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**Recommendations for improving the legal framework and
functioning of institutions**

In 2006 **Transparency International Bosnia and Herzegovina (TI BiH)** conducted the 2007 National Integrity System (NIS) Study. The concept of NIS was originally developed by Transparency International (TI) as part of its holistic approach to combating corruption. The National Integrity System encompasses the key institutions, sectors or specific activities (the ‘pillars’) that contribute to integrity, transparency and accountability in society. The purpose of an NIS study is to assess the National Integrity System, in theory (law and regulatory provisions) and practice (institutional capacities). A number of local experts participated in the development of the Study which was made possible with funding from the Open Society Fund and the German Government. The Study follows the international TI methodology that constitutes a basis for national anticorruption strategies in over 60 countries worldwide.

The project entitled “Improvement of the National Integrity System”, which TI BiH has been implementing in 2007, is a continuation of work that started with the NIS Study project. The project is aimed at identifying, on the basis of surveys and studies as well as best practices from the developed countries, necessary corrections to the existing legal framework, improvements in the organisation, functioning and mutual cooperation of institutions in anticorruption combat, through a national integrity workshop programme. Reaching the widest possible consensus between the representatives of governmental institutions, civil society and expert public through joint work in national integrity workshops should enable the quality of the proposed solutions to contribute to the real progress in curbing corruption, and on the other hand, the involvement of a wider range of actors in the process should create wider support to and simpler implementation of anticorruption measures. The first national integrity workshop that gathered the representatives of all three government branches, expert public and representatives of civil society was held on 8 May 2007 in Sarajevo. The recommendations below are a product of extensive analyses, studies and surveys, which were updated based on the conclusions of the workshop.

Strategic approach

Strategic approach to anticorruption combat as the basic concept has 3 levels:

1. Correction to the legal framework

Corrections to the legal framework should be made having in mind the fact that BiH ratified international instruments, the most important of which is certainly UNCAC, which require the country to do so. Changes to the legal framework should be made with the aim of strengthening the integrity and improving the functioning of the institutions through extensive consultations with relevant actors.

2. Strengthening institutional capacities and full implementation of the law

Strengthening institutional capacities is certainly an essential prerequisite to efficient implementation of the law and functional system as a whole. Therefore, the building of institutional capacities must be one of the priority activities. Special attention should be paid to strengthening capacities of independent institutions such as the Election Commission, SAIs, Ombudsman, etc., while at the same time ensuring their full independence.

3. Prevention of corruption and citizen participation

Social prevention must be a part of the overall development strategy and encompass the measures of social, legal, economic, educational, etc. policy. Prevention is always the best solution given the fact that the repressive measures imposed *post delictum* require time and resources, and their outcome is generally uncertain. The issue of corruption prevention has not been given enough attention by the relevant institutions in BiH.

Holistic approach to curbing and combating corruption refers to the implementation of a wide range of reforms with which BiH should ensure the establishment of the rule of law, functional and self-sustainable state structure, and reduction of unemployment and poverty. Key reforms that play a vital role in anticorruption combat are:

- Public administration reform;*
- Police reform;*
- Continuation of the judicial reform;*
- Development of the national strategy for promotion of foreign investment.*

International legal instruments adopted by BiH

The most important international legal instrument for anticorruption combat is the UN Convention against Corruption (UNCAC), which BiH signed on 16 September 2005, and the Presidency of BiH issued a decision on the ratification of UNCAC at its 89th regular session on 27 March 2006. As Article 21 of the Law on the Procedure for Concluding and Implementing International Agreements provides, the next step in the process of ratifying international agreements is a deposit of the ratification instruments with the UN Secretary General. The Ministry of Foreign Affairs did that on 16 October 2006 through the BiH Mission to UN in New York, whereupon the Convention entered into force and became binding for BiH.

Other significant international anticorruption instruments signed and/or ratified by BiH are:

- Council of Europe Criminal Law Convention on Corruption of 27 January 1999; signed on 1 March 2000, ratified on 30 January 2002, entered into force on 1 July 2002.
- Council of Europe Civil Law Convention on Corruption of 4 November 1994; signed on 1 March 2000, ratified on 30 January 2002, entered into force on 1 November 2003.
- United Nations Convention against Transnational Organised Crime of 15 November 2000; signed in 2005, still not ratified.
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; signed, but not ratified.

The forthcoming consistent implementation of UNCAC is one of the most important steps in achieving progress in anti-corruption combat. UNCAC is the first genuinely global and most comprehensive legal instrument for anti-corruption combat that should bring about

significant improvements in BiH in at least three areas: combating corruption, confiscation of the proceeds from crime, and international co-operation.

Given the BiH's commitment to full membership in the EU, it is necessary to highlight the significant EU documents regulating curbing and combating corruption such as the EU Comprehensive Anticorruption Policy and 10 Principles for the Improvement of Anticorruption Combat in acceding candidates and other third countries in which there is an increased need for strategic approach to combating corruption, with involvement of all institutions in society. These documents indicate a need for the adoption of all relevant international instruments by states, emphasising the necessity of their full implementation, which is what the real progress in curbing corruption depends on.

Recommendations:

Based on the detailed analyses, surveys and studies, and in accordance with the international instruments ratified by BiH which have thus become an integral part of national legislation, and in accordance with the strategy for combating organised crime and corruption the following recommendations were identified:

The most important recommendations:

- *To provide for sanctions for failure to act in accordance with the Law on Freedom of Access to Information and amend the Laws on Freedom of Access to Information at the level of BiH and Republika Srpska so as to enable effective protection of this entitlement;*
- *To ensure that all governmental institutions and public authorities at all levels adopt codes of conduct for their employees;*
- *Matters regulating political party and election campaign financing in Bosnia and Herzegovina (fundraising, i.e. funding and spending of funds for regular activities and election campaigns) should be covered by a single Law on Political Party Financing;*
- *To speed up efforts aimed at establishing an anticorruption body that will be tasked with conducting investigations and acting preventatively as well as at educating all segments of society in what the devastating effects of corruption are;*
- *As the criminal legislation of BiH provides a fundamental legal framework for confiscation of the proceeds from crime, it is necessary to adopt a special regulation on confiscation of assets since the Law on Criminal Proceedings of BiH does not contain provisions with regard to the procedure of confiscating the proceeds from crime by application of the reverse burden of proof (civil-law confiscation of assets that are suspected of being acquired by illegal means), taking into consideration experiences from other countries which have such legal mechanisms in place in their respective legislations.*

1. Prevention

The heritage of the modern theory and practice in counteracting all forms of punishable and sociopathological phenomena is to undertake systemic preventative activities. Reducing social and government involvement only to the activities aimed at eliminating the consequences of corruption, while neglecting criminogenic determinant and causes of such practices, cannot result in success. Therefore, as a result of in-depth analyses and discussions at the social integrity workshop, the following recommendations were identified in the field of prevention:

- To adopt a code of ethics for civil servants at the state level, using the International Code of Conduct for UN Public Officials as a model and to provide for liability for criminal offences of those who violate it;
- To better define criteria for internal and external transfer of civil servants in the Law on Civil Service in the Institutions of Bosnia and Herzegovina;
- In case of suspected corrupt behaviour on the part of civil servants, to enable their transfer to another position even before their disciplinary liability is determined and prior to the “official” annual performance appraisal (which takes very long), i.e. to enable rotation of staff;
- To educate and facilitate the reporting of corrupt behaviour on the part of civil servants, in particular by ensuring adequate protection for those who report corruption *bona fide*;
- To ensure continuous training and education of all civil servants about the detrimental effects of corruption;
- To provide for sanctions against those who fail to act in accordance with the Law on Freedom of Access to Information and amend the Laws on Freedom of Access to Information at the level of BiH and RS so as to enable effective protection of this entitlement;
- To ensure efficient complaint mechanisms are in place for citizens lodging complaints against public authorities when they are denied access to information under their control;
- To amend the Election Law and the Law on Civil Service in the Institutions of BiH by making it mandatory for elected officials and civil servants to submit reports on their assets at the end of each year as well as after they leave office, rather than only before they take up office;
- To better define the award procedure by direct agreement in the Law on Public Procurement;
- In the Law on Audit of Financial Operations of the Institutions in BiH, to provide for clear sanctions against public authorities that fail to act in a timely manner to the requests from the Audit Office with regard to the availability of data;
- To improve the existing normative framework of the Law on High Judicial and Prosecutorial Council of BiH by providing for efficient mechanisms for continuous checks of judges’ and prosecutors’ assets;

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- To provide for clear sanctions against those who violate the Code of Ethics for Judges and prosecutors;
- To incriminate bribery in the private sector;
- To ensure funds from the budget for funding corruption-related research and projects of independent organisations (academic institutions and non-governmental sector), which would also facilitate and verify the progress achieved with regard to this;
- To make it mandatory for all enterprises in the private sector to report corruption to the police and public prosecutor's offices;
- To make it mandatory for private legal entities to adopt codes of ethics as well as to implement internal audit controls;
- To fund and carry out continuous state-level campaigns for raising awareness of corruption;
- To provide for tax-exempted donations in the Law on Associations and Foundations;
- To better regulate volunteer work in nongovernmental associations in the Labour Law (to enable recognition of on-the-job training period)
- Finally, acknowledging that the contemporary criminal law is preventatively-oriented (Bačić, 1998)¹, to provide for a criminal offence of illegal accumulation of wealth (significant increase in assets of a public office-holder or his/her close relatives, which cannot be explained through legal incomes) in the Criminal Code and to criminalise active illegal and amend passive illegal interceding.

2. Anticorruption bodies and improving the functioning of the existing institutions

Bosnia and Herzegovina does not have a specialised anticorruption body. This is very surprising given that most of the countries undergoing transition, some of which have already become EU members, have put the corruption problem among their priorities in democratic development. The issue of usability of an anticorruption body in post-conflict societies, where the overall social stability may be caused by corrupt ruling elites, needs to be taken into account when considering institutional response to the problem of corruption in BiH. Strong anticorruption agency may prevent backward social trends² as well as the *state capture* phenomenon from happening.

General recommendations:

¹ It is so oriented by its very meaning: by prescribing what is punishable and what is not, it warns members of society of what constitutes socially-acceptable behaviour and what does not. In addition, by applying its *ius puniendi* to the perpetrators, the criminal law generally acts preventatively on other potential perpetrators by making them desist from their intentions.

² Ackerman S. (1999), *Corruption and Government: Causes, Consequences and Reform*, Cambridge University Press; p. 131: "A recent study suggests that a high level of ethnic fragmentation makes it difficult to establish a functioning, competent government (Easterly and Levine 197), but a state can overcome the disadvantages of ethnic divisions by establishing strong, corruption-free government institutions. Where ethnic divisions have not been well handled, as in Nigeria, the result can be a state focused on sharing the spoils, not promoting overall prosperity. Divisions can be so severe that government can aim for no more than the avoidance of civil war."

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- It is necessary to continue developing and strengthening specialised departments in key institutions: Financial Police, Indirect Taxation administration, state- and entity-level public prosecutor's offices, FIU – SIPA, internal control in BiH police organisations, BiH Public Procurement Agency; and to strengthen the powers of the High Judicial and Prosecutorial Council of BiH with the aim of ensuring better control of the work performed by the courts;
- To strengthen material and human resources of the Special Department for Organised Crime and Corruption of the Public Prosecutor's Office of BiH, which is currently staffed with six BiH and three international prosecutors working in five teams;
- To ensure professional development and continuous education of the staff working in the abovementioned institutions, whose work is related to anticorruption combat, with the aim of creating a pool of well-trained, highly motivated and independent professionals who will represent the core of anticorruption efforts in the BiH anticorruption agency;
- To launch a campaign on the problem of high-level corruption and possible institutional responses to this problem, with the aim of raising public awareness and informing the public of the importance of an anticorruption agency in BiH.

Special recommendations:

While considering possibilities for establishing an anticorruption body in BiH, based on the analyses conducted so far, and having in mind the specific nature of corruption in BiH, we can put forward the following set of recommendations:

- To speed up efforts aimed at establishing an anticorruption body that will be tasked with conducting investigations and acting preventatively as well as at educating all segments of society in what the devastating effects of corruption are;
- The legal name of the anticorruption body should contain the term “agency” as this implies initiative and agility in anticorruption combat;
- The agency should be independent, both in theory and in practice, should have adequate budget at its disposal, and should be defined statutorily as a legal entity that regularly reports to the Parliamentary Assembly of BiH;
- It is recommended that the European Commission and international funds should fund the Agency's work for the first 3 to 5 years. The Agency will also be funded from its own funds (this remains to be defined by the law);
- To establish a coordination mechanism for implementation of the national anticorruption strategy which will link the joint state institutions as well as all the other levels of the executive in the country, in cooperation with the competent representatives of the international community, private sector and civil society;
- To appoint a special commission for the appointment of the head of the Agency and its staff, outside the government system and public administration – i.e. civil service of BiH, through involvement of as many institutional actors as possible: persons proposed by the Presidency of BiH, representatives of the Parliamentary Assembly of BiH, presidents of the Entity Supreme Courts and the Court of BiH, representatives of NGOs (engaged in anticorruption combat) as well as the

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representatives of the international community, i.e. OSCE and EU. Members of the special appointment commission would, in expert consultations, define criteria for recruiting the head and the staff of the Agency.

- To ensure that each legal or political entity, institution or person may be subject to investigation by the Agency;
- To introduce provisions into the Law on the Anticorruption Agency requiring all state institutions at all levels, public services, authorities, offices and individuals to cooperate with the Agency and to act in accordance with its requests, i.e. to be bound to make available to the Agency all the information in their control which might be relevant for investigating criminal offences of corruption, and whose disclosure might be requested by the Agency.
- To specify in a special provision of the Law on the Anticorruption Agency the Agency's authority with regard to control and investigation of corrupt actions in the public and private sectors, with emphasis on office-holders and civil servants at all administrative and political levels in BiH;
- The Agency should be able to independently investigate cases of corruption, where there is reasonable doubt to believe that discretion might be compromised. This means that the Agency's staff should have full police powers and may use all available investigative techniques that are provided for in the criminal legislation of BiH;
- To form a team of experts who will produce a detailed synopsis of acts of corruption that can be qualified as subject to criminal-legal sanctions in accordance with the existing BiH legislation, with the aim of facilitating the Agency's activities and providing clear definitions for its work.

3. Conflict of interest

- Change the name of the Law into "the Law on Preventing Conflict of Interest in the Institutions of Bosnia and Herzegovina";
- Through amendments to the Law, to officially transfer the powers for implementation of the Law from all levels to the Central Election Commission of Bosnia and Herzegovina;
- To harmonise the Law on Conflict of Interest with other laws that are directly or indirectly related to this area (the Law on Public Procurement, the Law on Public Enterprises, etc.);
- To ensure that mechanisms for preventing and penalising conflict of interest are in place for all elected and appointed public positions by including these positions in the law on Conflict of Interest and other relevant legal acts;
- To bind all governmental institutions and public authorities at any level to adopt codes of conduct for their employees;
- To introduce into the Law on Conflict of Interest clear differentiation of sanctions in terms of different treatment of different levels of administration;
- To also introduce differentiation of sanctions for incompatibility of functions by providing for stricter sanctions for incompatibilities ranging from those related to the engagement of public officials in public enterprises, privatisation agencies and private enterprises which do business with the government authorities or in which the authorities have invested to those related to the engagement of public

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officials in educational or scientific, health, cultural and sports institutions, non-governmental and non-profitable organisations, foundations and associations;

- With the aim of ensuring more efficient implementation of the provisions of the Law with regard to acceptance of gifts by public officials, it is necessary to formulate additional legal control mechanisms for the accepted gifts which would involve other institutions – those that the public officials work in;
- To introduce sanctions for failure to comply with the provisions of the Law in relation to the regular submission of financial reports by public officials;
- To increase capacities of the BiH Central Election Commission for implementation of the Law and to initiate legislation activity and positive practice so as to engage other institutions to participate more actively in this process, which would help establish strong cooperation and continuous exchange of information between the Central Election Commission, Tax Administration, Public Procurement Agency, Public Prosecutor's Office and other law enforcement bodies.

To ensure realisation of the following recommendations of the Central Election Commission of BiH

- Having in mind the existing practice in implementation of the Law on Conflict of Interest in the Governmental Institutions of BiH and the fact that the adoption of the Proposed Changes and Amendments to the Law has been pending since August 2006, the Central Election Commission of BiH believes that it is necessary to set up a new inter-portfolio working group that would come up with new changes to the Law in addition to the existing ones, given that we regularly encounter unclear situations that were not included in the previous proposal of changes and amendments;
- To adopt a code of conduct for the legislature which would regulate the rule of conduct for elected officials;
- To launch an initiative for establishment of an ethical committee in the legislature which would monitor the performance of the obligations stemming from the code of conduct and would act as a “first filter” for preventing individuals from creating conflict of interest;
- To expand its activities to examination of contracts concluded between the government and the elected officials, executive officeholders and advisors at the cantonal and municipal levels;
- Given that the Department for Enforcement of the Law on Conflict of Interest has only two investigative teams who are not able to carry out all the required checks at all levels in BiH, it is necessary to staff the Department with more people so that the activities of the Central Election Commission of BiH, in terms of contract checks, could be expanded to the municipal and cantonal levels.

4. Political party financing

- Matters regulating political party and election campaign financing in Bosnia and Herzegovina (fundraising, i.e. funding and spending of funds for regular activities

and election campaigns) should be covered by a single Law on Political Party Financing;

- The Law on Political Party Financing in Bosnia and Herzegovina applies only to the political parties that are represented in joint state institutions (and to all levels at which they are politically active), but not to those that operate at lower levels. For that reason, this Law needs to regulate sources of funding of the political parties operating at the Entity, cantonal and municipal level;
- The Law on Political party Financing needs to regulate the relationship between the public and private financing of parties in a manner that the annual amount that a political party receives from the budget may not exceed a certain percentage of the total annual income of the party;
- To prohibit political parties from receiving voluntary contributions from anonymous sources, and in the event that such contributions are received, to introduce the obligation of reporting them and making payment to the competent authorities;
- To introduce the obligation for elected officials at all levels to submit to the Central Election Commission reports on their assets on an annual basis, in the meantime if there has been a “significant change” to the assets of the elective or elected candidate, as well as after a certain period of time following the expire of term in office, for example after two years. The term “significant change” could be best limited in terms of an amount of money, e.g. according to the parameter of the annual salary of the candidate or elected candidate. This would give an opportunity to the general public and authorities in charge of criminal prosecution to continuously monitor what “effect” the participation of the elected candidate in the executive has had on his/her assets;
- To introduce the stricter legal obligation to monitor the accuracy of the data contained in the financial disclosure forms of elected officials at all levels in a manner that the implementing institutions and implementation timeframes should be explicitly defined;
- To remove from the Election law and the Law on Political Party Financing the provisions requiring the Central Election Commission of BiH to seek, prior to assessing a civil penalty or taking administrative action, to achieve voluntary compliance with the provisions of the Law with the political party found to be in violation;
- With the aim of ensuring more efficient control of all segments of financial operations of political parties in BiH, it is necessary to adequately equip, in terms of material and human resources, the Department for Auditing Financial Operations of the Political Parties of the BiH Central Election Commission and provide legal basis for institutional cooperation of this institutions with the SAIs, tax administration and authorities in charge of criminal prosecution at all levels;
- To harmonise the Law on Political Party Financing with the conclusions of the Conference of Anticorruption Bodies (Madrid, 1998).

5. Confiscation of the proceeds from crime

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- As the criminal legislation of BiH provides a fundamental legal framework for confiscation of the proceeds from crime, it is necessary to adopt a special regulation on confiscation of assets since the Law on Criminal Proceedings of BiH does not contain provisions with regard to the procedure of confiscating the proceeds from crime³, by application of the reverse burden of proof (civil-law confiscation of the assets suspected of being acquired by illegal means), taking into consideration experiences from other countries which have such legal mechanisms in place in their respective legislations;
- It is necessary to establish state bodies (agencies, administrations, etc.) that would be responsible for managing temporarily confiscated and seized property;
- It is necessary to regulate the operation and activities of such bodies and its cooperation with other law enforcement agencies as well as to define its role within the criminal legislation system.

³ Pursuant to the provision contained in Article 110, Paragraph 3 of the Criminal Code of BiH, The court may also confiscate the gain referred to in Paragraph 1 of this Article in a separate proceeding if there is a probable cause to believe that the gain derives from a criminal offence and the owner or possessor is not able to give evidence that the gain was acquired legally. This provision is a novelty in our criminal legislation and as such, given the certain inherent contradiction and vagueness, it creates a dilemma with respect to the basis and manner of its application. Consistent application of the provision contained in Paragraph 1 of this Article, pursuant to which nobody is allowed to retain material gain acquired by the perpetration of a criminal offence, justifies introduction of legal provisions enabling the confiscation of material gain acquired by the perpetration of a criminal offence even in cases when it was not possible to bring criminal proceedings and reach a verdict that would determine that the criminal offence was committed and that material gain was acquired by the perpetration of that offence (for instance, in case of perpetrator's death). However, provision contained in Paragraph 1 of this Article, providing that nobody is allowed to retain material gain acquired by the perpetration of a criminal offence, presupposes determination of commission of criminal offence and acquirement of material gain by the perpetration of that offence. The provision contained in Paragraph 3, although it refers to the gain under Paragraph 1 of this Article, i.e. the gain found to have been acquired by the perpetration of a criminal offence, provides for the confiscation of the gain only "if there is a probable cause to believe that the gain derives from a criminal offence". The provision raises certain reservations also because, although the possibility of confiscating the gain is linked to the existence of a probable cause to believe that the gain derives from a criminal offence, the burden of proof rests, pursuant to this Law, with the owner or possessor, who does not have to be the person for whom there is a probable cause to believe that he/she is the perpetrator of the criminal offence by which the gain was acquired. The Criminal Procedure Code of BiH does not contain provisions with regard to the procedure of confiscation of the gain pursuant to Paragraph 3 of this Article.

Commentary on the Criminal Procedure Code of BiH.