**Introducing anti-corruption assessment of laws**

**in Bosnia and Herzegovina**

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The views expressed in this document are solely those of the author and do not necessarily reflect the views of the Regional Anti-Corruption Initiative (RAI) or its member States, or of the Austrian Development Cooperation.

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1. **Summary**

So far, there is no specific corruption proofing mechanism in Bosnia and Herzegovina. On the State level, Bosnia and Herzegovina wants to introduce corruption proofing and put it on an explicit legal basis. To this end, the assessment identifies and recommends the following **key steps**:

* The **Agency** for Prevention of Corruption should be the main body carrying out (external) corruption proofing. The main reason would be its anti-corruption capacity as well as the easiness of coordinating corruption proofing with general corruption risk assessment activities.
* The Agency should adopt a **methodology** based on the Regional Methodology, Part 2. This would include detailed procedural steps as well as an instructive list of corruption risks. The revised Methodology of Moldova of 2016 could serve as an additional source of inspiration for the Agency, in particular regarding the corruption proofing process.
* **Timing**: Regular corruption proofing by the Agency should be carried out once a state body authoring a legal rule is about to adopt it. In addition, each legal drafter should apply the methodology already when formulating provisions.
* Corruption proofing should be put on a **statutory basis**. Chapter 4.5 of this assessment provides guidelines for formulating an amendment to the “Law on the Agency for the Prevention of Corruption”.
* The Agency will need a dedicated unit for carrying out corruption proofing. The number of **staff** of successful corruption proofing units varies between 5 (Lithuania) and 16 (South Korea).
* **Civil society** already has the option to conduct corruption proofing and to feed it into the legislative process as part of public consultations under the “Council of Ministers Regulations on Consultations in Legislative Drafting”. Nonetheless, the Agency should reach out to and include civil society organisations when training its staff, drafting and discussing the methodology, and when drafting corruption proofing reports.

1. **Terms of Reference**

In 2014, RAI and the Regional Cooperation Council (RCC) developed and published the **Regional** **Methodology** on Anti-corruption Assessment of Laws (corruption proofing of legislation). Following up on the Regional Methodology, RAI intends to facilitate the introduction or strengthening of anti-corruption assessment of laws in at least three beneficiary countries until end of 2018.

This assessment dovetails an in-country **workshop** organised by RAI Secretariat on 26 September 2016 in Sarajevo with representatives from the following bodies:

* Agency for the Prevention of Corruption and Coordination of the Fight Against Corruption of Bosnia and Herzegovina,
* Anti-Corruption Team of Government, Federation of Bosnia and Herzegovina,
* Center for Security Studies,
* Centre for Investigative Journalism,
* Council of Ministers of Bosnia and Herzegovina, Legislative Office,
* Ministry of Justice of Bosnia and Herzegovina,
* Ministry of Security of Bosnia and Herzegovina,
* Police of Brcko District,
* Public Interest and Advocacy Center,
* Regional Cooperation Council,
* Transparency International Bosnia and Herzegovina,
* UN Women Bosnia and Herzegovina,
* UNODC Bosnia and Herzegovina office.

The workshop presented corruption proofing as a tool and bought in support from the present stakeholders.

On the State level, Bosnia and Herzegovina wants to introduce corruption proofing and put it on an explicit legal basis. This report reviews the current state of play and the necessary **key steps** for introducing corruption proofing in Bosnia and Herzegovina.

1. **Current state of play**

## Strategy

The “Bosnia and Herzegovina Anti-Corruption Strategy for 2015-2019 and the Action Plan for the Implementation of the Anti-Corruption Strategy for 2015-2019” point in the direction of introducing corruption proofing as follows:

“11. Enabling the Agency for the Prevention of Corruption and Coordination of the Fight against Corruption and other anti-corruption bodies to provide their opinions about the proposed anti-corruption laws […]

16. Introduction of the obligation to conduct public hearings on legislation with provisions of anti-corruption”

However, one should keep in mind that above actions are somewhat limited to **specific** anti-corruption legislation, while corruption proofing includes all legislation, including legislation not primarily or specifically dedicated at fighting corruption (such as for example a customs law).

## Legal basis

The “Law on the Agency for the Prevention of Corruption and the Coordination of the Fight against Corruption” foresees the following:

Article 10 (Responsibilities of the Agency)

j) Monitor the effects of laws and bylaws aimed at preventing corruption and provide opinions and guidelines on the issue of their implementation, initiate activities in relation to amending the current legislative arrangements and harmonize them;

[…]

r) Perform other activities relating to corruption prevention.

Article 11 (Forms of action)

When carrying out the activities falling within its responsibility, the Agency shall: issue anti-corruptive measures, make recommendations and guidelines, give opinions and raise initiatives.”

As is the case with the anti-corruption strategy, the Law focuses on **specific** anti-corruption legislation, leaving general legislation rather aside.

**Public consultation** on draft laws is formally based on two regulations.

* The Council of Ministers “Regulations on Consultations in Legislative Drafting” of 2006.[[1]](#footnote-1) The regulations establish the procedures to be followed by all ministries and other institutions of Bosnia and Herzegovina for consultation with the public and organisations.
* “Rulebook on Conducting of the Rules [sic] for Consultations in Drafting of the Legal Regulations in the Ministry of Justice of Bosnia and Herzegovina” of 2008.[[2]](#footnote-2) The Rulebook prescribes the procedures for public consultation within the process of drafting legal regulations in the Ministry of Justice. This is in order to make the rules for consultation during the drafting of legal regulations more understandable and conductible.

The Regulations and the Rulebook call for the **publication** of all proposed laws and secondary legislation documents, the possibility for citizens to send written **comments,** within a **period** of at least 21 days, and for an **explanatory** document for any draft law. Individuals and organisations that express interest in normative legal activities have a right to be notified concerning draft regulations. A statement by the Ministry of Justice has to show the comments delivered during consultations and the **reasons** why the suggestions were either accepted or rejected.

1. **Recommended set-ups**

## Entity in charge

If one compares internationally, there are several options of state bodies for conducting corruption proofing, in particular:

* Ministry of Justice,
* Parliament,
* Anti-corruption body.

Of all three options, the Agency for the Prevention of Corruption seems to be the preferable one in Bosnia and Herzegovina for the following reasons:

* It is already tasked with carrying out **risk assessments**. Insights on corruption risks could feed into corruption proofing of legislation, and vice versa. Furthermore, both exercises need to be delineated from each other – how far does risk assessment look into legislation, and how far does corruption proofing look into organisational corruption risks? Having the same institution carrying out both tasks will facilitate communication and coordination of both tasks.
* The Agency is **independent** as compared to the Ministry of Justice. Regarding Parliament, the Agency would have the advantage of being able to intervene much **earlier** in the legislative process, than Parliament naturally would do. Furthermore, Parliament reviews rather statutes than **bylaws** and decrees. Finally, Parliament and Ministry of Justice do not have the same access to intelligence on corruption risks as the Agency will have.
* The Agency has the **staff** with the necessary general anti-corruption expertise. It could easily rotate staff from other departments in and out of the corruption proofing unit in order to raise capacity of all staff and of the corruption proofing unit as well.

## Methodology

The Agency could adopt a methodology based on the **Regional** **Methodology**, Part 2. It could by and large use or integrate the list of corruption risks and the instructive examples from Part 2 of the Regional Methodology. It could also use the checklist in Annex 2 of that Methodology. As for the procedure, it could also by and large use the instructions of Part 2 Chapter I. Furthermore, the revised Methodology of Moldova[[3]](#footnote-3) could serve as an additional source of inspiration for the Agency, in particular regarding the corruption proofing process. It has been praised by a RAI-expertise for its comprehensive consideration of details in particular regarding procedure.

The main question regarding the corruption proofing procedure will be **timing** – when shall the Agency do the regular corruption proofing? The adoption of the draft law by a state body seems an opportune moment for this. This would provide the option of adapting the law based on the Agency’s recommendations before it reaches cabinet.

Obviously, the Methodology should be **disseminated** to all state bodies including Parliament, as well as to civil society, in order for them to conduct corruption proofing on their own at any stage of the process, including when formulating draft laws.

## Legal basis

Ideally, corruption proofing should be put on a statutory basis (Regional Methodology, Part 2, 2.1). The Law on the Agency for the Prevention of Corruption seems the most suitable place for anchoring corruption proofing legally. One could amend Article 10 j of this Law by adding a letter “j-1”:

“j-1) Reviewing the form and substance of drafted or enacted legal rules in order to detect and minimise corruption risks (ambiguity or the lack of corruption prevention mechanisms) that the rules could facilitate (corruption proofing).”

In a new Chapter 7, two new Articles could be introduced along the following lines (the wording will depend on legal technique and practice in Bosnia and Herzegovina):

**Article 23 a - Procedure**

1) [*Scope*] Corruption proofing comprises all legal rules, including draft laws, enacted laws, laws of all regulatory levels (statutes and bylaws), laws of all regulatory sources (parliamentary and executive including presidential acts) and of all sectors (public and private law). It also includes official explanatory notes as a source for interpreting laws.

2) [*Notification*] All state bodies have to submit their draft laws to the Agency prior to submitting the drafts for adoption. State bodies can ask the Agency for advice at any stage of the regulatory process.

3) [*Prioritisation*] The Agency selects and prioritises the laws subject to corruption proofing independently based on risk criteria and its available resources.

4) [*Methodology*] The Agency adopts a methodology detailing all procedural steps and all sub-categories of regulatory corruption risks.

**Article 23 b – Cooperation with other stakeholders**

1) [*Provision of information*] All state bodies – whether authoring the law or not – have to provide the Agency with information and expert input necessary for conducting the corruption proofing.

2) [*Assistance*] The Agency may assign anti-corruption assessment of draft or enacted laws to (other) state authorities, academic institutions, or similar stakeholders, consult with them, or request expert input as necessary.

3) [*Public access*] The Agency publishes its Methodology on corruption proofing and all corruption proofing reports online, unless they concern a non-public confidential bylaw.

4) [*Monitoring of compliance*] All state bodies have to provide substantiated feedback to what extent they complied with recommendations by the Agency and for what reasons they did not or only partially comply.

3) [*Civil society*] Interest groups from civil society can submit corruption proofing recommendations to the state bodies authoring draft regulations in line with the rules on public consultation contained in the Council of Ministers “Regulations on Consultations in Legislative Drafting”.

The above sketch of a legal provision is not intended to be a draft law ready for submission. It is rather meant as a starting point for reflections and discussions on the proper statutory basis for corruption proofing in Bosnia and Herzegovina. Further examples of statutory bases for corruption proofing can be found in Annex II of the Regional Methodology.

Above Article 23a paragraph 2 should be referenced in the procedural law concerning the regulatory process on the State level. This would remind all stakeholders of the corruption proofing step. To this end, a new subsection could be added to Article 31 paragraph 1 of the “**Rules of Procedure** of the Council of Ministers” as follows: “[Legal authors shall obtain an opinion] […] g) of the Agency for Prevention of Corruption in relation to regulatory corruption risks”. This would probably cover all laws subject to corruption proofing as proposed by above Article 23a. The corruption proofing opinion could also be anchored with the same provision in the Rules of Procedure of the House of People (Article 95 paragraph 3, stating the mandatory attachments of law proposals; a new letter “g)” could be added to this end).[[4]](#footnote-4)

## Organisational set-up

The Agency will have to task and train dedicated staff on corruption proofing. These are comparative **numbers** of full-time staff working on corruption proofing at the respective anti-corruption agencies:

* Lithuania: 5
* Moldova: 12
* South Korea: 16

RAI has developed and piloted a **training module** on corruption proofing and is ready to provide assistance in this regard, one the unit is in the process of being established.

## Civil society

External assessments by **civil society** stakeholders include anti-corruption aspects in the past, an example being an open letter by Transparency International on the substance of a draft procurement law.[[5]](#footnote-5) However, civil society organisations have no methodology or steady mechanism of corruption proofing so far. Civil society organisations could develop their own methodology, or apply the future methodology as adopted by the Agency. In any case, it is recommended that the Agency reaches out to civil society organisations when training its staff, drafting and discussing the methodology, and when drafting corruption proofing reports.

1. Of 7 September 2006, Official Gazette of BiH 81/06 (Bosnian). [↑](#footnote-ref-1)
2. <http://www.mpr.gov.ba/web_dokumenti/Pravilnik%20za%20konsultacije%20en.pdf>. [↑](#footnote-ref-2)
3. The Methodology will be available soon on the RAI-website. [↑](#footnote-ref-3)
4. Official Gazette 58/14, [www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/New2015/BH%20Rules%20of%20Procedure%20of%20the%20House%20of%20Peoples%20of%20BHPA%2058-14.pdf](http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/New2015/BH%20Rules%20of%20Procedure%20of%20the%20House%20of%20Peoples%20of%20BHPA%2058-14.pdf): latest version available in English; possibly the numbers of Articles has changed in a more recent version. [↑](#footnote-ref-4)
5. Open Letter against adoption of the new Law on public procurement, 25 April 2014 <http://ti-bih.org/en/7172/otvoreno-pismo-protiv-usvajanja-novog-zakona-o-javnim-nabavkama/>. [↑](#footnote-ref-5)