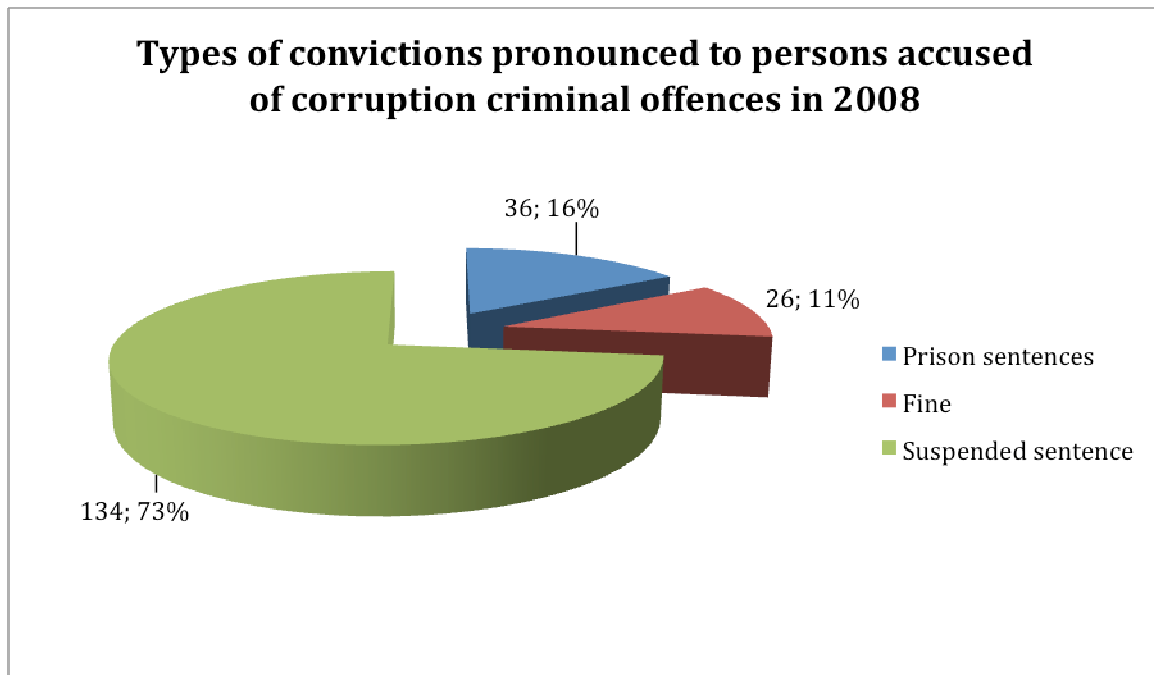


Chart 11

As can be observed from the chart above, in relation to convictions pronounced in 2008 for corruption criminal offences, the courts in BiH sentenced 30 persons to prison, 20 persons were punished with fines, and 134 persons were sentenced to suspended sentences. It can be said that Bosnia and Herzegovina is a state with a solid legislative and institutional framework which is a basic precondition for successfully combating corruption, but one can also conclude with certainty that the existing laws are still not implemented, primarily because of inadequate cooperation and coordination of institutions responsible for their implementation.

Appropriate and effective institutional framework which includes appropriate coordination and cooperation of relevant institutions to implement Anti-Corruption Policy and their effective monitoring are of crucial importance for successful combat of corruption.

It is obvious that the strategy of Bosnia and Herzegovina for combating organized crime and corruption has not given visible results yet and that, given the increasing subtlety of

corruption, it is necessary to draft and adopt a separate strategy only for the fight against corruption and to establish "a specialized independent agency to combat corruption", based on the model of good practice in the world (Hong Kong, Singapore, etc.), and which is also an obligation for BiH which arises from the conventions which BiH signed and ratified. Given the numerous obligations prescribed by international instruments to combat corruption, as well as the recommendations of the Council of Europe's Group of States against Corruption (GRECO) for BiH, it is of utmost importance to establish specialized bodies to combat corruption which would carry out coordination of existing institutions which fight against corruption.

Although the conventions prescribe for the specialization of bodies to fight against corruption, there are currently only two prosecutor's offices in BiH which have specialized departments for this emerging type of crime. It is the Special Department for Combating Organized Crime, Economic Crime and Corruption in the BiH Prosecutor's Office and the Special Prosecutor's Office for Combating Organized and Gravest Economic Crime - Special Prosecutor's Office in the District Prosecutor's Office in Banja Luka. Following the example of these two prosecution offices it is necessary to consider the possibility of carrying out a specialization for prosecutors to combat corruption in the other prosecutor's offices in BiH.

Given the quality of information which we have received from the judicial institutions, one can draw a general conclusion that the judicial institutions in BiH, even after the implemented computerization of the courts and prosecutor's offices, still do not have an informed and unified system of reporting on the prosecution of crimes related to corruption. For this purpose it is necessary to initiate the establishment of a centralized database of all processing of criminal offences, including the corruption criminal offences. (The BiH Court even provided two answers to questions we submitted, one response was submitted by the writing-office of the Section III, and the other the writing-office of the Section I and II).

General conclusion on the collected and processed statistical data relating to the prosecution of crimes of corruption in BiH in 2008 (which, due to all above mentioned facts, should be taken with some reservation) could be the following: "In relation to

criminal offences of corruption defined by criminal laws in BiH, in 2008 the BiH Prosecutor's Office acted upon claims which included a total of 3367 persons. Investigations were conducted against 1591 persons, 325 persons were accused, out of which the courts have confirmed the indictments in relation to 316 persons. Courts passed the convictions in 196 cases, out of which 36 persons were pronounced with a prison sentence, 26 persons with fines, and 134 persons with suspended sentences. Dispensed verdicts were pronounced by courts for 19 persons in 2008, and 79 persons were acquitted.

Notable is the extremely high percentage of rulings ordering suspended sentence, even 68% of the total number of convictions for corruption criminal offences falls under this type of sanctions. Out of the total number of convictions 18% of verdicts pronounced a prison sentence.

Given the answers to questions which are related to the taken illegal financial gain, and the average length and cost of criminal proceedings, it is apparent that judicial institutions in Bosnia and Herzegovina (except for the BiH Court which provided data on the average duration of court proceedings) still do not have an established a system of monitoring parameters related to the duration of the proceedings and the costs of the proceedings.

Given the quality of information provided by the competent institutions during this research in an effort to present the review of processed corruption criminal offences in BiH, one reaches a conclusion that the results of this analysis present a good initial estimate and the basis for detecting the current status and the direction which should be taken in order to obtain complete and meaningful information about processing of corruption criminal offences before the courts and prosecutors in BiH in the future.

MONITORING OF CHANGES TO THE LEGAL FRAMEWORK AND OF THE IMPLEMENTATION OF THE LAW ON CONFLICT OF INTEREST, FINANCING OF POLITICAL PARTIES AND OF THE ELECTION LAW

Legal Framework

A significant segment of the anti-corruption legal framework in Bosnia and Herzegovina refers to the BiH Election Law³⁰ in the part which treats the financing of the election campaigns, the BiH Law on Financing of Political Parties³¹ and the BiH Law on Conflict of Interest within the government institutions³², together with the analogue³³ laws at the entity and Brčko District level. With the exception of the BiH Election Law, the aforementioned laws were subject to significant amendments in 2008. Some of the amendments have been adopted, some are still in parliamentary procedure while some of the laws are new and were adopted in 2008. Hereinafter, the quality and the effects of these solutions on the upcoming anti-corruption processes in the country will be elaborated.

Chapter 15 of the *BiH Election Law* treats the issues of financing the election campaign together with the methods of submitting and the contents of the financial reports which the political parties and the candidates for the election function as well as the appointed members of authorities at all levels submit to the Central Election Commission BiH (CIK BiH). The Law also prescribes the method in which CIK BiH shall act in cases of violation of legal provisions. With respect to the latter, the principle of a “voluntary” compliance of the law has not been abolished yet from the aforementioned chapter, so

³⁰ The Election Law of Bosnia and Herzegovina “BiH Official Gazette” no. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08

³¹ The Law on Financing of Political Parties, BiH Official Gazette no. 22/02.

³² The Law on Conflict of Interest in the BiH Institutions, BiH Official Gazette no. 16/02, 14/03, 12/04, 63/08.

³³ Parallel legislation at the RS level are Law on Financing of Political Parties from the RS budget and the Law on Prevention of Conflict of Interest within the RS government bodies. On the FBiH level, there is the Law on Prevention of Conflict of Interest within the government bodies of the Federation of Bosnia and Herzegovina, while the Law on Financing of Political Parties from the FBiH budget has not yet been adopted despite being in parliamentary procedure

that the CIK BiH seeks to achieve that the political parties, coalitions and candidates act voluntarily in accordance with the set provisions³⁴, before it penalizes or undertakes any administrative measures to sanction the failure of submitting these very important reports. Such formulations were sensible at the time when the rules for financing and submitting transparent financial reports were new to the political bodies and when they needed more time to undergo a training program on implementing and abiding by this set provision in practice. However, after a number of years that the regulation has been in force, asking the political parties to abide by the law on voluntary basis, despite the fact that all relevant surveys have indicated that they are the most corrupted institution in the country³⁵, is not an appropriate provision and it should be abolished. This provision has caused both problems in the implementation and a dilemma for the CIK BiH resulting in a significant delay in the implementation of the Law and additionally enabling the already present political influences to stir this institutionally important process into a politically motivated process and to marginalize it. This will be further elaborated in the part on the implementation of the Law. Furthermore, Article 15.7 regulates the requirement for all candidates for the election function at the state or entity level to submit a statement on their overall assets within 15 days from accepting the candidacy³⁶. The weakness of such a formulation lies in the fact that it does not foresee that the appointed official will submit an annual statement on his/her financial situation nor a report on any significant change of his/her assets, which actually reduces the possibility of timely detection of undue influence that the exercise of a public function may have on the property status of elected officials. Another problem is the level of implementation of the aforementioned provisions, which will be discussed further in the analysis.

The BiH Law on Financing of Political Parties was adopted in 2000 and regulates, among other issues, the level of financial contributions which a legal or natural person

for almost two years. In Brčko District there is the Law on Financing of Political Parties from the Brčko District BiH budget and the Law on Conflict of Interest in the Institutions of Brčko District BiH

³⁴ Article 15.6, paragraph (3) of the BiH Election Law

³⁵ <http://www.ti-bih.org/Articles.aspx?ArticleId=cbe060d5-8c9f-479c-90e1-da5c0caf1a6c>

³⁶ Article 14.8 of the BiH Election Law provides that all candidates appointed to levels other than the state or entity level are obliged to submit a signed statement about their assets to the CIK BiH within 30 days from the confirmation of their mandate.

can donate to political parties³⁷, the requirement of reporting any contribution that exceeds the limit of 100 KM as well as the ban on donating contributions to the parties for the state, entity, cantonal, municipal and local community bodies, public institutions, public companies, charities, solely non-profit companies, religious communities, business corporations where the investment of public capital amounts to a minimum of 25% together with private companies which perform public services under contract with the government. One of the deficiencies of this Law is that it fails to regulate the relationship between public and private financing of political parties resulting in the fact that budget funds are almost an exclusive or a major part of financing of the political parties. Additionally, the aforementioned provision on the requirement to report any contribution that exceeds the limit of 100 KM leaves a large space for manipulation in practice where the total amount of contributions is “split” into a number of individual contributions of which none exceeds the set limit of 100 KM. This violates the principle of transparent financing of political parties together with the consequences in terms of exercising strong influence of larger donors on the work of a political party and what is even more dangerous, this effect will remain unrevealed and it can be contrary to the public interest, especially if it is the case of the ruling parties. At the same time, these parties have a lower ratio of public to private financing which goes in favour of the previous thesis. The third large problem related to this regulation is that for a long period of time the entities have not adopted relevant laws which would treat the issue of political party financing, acting at the levels lower than the state level of authority, while the BiH Law on Financing of Political Parties had only regulated the means of allocating funds for the parties represented at a level of joint i.e. state institutions thus leaving completely open the space for manipulation at lower levels for a very long period of time. This was partially resolved with the adoption of the respective Law in the RS in July 2008, while the FBiH Parliament, as previously mentioned, has not yet offered a solid solution.

³⁷ The total amount of a single donation shall not exceed the amount of eight average salaries in BiH in accordance with the data provided by the BiH Agency for Statistics in one calendar year and this contribution cannot be donated more than once a year (Articles 4 and 5 of the Law on Financing of Political Parties).

At the beginning of 2008³⁸ the *Proposal of the new BiH Law on Financing of Political Parties*³⁹ was sent into parliamentary procedure which included the following amendments to the Law in force: the political parties were entitled to receive contributions from abroad while previously they were only allowed to receive donations from local legal and natural persons. Additionally, there was a proposal for the increase of the set donation limit by legal entities from the current 8 to 15 average net salaries in one calendar year. The new definition of banned contributions excluded the possibility of political parties using the office space granted on the basis of a decision by the relevant authorities but prohibited any generation of profit from property which is not in the ownership of the political party. The proposed amendments provided a somewhat more detailed definition of the budget distribution for financing of political parties and coalitions as well as the parliamentary groups, the club of delegates and delegates in the BiH Parliamentary Assembly. Additionally, the Office for Audit of Institutions in BiH, the entity tax administrations and other institutions at all levels of authority were obliged to assist the Office for Auditing the Financial Operations within the CIK BiH (hereinafter the Audit Office) in performing the activities stemming from its duties- which could be regarded as a positive step in the context of the Law implementation. There was also a proposal for the parties to inform the CIK BiH of any changes of their assets and to regulate the system and the functioning of the internal control of financial operations. Majority of the proposed amendments were grounded on findings of the Audit Office over many years, as it was the case with the use of office space, accepting illicit contributions, exceeding the permitted annual amounts of individual contributions...etc. However, the question still remains whether these problems should have been solved by legalizing them or by tightening the control mechanisms and applying more rigorous sanctions to prevent the same violation of the Law be repeated year after year.

The remaining proposed amendments are mostly technical and will not be the subject of this analysis.

³⁸ The proposal to the Law was submitted to the BiH Parliamentary Assembly on April 24, 2008.

³⁹ <http://www.parlament.ba/pzakoni/1/45/1.html>

Undoubtedly, the proposed Law regulates much better the issues which were previously vague or caused problems during implementation, but there are still issues which even this new proposal of the Law fails to include and which were previously mentioned. The fact is that the BiH Central Election Commission, as the creator of the majority of the proposed amendments, has become a service to political parties since the departure of its international members and that there is an evident lack of political will to resolve this issue thoroughly (which is reflected in exceedingly long procedures for the adoption of the Law). All this underlines the fact that a significant space for financial manipulation by the political parties will still remain open.

*The Law on Financing of Political Parties from the budgets of Republika Srpska, cities and municipalities*⁴⁰, was adopted in the RS in the middle of 2008. The Law regulates a segment of financing the political parties and coalitions who have delegates or members in the assembly, independent delegates and members (including clubs or groups of delegates/members) as well as political parties, coalitions and independent candidates with confirmed electoral lists. The Law thus differentiates regular financing and financing during the election campaigns. The regular financing provides for a minimum of a 0.2% of budget funds to be ensured and allocated in the ratio of 20% to all parties with delegates in the assembly/boards and independent delegates, while the remaining 80% will be allocated in proportion to the number of mandates won in the assembly/board. On the other hand, the election campaign funds amount to 0.05% of the budget and are allocated “in accordance with the election regulations.” The allocation of these funds is conducted by the Ministry of Finance of the RS or the relevant unit of local self-government. The lack of this Law is that it fails to define concrete categories of costs to be covered from the funds for regular financing of political parties leaving to the arbitrariness of political parties to categorize any type of expenditure into the regular operational expenditures. Apart from the distribution of funds, this Law thus fails to control any issues of controlling the budget spending, while, on the other hand, the legislation at the state level deals solely with the spending of funds for election campaigns enabling the political parties to spend the money of the tax payers randomly

and arbitrarily.

As previously stated, the Law on financing political parties from the budget of the Federation of Bosnia and Herzegovina, has not been adopted even after two years of being in parliamentary procedure which is a clear *reference to the lack of political will* to resolve this issue in a proper manner in the FBiH.

As far as Brčko District is concerned, the Law on Financing of Political Parties from the budget of the Brčko District of BiH⁴¹ has been in force since 2004. Regular financing provides for allocation of 0.1% or 200.000 KM from the budget with an equal distribution of 30% of the funds to all political parties represented in the Assembly and 70% proportional to the number of representative seats. The financing during election campaigns provides for allocation of 0.03% or 60,000 KM depending on which amount is lower. The distribution abides by the principle that each party is entitled to cost covering in the amount of 4.000 KM. The amendments to the Law adopted in 2008 oblige the Finance Directorate of Brčko District BiH to allocate the funds in accordance with the information submitted by the Central Election Commission BiH. Contrary to the relevant Law in the RS, the Law in Brčko District defines the categories of costs to be covered from the funds allocated for the work of political parties.

The Law on Conflict of Interest in the BiH Government Institutions is applied to appointed officials, holders of executive functions and advisors (hereinafter – public officials) at the level of joint institutions while the conflict of interest issue is regulated by analogue laws at the entity and Brčko District levels. For other holders of public functions, the conflict of interest is defined by other regulations such as the laws on state service/administration, the Code of Ethics for Judges and Prosecutors and others. However, there are still public functions where no satisfactory mechanisms for prevention and sanctioning of conflict of interest are in place (such as, for example the

⁴⁰ The Law on Financing of Political Parties from the budget of Republika Srpska, the cities and municipalities, the Official Gazette of the RS, no. 65/08

⁴¹ The Law on Financing of Political Parties from the budget of Brčko District BiH. Official Gazette of Brčko District no.29-04.

employees in educational and other institutions) and it is essential to regulate this⁴². The Law defines the conflict of interest as a private interest that can have an effect on legitimacy, transparency, objectivity and impartiality in performing of the public function by the appointed officials, holders of executive functions and advisors.

„Practically the most important provisions of the Law on conflict of interest refer to the inconsistency of functions i.e. the ban for the public officials to perform the function of a director, authorized person or a member of the managing boards of public companies and agencies for privatization within six months from completing the public function. The Law also forbids public officials and their close relatives to have any engagement in private companies that conduct business with government or in which the government body has invested under certain conditions. Additionally, there is a ban on concluding deals on personal service rendering with any public or private company which has made an agreement or in any other way deals with the government institutions at any level; performing more than one executive function and other inconsistencies. The Law foresees serious measures for the violation of these provisions – candidacy ban for any of the appointed functions for the period of four years and a fine between 1.000 KM and 10.000 KM”⁴³. The main drawback of such legal provision is that it leaves the opportunity for the public officials to perform their function until next elections, since the measures to be pronounced by the CIK BiH in case of a failure to eliminate the conflict of interest have not been defined precisely. Such a legal setback has been widely used in practice and certain individuals have continued to perform their public function⁴⁴ regardless of the fact that CIK BiH has identified the conflict of interest.

Article 10 of the Law regulates the issue of receiving gifts and foresees that any gift awarded or service rendered, which exceeds the value of 200 KM, has to be reported to

⁴² “The Law on Conflict of Interest in the BiH Institutions – the assessment of quality and level of implementation of the legal framework and the proposals for its improvement,” Aleksandra Martinović, Open Society Found BiH & TI BiH, December 2007. page 3.

⁴³ “The Law on Conflict of Interest in the BiH government institutions – assessment of quality and level of implementation of the legal framework and proposals for their implementation.” Aleksandra Martinović, Open Society Found BiH & TI BiH, December 2007. page. 4.

⁴⁴ As is the case with the current BiH Minister of Foreign Affairs Sven Alkalaj for whom the CIK BiH has passed a decision on conflict of interest in on April 24, 2008.

the CIK BiH, in which case the reported gift becomes property of BiH. However, such provisions were rarely implemented in practice and there are no effective mechanisms to control their implementation. The other important mechanism is included in Article 12 of the Law and defines the issue of transparency of personal assets and foresees an obligation of submitting a financial report to the CIK BiH. These reports refer to the participation of the elected and appointed officials, advisors, members of the managing, supervisory or executive boards of companies in the function of the director or member of the managing board of the agency/directorate for privatization, participation in any business deal in a private company as well as information on additional incomes, ownership interests in companies (more than 10.000 KM) or other financial interests (more than 1.000 KM per month)⁴⁵. Although the purpose of these reports is to identify and prevent conflict of interest, they do not significantly answer their purpose in practice, due to the fact that the officials are handing in the reports irregularly, that there is no solid mechanism for implementation and that there is an absence of sanctioning of the officials.

Besides, the Law on Conflict of Interest in the BiH institutions fails to treat the issue of a stakeholder or shareholders' capital of the public officials in the companies before these officials are elected or appointed to the position for which the Law provides that in certain situations they can represent a conflict of interest.⁴⁶ This Law, together with all the analogue laws in BiH, "does not set any obligation to the elected representatives, the holders of executive functions or advisors in the context of handling their property in business companies. Thus it would be desirable to regulate this area with amendments modeling this Law on the Law on Preventing Conflict of Interest in Performing the Public Function of Republic of Croatia where Article 11 foresees that the "Official who has 25% or more shares or stake in the company shall transfer his/her management rights on the basis of his/her stake in the company to another individual (except individuals in connection) or to a special body. This individual or a special body (trustee) shall act on

⁴⁵ "The Law on Conflict of Interest in the BiH Government Institutions – assessment of quality and level of implementation of the legal framework and proposals for their implementation." Aleksandra Martinović, Open Society Found BiH & TI BiH, December 2007. page. 5

⁴⁶ "The Law on Prevention of Conflict of Interest in the RS Government Institutions – comparative analysis," Open Society Fund BiH and TI, Nebojša Milanović, 2008. page. 7

its own behalf in the context of achieving the membership rights and stakes in the company on behalf of the official” and “during the time the official’s management rights in the company have been transferred to another individual or a special body, the official shall not issue any notifications, instructions, orders or in any way be in connection with the individual or the special body and thus influence the achievement of rights and meeting of requirements stemming from the membership rights in the companies. The official is entitled to receive information once a year on the condition of the company in which he/she is a stakeholder.”

The Law on Conflict of Interest in Government Institutions of the FBiH⁴⁷ was adopted in 2008, almost six years after the adoption of the relevant Law on state level. The FBiH Law is analogue to the state law and thus it “takes over” all the previously mentioned problems present at the state level. However, since this Law regulates the obligation of public officials in performing their public function both on FBiH, cantonal and local levels (municipal and city), and since the set provisions are equal for all the officials on the mentioned levels, the violation of the Law will put all the officials from these levels in the same position. For example, an official on the municipal level with lot less responsibility and less possibility for corruption in the case of a conflict of interest can be sanctioned equally as an official on the entity level with a much bigger scope of possibilities for corruption. One of the basic needs for drawing up regulations on the entity level was to establish different scales of sanctions in line with the scope of responsibility that the public official has accepted. Thus, this remains a reproach to the Law on FBiH level which should be remedied by the legislative authorities.

The Law on Prevention of Conflict of Interest in the Government Institutions in the RS⁴⁸ is also a new law adopted in 2008 by the RS National Assembly. Pursuant to Article 2 of this Law, conflict of interest is present in circumstances when the elected representative, holder of executive function or an advisor has a private interest which can influence or it has the possibility of influencing the impartial and objective performance of his/her duty. Contrary to the FBiH Law, the RS Law is formulated somewhat differently from the

⁴⁷ The Law on Conflict of Interest in the FBiH Government Institutions, FBiH Official Gazette no. 70/08.

⁴⁸ The Law on Prevention of Conflict of Interest in the RS Government Institutions, RS Official Gazette no. 73/08

relevant state law and in some segments it is much more liberal and less precise – facts that the authors of this analysis regard as the deficiencies of the Law. Starting from Article 1 of the Law which reads that “certain issues regulated by the law can be regulated otherwise by special laws”⁴⁹ brings into question the procedure of amending the Law and its validity. An additional problem of this Law is the narrowing down of the circle of people on whom the Law applies to, since from Article 4 of the Law „it can be concluded that the RS Law is not applicable to kinship by marriage and it only refers to the child of the spouse i.e. it applies only to the first level of the kinship by marriage and not to the second level.”⁵⁰ This will not prevent the use of privileged position of the officials where the government institution in which they work will conduct business with the companies officially registered under the name of their close relative although in reality they are in the ownership of the political official him/herself. The following problem is the formulation of Article 5 of the Law. Despite its limitations on the possibilities of engaging public officials in supervisory boards or as directors of public companies within three months after the termination of their mandates, paragraph 3 of the same Article enables the possibility „for the elected representatives, holders of executive functions and advisors in the RS government institutions to be members of supervisory boards and directors of public companies established by the local self-government authorities and the other way around, for the holders of executive functions and advisors from the local levels of government to be members of supervisory boards and directors of public companies established by the RS.”⁵¹ It is evident that the „RS Law provides for a narrow circle of institutions in which the RS officials may come into a potential conflict of interest in comparison to the other three jurisdictions. It also indicates a narrower scope of functions (only members of supervisory boards and directors of public companies in the RS) and a shorter period (three months from the day of mandate termination) for taking over the new functions in comparison to the time frames on state, FBiH and Brčko District levels.”⁵² Thus, the amendment of this Article

⁴⁹ “The Law on Prevention of Conflict of Interest in the RS Government Institutions, -comparative analysis“, Open Society Found & TI BiH, Nebojša Milanović, 2008, page 2

⁵⁰ Ibid

⁵¹ Ibid, page.4

⁵² Ibid, page.5

of the Law and the extension of the period for the takeover of the new function to one year would at least symbolically limit the possibilities of the previous decision-maker in the government institutions to use his/her political influence for private, personal arrangements.

Another problem that this Law will come across in its implementation is that “it only refers to business companies” meaning companies (business companies) established in accordance with the regulations on business companies further implying that it refers to partnership and limited partnership corporations as well as limited liability companies and joint-stock companies. Since the latter two are a regular form of organizing a business company in BiH it is important to underline that they can be in private ownership – in the ownership of a natural person (mostly limited liability companies) and mixed ownership - joint-stock company whose owners can be the state, other business companies and natural persons. That means that the RS Law does not differentiate the ownership structure when it defines the inconsistency of the public officials’ functions while the laws on state, FBiH and Brčko District BiH levels make this difference and limit the application of this Article solely to “private companies” which are defined as companies established by law outside the scope of a public company.⁴⁵³ This leaves the possibility for different interpretation of the presence of a conflict of interest in relation to the business companies in mixed ownership leaving space for Law violation. Additionally, the implementation of the Law will most probably have further political connotations since Article 13 of the Law on Prevention of Conflict of Interest in the RS Government Institutions regulates that the procedure for establishing conflict of interest is conducted by the Commission as an independent body although the Commission is appointed by the RS National Assembly. Pursuant to the Law, the Commission has 6 members of which at least one must hold a law degree and a successfully completed professional exam. Other members of the Commission are appointed on the grounds of a public announcement for all three constituent peoples to be represented after which the authorized Assembly body proposes candidates for the appointment of the Commission members. The election itself is conducted by voting of the RS National Assembly representatives. It is evident that the

Commission members may be submissive to the political pressures in the decision-making since their appointment depends on those to whom the Law applies. Thus, the whole appointment procedure is subjected to manipulations in the context of appointing “suitable” candidates and Commission members who will bring the enforcement of the Law in question for the benefit of the political interests of those who had appointed them to these functions. The same procedure refers to the appointment of the members of the Appeals Commission bringing the appeal procedures in question together with the overall system of establishing conflict of interest in the RS.

The aforementioned Laws are substantially harmonized with the UN Convention against Corruption (UNCAC)⁵⁴, which acts as a global and legal document in the fight against corruption and leaves the governments a wide framework for the implementation of the regulations taken over with the signing of the Convention. BiH signed this document in 2005 and the BiH Presidency passed a decision on the ratification of the Convention at its 89th session in 2006. Article 7 of UNCAC is very important in the context of the aforementioned laws as it talks about the public sector and tends to build anti-corruption mechanisms within the sector. According to the Comparative Analysis of the BiH legal framework with the UN Convention against Corruption “the laws on administrative service in the BiH administration support these principles.” The second Article of the Convention that touches upon the analysed legal framework is Article 8 which describes the code of conduct of the public officials and promotes work transparency, competencies, integrity and honesty. Although BiH partially possesses legal mechanisms that regulate this issue for the officials on the state level or representatives of the government institutions, which is the issue treated by these laws and certain codes, there are still no codes of conduct for the individuals employed in all state institutions and public companies. This problem is directly tied to the government institution representatives since after identifying the negligence in the work of the government representatives and after they hand in their resignation or after they lose their mandate at the elections, a large number of officials continue working in the public companies where there are no

⁵³ “The Law on Prevention of Conflict of Interest in the RS Government Institutions, -comparative analysis“, Open Society Found & TI BiH, Nebojša Milanović, 2008, page.6

⁵⁴ http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

mechanisms to sanction the non-ethical and corrupted behavior making the system malversation licit. Additionally, this Article of the UNCAC deals with the issues covered by the topic of the Law on Conflict of Interest and proposes contemplating possibilities for establishing measures and systems to facilitate reporting of corruptive activities by the public officials. This is still an idle issue since there are no mechanisms for protecting the persons reporting corruption. The “xi Recommendation” by GRECO (Group of States against Corruption) was formulated in that context. In the „Compliance Report on Bosnia and Herzegovina – Second Evaluation Round“⁵⁵ adopted by GRECO in February 2009, it was assessed that this proposal that requires training in the area of reporting corruption and establishment of a system of prevention was not carried out.

Another important proposal for the analyzed legal framework is the „x Recommendation“ which requires introduction of limitations to employment opportunities after the expiry of the mandate of public officials in Brčko District and the RS. Although it was stated in the Report that this proposal was partially fulfilled at the level of Brčko District and not fulfilled at the level of the RS as the documents relating to this proposal were not submitted to GRECO – it can be concluded that this requirement was partially completed since the relevant RS Law had failed to resolve adequately this issue and the entity laws were not harmonized with the relevant state law. GRECO's „ix Proposal“ includes issues of establishing an efficient system of gaining insight into the financial reports by the relevant state agency and BiH CIK in order to prevent conflict of interest at the level of individual counseling of public officials. As it can be viewed from the analysis, the system of financial reporting was established on state as well as entity and local levels of authorities. However, the GRECO Report indicates that there is an evident lack of adequate sanctioning mechanisms for inaccurate financial reports. Furthermore, apart from the beginning of the mandate, the mechanism for reporting the financial situation of the public official during the mandate - especially if there are significant changes in his/her assets – were not harmonized with the undertaken duties. Verification of the accuracy of information submitted in financial reports is not foreseen by legal regulations and institutional mechanisms, nor do other relevant entities have the obligation to assist

⁵⁵ [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2\(2005\)8_BiH_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval2(2005)8_BiH_EN.pdf)

the BiH CIK in identifying inaccurate information. Thus in practice, this provision of the Law is neither transparent nor efficient as was stated in the Report with the assessment that the Recommendation was only partially implemented.

Implementation – positive and negative indicators

The implementation of the analyzed laws at the state, entity and local levels is under the competency of BiH CIK with the exception of the Law on Prevention of Conflict of Interest in the RS Government Institutions for which the competency lies with the Commission in the RS.

BiH Central Election Commission was set up in 2001 after the adoption of the BiH Election Law in the BiH Parliamentary Assembly. This body is comprised of seven members from all three constitutive peoples and others where the Commission President is appointed among the members in accordance with Article 2 of the BiH Election Law. BiH CIK President rotates every fifteen months with one member of the Commission to be elected to this position only once during the period of 5 years, and the rotation of BiH CIK President has to abide by the national principle.

Apart from the aforementioned laws, the work of BiH CIK is regulated by by-laws primarily by the Rules of Procedure⁵⁶, the Regulation on administrative procedures of reviews, controls and audits of the political parties' reports⁵⁷ – a new Regulation adopted after the Local elections in 2008, the Regulation on annual financial reports of the political parties⁵⁸, the Regulation on pre-elections and post-elections financial reports of political entities⁵⁹ and various types of forms that facilitate the means of registration and reporting issues of political party financing and conflicts of interest.

Regarding the implementation of the aforementioned laws by BiH CIK in 2008 and first half of 2009, the Commission has conducted audits of the financial reports for 2004,

⁵⁶ BiH Official Gazette, no. 13/02, 20/03, 4/04, 10/04 I 102/06

⁵⁷ http://www.izbori.ba/documents//2008/pravilnici/pravilnik_o_administrativnim_procedurama-BOS.pdf

⁵⁸ BiH Official Gazette, no. 61/06

⁵⁹ BiH Official Gazette, no. 61/06

2005, 2006 and 2007 in accordance with the BiH Election Law and the Law on Financing of Political Parties.

Due to the violation of both laws, BiH CIK passed thirteen decisions for 2007 issuing fines to the following political parties:

1. Croatian Democratic Union (HDZ BiH) : fine amounting to 3,700.00 KM
2. Social Democratic Union BiH (SDP BIH) : 2.500,00 KM
3. Party for BiH (SBIH): 2.500,00 KM
4. Serbian Radical Party Dr. Vojislav Šešelj: 700,00 KM
5. Serbian Democratic Party (SDS) : 900,00 KM
6. National Bosniak Party (NBS) : 600,00 KM
7. Croatian Right Bloc BiH: 300,00 KM
8. Democrats of Bosnia and Herzegovina: 300,00 KM
9. HSS-NHI: 1.000,00 KM
10. Party of Democratic Progress of Republika Srpska: 1.000,00 KM
11. Croatian Bloc BiH: 400,00 KM
12. Croatian National Unity: 300,00 KM
13. Democratic Patriotic Party: 200,00 KM

The sanctions were issued due to improper completion of the financial reports, lack of evidence for the income and revenues in party organizational boards, lack of additional documentation, failure to complete the form of the annual financial report in accordance with the Regulation on annual financial reports of the political parties, receiving of banned contributions, failure to report all contributions in the annual financial report...etc.⁶⁰

⁶⁰ http://www.izbori.ba/documents/2009/Saopstenja/Sao_16_07_2009_CIK_BiH.pdf

On the basis of the 2006 report, BiH CIK issued in total nine sanctions to political parties and a total of nine sanctions on the grounds of the report for 2005 whereas the previously passed decisions in four cases were confirmed last year on the grounds of the report for 2004. Regarding the Local elections in 2008, BiH CIK issued at the beginning of last year an Information on submitted post-election financial reports – Local Elections 2008 up to December 23, 2008⁶¹, which reads that out of 414 political entities registered for the Local elections in 2008, 12 political parties and 139 independent candidates failed to submit the set post-election financial report. BiH CIK has not yet sanctioned this issue. Additionally, the Information reads that after gaining insight into the data submitted in the reports, it was concluded that only one political party- Alliance of Independent Social Democrats (SNSD) Milorad Dodik has violated the set limits on expenditures during the election campaign amounting to 543,039. 87 KM. The sanctions for such violations of the provisions of the Law have also not been issued yet. Regarding the requirement defined by the BiH Law on Financing of Political Parties on an obligatory submission of financial reports⁶², BiH CIK concluded on May 8, 2009 that up to the date, 162 political parties have failed to submit the annual financial reports for 2008. Since the legal deadline for the submission of the report is June 1, 2009, there is still no available data either on the number of political entities who have met this requirement or on the sanctions to be issued by the BiH CIK for the violation of the Law.

Regarding the BiH Law on Conflict of Interest and the analogue laws on entity and Brčko District levels, BiH CIK fined six officials in 2008 and the first half of 2009, i.e. five officials on state level and one on Brčko District level. It is important to underline that BiH CIK has adopted Instructions for the Implementation of the Law on Prevention of Conflict of Interest in the Institutions of BiH which regulates this issue on entity and lower levels of authority up to the adoption and implementation of the analogue laws. However, at the beginning of 2008, “BiH CIK had put this Instruction out of force causing various controversies since BiH CIK has thus suspended the implementation of the state Law on the entity and Brčko District levels and created a legal void for entity

⁶¹ http://www.izbori.ba/documents%5Crevizija%5C2008%5CInfo_Rev_23122008.pdf

⁶² Article 11 of the Law on Financing of Political Parties

and lower levels of authorities just before the local elections in BiH at the beginning of October 2008 “⁶³ The following persons were sanctioned:

- Sven Alkalaj, BiH minister of Foreign Affairs, four year candidacy ban;
- Igor Crnadak, deputy BiH Minister of Defence, four year candidacy ban;
- Senad Šepić, deputy BiH Minister of Civil Affairs, four year candidacy ban,
- Miodrag Bukvić, delegate in the Brčko District Assembly, four year candidacy ban and a fine of 1,500 KM;
- Vasilje Žarković, advisor to the Serb member of the BiH Presidency, four year candidacy ban and a fine of 1,000 KM
- Hadži Jovan Mitrović, delegate in the House of Representatives of the BiH Parliamentary Assembly, four year candidacy ban and a fine of 10,000 KM.

As evident from the aforementioned, the sanctions mostly relate to the candidacy ban for the period of four years and low fines. Although the Law on Conflict of Interest has a mostly preventive character, a question arises whether the relevant entities, most notably the Prosecutor’s Office will investigate the scope and measure of the conflict of interest that the public officials have actually used and whether they have thus achieved certain illegal benefit for themselves or for persons in connection with them in which case the mentioned sanctions should be supplemented with the sanctions foreseen by the criminal law (giving and accepting bribe, illegal mediation, abuse of function and authorities...etc).

At the time of writing this analysis there was no available data on the sanctions in the form of a refusal to confirm the mandate due to the violation of the provisions of the Law regarding the requirement for the candidate to submit a form on his/her assets within 30 days from holding elections on the local level.

⁶³ “The Law on Prevention of Conflict of Interest in the RS Government Institutions – comparative analysis,” Open Society Found & TI BiH, Nebojša Milanović, 2008.,page.2

The essential problem in the implementation of the Law is that the procedure for establishing the conflict of interest is too long and subjected to manipulations in practice. This statement is grounded in the process launched by Transparency International (TI) BiH against the former Prime Minister Nedžad Branković. Namely, TI BiH issued a request to the BiH CIK at the end of 2007 to pursue the case of a conflict of interest since the Prime Minister was at a same time also a shareholder in a Fund Management Company ABSD. Since BiH CIK failed to launch the procedure in this case for six months, TI BiH transferred the case to the Court of BiH in March 2008 which in September the same year ordered BiH CIK to launch the procedure. However, BiH CIK declined jurisdiction in the case making TI BiH file an appeal to the Court of BiH. In January of the following year, the Court of BiH passed a decision on the jurisdiction of the BiH CIK and obliged it to pass a decision in the case within 60 days. Almost two years after TI BiH had launched the procedure, BiH CIK passed a decision stating that Nedžad Branković, the Prime Minister at the time, was not in the conflict of interest since the FBiH Government had not passed any decision on this issue in the inquired period regardless of the fact that the Law indicates that it is sufficient the official has the possibility use the benefits offered by his position to determine grounds of conflict of interest.⁶⁴ By arbitrary and deliberate rejection to apply the Law, by prolonging the passing of the decision, by rejecting to abide by the valid court ruling and an illegal conclusion, BiH CIK has proven that it does not act in the service of the citizens and public interest but that it is a service of the political parties and their representatives in the authorities. Unfortunately, this is just one example of the political influences on the work of the BiH CIK since the departure of the former, international members of CIK. Some public actions of certain members of BiH CIK who were subjected to political pressures themselves, indicates that there were plenty more inapt political effects on the institution. It can be concluded that BiH CIK is just another law enforcement entity in BiH whose decisions should be reviewed through an independent audit. The competent Commission for the enforcement of the Law on Preventing Conflict of Interest in the RS government institutions has just recently began operating although, due to the appointment procedure of its members, the same issue of objectivity, professionalism

⁶⁴ BiH Law on Conflict of Interest, Articles 3, 4 and 5 of the Law

and impartiality can be raised causing the implementation of this Law to, most likely run into great obstacles. Recently, TI BiH initiated a procedure with the Commission for establishing conflict of interest for the current RS Prime Minister Milorad Dodik who is also a Chairman of the Credit Board in the Shareholders' Assembly of the RS Investment-Development Bank while the RS Government headed by the Prime Minister Dodik performs the function of the Bank's Assembly in accordance with the Law on RS Investment-Development Bank. Regardless of these facts, the Bank has approved a 3 million KM loan to the company "Fruit Eco" which is in the ownership or co-ownership of Mr. Dodik's son. The Commission for establishing conflict of interest in the RS government institutions has declined jurisdiction in the case launched by TI BiH claiming that at the time in matter, the Law on Prevention of Conflict of Interest in the RS Government Institutions was not in force and as such it could not have been applied to this actual case. A question arises whether the legal void in this area that resulted from last year's suspension of the implementation of the state Law at the entity and Brčko District levels and a long deadline for establishing a relevant body at the RS level, was created on purpose. TI BiH is of opinion that the RS Commission lacks the competency to perform the consigned duties since it called upon the criminal law in the explanation of its decision, although the issue of establishing conflict of interest is *par excellence* an administrative issue and is in no direct or indirect correlation with the criminal law and valid principles in that branch of law.⁶⁵

Conclusions and recommendations

After analyzing all three legal units developed in this paper, it can be concluded that an upgrade of all three areas is essential, in fact of all analogue legal solutions on state, entity and Brčko District levels, but even more importantly laws need to be implemented in practice. It is essential to complete the process of amending the laws as soon as possible, most notably before the General elections in 2010 in order for BiH to enter the next election cycle with more adequate regulations and fewer cases of law abuse.

⁶⁵ In accordance with the Appeal of TI BiH against the Conclusion of the RS Commission for establishing conflict of interest in the RS government institutions, no 02-476-S/09 S.O. from 18.07.2009

The amendments to the analyzed laws should specifically accept the following recommendations:

- Revoke the provision on “arbitrary” abidance of the Law from Chapter 15 of the BiH Election Law;
- Introduce a provision in the same Chapter of the BiH Election Law that provides for an annual requirement to submit a financial report of the elected officials, and a requirement to submit a financial report in case of any “significant” change in the financial situation in order to promptly identify irregular effects that the public function has on the financial aspect of the public officials and persons in connection with them;
- Introduce control mechanisms for the accuracy of information submitted in the financial reports of the elected officials;
- In the Proposal to the BiH Law on Financing of Political Parties it is important to regulate the relationship between public and private financing;
- In the BiH Law on Financing of Political Parties and the entity laws, it is important to define the categories of expenditures that are classified in the regular operational costs of the party and to ensure adequate control of spending public funds awarded to the parties;
- In the RS Law on Financing of Political Parties at the level of RS, the city and the municipalities, it is important to introduce better legality control mechanisms for allocation of funds;
- Adopt the Law on Financing of Political Parties from the FBIH budget as soon as possible;
- Consider unifying legal provisions that treat financing of political parties and election campaigns into one Law in order to make it clearer and more understandable but also easier to implement;

- Initiate adoption of the Law on Lobbying at all levels of authorities in BiH as soon as possible;
- Regulate the issue of conflict of interest in all public institutions with amendments to the Law on Conflict of Interest in the BiH institutions and with amendments to other relevant laws;
- Regulate the mechanisms of Law abidance by amending the BiH Law on Conflict of Interest by prompt elimination of the conflict of interest with the officials for whom the conflict of interest was established;
- It is important that the Law on Conflict of Interest regulates the issue of stakes and share capital of the elected representatives, holders of executive functions and advisors in companies before these officials are elected or appointed to their functions. This could be done by introducing provisions modeling this Law on the Law on Prevention of Conflict of Interest in Performing the Public Function of Republic of Croatia which regulates this issue with the following requirement:” Official who has 25% or more shares or stake in the company shall transfer hos/her management rights on the basis of his/her stake in the company to another individual (except individuals in connection) or to a special body. This individual or a special body (trustee) shall act on its own behalf in the context of achieving the membership rights and stakes in the company on behalf of the official” and “during the time the official’s management rights in the company have been transferred to another individual or a special body, the official shall not issue any notifications, instructions, orders or in any way be in connection with the individual or the special body and thus influence the achievement of rights and meeting of requirements stemming from the membership rights in the companies. The official is entitled to receive information once a year on the condition of the company in which he/she is a stakeholder”;
- Establish legal control mechanisms of the accuracy of data contained in the financial reports of public officials in accordance with Article 12 of the Law on Conflict of Interest in the BiH government institutions (personal financial status)

and relevant laws;

- In the Law on Conflict of Interest in the FBiH government institutions, it is important to confine the criminal provisions of the entity, cantonal and local levels of authority;
- In the Law on Prevention of Conflict of Interest in the RS Government Institutions, revoke or develop Article 1 of the Law in order to prevent inadequate interference of other laws into this issue;
- In accordance with the BiH Law on Conflict of Interest as the frame law, it is important to expand the number of people to which the Law on Prevention of Conflict of Interest in the RS Government Institutions applies to include kinship by marriage as well;
- Harmonize the RS Law with the BiH Law on Conflict of Interest in the segment of the limitation period for employment after the expiry of the mandate, i.e. increase the three-month period to a minimum of six months, increase the number of institutions in which the public official can come into conflict of interest by regulating the issue of membership in supervisory boards and public companies regardless of the level of the official's function and the institution that has established the company and expand the number of functions where the public officials can come into conflict of interest all in accordance with the BiH Law on Conflict of Interest;
- In the same Law, define the term "business company" and differentiate the capital ownership structure to prevent abuse in the interpretation of the Law in relation to the mixed capital companies;
- Ensure independence and necessary competency of the RS Commission for establishing conflict of interest;
- Adopt code of ethics for employees in all state institutions and public companies with specifically defined ethical and anti-corruption principles.

Regarding the implementation of the Law at the levels of authorities, it is evident that it is conditioned primarily by the capacities of the BiH CIK to fulfil the obligations that were legally consigned to it. BIH CIK monitors the implementation of the mentioned laws at all levels with the exception of the RS Law on Conflict of Interest – that means that they monitor the work of an estimated 5,000 officials excluding their relatives and it is evident that BiH CIK lacks human and financial resources for the scope of work consigned to it. Additionally, BiH CIK's work is conditioned by political pressures which could be overcome with adequate protection of the BiH CIK members through legal frameworks and sanctions for the BiH CIK members, political entities and their representatives for any such abuse of the BiH CIK.

Thus it is important to:

- Increase capacities within BiH CIK for the implementation of the Law and provide for introduction of other entities into the implementation process and ensure better coordination between BiH CIK and other entities for law implementation;
- Provide for mechanisms of protection from the political attacks and pressures on the members of the BiH CIK with adequate sanctions for such activities to both the BIH CIK members as well as other officials and political subjects;
- Regulate the means of implementing the Law at the entity and Brčko District levels through by-laws since BIH CIK with its capacities will not be able to successfully monitor the implementation of these laws on lower levels of authorities.
- With amendments to the Law and by-laws regulate the obligation of the BiH CIK to launch procedures and pass decisions in set time frame on cases of Law on conflict of interest. In this case, it is important to foresee sanctions for the BiH CIK members for violating these provisions.
- Make a clear difference between sanctions for the officials from different levels of authority taking into consideration the scope of their responsibility, possible abuse and other relevant factors, notably on local level.

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- Establish Code Committees within the government and other public institutions that would monitor the fulfillment of the requirements in the area of conflict of interest in other public institutions.
 - Introduce control mechanisms for reporting/not reporting gifts by the public officials and adequately resolve the issue of sanctions for violation of Article 10 of the Law on Conflict of Interest in BiH institutions (receiving gifts) and urgently adopt a Regulation on gifts by the BiH CIK which has been in procedure for years.
 - Establish adequate procedures of reporting queries on corruption within public institutions and protecting persons who report corruption and conduct training of the people on the rights and mechanisms at their disposal in accordance with the “xi Recommendation” by GRECO.

FUNCTIONING OF POLICE AND INTELLIGENCE AND SECURITY AGENCIES

The work of intelligence and security agencies and law enforcement agencies in BiH is regulated by laws on internal affairs, laws on special law enforcement agencies, laws on police officers, as well as rulebooks on internal organizations of these bodies. The work of the police officers in RS is therefore regulated by the Law on Internal Affairs of RS, in the FBiH it is regulated by the Law on Police Affairs of FBiH, as well as by ten cantonal laws on internal affairs, while some cantons even have laws on police officers. The police of Brčko District performs its duties based on the Law on the Police of Brčko District of BiH, while the work of the law enforcement agencies at the level of BiH is regulated by the Law on State Investigation and Protection Agency (SIPA), the Law on State Border Service, as well as the Law on Police Officers of BiH, and the Law on Intelligence and Security Agency of BiH (OSA).

Bosnia and Herzegovina has achieved certain progress in the police reform at the state level during 2008, since the Parliamentary Assembly of BiH adopted the Law on Independent and Supervisory Bodies of Police Structure of BiH, and the Law on Directorate for Coordination of BiH Police Bodies and Agencies for Police Structure Support of BiH, in April 2008. The adopted laws on independent and supervisory bodies of the police structure of BiH provide for the establishment of the Independent Board, the Police Officer Appeals Board, and the Citizen Appeals Board. The Law on Directorate for Coordination of Police Bodies and Agencies for Police Structure Support of BiH establishes the Directorate for the Coordination of Police Bodies, the Agency for Forensic Examinations and Expertise, the Personnel Education and Professional Development Agency, and the Agency for Police Support, and sets out their competences and their organization as administrative organizations for police structure support of BiH. The local level of the police, as part of the new, unified, police structure of BiH, and other details of the police structure will be dealt with, however, after the constitutional reform in BiH in accordance with the three principles of the European Commission. The laws defining this will be adopted not later than one year after the adoption of the Constitution of BiH. The structure of the unified police forces of BiH will match the

constitutional structure of the country. The competent bodies have therefore delayed the police reform at the local level until the completion of the constitutional reform.

In the following period, the focus should be directed to the positive law institutional framework of police bodies in BiH, with the aim of solving key problems in the work of these institutions (Law on Internal Affairs, Law on Police Officers, Law on State Investigation and Protection Agency, Law on Border Police) which, until now, *insufficiently, or almost not at all, dealt with the functional links between authorized official persons and prosecutors, or between police bodies and the Prosecutor's Office.* Police agencies and the prosecutor's offices are different bodies by status, and they have different solutions for issues of independence, accountability, administration line, education, development, and specialization, as well as professional support, and only the Law on Criminal Procedure represents a link between police agencies, on the one hand, and the Prosecutor's Office, on the other.

These are the reasons why it is necessary to *enhance the existing, and adopt the new cooperation mechanisms between the police and the Prosecutor's Office, with the aim of increasing the efficiency of the above mentioned bodies, by adopting the necessary implementing regulations, establishing continuous joint police and prosecutor training, and the harmonization of records and statistics.* With the aim of ensuring efficient and legal investigation, it is necessary to ensure intensive and active communication, as well as mutual coordination of activities between the Prosecutor and authorized persons, especially regarding analysis and assessment of gathered information and evidence, planning and performing of investigative activities (regarding type and manner of activities – legality and regularity of activities).

There are no functional bonds between different police and intelligence and security agencies, but they are necessary for official cooperation. According to existing laws, the Ministries of Internal Affairs are charged with the implementation of policies, the enforcement of laws, the ensuring of adequate resources for the work of the police, as well as the gathering of relevant information for criminal investigations, while the police represent operative bodies which directly take measures for the prevention and exposure of offences.

Many examples show that *true independence of these police institutions from other government bodies has not been achieved*. This is why a *complete de-politicization and professionalization of these institutions* is necessary in order to prevent bad influence of other government bodies and policies. The professional core of police structures must remain intact regardless of the changes in the police structure of BiH. The implementation of the Law on Independent and Supervisory Bodies of the Police Structure of BiH would create an atmosphere for true work independence of agencies from political and other influences.

Implementation – positive and negative indicators

The Law on State Investigation and Protection Agency regulates the works and duties of authorized persons for prevention, exposure and investigation of offences under the jurisdiction of the Court of BiH, and especially: organized crime, terrorism, war crimes, human trafficking, other offences against humanity and values protected by international law, capital financial crimes, as well as helping the Court and the Prosecutor's Office of Bosnia and Herzegovina in gathering of intelligence, and the enforcement of the orders of the Court and the Chief Prosecutor of BiH. According to the Law on Internal Affairs of RS, police work is, among other things, prevention of offences, exposure of offences, catching and handing over perpetrators of offences to competent bodies, which is performed in accordance with the Law on Criminal Procedure and the Criminal Procedure Code of RS.

The RS Law on Internal Affairs also regulates the competences and duties of authorized officials for the performance of the above mentioned operational and expert police work. This Law does not regulate special cooperation with prosecutor's offices, and it does not determine the relation between the police and the Prosecutor's Office as two bodies working on criminal investigations.

Unlike the RS Law, The Law on Internal Affairs of FBiH establishes, besides the provision which regulates the duties of the Police Administration, the immediate measures for the prevention and exposure of offences, and the finding of perpetrators of such crimes, and it is obliged to cooperate with the competent Prosecutor's Office regarding the processing of offences.

However, the cantonal laws on internal affairs do not contain other provisions, besides the provision that ministers of internal affairs have to ensure and realize the cooperation of ministries with other government bodies, which define in more detail the relation of cantonal police departments with prosecutor's offices in criminal investigations. However, these laws regulate the obligations of the police to prevent and expose perpetrators of offences, find the perpetrators, and hand them over to competent bodies in cases when this is not the competence of the Court Police.

The Law on the Police of Brčko District of BiH also regulates the rights and duties of police officers. However, besides one of the basic tasks of the police, the exposure of offences, misdemeanors, economic offences, and investigations, one special provision states that the investigation must be conducted under the supervision of the Public Prosecutor of Brčko District.

In 2008 police officers of SIPA had 3242 cases, out of which 2098 were realized and 147 reports on committed offences were submitted to the Prosecutor's Office of BiH, but none of the reports related to corruption offences.

In 2008 the Federal Police Administration registered 23,719 offences. There were 102 offences regarding the Law on Criminal Procedure of Bosnia and Herzegovina, 23,452 offences regarding the Law on Criminal Procedure of the Federation of Bosnia and Herzegovina, and 165 offences regarding other special laws. *Only one case of organized crime offence was registered, and no corruption offences.*

Based on the available data, it is evident that police agencies have not submitted a single report on committed corruption offences in 2008. Also, the state and entity courts have not conducted proceedings for committed corruption offences.

Police and intelligence and security agencies have a disciplinary procedure for the violation of duties of work and other work matters. The police officers answer for violations of duties through the internal disciplinary actions within the internal control of work of police officers. According to the available data, *no police officers were held responsible for the violation of work duties regarding corruption (receiving of gifts, and other types of benefits) while performing work tasks.* There have been disciplinary

procedures, disciplinary measures, and judgments against police officers of some of the police agencies, but only for offences regarding the abuse of position or competences.

With the aim of eliminating political interference in the operational work of the police, the following bodies are established within the police structure: Independent Police Commission at the level of BiH for the level of the BiH police structure elected by the Parliamentary Assembly of BiH, the Independent Police Commission at entity level elected by the Parliaments of the entities, the Citizen Appeal Office, and the Security Council.

No one has the right to interfere with the work of police and judicial bodies, and everyone, if he/she is truly guilty, and if there are proper evidence, should answer. Because, there must not be, and cannot be, anyone who is untouchable. Of course, this is all under the condition that the police and judiciary perform their work in a professional manner.

Analyzing the position of police agencies (as authorized bodies which are most often present during an investigation) and the Prosecutor's Office of BiH, as well as their mutual relation, problems in the practical application of the legal provisions were identified. When analyzing the relations between the police and the Prosecutor's Office of BiH, one should start with the legal provisions which regulate their position, their mutual relations, primarily in the investigation process, as one phase of the criminal procedure where these relations are mostly established.

With the coming into force of the new Law on Criminal Procedure of Bosnia and Herzegovina, the most significant amendments with regards to the previous criminal procedure have been introduced through the changed role of the subjects of the criminal procedure in the investigation procedure. This Law gives all the competences for the investigation procedure to the prosecutors of the Prosecutor's Office of BiH. The role of authorized official persons in the investigation procedure is extended from initiators, persons submitting criminal complaints, to an active investigation subject. The basic question is whether the roles of the police and the prosecutors of the Prosecutor's Office of BiH, and their relation in the investigation, are regulated clearly enough by the Law. The author believes that the existing Law on Criminal Procedure is basically good. The

Law, namely, establishes the institution of supervision of the Prosecutor over the work of authorized persons, but it does not define the manner and procedure for the exercising and application of such supervision. It is necessary to draft implementation provisions, such as the Rulebook on Actions and Cooperation between the Prosecution and Authorized Persons. Until now, only SIPA and the Prosecutor's Office of BiH have regulated most of the above mentioned issues through the Memorandum and Guidelines on Professional Cooperation.

This certainly implies the harmonization of records and statistics, the adoption of implementing regulations and guidelines, with the aim of precisely defining the role and duties of the prosecutor and the police as participants in joint criminal investigations. The Prosecutor's Office of BiH is an independent government body with a defined principle of subordination and the voluntary and requested reporting of representative bodies and the Government on the application of the Law on Criminal Procedure and the work of the prosecution. On the other hand, the administrators of police agencies answer to Ministers of Internal Affairs and the Governments, and the division between police supervision and the operational work, and the administration, is not always strictly secured.

Due to the chain of command in police agencies, on the one hand, and the prosecutors of the Prosecutor's Office of BiH, as the head of investigations, on the other, there can be problems in the understanding of who gives orders to authorized persons in investigations – the prosecutor, who leads the investigation, or the superior police officer.

The laws on audit of institutions of BiH and of the entities regulate the scope and work of these offices. The main goal of the Audit Office is to receive, through auditing, independent opinions on the performance of the budget and on financial reports, the usage of funds and the managing of state property by budget beneficiaries and public institutions in BiH, as well as to conduct further supervision of the implementation of recommendations given in audit reports, and the analysis of measures taken based on these recommendations. The Audit Office informs the Parliamentary Assembly of BiH and of the entities, as well as the public, on its orders and recommendations, and

publishes audit reports (internet, media, and the press). Practice has shown that audit reports, or their recommendations, are not identified often enough by police agencies as source of information for possible investigations, since police agencies have not submitted a single report on a committed offence based on an audit report, in 2008.

Conclusions and Recommendations

A certain progress in the police reform of BiH has been achieved with the adoption of the Law in April, 2008, which formed four new police agencies at state level, and three supervisory police bodies. However, these seven institutions are not completely formed, nor do they have enough staff, and it is necessary to intensify work on staffing and provide technical equipment in the following period.

The cooperation and exchange of information between law enforcement bodies is still weak, and interagency and international cooperation needs to be improved. There are only a small number of successful police actions regarding crime exposure, which are a result of the cooperation of several intelligence and security institutions. Only in this way will the fight against all forms of crime be made efficient, and dualisms in the work will be avoided.

The harmonization of records and statistics can contribute to providing a complete picture of the public, but it can also contribute to the development of a sense of joint activity of the police and the Prosecutor's Office in the fight against crime. One of the ways can be the unification of statistics, but also their detailed classification in categories. The usage of the existing telecommunication infrastructure is recommended for the exchange of information between security and judiciary institutions.

Practice has shown the need for joint education of police officers and prosecutors. Further analysis on which types of education would be necessary is still needed. The bearers of these activities should be the centers for the education of judges and prosecutors, police academies, and the Departments for Education of police agencies.

It is necessary to permanently work on the legal and criminalist training of staff belonging to units for the fight against organized crime, and they need to possess modern

material and technical equipment for the undertaking and conducting of special investigations, which are especially important for the proving of offences regarding organized crime and corruption.

The lack of professional support in terms of experts of various profiles in all agencies is noticeable, and it is necessary to ensure support by hiring economic, financial, and IT experts, which would provide the police with instructions on certain cases. A lack of quality communication and cooperation between citizens and the police is noticeable, so that a transformation from the traditional police model into a model in which the police acts within the community is required, as well as building of a work organization model of the police based on Western European standards. The elimination of the identified deficiencies in the investigation is an important element for the functioning of a full criminal protection, and it cannot be realized without giving full support to the new role of the prosecutor and the police. The organization, the rights and competences, as well as their correct application and interpretation, must not give way, and a right balance between the interests of criminal prosecution and the protection of rights and freedoms of citizens must be found in that context. This requires not only a good legal framework, but also a modern educational model which will be suitable for the expert qualification of prosecutors and authorized official persons for the fight against the progressively complex forms of crimes. This can be enforced through modern methods and means, and the application of a harmonized system in the work of the Prosecutor's Office and the police. The fight against crime requires changes in awareness, which stand out from the present organization, competences, status, accountability, and the mutual relation between the two state bodies of the Prosecutor's Office and the police.

MONITORING OF FUNCTIONING OF THE PUBLIC SECTOR AUDIT OFFICES

Legal framework and institutional capacity of the public sector auditing institutions

The function of the public sector external audit in Bosnia and Herzegovina was established in 1999, through the adoption of the Law on Audit at the level of BiH and at the entity level, and it became operational in mid 2000, through the appointment of the Chief Auditor and the Deputy Chief Auditor in all three Supreme Auditing Institutions (SAI) – Audit Office of the Institutions of BiH (SAI BiH), Audit Office for the Institutions of the Federation of BiH (SAI FBiH), and the Supreme Office for the Republika Srpska Public Sector Auditing (SAI RS). After five years of activities, new audit laws were drafted with the aim of their mutual harmonization, and their harmonization with international standards and best practices. The Laws were finally adopted in the state and entity parliaments at the end of 2005, or at the beginning of 2006 in a somewhat changed form compared to the proposal of the work group, which prepared the draft of the law. Because of that there were problems in the practical implementation of the law, primarily regarding the insurance of the independence of the SAI, and the appointment procedure of General Auditors and Deputy General Auditors. Namely, the new laws established that the election of the General Auditor and Deputy General Auditor in all three SAI's should be performed based on a public competition with the aim of electing the most skilled persons with proven integrity⁶⁶. However, the election procedure through a public competition was implemented only at the level of BiH, while new provisions were entered into the entity laws which automatically extended the mandate of existing General Auditors and their Deputies during the next seven years. In addition, the procedure that was implemented at the level of BiH has rendered the institution of a public competition pointless, since the election was made based on ethnic, territorial, and political belonging of the candidates.

⁶⁶ Law on Audit of Institutions of BiH, Official Gazette of BiH, no. 12/06
Law on Audit of Institutions of FBiH, Official Gazette of BiH, no. 22/06
Law on Audit of Public Sector of Republika Srpska, Official Gazette of RS, no. 98/05

The other problem is the result of the adoption of the Law on Wages in Institutions of BiH⁶⁷, which increased the wages of all officials at the level of BiH, and only lowered the wages of the General Auditor and his Deputy at the level of BiH, but also diminishes the independence of the Audit Office regarding other benefits that relate to the education and training of the Audit Office staff, which best shows the relation towards this institution. An additional problem is the further fragmentation of the public sector audit function in BiH, which is the result of the adoption of the Law on Audit of Brčko District, which until then was not covered by the audit. This Law establishes the audit institution of Brčko District, which is a fully independent institution competent for the audit of institutions of the District. However, the problem is that this law is basically a copy of the old law on audit at the level of BiH, which did not adequately guarantee the independence of the SAI.

Positive and negative indicators of the implementation of the Law

All three SAI mostly implement the audit of financial reports of public sector institutions, including the assessment of the harmonization of business operations with the relevant laws and provisions which regulate the spending of the budget funds and the usage of public resources. Three years ago, the SAI FBiH and the SAI RS started with the training on performance auditing while the SAI BiH began with its training one year later. However, the focus and the attention of the public are still on the financial audit. One of the key laws, compliance to which State Auditors paid special attention to, is the Law on Public Procurement. In accordance with that, most of the audit reports contain results relating to the unprincipled or wrongful application of legal provisions, and in a few cases it was noted that public procurement was not implemented in accordance with the Law on Public Procurement⁶⁸. However, even when the public procurement procedure is formally implemented through a public tender, annexes to the contract are later adopted which completely change the meaning of the tender procedure⁶⁹, which is

⁶⁷ Law on Wages and Reimbursements in Institutions of BiH, Official Gazette of BiH, no. 50/08

⁶⁸ www.revizija.gov.ba/ reports for 2007, and www.gsr.rs.org/izvještaji for 2007 and 2008 (characteristic cases are BHRT, Ministry of Finance of BiH, Ministry of Foreign Affairs and the realization of some investment projects in RS through the doubtful application of some of the Articles of the Law on Public Procurement)

⁶⁹ Statement of the Chief Auditor of RS from 5 January, 2008, in the newspaper Blic, statement of the Chief Auditor of

partially also the result of the legal provisions which are not defined precisely enough. The attempt to amend those provisions, in order to eliminate the ambiguities and flaws, failed in the Parliament of BiH. However, the auditors have often warned of the fact that certain companies in the FBiH and the RS receive almost all of the large state contracts under very dubious circumstances, and that everyone knows in advance what to write in a tender in order to pass, or get the job⁷⁰. Although it is obvious that the results of the auditors show that public procurement procedures were violated, the number of raised charges for these abuses is disproportionate.

This can be partly due to the fact that audit reports provide no forensic evidence which is needed for indictments, but only indications of the fact that the law has been violated. The aggravating circumstance is the fact that the Parliament constantly adopts decisions on delivering all audit reports which contain qualifications of such actions to the Prosecutor's Office and the SAI comply with that, although the Law on Audit gives them the possibility to immediately notify competent bodies in case they discover indications of crime and corruption⁷¹. Because of that, prosecutors often complain of receiving excessive materials with plenty information, based on which they cannot immediately file indictments, but have to make additional investigations. The other group of audit results is related to the irrational spending of money, and these result have been appearing for years. The biggest problem is the fact that for many of the expenditures there are no systemic and principled regulations, but everyone adopts rules for themselves which are often, as such, not complied with. At the end of 2008, the laws on wages and benefits in the institutions of BiH were adopted (as well as entity laws) which have partially resolved that problem, but the unresolved problem of other expenses still remains. There is an impression that there is no will for adequate and final regulation of that area, since some officials fiercely fight for the protection of gained privileges. This is also the main reason why such reports repeat year after year.

FBiH from 31 March, 2008, in the newspaper CIN, and the statement of the President of the Association Tender from 17 April, 2009, at BHT1

⁷⁰ CIN 15 September, 2008 (statement of the Chief Auditor of FBiH)

⁷¹ Article 19 of the Law on Audit of Institutions of BiH states „The Audit Office is obliged to inform, after informing the administrator of the audited institution, except if that influences the investigation, law enforcement bodies that there were indications on significant violations. In these situations, the Audit Office is obliged to inform the Ministry

For many years, audit reports from all levels point out to the weak systems of internal control and the lack of the function of internal audit of public sector operators as an important element in the reduction of the abuse of public funds, crime, and corruption, although there were legal provisions on their obligatory establishment⁷². In 2007 laws on internal audit⁷³ were adopted which, among other things, foresee the introduction of PIFC (Public Internal Financial Control), but even with that, this process moves ahead very slowly. The work group for the drafting of the PIFC strategy, comprised of representatives from the state and entity ministries of finance, has not performed its job due to various obstructions. What also needs to be pointed out is that the percentage of the implementation of recommendations given by the auditors in their reports is also very low. The Audit Office of the Institutions of BiH reported that only half of the recommendations given in previous audit reports was realized, which is truly a low percentage compared to other countries⁷⁴.

The question asked by the public most often is the taking of measures for the establishment of responsibilities for violations of laws and regulations. The current situation in this area shows that everyone is declaratively for the option that those responsible for the violation of regulations should answer, but something completely different occurs in practice.

The existing parliamentary commissions and boards do not have the necessary capacity, or the expert support, for the adequate evaluation of audit reports, and the resulting proposals for adequate actions. This is especially the case in the Parliament of BiH, where only a very small number of representatives and delegates work in a larger number of commissions, so that they do not have the necessary capacity and time to dedicate themselves to audit reports. Regarding that, the situation in Republika Srpska is considerably better than in FBiH and at the level of BiH, which is probably the result of

of Finance and Treasury of BiH and the competent Minister.“

⁷² Article 23 of the Law on Financing of Institutions of BiH (Official Gazette of BiH, no. 61/04)

⁷³ Law on Internal Audit of Institutions of BiH, Official Gazette, no. 27/08, Law on Public Sector Internal Audit of Republika Srpska, Official Gazette of RS, no. 7/08

⁷⁴ Audit Report for 2007, published in October, 2008

the fact that the People's Assembly of RS established a special audit board a long time ago, which exclusively deals with audit reports of the Supreme Audit Department of RS.

There is a common procedure through which the parliaments implement formal procedures of „public hearings” of the responsible persons from institutions in which irregularities have been identified. The ministers rarely attend these hearings, or do not attend them at all, but usually send their assistants. It, therefore, seems that the executive authorities are “stronger” than the legislation authorities, since the parliaments either do not have the “strength” or do not want to order the ministers to attend the hearings, or to demand from the holders of executive functions to resign from duty due to incapability or negligence. There is an impression that they conduct hearings in order to create the impression that they are doing something regarding to these issues, although basically nothing changes. How else can it be explained that, for example, the Finance and Budget Commission of BiH conducted hearings of persons from institutions which were rated positively by auditors, other than as adverting attention from the basic problem. There are also cases of relativization of results by parliamentarians, with the aim of protection of party colleagues who are in the executive authorities.

There are also facts which point to the issue that some members of commissions are not committed to audit results in the right manner, and this happens primarily in cases where the results are used for personal purposes, publically demanding from the auditors (which is certainly a pressure on auditors) to investigate certain cases against some of the directors of state agencies with whom they have a personal conflict. On the other side are the holders of public functions which get negative results during audits and therefore attack the auditors with all available means. Regarding that, the Chief Auditor of Republika Srpska has said on many occasions, publicly, that he is under tremendous pressure because of such attacks⁷⁵.

However, what concerns lately, and which has not been the case before, is that there are more and more complaints by non-governmental organizations and the public, regarding the work of auditors in all three SAI. The complaints on auditors state that they have

⁷⁵ Statement given on 20 January 2009 (see: www.capital.ba)

succumbed to political pressures, and that they work in “white gloves”, or that they are corrupt. Such an allegation came from one non-governmental organization for the Chief Auditor regarding a report on large investment projects in Republika Srpska⁷⁶, probably because it was expected from the Chief Auditor to audit some of the projects which received much attention from the public.

There is also a similar situation in the Federation of BiH where the media from FBiH have been connecting the Chief Auditor and his Deputy with some of the leaders of ruling political parties and charging them with covering up of corruption, while there are doubts coming from the opposition in the correctness of the appointment procedure of auditors and their work in FBiH. The charges raised against the current Deputy Chief Auditor for the abuses at earlier jobs, who still performs that duty⁷⁷, received the biggest attention.

At the level of BiH, there were also doubts in the results published in July, 2008. Even one of the administrators of the Audit Office of Institutions of BiH has expressed claims and disclosed evidence which show that some of the audit reports were amended to hide the abuse of some of the high ranked public officials⁷⁸, which has not yet been denied. It is symptomatic that all of this happened during the appointment procedure of the administration of the Audit Office of BiH.

All these things which reached the public seriously question the independence, and threaten the previously gained credibility, of the audit institutions.

Conclusions and recommendations

The functioning of audit institutions in BiH is largely under the influence of the overall situation in Bosnia and Herzegovina. It is obvious that there has been certain stagnation in the development of audit institutions which is, among other things, the result of the

⁷⁶ Statement of the Centre for Human Politics given 11 October, 2008 (see: www.chpngo.org)

⁷⁷ Statement of the Cantonal Court in Mostar, from 22 April, 2008

⁷⁸ See: Glas Srpske, Nezavisne novine, RTRS, Dani (statements given between 3 and 10 July, 2008)

inadequate engagement of parliamentary commissions (boards) competent for the evaluation of audit reports. It is therefore necessary to undertake the following activities:

- At the level of BiH and F BiH, it is necessary to form special audit commissions (boards) and to secure constant expert support in persons employed full time in the parliaments.
- The parliaments and governments at all levels must urgently adopt the necessary implementing regulations, which will clearly regulate the spending of budget funds.
- A strategy for the introduction of the Public Internal Financial Control (PIFC) must be drafted, including the faster forming of Central Units for Harmonization in the ministries of finance at state and entity levels, as well as the Coordination Boards for these Units.
- The necessary system regulations, which regulate all categories of expenditures, must be adopted.
- The Law on Public Procurement must be amended, with the aim of defining particular provisions in more detail. Initiate, in accordance the existing laws on audit, the assessment of the control of the quality of work of audit institutions.
- Audit institutions need to establish the, so called, forensic audit which will make the work for Prosecutor's Offices, regarding the ensuring of additional evidence for indictments, significantly easier, including the potential amendments to existing audit laws.
- Audit institutions should stop the practice of sending all audit reports, and send only these reports in which there are clear indications for the violation of laws. In that way the work of the prosecutors will be made easier. They also need to establish a closer cooperation with Prosecutor's Offices.
- The parliaments at all levels need to harmonize and precisely define the procedure for the appointment of the administrations of audit institutions, in order to avoid suspicions in the election procedures that will follow.

- Intensify performance audit, which, among other things, can, and needs to, encompass the efficiency audit of judiciary bodies regarding audit reports.

MONITORING OF AMENDMENTS TO THE LAW ON PUBLIC PROCUREMENT

Implementation: positive and negative indicators

According to the report of the Public Procurement Agency of Bosnia and Herzegovina in 2007, procurement contracts were concluded in a total amount of 1,331,373,098.16 KM⁷⁹. This is 10% more than in 2006, when the total amount of procurement contracts concluded was 1,209,859,785.72 KM. The report identifies the following trends in the area of public procurement:

- Procurement procedures for goods are represented the most, and at all levels, with an amount of 600,561,687.19 KM, or 50%, which is less than in 2006, when the amount was 714,644,251.87 KM or 62%;
- Procurement of services is represented the least with 17.25%, which is more than in 2006, when it amounted to 7%. The stated indicator represents the tendency of approaching the average of the countries of the European Union, in which the procurement of services amounts to 47% of the total number of procurements;
- The procurement of works in 2007 amounted to 392,901,181.53 KM, which is a little more than 32%, which is more than in 2006, when the amount was 292,105,812.74 KM, or 25%;
- The procedure which is most represented by type is the open procedure with 81.47 %, which is somewhat more than in 2006, when it amounted to 79.78%. The negotiated procedure is represented with 9.36 percent, which is less than in 2006, when it amounted to 16.03%. The stated percentage of 9.36% is within the boundaries of the common representation in the countries of the European Union (around 10%);

⁷⁹ Report of the Public Procurement Agency of Bosnia and Herzegovina for 2007

- The procedures from Chapter II participate in the total amount with 90.17% (in 2006, it was 96.4%), and the procedures from Chapter III participate with 9.83% (in 2006, it was 3.4%);
- The share of public procurement in the total GDP is 20,670,000,000.00 KM (approximate for 2007, according to the information of the Agency for Statistics of BiH), or 6.44% which represents a small share of participation, having in mind that this percentage in the countries of the European Union is around 15%. Comparing the share of public procurement in the GDP, in 2006, which amounted to 7.97%, a *decline in the share of the public procurement can be felt*, which points to the *lack of investment projects in Bosnia and Herzegovina*;
- In 2007 a total of 7,463 public procurement notices were published;
- The sum of the contract award notices and the notices on cancellation (9664) is higher than the number of procurement notices (7463) due to the fact that contract award notices are published, and the procurement notices in the negotiated procedure without the publication of notice are not. A certain number of procurement notices contain a number of lots, and the contract award notices are published for every concluded contract.

The indicators from the Annual Report point to the fact that the practice of the application of the Law on Public Procurement of Bosnia and Herzegovina is moderately approaching the practices of the countries of the European Union, and that this report contains indicators which are also monitored in the countries of the European Union. The Annual Report does not contain indicators of performance of the application of the domestic preferences, because the Guidelines for the preparation of the report on the procedures from Chapter II of the Law on Public Procurement of BiH were adopted in the last quarter of 2007 (Official Gazette of BiH no. 82/07), and the Agency did not have information on this part of the public procurement procedure in BiH. Based on the indicators shown in this report, the Agency will prepare a notification in which the functioning of the system and the identified problems will be pointed out. The next given indicator is the review of the average number of received tenders, according to the subject of public procurement, which points to the fact that the market in Bosnia and

Herzegovina is still not developed enough. The Procurement Review Body received 1,144 appeals in 2007 (according to the information from the Work Report for 2007 of the PRB), which represents 15.3% of appeals compared to the number of procurement notices. The total value of 20 awarded contracts with the highest value amounts to 259,981,666.99 KM, which is 21.65% of the value of all the contracts awarded through procedures from Chapter II of the Law, or 19.53% of the value of all the contracts awarded through procedures from Chapter II and Chapter III of the Law.

Identified problems

The application of the Law on Public Procurement in practice has shown a series of its flaws. The Law establishes the domestic preferences in the amount allowed by the secondary legislation. In that sense, the Council of Ministers has adopted the Decision on Obligatory Application of Domestic Preferences in all areas, except electricity. The domestic preference is excluded from the Directives, but it is foreseen in the Law of BiH as a protective measure for domestic operators, with the aim of strengthening their market position and the restoration and protection of the development of the economy of Bosnia and Herzegovina. This would have to be an interim measure, and it would have to be stricken from the Law on Public Procurement, since CEFTA foresees the complete abolition of preferential treatment for its members by 2010. This provision of the Law on Public Procurement is completely contrary to the basic principles of public procurement, competitiveness, and efficiency.

Compared to the community legislation on public procurement, the Law of Bosnia and Herzegovina does not accept competitive dialogue as a type of procedure. The competitive dialogue is a new type of procedure introduced in the legal system of the European Union through the 2004 Directives. This does not mean that the competitive dialogue is simultaneously incorporated into the national legislation of member states, and, in that sense, there are no experiences on its application. It is possible that exactly this was the reason why this procedure was not foreseen in the Law of Bosnia and Herzegovina. It can be assumed that the European Commission did not want to insist on the introduction of the competitive dialogue into the legislation of Bosnia and Herzegovina, before it receives the reactions to the application of this new procedure in

practice, since the comments on its introduction were negative. It is still not possible to receive feedback from member states of the European Union regarding the implementation of the competitive dialogue, since the deadline for the implementation of the Directives has recently expired.

Electronic public procurement, electronic auctions, and dynamic purchasing systems are tools from the Directives which were not built into the Law of Bosnia and Herzegovina. Bosnia and Herzegovina is technically not ready to introduce them, because they are based on highly evolved IT knowledge. This is not discouraging information, since not even all the member states of the European Union have met the requirements for the application of these tools. Considering that this is new technology, which is possibly not accessible to all the operators equally, the Directive explicitly states that the chosen means of communication has to be widely accessible, not limiting thus the access to the operators, as well as that the tools used in the communication through electronic devices, and their technical characteristics, must be non-discriminating, widely accessible, and interoperational with the information and communication products used generally. The introduction of electronic public procurement led to the justified fear that this new system will lead to the fragmentation of the European Union market, considering that not all member states have compatible standards. On the other hand, there are less developed member states that do not have the basic conditions for the implementation of electronic public procurement. Bosnia and Herzegovina also belongs to this category.

A special problem in the application of the Law is Article 23 which foresees a range of conditions in a situation when the participant has to be excluded from the procedure, or bidding. So, for example, the contracting authority is obliged to exclude from the procedure any participant that is bankrupt. Such a limitation is not foreseen by the Directives. The operator in question must deliver a certificate from the court registry, and if that is not possible, an equivalent document issued by a competent court or administration body. Considering that the certificate from the registry of economic associations must contain a mark stating that the operator is bankrupt, a doubling of the documentation is not necessary. This is true for operators from Bosnia and Herzegovina. For operators from other countries, if the certificate from the registry does not contain a mark regarding bankruptcy, it would be necessary to submit an additional document. On

the other hand, there is a problem of harmonization of the laws with the regulations and the organization of certain institutions which are competent for the issuing of various documents foreseen by the Law, as well as the problem of the harmonization of the content of the issued documents. One of the problems regarding the application of the Law relates to the question of the finality of the administrative act adopted in the review procedure. In order to shed light on this problem, a procedure for the authentic interpretation of Article 52 of the Law on Public Procurement was initiated before the Parliamentary Assembly of Bosnia and Herzegovina. The legal regulation of the review procedure is the most evident setback of the Law on Public Procurement, which leads to ambiguities and a non-unified interpretation by the institutions established by this Law, as well as the contracting parties.

Analysis of the new proposed Law on Public Procurement

The proposed Law on Public Procurement was adopted by the Council of Ministers of Bosnia and Herzegovina on 29 December, 2008, and the Proposal was referred for consideration to the Parliamentary Assembly of Bosnia and Herzegovina, in accordance with the basic legislative procedure. The constitutional foundation for the adoption of this Law is comprised in Article I and Article IV of the Constitution of Bosnia and Herzegovina. The reasons for the adoption of the law can be found in the fact that the House of Representatives of the Parliamentary Assembly of BiH has adopted a conclusion on 16 March, 2008, stating that the Council of Ministers is obliged to prepare a new draft of the law within three months. The new proposal of the Law on Public Procurement gives the definitions of the terms used in the Law, and defines the principles, contracting authorities, and the types of contracts in accordance with the Directives. The proposal defines the term lot, and introduces the division into lots, and set out public procurement procedures in accordance with the Directives, except for the competitive dialogue procedure. The obligations of using a common language for public procurement, and the set timelines regarding the procedures that are in accordance with the Directives, are defined. A positive novelty regarding the existing Law on Public Procurement is the clear definition of the conditions for the abilities of the candidate/tenderer. It gives a definition of the conflict of interests, and points to other regulations which define this issue in detail. The proposal foresees the obligation of the

contracting body to refuse the request for participation in the public procurement procedure or the tender if the candidate, or the tenderer, has given, or was willing to give, bribe to a present or former employee of the contracting body, it defines the competences of the Public Procurement Agency in a wide sense, and authorizes it to start a review procedure in cases when the public interest is threatened, explicitly stating when the Parliamentary Assembly of BiH can discharge a member of the Procurement Review Body before time, it expands the provisions regarding the review procedure which should eliminate all ambiguities which exist in the existing Law, it states the principles on which legal protection is based: legality, efficiency, cost-effectiveness and contradiction, it defines the parties and the legal capacity in the legal protection procedure, it explicitly states the relevant violations of the Law on Public Procurement, and it defines the competences of the Procurement Review Body. The proposal defines the content of the appeal, and this institution was copied from the Law Administrative Procedure. The proposal defines the Decision of the Procurement Review Body as final and executive, it defines cases of the exemption of persons in the review procedure due to conflict of interests, it defines the filing of administrative lawsuits before the Court of Bosnia and Herzegovina, which is an urgent procedure, it foresees the subsidiary application of rules of the administrative procedure on the procedure before the Procurement Review Body, it defines the relations with other laws, regarding the demands of contracting parties for the fulfillment of obligations, specifically, the Law on Obligatory Relations, and it standardizes the obligation of the Public Procurement Agency to establish a system for the electronic publication of all notices set out by the Law, within two years from coming into force of the new Law.

The most problematic part of the Proposal relates to the threshold for direct agreements which is raised from 3,000 to 6,000 KM. Under conditions when obligatory public notices are not foreseen, the amount for the procurement of goods is raised from 30,000 to 50,000 KM. These drastic changes of the amount for direct agreement will allow, even without public notices, non-transparent public procurement up to a much higher limit, and far more often. The discretion right of public officers will grow, as well as the possibility of larger misappropriations, and more significant harms to the budget.

The expansion of provisions relating to the exemptions for the application of the Law only increases the “gray zone of semi-legality” mentioned in many audit reports on the work of public bodies from all levels of authority in BiH. The expansion of non-transparent procedures legalizes “special” public procurement in much higher amounts of money than now. This will result in significant damages for small and medium enterprises, and it will diminish the appeal of business places of BiH, as well as the level of investments in the country. It can be seen from budget analyses that up to 3 billion KM are spent annually in BiH for public procurement, and the information tell that up to 25% of these funds get spent without restrictions through various forms of failures of law and corruption. Such new provisions will give even more space for manipulations in tender procedures, and the abuse of public funds during contracting.

Conclusions

The area of public procurement in Bosnia and Herzegovina is defined at the state level. The Law on Public Procurement of Bosnia and Herzegovina is not completely harmonized with the *acquis communautaire*, or the relevant Directives of the European Union. The domestic preferential treatment is set out in the law of Bosnia and Herzegovina as a protective measure for domestic operators with the aim of strengthening their market position, and of restoring and protecting the development of the economy of Bosnia and Herzegovina.

At the same time, the amendments to the existing Law raise the threshold amounts for direct agreements even without the obligatory public notices, so that the preferential treatment is abused exclusively for the protection of big companies with powerful political backgrounds. The existing Law on Public Procurement should be amended because of a series of flaws which the practical application of this Law has demonstrated. However, the proposal of the new Law, instead of eliminating the current legal ambiguities and blanks, gives additional possibilities for the bending of legal procedures in public contracting processes. The Law had a few amendments, but these were not basic elements. The amendments mostly concerned the postponing of the establishing deadlines and the beginning of work of the bodies set out by the Law, which is the reason why the Law could not have been implemented for a certain time after the adoption of

the original draft. Subject to the amendments to the Law on Public Procurement were also the thresholds which is shown by the last amendment from February, 2009. Thresholds should be systematized by acts of lower legal power, and not through a law, because of the simpler procedures for their amendment. Thresholds in Bosnia and Herzegovina are the criteria for international competitiveness, and in the European Union for the supranational regulations, or the Directive.

Non-governmental organizations have repeatedly filed specific anti-corruption proposals to the competent institutions and individuals in order to make the Law on Public Procurement more efficient and transparent, so it can ensure the rational and responsible allocation of budget funds. However, these proposals have not yet been considered, let alone adopted. The representatives of civil society, who could greatly contribute to the creation of the Law and its suitability with the domestic situation, along with harsher sanctions for its violation, were not invited to the public debate on the new proposal of the Law, held 11 March, 2009.

CONCLUSIONS OF THE MONITORING REPORT

Progress of Legislative and Executive Authorities in the Implementation of Anti-Corruption Activities.

International standards regarding the fight against corruption (like Conventions such as CoE-GRECO, UNCAC, and OECD) are quite heteronomous and vast. The analysis of activities of the legislative and executive authorities in BiH in the implementation of anti-corruption activities, shows that a *special anti-corruption body is still missing*, which would coordinate and systemize the activities for the prevention and fight against corrupt practices. Also, *a feasible and comprehensive anti-corruption strategy is still missing*, which would clearly define mechanisms for implementation and monitoring. The criminal legislation still does *not set out the accountability for active illegal mediation and illegal enrichment*, and the legislation on conflict of interests, among other things, *does not adequately define the issue of property cards of public officials*. Efficient mechanisms for the seizure of illegally obtained property are still not developed, and *adequate protection is not guaranteed to persons who report corruption within the organization they work for*. The culture of corruption tolerance is especially present – corruption is still seen as a “neat way of getting things done”, and as part of the mentality.

The adoption of the Anti-Corruption Strategy, the amendments to legislation, and the signing of international contracts, would not, *ipso facto*, on itself, produce any changes. Only a *synthesis of these activities*, with the monitoring of the implementation of changes on the field, and the constant pointing to the need for the harmonization with international standards, represents the right path. If BiH wants to send a message of determination regarding the unacceptability of corruption practices, but also to fulfill the obligations required in the integration processes, many more things need to be done. To that regard, the adoption of a new anti-corruption strategy, with a clearly defined, feasible action plan, and clearly defined mechanisms for the monitoring of progress, seems necessary, within which there will be speedy work at the establishing of a special anti-corruption body and the further specialization of those employed to fight corruption, as well as the improvement of the legal framework, particularly related to criminal

legislation and the legislation of conflict of interest, and seizing of material gains from an offence, and the protection of the person reporting corruption. It also necessary to make constant efforts (legal and other) for the promotion of the culture of integrity (through campaigns, forums, by consulting civil societies in anti-corruption efforts, etc.).

Processing Corruption before the Courts and Prosecutor's Offices in BiH. The monitoring of the work of the courts and the Prosecutor's Offices in BiH regarding the processing of corruption shows an evident *legal and institutional over-systematization and the flaws of the reporting system*. The complexity of the political system and organization of the state of BiH, reflect in the over-systematization of the legal framework which defines the anti-corruption area, and in the extreme fragmentation of the institutions of the criminal system of BiH, which are established in accordance with the complex administrative division of the state. The courts and the Prosecutor's Offices in BiH still do not have established parameters which would help them track and determine the costs of criminal procedures, seized illegally obtained gains, and the total of charged funds paid into the budget.

The legislation of BiH is quite harmonized with the regulation of the international conventions, but the criminal laws in BiH have left out the incrimination of illegal enrichment (Article 20 of the UN Convention), bribery in the private sector (Article 21 of the UN Convention) and the misappropriation of property in the private sector (Article 22 of the UN Convention). Although Article 5 of the UN Convention requires of BiH to develop and implement an efficient anti-corruption policy, and to evaluate its implementation from time to time, BiH has still not established an efficient mechanism for the implementation and monitoring of anti-corruption policies. Of the total number of sentences which the courts in BiH have issued for committed corruption offences during 2008, 66% relate to convictions. Of the total number, only 16% of convictions were prison sentences. The highest percentage of convictions (73%) was parole sentences, while 11% of the convictions were material sentences.

The drafting and adoption of a special Strategy only for the fight against corruption and the establishment of the "specialized independent anti-corruption agency" is an

obligation of BiH from the signed and ratified Conventions⁸⁰, which is something BiH still has not implemented. Having in mind the numerous obligations from international anti-corruption instruments, as well as the recommendations of the Group of States against Corruption (GRECO) for BiH, the importance of the establishment of a specialized anti-corruption body which would coordinate existing anti-corruption institutions, is unquestionable.

It would also be necessary to establish specialized anti-corruption departments at Prosecutor's Offices, as well as to organize special agencies for the implementation of the law. Although Conventions set out the specialization of anti-corruption bodies, currently in BiH there are only two Prosecutor's Offices which have specialized departments for this form of crimes. In the Prosecutor's Office of BiH there is a Special Department for the Fight against Organized Crime, Economic Crime, and Corruption, and in the District Prosecutor's Office of Banja Luka there is a Special Prosecutor's Office for the Suppression of Organized Crime and Highest Forms of Economic Crime – the Special Prosecutor's Office.

The advancement of the reporting system of courts and Prosecutor's Offices is unquestionable. It is necessary to build a comprehensive and unified system which will report on the processed corruption offences. With that aim, it is necessary to initiate the establishment of a centralized database on the processing of all offences, and therefore, corruption offences as well.

Parameters need to be incorporated into the existing reporting systems of courts and prosecutor's offices, which will help the tracking of costs of individual process activities, the values of the seized illegally obtained proceeds, and the funds paid into the budgets. Having in mind the answers to the questions relating to the seized illegally obtained proceeds, the average duration and cost of criminal processes, it is obvious that legislative institutions in BiH still do not have an established system for the tracking of

⁸⁰ Article 6 of the UN Convention obliges BiH to establish an independent and expert body (agency) competent for the enforcement, monitoring, supervision, and implementation of the anti-corruption policy. The Strategy of the Council of Ministers of BiH for the Fight against Organized Crime and Corruption for the time period 2006-2009, sets out the establishing of such a body, but such a body is not yet operational.

parameters regarding the costs of the proceedings, the seized illegally obtained proceeds, and the real amount of funds paid into the budgets.

Changes to the legal framework and the implementation of the Law on Conflict of Interest, Financing of Political Parties and of the Election Law. The existing legal framework which treats the issues of transparent operation of political parties and candidates for election functions, their financing, and the conflict of interests, leaves a vast space for manipulation and corruptive actions. The initiatives for the correction of the related legal regulations face huge obstacles, delays, and obstructions, because of which the proposals for amendments, as well as the drafts of necessary laws at certain levels of authority, spend several years in parliamentary procedures. The key problems in the *Election Law of BiH* relate to the delays in the implementation of the Law, inadequate mechanisms for timely exposure of illegal enrichment of elected officials, and the non-existence of the control of the accuracy of information on the property cards which officials have to submit to the Central Election Commission of BiH (CIK BiH). Similar and numerous other problems exist also in the current *laws on financing of political parties*, while the proposal of the new umbrella Law on Political Party Financing is unjustifiably long in parliamentary procedure. However, not even this proposed Law treats individual important issues such as the defining of categories of costs which the parties can cover from budget funds. This issue is partially resolved in the analogue Law at the level of Brčko District; the Law of RS does not even mention it, while the Federation of BiH has not yet adopted a Law on Political Party Financing. Not even the *Law on Conflict of Interest in the Institutions of BiH* has met the expectations, when it comes to more responsible and moral performance of public functions, and one of its fundamental problems is the fact that, even though it foresees sanctions for violations of the law, it allows officials who have violated the law to continue performing the public function during the election period of four years.

A special problem is the implementation of all the above mentioned laws. CIK BiH, as the body in charge of their implementation (with the exception of the conflict of interests in the authority bodies of Republika Srpska, which is, according to the recently adopted Law in this entity, mostly under the competence of the newly formed Commission for the identification of conflict of interest in this entity), performs its work under the

financial and political pressures made by political parties and their representatives, which is manifested even in the violation of the Law by CIK BiH, especially in the establishment of the conflict of interest of the former Federal Prime Minister, Nedžad Branković, during which CIK BiH failed to enforce a valid court decision. The detailed analysis of all three legal units leads to the conclusion that an upgrade of all the treated areas is necessary, even before the General Elections in 2010, so that BiH could enter the next election cycle with a regulation that is as adequate as possible, and with a smaller number of abuses than now, especially having in mind the meaning of the fight against corruption for the European path of BiH.

It is necessary to adopt the *amendment to the Election Law in BiH and the Law on Conflict of Interest in the Institutions of BiH*, in this area, and the *harmonization* of the Law on Conflict of Interest in the Government Institutions of FBiH, and the Law on the Prevention of Conflict of Interest in the Government Bodies of Republika Srpska, with the analogue law at the state level. What need be adopted, as soon as possible, are the proposed draft of the Law on Political Party Financing of BiH, and the amendment to the Law on Political Party Financing from the Budget of Republika Srpska, its cities and municipalities, as well as the upgrade of the proposed solutions in accordance with the best anti-corruption practices. What is also inevitable is the strengthening of the capacity and the objectiveness of law implementation bodies, especially the CIK BiH, and the ensuring of a better coordination, through the adoption of new measures, of all the law enforcement bodies, and especially CIK BiH and the investigation bodies/prosecutor's offices at all administrative levels in BiH.

Functioning of police and intelligence and security agencies. With the aim of resolving key problems in the work of these institutions, the attention needs to be focused on the positive legal institutional framework of police bodies in BiH (Law on Internal Affairs, Law on Police Officers, Law on State Investigation and Protection Agency, Law on Border Police) which, until now, have not sufficiently treated the functional relations between authorized official persons and prosecutors, or not at all, or the relations between police bodies and the Prosecutor's Office. Police agencies and the prosecutor's offices are different bodies by status, and they have different solutions for issues of independence, accountability, administration line, education, development, and

specialization, as well as professional support, and only the Law on Criminal Procedure represents a link between police agencies, on the one hand, and the Prosecutor's Office, on the other.

It is necessary to enhance existing, and adopt new cooperation mechanisms between the police and the Prosecutor's Office, with the aim of increasing the efficiency of the above mentioned bodies, by adopting the necessary implementing regulations, establishing a continuous joint police and prosecutor education, and the harmonization of records and statistics. With the aim of ensuring efficient and legal investigation, it is necessary to ensure intensive and active communication, as well as mutual coordination of activities between the Prosecutor and authorized persons.

Many examples show that true independence of these police institutions from other government bodies has not been achieved. This is why complete depoliticization and professionalization of these institutions is necessary in order to prevent bad influence of other government bodies and policies. The professional core of police structures must remain intact regardless of the changes in the police structure of BiH. The implementation of the Law on Independent and Supervisory Bodies of the Police Structure of BiH would create an atmosphere for true work independence of agencies from political and other influences.

The cooperation and exchange of information between law enforcement bodies is still weak, and the interagency and international cooperation needs to be improved. There are only a small number of successful police actions regarding crime exposure, which are a result of the cooperation of several police and intelligence and security institutions. Only in this way will the fight against all forms of crime be made efficient, and dualisms in the work will be avoided.

It is necessary to permanently work on the legal and criminalist qualification of the staff from units for the fight against organized crime, and they need to possess modern material and technical equipment for the undertaking and conducting special investigations, which are particularly important for the proving of offences regarding organized crime and corruption.

A lack of professional support can be felt regarding experts of various profiles in all the agencies, and it is necessary to ensure support by hiring economic, financial, and IT experts, which would provide the police with instructions on certain cases. A lack of quality communication and cooperation between citizens and the police can be felt, so there is a need for transformation from the traditional police model into a model in which the police acts within the community, and the building of a work organization model of the police based on Western European standards.

Functioning of the Public Sector Audit Offices. The functioning of audit institutions in Bosnia and Herzegovina is greatly under the influence of the overall situation in the country, and, therefore, there has been certain stagnation in the development of audit institutions. Independence as the key precondition for the functioning of supreme audit institutions has been compromised by the adoption of the Law on Wages which derogates the *lex specialis* Audit Law, as well as by the non-transparent appointment process of the management of audit institutions.

Most audit reports in BiH contain results relating to the violation or the inconsistent application of the Law on Public Procurement, and results on the irrational spending of public funds which has for many years been the consequence of the non-existence of an adequate regulation.

Having in mind the scope of the violation of regulations and the irrational administration of public funds, the number of measures taken for the sanctioning of persons responsible, either by the parliaments, or the judiciary bodies, is disproportionate. This is largely the consequence of the work of parliaments, because the parliamentary procedures for the evaluation of audit reports are more of a declarative nature than truly directed towards the identification of responsibilities of holders of executive functions, and it is also the consequence of the unregulated cooperation between audit institutions and the prosecutor's offices.

Lately, there has been an increase in criticism of the public, especially of non-governmental organizations, referring to the work of auditors. The basic objections are that auditors have failed to revise some of the activities of the authorities which received a lot of public attention, but they also object to the possible "doctoring" of audit reports.

Special parliamentary commissions which would be competent for auditing and the necessary legal acts and implementing regulations which will precisely regulate the spending of public funds need to be established at all levels. What is also necessary is the establishment of the, so called, forensic audit which will make indictments easier, and enable the possible improvement in the cooperation between audit institutions and the prosecutor's offices. In accordance with the Audit Law, the implementation of the control of the quality of work of audit institutions is very important (*peer review*).

Amendments to the Law on Public Procurement. The legal regime of public procurement in BiH is greatly harmonized with the Community legislation in this area. Such a conclusion can also be drawn from the Report of the Public Procurement Agency, where it can be seen that, according to the statistics, Bosnia and Herzegovina does not fall behind the countries of the European Union in this area. The Law on Public Procurement of BiH is a positive example of the adoption of regulations at the state level. In this specific case, the Law on Public Procurement has ended the period of non-transparent public procurement which were a common practice in Bosnia and Herzegovina before the adoption of the above mentioned Law.

The problem of corruption in public procurement is also present in BiH, and, unfortunately, in that sense our country does not fall behind the statistics of the European Union, in which, regardless of the very good regulations in this area, millions of Euros get spent every year.

It is necessary to *adopt the new Law on Public Procurement*, as soon as possible, which would eliminate the flaws of the existing Law on Public Procurement. This primarily means that the new regulation should not provide for the domestic preferences, considering that such a solution is not in line with the Directives of the European Union, or the rules of CEFTA. Besides that, the set out domestic preference is not in line with the basic principles of public procurement. In the context of the adoption of the new law, it is very important to pay attention to *ensuring of legal protection for participants in the procedure*. In that sense, when formulating the provisions on legal protection, or on the review procedure, the Decisions of the European Court, adopted regarding legal protection issues, should be respected. This would anticipate the solutions for future

cases. It is necessary to *permanently develop awareness of citizens about the importance of public procurement*, and to inform citizens through the media about the purpose of public procurement. In this way, the attention of the citizens would be focused, but it would also focus the attention of (potential) participants in procedures on the fact that this refers to spending of budget funds which will eventually be returned to tax payers through an improved infrastructure and quality provision of public services. In such a way, the promotion of the importance of public procurement would influence the development of awareness, and thereby also the reaction of the citizens, on the harmfulness of corruption, or public procurement which is not in line with the *value for money* principle.

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