STABILITY PACT ANTI-CORRUPTION INITIATIVE (SPAI)

REGIONAL SECRETARIAT LIAISON OFFICE (RSLO)

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While corruption remains one of the biggest obstacles for economical and social development in many countries in the world, world's leaders in fight against corruption has recognised the problem and work, for more than a decade, towards world free of corruption.

United Nations Convention against Corruption (UNCAC), adopted on 31 October 2003 by the UN General Assembly, represents a global response to corruption. It is a first global, legally binding instrument about corruption and a comprehensive document which contains measures for prevention, criminalization and international cooperation.

The signing ceremony of this key instrument was held on 9th December 2003, in Merida, Mexico. Ever since, increasing number of countries around the globe are celebrating this day as the International Anti-corruption Day.

Transparency International (TI) had given a significant contribution during the UNCAC negotiation process and is active today in promotion of signing, ratification and implementation of the UNCAC in many countries. Further more, TI is a partner organisation for creation of mechanisms for successful monitoring of the UNCAC implementation. TI calls on anti-corruption practitioners and activists world wide to join in advocating these steps.

Recognising the vital importance for this instrument to be adopted in Bosnia and Herzegovina, TI BiH organised on the 09 December 2004 a UN Convention against Corruption conference, in Sarajevo, BiH, in order to call upon prompt the signing of UNCAC by the BiH authorities and to help establishing the International Anti-Corruption Day as an occasion for the country's leaders to discuss the progress in signing of the UNCAC, its ratification and general progress in curbing corruption in the sectors covered by the UNCAC. This also represents a good opportunity to evaluate the anti-corruption measures and operations of all the responsible authorities in the country during the past years and to raise public discussions about efficiency of certain institutions in dealing with corruption.

The Regional Secretariat of the Stability Pact Anticorruption Initiative (based in Sarajevo) implements a *Regional Project for supporting the process of signing, ratifying and implementing the UN Convention against Corruption*. Within the Project framework series of Pre-ratification and thematic conferences were held and a standard regional compliance matrix was developed. Since the initiation of this project all 8 member countries became signatories and four of them already ratified it focusing more on implementation.

Furthermore, it is expected that through the continued enhanced level of information exchange and professional experience, the countries of the region will be in the position to speed up the process of harmonizing the national legislation with the standards set forth within the UN Convention against Corruption.

The political will of the SPAI member countries to implement the Merida Convention was expressed as the highest political level during the Ministerial Conference organized by SPAI within the European Parliament, in Brussels, May 2005. The 8 participating ministers endorsed the Declaration on 10 Joint measures to curb corruption in SEE. The first measure refers to "signing, ratifying and starting implementing UN Convention against Corruption" within one year timeframe.

In cooperation with the Stability Pact Anti Corruption Initiative, on 09 December 2005, TI BiH marked for the second time the International Anti-Corruption Day in BiH by organising the UN Convention against Corruption Conference. The conference was a continuation of all the previous activities in this field and was dedicated to a progress that BiH has made towards the UNCAC. Although joined the group of Signatory States, BiH is expected to ratify and start implementing the UNCAC. Therefore, the aims of the Conference were:

- Presentation of the global UNCAC progress report,
- Assessment of the harmonization between UNCAC and the domestic legislature,
- Discussion, with the representatives of relevant institutions and organizations, areas covered by the UNCAC which may be of particular importance for BiH (such as the measures for curbing corruption in business sector, international cooperation, asset recovery), and
- Discussion of mechanisms to be applied in order to ratify and fully implement the UNCAC in BiH.

The Conference was attended by number of important parties for curbing corruption in different fields who try to contribute in defining some of the next steps important for ratification and monitoring of the UNCAC in BiH.

UN CONVENTION AGAINST CORRUPTION

Overview of the extent to which the existing legislation in BiH is brought into line with the UN Convention against corruption

Once it is ratified by the Parliamentary Assembly of BiH, the UN Convention against Corruption will become an integral part of the BiH legislation and, as such, will require the authorities in BiH not only to adhere to it, but also to make certain changes to the existing legislation.

The purpose of this analysis is to examine the relationship between the Convention and the existing legislation in BiH as well as to point out to what extent the national legislation has already been brought into line with the Convention, what changes will still be necessary, and what new laws and other regulations will have to be adopted.

After ratifying the Convention, the state of Bosnia and Herzegovina shall deposit the instrument of ratification with the Secretary-General of the United Nations.

Article 65 of the Convention specifies that each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under the Convention. Likewise, each State Party may adopt more strict or severe measures than those provided for by the Convention for preventing and combating corruption.

Not later than one year following the entry into force of this Convention, THE SECRETARY-GENERAL OF THE UNITED NATIONS SHALL convene the Conference of the States Parties to improve capacities and cooperation between the States Parties for the purpose of achieving the objectives set forth in the Convention as well as improving and revising its implementation. The Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. Each State Party shall provide the Conference of the States Parties with information on its programmes, plans and practices, as well as on legislative and administrative measures to implement the Convention, as required by the Conference of the States Parties. The Conference of the States Parties shall examine the most effective way of receiving and acting upon information, including, inter alia, information received from States Parties and from competent international organizations. The Convention also stipulates that inputs received from relevant non-governmental organizations (duly accredited in accordance with procedures to be decided upon by the Conference of the States Parties) may also be considered.

The Convention starts with the Preamble which, as in other conventions, has a declaratory character.

Article 1 states the purposes of the Convention. As can be seen, the Convention has three primary general purposes.

The first purpose is to promote and strengthen measures to prevent and combat corruption more efficiently and effectively. This means that in international law there already are preceding instruments dealing with anti-corruption combat (see Preamble), but it can be considered that these instruments and their implementation are not sufficient, hence the use of terms PROMOTION and STRENGTHENING of measures. All previous measures and actions had a rather regional character (Organization of American States, European Community, OECD, Council of Europe, Criminal Law Convention, which was ratified by BiH in 1999, Civil Law Convention on Corruption of the Council of Europe, and African Union), while the UN Convention against Corruption constitutes the first global anti-corruption instrument laid down under the aegis of the United Nations. This, in fact, is the Convention's greatest value.

The second purpose is to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery. Consistent with the first purpose, having in mind that corruption is a global problem and that the past cooperation between states was of regional character only, this Convention expands the possibilities of global cooperation.

The third purpose is to promote integrity, accountability and proper management of public affairs and public property. This is consistent with the provisions contained in the Statute of Transparency International BiH, which is obvious from the following sentence with which TI addresses the public in BiH: *"The aim of Transparency International BiH is to combat corruption, promote good management, responsibility and transparency in work of public institutions, foster democratic values and support fair market competition."*

Article 2 defines the terminology used for the purposes of the Convention.

"Public official" is a generic term used by the Convention and it is defined very broadly. It is used to describe:

a) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority. It can be taken that this part of the definition refers to what in BiH is meant by a civil servant employed in a public authority. According to the Law on Civil Service in the Institutions of Bosnia and Herzegovina ("Official Gazette of BiH" 19/02, 35/03, 4/04, 17/04, 26/04, 37/04 and 48/05), "civil servant is an individual appointed to a civil service position by an administrative act in accordance with law." (Article 1, Paragraph 2). This means that the said Law defines only civil servants employed in executive and administrative authorities defined in the Convention. There are also entity laws on civil service and they define "civil servant" in identical way.

   Apart from this definition, there are also other laws which to a certain extent cover the term "public official" as defined in the Convention. For example, these are the Laws on Courts at the cantonal, entity and state levels, which regulate the position of a judge, while the position of other administrative staff is regulated by the Law on Civil Service in Administration, depending on the respective level of administration.

   The position of the members of governments is regulated by the Laws on Government Appointments, the position of the MPs is regulated by the Election Law,

and the position of judges of the Constitutional Courts is regulated by the relevant laws at the state and entity levels. The same applies to ombudspersons. Special laws govern the position of the officials in the High Judicial and Prosecutorial Council, President and Vice-President of the Central Bank of BiH, members of the Election Commission of BiH, military staff working in the institutions of BiH (now all the military staff are employed there), members of the Permanent Committee for Military Issues, Supreme Auditor and Deputy Supreme Auditor (at both the state and entity level), Chief Public Prosecutor, Deputy Chief Public Prosecutor and Prosecutors (at all levels), Public Attorney and Deputy Public Attorney, advisors, secretaries of the chambers of the BiH Parliament, etc. None of them are civil servants in terms of the domestic law, but fall within the definition set forth in the Convention;

b) any other person who works in public enterprises and other agencies and organisations performing a public function;

c) lastly, the Convention broadens the definition of this term and specifies that public official is "any other person defined as such in the domestic law of a State Party".

The term "foreign public official", used for the purposes of the Convention, corresponds to what the Criminal Code of BiH terms "foreign official". Foreign official is any person holding a legislative, executive, administrative or judicial office of a foreign country or international organisation and any person working as judge or official of the international court serving in BiH.

The term "official of a public international organisation", used for the purposes of the Convention, is already contained in Article 1, Paragraph 7 of the Criminal Code of BiH.

The term "property" is generally accepted in the domestic legislation.

The term "confiscation" does not exist as such in the Criminal Code of BiH, but Article 74 provides for "forfeiture" (of objects used or destined for use in the perpetration of a criminal offence, regardless of whether they are owned by the perpetrator or by another person). Confiscation used to exist in the domestic (criminal) legislation as was one of the "revolutionary" measures, according to which private property was confiscated to be turned into public property. Very close in meaning is the term "nationalisation", with the only difference that confiscation was one of the sanctions provided for by the criminal legislation used for taking away somebody's private property, while nationalisation was not connected with criminal proceedings but referred to the whole process of changing the (surplus of) private property into state/public property.

The term "proceeds of crime" is an antipode to the term "confiscation of material gain acquired through perpetration of a criminal offence" contained in Chapter XII of the Criminal Code of BiH.

The terms "freezing or seizure and temporary prohibition of the transfer, conversion or movement of property", used for the purposes of the Convention, are mentioned in the Criminal Procedure Code, in the chapter dealing with temporary seizure of objects and property, and refer to the forfeiture of objects under the Criminal Code of BiH as well as of the objects that can serve as evidence in criminal proceedings.

Article 3 of the Convention deals with the scope of application. According to this Article, the Convention shall apply to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with the Convention. What is also very interesting is that for the purposes of implementing the Convention, it shall not be necessary**,** except as otherwise stated therein, for the offences set forth in it to result in damage or harm to state property.

Article 4 deals with the protection of sovereignty of States Parties. According to this Article, nothing in the Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

Chapter II of the Convention deals with the preventive measures in curbing corruption.

Article 5 states the objectives of the Convention (preventive anti-corruption policies and practices). Each State Party is required to develop and implement effective anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

Article 6 deals with the establishment of preventive anti-corruption body or bodies. As far as this obligation is concerned, the domestic legislation will have to put in additional effort to set up such a body. The existence of such a body was provided for by the Draft Anticorruption Law, but this draft has never been adopted as a law. This will be one of the key questions when the legislation necessary for implementation of the Convention is adopted in BiH. The authority of and membership in this Commission will be a litmus test of the willingness of BiH authorities to genuinely embrace the Convention and its principles, to build them into the domestic legislation and, what is most important, to put in practice whatever laws are adopted. The Convention requires this body to have "the necessary independence" and to be "free from any undue influence". Lastly, the States Parties are required to provide "the necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions". Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

Article 7 deals with the public sector. Principles contained in Article 7 aim at building mechanism that will contribute to the reduction of corruption in public sector (procedures for the selection of individuals for public positions, rotation of such individuals to other positions, adequate remuneration, equitable pay scales, education of public officials as a basis for proper performance of public functions, etc.). These principles are upheld by the existing Laws on Administrative Service in BiH. Lastly, Paragraph 4 of this Article requires that each State Party should adhere, to the maximum possible extent, to the principles of transparency and prevention of conflicts of interest.

Article 8 deals with codes of conduct for public officials. Currently in BiH there are codes of conduct for civil servants (adopted by the civil service agencies), but not for the persons employed in public state-owned enterprises and public state institutions. As can be seen from the aforesaid, the term "public official", which is used for the purposes of the Convention, is

broader than the term "civil servant", which is used in the domestic legislation, as, besides "civil servants", it also encompasses persons who perform political functions (MPs, ministers, advisors, judges, ombudspersons, supreme auditors, etc.) as well as those employed in public state-owned enterprises. Additional effort will be needed to develop and implement codes of ethics that would also encompass the abovementioned categories of "public officials". Finally, this Article deals with the questions covered by the Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina (outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result).

Article 9 of the Convention deals with public procurement and management of public finances.

As far as public procurement is concerned, it should be noted that the Law on Public Procurement has recently been adopted at the state level. The Law is in line with the principal recommendations contained in the Convention with respect to public procurement: transparency in public procurement, the establishment, in advance, of conditions for participation, the use of objective and predetermined criteria for public procurement decisions, an effective system of appeal, and an effective system of domestic review.

As far as management of public finances is concerned, the recommendations relate to procedures for the adoption of the national budget; timely reporting on revenue and expenditure; and a system of accounting and auditing standards and related oversight. The existing Budget Laws in BiH already provide for such obligations, although separate laws dealing with budget expenditure are also passed. Finally, the existing Laws on Public Sector Auditing contain rules relating to accounting and auditing standards.

Article 10 of the Convention deals with public reporting. In a way, laws on free access to information "cover" the obligations set forth in the Convention (obtaining information on "decision-making processes […] with due regard for the protection of privacy and personal data" in that process as well as publishing information on the performance of public administration).

Article 11 deals with the measures relating to the judiciary and prosecution services. This Article stipulates that such measures may include rules with respect to the conduct of members of the judiciary (as well as prosecution services). The High Judicial and Prosecutorial Council is currently developing the draft codes of ethics for judges and prosecutors (they can be found on www.hjpc.ba) which should be in line with the European standards both in terms of the contents and in terms of the procedure for a more efficient application.

Article 12 of the Convention deals with prevention of corruption involving the private sector. This provision is rather new and the domestic legislation will have to be adapted to this requirement. First of all, this applies to the development of codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State. The Chambers of Economy have already adopted codes of conduct (i.e. rules and usances of business conduct). The rest is governed by the rules on good corporative management which are, in a way, built into the laws on enterprises as well as by the OECD

rules, which constitute the bible of corporate management. The BiH economy is in a grave situation, privatisation is still ongoing, new owners of privatised companies often behave with disrespect towards both the employees and the state, while on the other hand there is a large number of enterprises that have not been privatised yet and in which the government is still a majority shareholder. These enterprises are hotbeds of corruption in terms of the virtual plunder of socially-owned capital and the government's passive and almost sympathetic attitude to such management of state-owned enterprises and their privatisation. The findings of the recent public sector auditing revealed the real condition of these enterprises (forestry, post offices, electric companies, railways, etc.).

Likewise, it will be very important for a State Party to make the process of registering a private business more transparent and unambiguous with respect to the identity of legal and natural persons involved in the establishment and management of corporate entities. First of all, this applies to the future ban on registration of the so-called fictitious businesses, registered by means of another person's identity card and authorisation, with the aim of laundering money as well as to the increase of equities and introduction of the so-called *fiduciary property*. As things stand right now, one can found a limited company with KM 5,000 and incur debts in the amount of KM 1,000,000, then dissolve the company, found another and continue working as if nothing had happened. Likewise, one can register his own valuable real property in another person's name, e.g. marital partner, so that when there is a court ruling for the collection of KM 1,000 debt from his company, the debt cannot be collected because, allegedly, the company does not have the property on which the court ruling can be executed.

This Article also deals with misuse of procedures regarding subsidies and licences granted by public authorities for commercial activities.

In addition, the Convention requires that the rules should be introduced to prevent conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure. The Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina contains certain provisions dealing with this issue, but they are rather inadequate and their implementation is ineffective, to say the least. With a view to rectifying this, the government will have to take further steps to improve the existing Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina, pass new laws at the entity levels and, what is especially important, set up agencies (either separate or within the Election Commission) that will exclusively deal with the issues relating to conflict of interest on the part of elected officials as well as civil servants.

Article 13 of the Convention deals with participation of society (individuals, civil society, non-governmental organizations and community-based organizations) in anticorruption combat. In fact, this Article gives the government and members of society suggestions as to how they should jointly fight corruption as a phenomenon and corruption in the form of individual cases. Likewise, this Article recommends adoption of legislation that can be recognised as the Law on Free Access to Information.

Article 14 deals with measures to prevent money-laundering. As BiH has recently adopted the Law on Prevention of Money-Laundering at the state level, there will be no need to pass

any other pieces of legislation on this issue, especially in view of the fact that the new Criminal Procedure Code provides for instruments that the Public Prosecutor's Office has at its disposal in combating money-laundering, which are mentioned in this Article.

Chapter III of the Convention deals with criminalisation and law enforcement.

Article 15 of the Convention deals with bribery of national public officials and defines solicitation and acceptance of bribes.

Chapter XIX of the Criminal Code of BiH – Criminal Offences of Corruption and Criminal Offences against Official Duty or Other Responsible Duty – contains criminal offences to which Chapter III of the Convention refers.

So, Articles 217 (Accepting Gifts and Other Forms of Benefits) and 218 (Giving Gifts and Other Forms of Benefits) of the BiH Criminal Code "cover" Articles 15 and 16 of the Convention, as, besides an official and responsible person in the institutions of Bosnia and Herzegovina, they also mention a foreign official person (under Article 16 of the Convention). Article 1, Item 7 of the Criminal Code of BiH defines foreign official person as a representative of a foreign country as well as of an international organisation.

According to the Criminal Code of BiH, the definition of the criminal offence of accepting bribes includes the so-called genuine passive bribery, non-genuine passive bribery and subsequent passive bribery, while the definition of the criminal offence of soliciting bribes includes genuine active bribery and non-genuine active bribery.

The comment to the BiH Criminal Code dealing with these criminal offences and corruption as a phenomenon mentions Transparency International as "the most renowned international anti-corruption NGO which regularly publishes results of the worldwide corruption survey…"

Article 17 of the Convention defines criminal offences of "embezzlement, misappropriation or other diversion of property by a public official". These offences are covered in Article 221 "Embezzlement in Office" of the BiH Criminal Code as well as in the provisions of the entity Criminal Codes relating to abuse of office or official authority.

Article 18 of the Convention defines the term "trading in influence", which corresponds to the criminal offence under Article 219 of the BiH Criminal Code "Illegal Interceding", while **Article 19** of the Convention deals with abuse of functions, which is covered in Article 220 of the BiH Criminal Code "Abuse of Office or Official Authority".

Article 20 of the Convention deals with illicit enrichment. Such formulation does not exist in the criminal legislation of BiH and there is no criminal offence defined in such a way. Of course, the definition of criminal offences against property contains a phrase "[…] obtaining illegal material gain", which condition must be met if a certain action is to be qualified as criminal offence against property. Furthermore, Chapter XII of the Criminal Code of BiH lays down rules regarding confiscation of material gain acquired through perpetration of a criminal offence. In order to meet the conditions under this Article of the Convention, notwithstanding the existing provisions, the State Party must also make changes to the Law on Conflict of Interest in Governmental Institutions of BiH and the Election Law of BiH.

With the view to bringing the Election Law of BiH in line with the definition contained in the Convention: "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income", Transparency International BiH has filed an initiative with the Election Commission of BiH for making changes to the sections of the existing Election Law of BiH dealing with the so-called "signed statements on total property situation" by introducing the candidate's and elected candidate's obligation to submit a signed statement of their property situation at both the beginning and end of their mandates. It is also necessary to change laws by introducing an obligation to submit statements on total property situation and defining the authority for checking the authenticity of these statements.

Article 21 of the Convention deals with bribery in the private sector. According to the criminal legislation of BiH, only officials or responsible persons, whether national or foreign, can be bribed. Bribery in the private sector is not recognised by the national criminal legislation. Bosnia and Herzegovina should consider the possibility of criminalising bribery in the private sector. However, the nature of the criminal offence under the Convention is identical to the nature of criminal offences currently existing in the domestic criminal legislation which are related to bribery of officials or responsible persons.

Article 22 of the Convention deals with embezzlement of property in the private sector. According to the existing Criminal Codes in BiH, this criminal offence can be committed only by an official or a responsible person (Article 221 of the Criminal Code of BiH – "Embezzlement in Office", Article 384 of the Criminal Code of FBiH – "Embezzlement in Office" and Article 348 of the Criminal Code of RS – "Embezzlement"). As can be seen, the Criminal Codes of BiH and FBiH recognise only embezzlement in office, while the Criminal Code of RS recognises only embezzlement. As far as BiH and FBiH are concerned, there is no doubt that this criminal offence can be committed only by an official or a responsible person, and as such cannot exist in the private sector. On the other hand, the Criminal Code of RS provides for the criminal offence of embezzlement in office and states that it can be committed **"generally while working in state organ or legal person"**. The comment to the Criminal Code of RS does not provide any additional explanation, but it is clear from the wording of the phrase that embezzlement can be committed in the private sector as well, as it is stated that embezzlement can be committed in a "legal person", which can undoubtedly be under private ownership.

Article 23 of the Convention deals with the laundering of proceeds of crime. In 2004 Bosnia and Herzegovina adopted the Law on Prevention of Money-Laundering, which established the "Financial Intelligence Department" and set forth the obligations of all organs with respect to the prevention of money laundering. The Law provides for certain infractions, while the criminal codes in BiH provide for the criminal offence of money-laundering.

Article 24 of the Convention deals with concealment as a separate criminal offence. The Criminal Code of BiH does not recognise concealment as a separate criminal offence, but defines the criminal offence of "rendering assistance to the perpetrator after the commission of a criminal offence", while the entity criminal codes do recognise concealment as a separate criminal offence.

Article 25 of the Convention deals with obstruction of justice as a separate criminal offence. The Criminal Code of BiH recognises the criminal offences of "Tampering with Evidence" (Article 236) and "Obstruction of Justice" (Article 241), while the entity criminal codes

recognise the criminal offences of "Attacking an Official in Execution of his Official Duty" and "Giving False Statements". It can be said that this Article of the Convention is covered by the domestic laws.

Article 26 of the Convention deals with liability of legal persons, which may be criminal, civil or administrative. As for civil liability, it is regulated in substantive regulations, e.g. the Law on Obligations, while criminal liability of legal persons was introduced to the domestic criminal legislation in 2003. Chapter XIV of the Criminal Code of BiH regulates criminal liability of legal persons. So, according to Article 131 of the Criminal Code of BiH, the following types of punishment may be imposed upon the legal persons: fines, seizure of property, and dissolution of the legal person.

Article 27 – Participation and attempt under the Convention are institutions recognised in the general provisions of the criminal law, which can be categorised as attempt or participation in any capacity such as an accomplice, instigator or assistant.

Article 28 of the Convention deals with knowledge, intent and purpose as elements of an offence. According to the domestic criminal legislation, these are termed: mental capacity, intent (direct or indirect) and negligence (advertent or inadvertent).

Article 29 of the Convention refers to statute of limitations (for criminal prosecution and execution of a sentence) as well as to accessory measures and security measures as criminal sanctions in accordance with the domestic criminal legislation. The principle of statute of limitations does exist in the criminal legislation of BiH and it is provided for in Article 19 of the Criminal Code of BiH, according to which criminal prosecution and execution of a sentence are not subject to the statute of limitations for criminal offences of genocide, crimes against humanity and war crimes, or for other criminal offences that, pursuant to international law, are not subject to the statute of limitations. However, this is only a possibility provided for in the Convention, and no change to the national legislation is required.

Article 30 of the Convention requires the States Parties to introduce the complete system of criminal law (substantive law, adjective law and the procedure for execution of criminal sanctions). On the other hand, this Article emphasises the obligation of a State Party to establish procedures for the disqualification of persons convicted of offences established in accordance with this Convention from holding public office and holding office in an enterprise owned in whole or in part by the State. Article 73 of the Criminal Code of BiH stipulates that the security measure (as an accessory criminal sanction) of ban on carrying out a certain occupation, activity or duty may be imposed for criminal offences against official or other responsible duty. This security measure may be imposed for a term which exceeds one but does not exceed ten years, with the provision that the time spent serving the punishment of imprisonment shall not be credited towards the term of this security measure.

Article 31 of the Convention deals with freezing, seizure and confiscation. Article 74 of the Criminal Code of BiH provides for forfeiture (which may correspond to seizure), Article 111 provides for ways of confiscating material gain acquired through the perpetration of a criminal offence, while Articles 133 and 140 provide for the procedure for undertaking the above institutions contained in the general provisions of the criminal law. The Criminal Code of BiH, however, does not contain provisions regarding "freezing", but this may correspond to what is referred to in Articles 65 through 74 of the Criminal Procedure Code of BiH as

"temporary forfeiture of objects and property". The institution of confiscation does not exist in the domestic criminal legislation (though it did exist in the criminal legislation of the former SFR Yugoslavia).

Article 32 of the Convention deals with protection of witnesses, experts and victims. There are Laws on Protection of Witnesses in BiH which constitute the legal framework required by this Article of the Convention.

Article 33 of the Convention lays out rules for the protection of any person who reports to the competent authorities any facts concerning offences established in accordance with the Convention. Articles 214 and 215 of the Criminal Procedure Code of BiH provide for the reporting of facts concerning criminal offences by citizens, but there are no provisions for protection of these persons.

Convention urges the State Party to consider incorporating into its domestic legal system appropriate measures to provide protection against any "unjustified treatment" for any person who reports "in good faith and on reasonable grounds" to the competent authorities against alleged perpetrators of offences established in accordance with this Convention. In view of this formulation, the Criminal Procedure Code will have to undergo certain changes.

Article 34 of the Convention deals with the consequences of acts of corruption with respect to legal proceedings to annul or rescind a contract, withdraw a concession, etc. The Law on Obligations provides for the basic institutions with respect to conclusion, rescission and annulment of a contract, not as direct consequences of acts of corruption, but as consequences of fraud as defect in consent. Articles 65 and 103 deal with annulment of a contract (contract that is contrary to mandatory regulations; provisions of the Criminal Code qualifying criminal offences are mandatory regulations, because parties do not have a free will to decide on that).

Article 35 of the Convention deals with compensation for damage. Chapter XVII of the Criminal Procedure Code of BiH provides for the possibility of filing a claim under property law against the perpetrator. According to the provisions of the Law on Obligations one can also lodge a damages claim (in contentious action).

Article 36 of the Convention requires that each State Party should ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. The Draft Law on Anti-Corruption Combat provided for the existence of such a body. The Convention requires that such body or bodies or persons should be "without any undue influence". Such persons or staff of such body or bodies should also have the appropriate training and resources to carry out their tasks. All these elements require that this body or bodies should be granted the necessary independence of all other authorities. This requirement may pose the first challenge to the national authorities after ratification of the Convention.

Article 37 of the Convention requires that certain changes should be made to the legislations of the States Parties with respect to cooperation with law enforcement authorities, mitigating punishment, introduction of the opportunism principle into the criminal legislation with respect to prosecution of perpetrators as well as the principle of granting immunity from prosecution to a person who provides substantial cooperation in the investigation. All these principles have already been incorporated into the national criminal and adjective law. The

Convention suggests that the States Parties should consider entering into bilateral or multilateral agreements or arrangements concerning these issues.

Article 38 of the Convention deals with cooperation between national authorities with respect to investigation and prosecution of criminal offences established in accordance with this Convention. This obligation is of a declaratory nature.

Article 39 of the Convention specifies that each State Party shall take such measures as may be necessary to encourage cooperation between national investigating and prosecuting authorities and entities of the private sector, relating to matters involving the investigation and prosecution of the perpetrators of offences established in accordance with this Convention.

Article 40 deals with bank secrecy. The Convention requires that Each State Party should ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws. Article 72 of the Criminal Procedure Code of BiH ("Order Issued to a Bank or to Another Legal Person") stipulates that if there are grounds for suspicion that a person has committed a criminal offence related to acquisition of material gain, the preliminary proceedings judge may at the motion of the Prosecutor issue an order to a bank or another legal person performing financial operations to turn over information concerning the bank accounts of the suspect or of persons who are reasonably believed to be involved in the financial transactions or affairs of the suspect, if such information could be used as evidence in the criminal proceedings. Likewise, Paragraph 5 of this Article provides for the possibility of temporary seizure of funds deposited in a bank account.

In addition, Article 116, Paragraph 2 of the Criminal Procedure Code (dealing with "special investigative actions") stipulates that the prosecutor shall have "access to computer systems and computerized data processing".

Article 41 of the Convention deals with criminal record. Each State Party is required to adopt such legislative or other measures as may be necessary to take into consideration any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with the Convention. This is a combination of provisions on criminal record and provisions on meting out penalties and, as such, is recognised in the criminal legislation of BiH.

Article 42 of the Convention deals with jurisdiction over the offences established in accordance with the Convention and lays down general rules on applicability of criminal legislation. Article 11 of the Criminal Code of BiH stipulated that the criminal legislation of BiH shall apply to anyone who perpetrates criminal offence within its territory. Article 12 provides for the applicability of the criminal legislation of BiH to criminal offences perpetrated outside the territory of BiH and stipulates in Paragraph 1, Item c) that the criminal legislation of BiH shall apply to anyone who, outside of the territory of BiH, perpetrates a criminal offence "which Bosnia and Herzegovina is bound to punish according to the provisions of international law and international treaties or intergovernmental agreements". Likewise, Article 42 of the Convention requires each State Party to take such measures as may be necessary to establish its jurisdiction over the offences established in

accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

Chapter IV International cooperation

Article 43 deals with international cooperation with respect to the implementation of the Convention. Chapter XXX of the Criminal Procedure Code of BiH lays down the rules relating to the procedure to render international legal aid and to enforce international agreements in criminal matters, so it can be said that the domestic legislation is already "ready" to act in accordance with the provisions of this Article of the Convention.

Article 44 of the Convention deals with extradition. This article applies to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party. However, there is an exception to this provision. Notwithstanding the abovementioned provision, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law. Likewise, it is interesting that the Convention provides for a possibility of using the Convention as a legal basis for extradition, in case the States Parties in question do not have a bilateral extradition treaty. In addition, this Article provides for the possibility of taking a person whose extradition is sought and who is present in its territory into custody if this can expedite the extradition procedure. Finally, the Convention contains rules relating to the situation when the extradition is unduly deferred as well as to the situation when the extradition is delayed even though there is an effective ruling. Of course, the Convention lays down the rules in relation to the situation when the requested State Party, notwithstanding all the formal conditions, may refuse a request for extradition if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions. Chapter XXXI of the Criminal Procedure Code of BiH contains provisions for the procedure to extradite suspects or accused and convicted persons, while Article 414 of the said Law states that the extradition procedure shall be carried out under the provisions of this Code, unless otherwise determined by the legislation of Bosnia and Herzegovina or an international agreement. Article 415 of the Criminal Procedure Code contains the following requirements for extradition: that a person whose extradition has been requested is not a citizen of Bosnia and Herzegovina; that the offence on the basis of which the extradition has been requested was not committed in the territory of Bosnia and Herzegovina, against it or its citizen; that the offence on the basis of which the extradition has been requested constitutes a criminal offence under the domestic legislation as well as under the legislation of the state in which it was committed; that the offence on the basis of which the extradition has been requested is not a political or military criminal offence; that there are sufficient evidence for a suspicion that the alien whose extradition has been requested committed a criminal offence or that there is a valid verdict; that the extradition of an alien has not been requested for the following purposes: criminal prosecution or punishment on the grounds of his race, sex, national or ethnic origin, religious belief or political views and that his extradition has not been requested on the grounds of a criminal offence that carries a death sentence under the legislation of the country which has requested the extradition unless the state which has requested the extradition has granted a guarantee that no death sentence shall be pronounced

or executed. Finally, Article 418 of the Criminal Procedure Code of BiH provides for conditions for detaining a person whose extradition has been requested (the so-called extradition detention).

Article 45 of the Convention deals with transfer of persons sentenced for offences established in accordance with the Convention in order that they may complete their sentences in other countries. Article 410 of the Criminal Procedure Code of BiH deals with the procedure for execution of the verdict rendered by foreign court.

Article 46 of the Convention deals with mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention. The Article states the types of assistance, the obligation of the State Party to designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance, what a request for mutual legal assistance should contain, and what the procedure for rendering mutual legal assistance looks like. As already mentioned in paragraph dealing with Article 43 of the Convention, Chapter XXX of the Criminal Code of BiH governs the procedure to render international legal aid and to enforce international agreements in criminal matters

Article 47 of the Convention deals with transfer of criminal proceedings. According to this Article, States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution. Article 413 of the Criminal Procedure Code provides for the procedure in cases when a foreign state requests from BiH to take charge of the criminal prosecution.

Article 48 of the Convention deals with law enforcement cooperation. Of course, the Convention encourages the States Parties to cooperate more closely with one another to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention.

Article 49 of the Convention deals with joint investigations and **Article 50** deals with special investigative techniques. These two articles are of a rather technical (criminological) nature and they both make recommendations to States Parties as to how they should effect this cooperation.

Chapter V Asset recovery

Article 51 reiterates that the return of assets is a fundamental principle of the Convention.

Article 52 of the Convention deals with prevention and detection of transfers of proceeds of crime. This Article, in fact, reinforces Article 14 of the Convention, which deals with measures to prevent money-laundering. Article 52 urges the States Parties to take such measures as may be necessary to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. In

addition, the States Parties are urged to prevent the establishment of banks that have no physical presence (off-shore banks) and that are not affiliated with a regulated financial group, while other States Parties are urged to refrain from establishing relations with such banks. Finally, any public official having a financial account in a foreign country is required to report that relationship to appropriate authorities in his or her country of origin. As far as the domestic legislation is concerned, it can be said that this Article of the Convention corresponds (besides laws governing the establishment and functioning of banks and financial dealings) to the Law on Conflict of Interest in the Governmental Institutions of BiH and, to a certain extent, to the Election Law. According to the Law on Conflict of Interest in the Governmental Institutions of BiH, public officials must not use the public duty for the purpose of achieving unfair personal goals, i.e. illicit enrichment. On the other hand, the Election Law of BiH requires every candidate and elected candidate (in parliaments, but not in the executive) to submit to the Election Commission of BiH, on a special form, a signed statement on his or her total property situation, at the beginning of his or her mandate. However, this is the only obligation that candidates and elected candidates are required to fulfil, so nobody checks their total property situation at the end of their mandates. TI BiH has recently launched an initiative for making changes to the Election Law of BiH requiring every candidate and elected candidate to submit to the Election Commission of BiH, on a special form, a signed statement on his or her total property situation during his or her mandate (in case of high property incomes) and obligatorily at the end of his or her mandate and two years after the expiry of his or her mandate.

Article 53 of the Convention deals with measures for direct recovery of property requiring each State Party to: (a) permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention; (b) take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and (c) take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention. The Law on Contentious Procedure of BiH contains rules relating to the procedure for, inter alia, recovery of assets, while the Criminal Procedure Code of BiH contains rules according to which the accused must recover material gain acquired by the perpetration of a criminal offence (through cooperation with law enforcement authorities or as an obligation when imposing a suspended sentence, etc.).

Articles 54 through 59 of the Convention contain rules that each State Party must implement to enhance international cooperation in confiscation and recovery of property confiscated in another State Party, with respect to criminal offences of corruption established in accordance with the Convention. Article 54 deals with mechanisms for recovery of property through international cooperation in confiscation, Article 55 deals with international cooperation for purposes of confiscation, Article 56 deals with special cooperation (situation when one State Party forwards information on proceeds of offences established in accordance with this Convention to another State Party), Article 57 deals with return and disposal of assets (how property confiscated by a State Party is returned to its prior legitimate owners in another State Party), Article 58 deals with financial intelligence unit (each State Party is urged to consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions). Article 59 encourages each State Party to conclude bilateral or multilateral

agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.

Bosnia and Herzegovina is yet to make changes to the domestic legislation with respect to the abovementioned issues and it is expected to sign or accede to the regional treaties in connection with implementation of this Chapter of the Convention.

Article 60 of the Convention deals with training and technical assistance between State Parties. This Article requires each State Party to develop specific training programmes for its personnel responsible for preventing and combating corruption with respect to investigations; strategic anticorruption policy; training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention; evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector; training in methods used in protecting victims and witnesses who cooperate with judicial authorities; and training in national and international regulations and in languages for officials who perform anticorruption activities in their work. In addition, this Article encourages States Parties to afford one another the widest measure of assistance (in terms of financial and educational issues) in their respective plans and programmes to combat corruption.

Article 61 deals with collection, exchange and analysis of information on corruption. Each State Party is encouraged to use the same methods and criteria in statistical analysis of the data on corruption, etc.

Article 62 of the Convention deals with other measures relating to implementation of the Convention through economic development and technical assistance. More specifically, each State Party is encouraged to take measures conducive to the optimal implementation of this Convention to the extent possible, through international technical and financial cooperation.

TRANSPARENCY INTERNATIONAL BiH

Mutual legal assistance

In order to point out the overall significance of mutual legal assistance, I find it very important to emphasise the fact that in the course of one calendar year around 10 000 requests for mutual legal assistance are received through the Ministry of Justice of Bosnia and Herzegovina, as a central authority for receiving requests for mutual legal assistance.

This assistance is realised in different ways and consists of a wide range of actions and activities undertaken by a competent authority of one state in accordance with the request made by a competent authority of another state. Basically, mutual legal assistance consists of the delivery of certain documents, hearing of witnesses, provision of evidentiary items, investigation, submission of evidence, etc. as well as of more complicated procedures such as transfer of criminal proceedings, extradition and execution of the verdict rendered by foreign court. Mutual legal assistance is afforded at the request of the requesting state which, besides all the obligatory elements, must contain a description of the assistance sought.

Mutual legal assistance is defined in the domestic legislation as well as in international treaties, whether bilateral or multilateral (conventions). In terms of criminal matters established in accordance with the UN Convention against Corruption, mutual legal assistance is defined in the Criminal Procedure Code.

The UN Convention against Corruption is one of the rare conventions that has defined manners of rendering mutual legal assistance so carefully and exhaustively. It is important to emphasise that this Convention provides for extradition procedures even for the states whose legislation does not make provisions for such procedures, i.e. the states that have not concluded any bilateral or multilateral treaties or agreements on extradition. This Convention has taken over and improved the general standards established in accordance with international treaties relating to mutual legal assistance.

The UN Convention against Corruption gives special attention to extradition of suspects or accused and convicted persons without interfering with the provisions of the domestic legislation of a State Party. In connection with that, I want to point to the provisions of the Criminal Procedure Code of BiH with respect to the extradition procedure. This procedure is defined in detail in Chapter XXXI (Articles 414 through 431). Article 415 sets down the requirements for extradition from Bosnia and Herzegovina to another state. These are as follows:

- that a person whose extradition has been requested is not a citizen of Bosnia and Herzegovina;
- that a person, whose extradition has been requested, has not been granted an asylum in Bosnia and Herzegovina, or that the person in question is not in the process of seeking asylum in Bosnia and Herzegovina;
- that the offence on the basis of which the extradition has been requested was not committed in the territory of Bosnia and Herzegovina, against it or its citizen; etc.

Article 415 contains six more requirements for extradition.

The first requirement for extradition from BiH stating "that a person whose extradition has been requested is not a citizen of BiH" constitutes the most common reason why BiH refuses the requests of foreign states for extradition of a person who committed a criminal offence in the requesting state and is present in the territory of BiH at the moment when the request is made.

No citizen of BiH, who is also a citizen of another state, may be extradited to the latter state even if he or she has a permanent residence in this state and committed a criminal offence on its territory. In such cases, the Court of BiH issues a decision establishing that the conditions for extradition of this person have not been met. This decision is then forwarded to the requesting state along with information that the requesting state may hand over criminal prosecution of the person in question to a competent authority in BiH.

What poses a problem in connection with the said decision is that most states have legislations that provide for strict limitations to the transfer of criminal prosecution to another state with respect to their own citizens as well as in the procedures for serious criminal offences punishable by a sentence of imprisonment of ten years or more.

The abovementioned requirements indicate that a person with a dual citizenship who commits a serious crime in one of the states of his or her citizenship might remain unpunished if he or she escapes to the other state of his or her citizenship upon commission of a serious crime.

This often happens in practice, which inevitably poses the question of how to solve this issue.

In one of these cases, a serious crime was committed in the territory of Serbia & Montenegro and the perpetrator surrendered to the competent authority in BiH upon commission of the crime. BiH sought evidence from Serbia & Montenegro through mutual legal assistance, without formally handing over the prosecution of the perpetrator. Upon receipt of the evidence, the competent court in BiH ordered detention of the suspect. The same court initiated a criminal procedure against the suspect.

This is one of the solved cases in the situations when a suspect has been prosecuted despite lack of appropriate agreements or arrangements between the two states. However, a certain number of cases remain unsolved.

This issue is partly solved in the European Convention on the Transfer of Proceedings in Criminal Matters as well as in the UN Convention against Corruption, which BiH is expected to accede to in the near future (the accession procedure is underway).

The problem is solved in such a way that the state which cannot execute extradition takes upon itself the obligation to prosecute the person whose extradition is sought.

We would use this opportunity just to raise this problem with the intention of solving it in future. We would also like to emphasise the need for better coordination between the authorities of BiH which participate in the rendering of mutual legal assistance, especially in extradition procedures. This particularly applies to the cooperation of the Ministry of Justice of BiH with the Court and Prosecution of BiH, Ministry of Security of BiH (especially with

INTERPOL) as well as with entity ministries of justice, ministries of the interior and prosecution offices.

We would like to emphasise that the Ministry of Justice of BiH puts much effort to improve cooperation with the institutions and authorities of BiH participating in the rendering of mutual legal assistance. To this end, the Ministry of Justice is preparing a special book entitled "Mutual Legal Assistance" which will give an overview of all international treaties dealing with mutual legal assistance that apply to BiH as well as explanations and guides on how to seek and render mutual legal assistance.

Although it has not been ratified yet, the UN Convention against Corruption will be published in the said book and the instructions on rendering mutual legal assistance will apply to this Convention too.

MINISTRY OF JUSTICE
Assistant minister
Mr Nikola Sladoje

Prevention of money laundering and the banking sector

Ladies and Gentlemen,

My name is Jasmin Šlaku. I work in "Raiffeisen bank dd BiH" as a coordinator for harmonisation of the Bank's rules with the generally accepted rules relating to money laundering and terrorism funding, i.e. the responsible person in the Bank for prevention of money laundering and terrorism funding.

I would like to thank Transparency International for organising this conference and I have to say it is a great honour and pleasure to be invited to participate in this conference, which only goes to prove that the efforts made by Raiffeisen Bank in this field are recognised and appreciated.

The topic of my presentation today is "Prevention of Money Laundering and the Banking Sector".

At the beginning, I would like to give you a short chronological overview of the legislation adopted in Bosnia and Herzegovina with respect to prevention of money laundering.

The first piece of legislation dealing with this issue, namely the Law on Prevention of Money Laundering of FBiH, was adopted in March 2000. This is practically the date when BiH started to implement activities relating to prevention of money laundering, which is not a considerable delay given that Great Britain adopted such a law in 1994.

Republika Srpska adopted the same law in 2001, while the Law on Prevention of Money Laundering was adopted in Brčko District only in 2003.

In the meantime, in December 2002 and March 2003, the RS Banking Agency and FBiH Banking Agency, which supervise banks in BiH, issued the Decisions on Minimum Standard Activities of Banks with Respect to Prevention of Money Laundering and Terrorism Funding, in accordance with their respective Laws on Banks.

It is also important to mention the Laws on Banks of FBiH and RS, whose provisions on prevention of money laundering and terrorism funding underwent certain changes and amendments at the initiative of the High Representative for BiH. These changes and amendments were subsequently adopted by the respective entity parliaments.

"Money laundering" was introduced as a new criminal offence to the criminal legislation of BiH, RS, FBiH and Brčko District in 2003.

It is important to mention that both physical and legal persons (as well as an employee in a legal person) may be found liable for money laundering. In case of money laundering, the following types of punishment may be imposed upon the legal persons: fines and dissolution of the legal person.

Finally, the last piece of legislation is the roof Law on Prevention of Money Laundering of BiH, which came into force on 28 December 2004 and nullified the laws on prevention of money laundering of the entities and Brčko District.

The primary reasons for adoption of the new Law on Prevention of Money Laundering are the international obligations of BiH and a well-known phenomenon of fictitious firms which move from entity to entity taking advantage of the limited territorial investigation authority of investigative bodies. Before the new Law was adopted, money laundering was within the jurisdiction of: Financial Police in FBiH, Department for Prevention of Money Laundering in RS, and Tax Administration in Brčko District. According to the new Law on Prevention of Money Laundering, combat against money laundering was transferred to the state level with the establishment of the Financial Intelligence Department (FID) within the State Investigation and Protection Agency (SIPA). Banks and other actors are required to submit to this Department reports on effected transactions under the Law on Prevention of Money Laundering.

The Financial Intelligence Department is a body with all police authority in accordance with the existing regulations. This represents a departure from the former practice where the Law was enforced by an administration authority within the relevant ministry of finance. I feel that the change in the authority to which transactions are reported is a better model right now, especially having in mind the widespread crime in BiH.

As a result of all the efforts BiH has made since the beginning of the current year, in June 2005 Bosnia and Herzegovina became a member of the **EGMONT Group (intelligence service in charge of combating money laundering).**

All the aforementioned facts have made commercial banks, including "Raiffeisen bank dd BiH", approach the implementation of the Law on Prevention of Money Laundering in a very serious way.

As mentioned before, bank is just one of the actors to which the Law on Prevention of Money Laundering applies, but I think it is the most important one because the proceeds of crime (such as tax evasion, customs fraud, illicit drugs production and trade, human trafficking, illicit trade in weapons, etc.) are supposed to be "laundered" or legalised, which can subsequently be used to acquire material gain through purchase of goods, services, real estate, movable property, rights, etc.

Banks are one of the actors that are obliged to bring their business acts and procedures in line with the existing laws and their implementing regulations in BiH so that they contain the following basic policies:

- Client acceptability policy;
- Client identification policy;
- Policy on permanent monitoring of accounts and transactions;
- Policy on managing risk from money laundering and terrorism funding.

Client acceptability policy makes clear what clients are acceptable for the Bank.

Client identification policy gives a clear list of the documentation that the client is required to submit, checks its validity and determines the period within which this documentation has to be updated.

Policy on permanent monitoring of accounts and transactions involves constant observation of the client's transactions and reporting of these transactions to the competent authorities. In this particular case, reporting is done as part of the Bank's reports to the Financial Intelligence Department.

Policy on permanent monitoring of accounts and transactions.

These policies lay down the obligations of responsible persons in a bank, internal audit and other organs of the bank, obligations with respect to the engagement of external independent auditors as well as obligations with respect to the establishment of appropriate departments /groups within the bank, etc.

As a rule, all commercial banks in BiH, including "Raiffeisen bank dd BiH", have already established their Departments for Controlling the Harmonisation with Relevant Regulations and Preventing Money Laundering.

The obligations of such departments, which are elected by the banks' supervisory boards, are as follows:

1. regular reporting to competent authorities, in accordance with relevant laws and regulations, about all transactions exceeding the prescribed amount as well as all related and suspicious transactions;
2. reception on a daily basis of reports on clients' suspicious activities;
3. giving orders to the employees with respect to the implementation of procedures established in accordance with relevant laws, regulations and programmes, and reporting to the bank's management and supervisory board;
4. monitoring of internal procedures as well as contacts with foreign authorities for the purpose of inspecting suspicious activities;
5. harmonisation of bank's procedures and internal acts with relevant laws;
6. education of employees;
7. submission of reports to the bank's management and supervisory board about the bank's actions and its harmonisation with the requirements for prevention of money laundering and terrorism funding as well as about the measures undertaken against suspicious clients at least once every three months;
8. assessment of the adequacy of the existing Programme, policies and procedures at least once a year and submission of recommendations to the bank's supervisory board on how to update or upgrade them;
9. provision of necessary assistance in the activities conducted by the bank's internal audit;
10. carrying out internal investigations of the bank's employees who neglected their duties in this field;
11. handling other banking frauds;
12. bank secrecy and the employees' attitude towards it.

These departments would have to be independent in decision-making processes. This is ensured by the fact that responsible persons in these departments are elected by supervisory boards and not the managements of the banks.

One can ask why this is done by banks, whether this is the task of governmental authorities and whether this is a common practice in other countries. In my opinion, reasons why banks are required to do so are as follows:

1. The Law on Prevention of Money Laundering gives banks the most important role in preventing money laundering. Should banks fail to comply with the provisions of this Law, sanctions may be imposed against them.
2. Notwithstanding the previous above reason, "Raiffeisen bank dd BiH" also has specific obligations to the Raiffeisen Group with headquarters in Vienna, so the failure to apply the Group's standards may result in risk for the whole Group.
3. Last but the most important reason is REPUTATION RISK.

At the end of my presentation I would like to give you an overview of the problems we encounter:

- Increased running costs due to the increase in the number of employees and improvement of IT support and purchase of the new software enabling better monitoring of suspicious activities on client's part.
- Lack of harmony between laws and their implementing regulations.
- Chaotic market conditions, grey economy, corruption, etc., which the government attempts to solve through commercial banks because they represent the best and the most well-ordered part of the BiH economy.

By way of illustration, Raiffeisen Bank has an internal list of around 1 700 legal persons which was made in accordance with the request/order of the competent authorities (financial police, tax administration, courts, public prosecution offices, FID, etc.), which suggests that in most cases banks are confronted with the laundering of money originating from tax evasion.

RAIFFEISEN BANK DD BiH
Jasmin Šlaku

Recovery of illegally acquired assets – freezing, seizure and confiscation

In 2003 Bosnia and Herzegovina conducted a reform of criminal legislation. New Criminal Code and Criminal Procedure Code entered into force in the whole of Bosnia and Herzegovina (in the entities and Brčko District) between 1 March 2003 and 1 August 2003.

I am mentioning this because it is connected with the presentation of the Public Prosecutor's Office of Bosnia and Herzegovina at this conference. It is important to say that, under Article 392 of the Criminal Procedure Code of Bosnia Herzegovina, the Prosecutor is obliged to collect evidence during the procedure and examine the circumstances that are important for the establishment of the property gain obtained by commission of a criminal offence, which is established in a criminal procedure ex officio.

According to Article 394 of the Criminal Procedure Code of BiH, the Court shall establish the value of property gain by a free estimate if the establishment would be linked to disproportional difficulties or a significant delay of the procedure. This means that the **legal grounds for forfeiture**, which is contained in the establishment of the criminal offence as well as in the fact that property gain was obtained, should be established indubitably, and evidence for establishment of the value of property gain are not presented. This provision removes obstacles in the process of forfeiting property gain in a simple way. Article 395 of the Criminal Procedure Code of BiH stipulates that when the forfeiture of property gain obtained by commission of criminal offence is a possibility, the Court shall ex officio and under the provisions applicable to the judicial enforcement procedure define **temporary security measures**. The Court shall ex officio establish temporary security measures by means of a decision. When conditions are met and when forfeiture of property gain is allowed under the law, these actions should as a rule be undertaken in early stages of the criminal procedure or in the investigation phase. The most common temporary security measures are ban on transfer of property, forfeiture and depositing of cash, ban on further payments from the suspect's or accused person's bank account. The identical security measure is provided for against legal persons (Article 386 of the Criminal Procedure Code of BiH) when the criminal proceedings are conducted against a legal person.

Article 396 of the Criminal Procedure Code of BiH stipulates that **the forfeiture of property gain obtained by commission of criminal offence may be pronounced by Court in a verdict by which the accused is declared guilty**, in a ruling on application of a correctional measure or in a verdict by which it is established that the accused committed a criminal offence in the state of mental incompetence having in mind that a damaging consequence did occur.

This means that property gain obtained through commission of a criminal offence is forfeited by Court in a verdict by which it is established that a criminal offence was committed. Seizure of property gain from the perpetrator is mandatory. However, protection of the interests of the injured party has the precedence, so the property gain obtained through commission of criminal offence shall be taken away from the perpetrator only if there are no conditions for awarding the claim under property law for repossession of items obtained

through a criminal offence to the injured party or if the property gain obtained through commission of criminal offence exceeds the awarded property claim.

By way of a reminder, seizure of property gain obtained through commission of criminal offence is not a criminal sanction, but a special criminal measure. The institution of seizure of property gain obtained through commission of criminal offence is based on one of the main legal principles – that **nobody can keep the property gain obtained through commission of criminal offence**.

However, the Criminal Procedure Code of BiH stipulates that before the final decision of the Court on seizure of property gain and articles obtained through commission of criminal offence, the Prosecutor may demand that articles and property should be secured for the purpose of subsequent permanent seizure, which is regulated in Articles 65 through 72 of the Criminal Procedure Code of BiH. Moreover, the Court may, on the motion of the Prosecutor, issue a decision ordering a legal or physical person to temporarily suspend a financial transaction that is suspected to be a criminal offence or intended for the commission of the criminal offence, or suspected to serve as a disguise for a criminal offence or disguise of a gain obtained by a criminal offence (this is most frequently the case with money laundering and the like) and that the financial resources and cash amounts should be temporarily seized and deposited in a special account and kept until the end of the proceedings (Article 72 of the Criminal Procedure Code of BiH). Article 73 of the abovementioned Law stipulates that the Court may, upon the motion of the Prosecutor, issue a temporary measure seizing the illicitly gained property or arrest in property to prevent any use, transfer or disposal of such property. For the purpose of this Article, property shall mean money, valuable objects as well as any other property gain obtained through commission of criminal offence, including real estate.

Article 111 of the Criminal Code of BiH provides for ways of seizing property gain obtained through commission of criminal offence. In terms of this Article, property gain means all the money, valuable objects and every other material gain (objects, rights, movable property and real estate) obtained through commission of criminal offence.

This Article also provides for seizure of the property gain obtained through commission of criminal offence from the third person to whom it has been transferred without compensation or with a compensation which does not correspond to the real value, if the third person knew or should have known that the property gain had been obtained through commission of criminal offence. Provisions contained in Paragraphs 2 and 3 of the same Article represent a novelty in the criminal legislation of Bosnia and Herzegovina. They stipulate that if proceeds of a criminal offence have been intermingled with property acquired from legitimate sources, such property shall be liable to confiscation not exceeding the assessed value of the intermingled proceeds. This provision is in line with the UN Convention against Transnational Organised Crime, which Bosnia and Herzegovina ratified on 5 February 2002.

Finally, Article 110 of the Criminal Code of Bosnia and Herzegovina, which defines the legal basis for confiscation of property gain obtained through commission of criminal offence, stipulates in Paragraph 3 that the court may also **confiscate the gain obtained through commission of criminal offence 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 obtained legally.**

I am emphasising this provision of the Criminal Code of Bosnia and Herzegovina because it gets us back to the beginning of my presentation and the discussion about adoption of the Law on Seizure of Illicitly Obtained Property. This provision, which stipulates that the Court may order seizure of the gain obtained through commission of criminal offence in a separate proceeding, represents a novelty in the criminal legislation of Bosnia and Herzegovina. In connection with this, certain dilemmas arise with respect to the legal basis for and manner of its application, especially having in mind that nobody can keep the property gain obtained through commission of criminal offence. The burden of proof that the gain was obtained legally would lie with the owner or possessor of this gain. The Criminal Procedure Code of BiH does not contain provisions that would apply to this special procedure of seizing property gain.

As Bosnia and Herzegovina has been signatory to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime since 30 March 2004, according to which seizure of property gain may be executed on any property that the property gain obtained through commission of criminal offence has been turned into, and even on legally obtained property, in the value that corresponds to the property gain obtained through commission of criminal offence, it will be necessary in future to enable application of the provision of the Criminal Procedure Code of BiH which stipulates that the seizure of the gain obtained through commission of criminal offence may be ordered in a separate proceeding if there is a probable cause to believe that the gain derives from a criminal offence.

Having in mind the abovementioned provisions of the Criminal Code and Criminal Procedure Code of BiH, it is clear that the existing legislation in Bosnia and Herzegovina facilitates the undertaking of measures for seizure of property gain obtained through commission of criminal offence and that criminal investigation involves the undertaking of all necessary measures aimed at detection, finding and temporary seizure of such gains, so as to ensure that the property gain does not remain in the possession of the perpetrator. It remains an open question for Bosnia and Herzegovina through which procedure and how to seize property obtained directly or indirectly through commission of criminal offence which was subsequently transferred and transformed as well as how to seize the proceeds, capital and economic gain obtained on the basis of such property.

As far as the problem of seizing illegally obtained property is concerned, I would emphasise in short that discussions were held in both the media and the expert circles in Bosnia and Herzegovina about three draft versions of the Law on Seizure of Illicitly Obtained Property. Two draft versions of this law were prepared by international experts and one was prepared by the Social Democratic Party (SDP). All the discussions about these three draft versions raised the following questions and dilemmas:

1. Through which procedure should the illegally obtained property be seized (administrative, contentious or criminal – which would also determine the institution to conduct the procedure, course and timeframe of the procedure, the type of decision to be issued by the person in charge of conducting the procedure as well as the appeal procedure). The Public Prosecutor's Office of BiH thinks that these could be either contentious or criminal procedure only.
2. Who would have the authority to initiate the procedure – Public Prosecutor or Public Attorney? Who would conduct financial investigations to determine the existence and extent of the property acquired through illegal activities. In Ireland, for example, there is the Criminal Assets Bureau established in accordance with a special law in 1996,

with which all law enforcement agencies as well as the Government and the Irish Bar are obliged to cooperate. The staff of the Criminal Assets Bureau is appointed by the Attorney General. The Public Prosecutor's Office of BiH thinks that a similar solution would be the most suitable for Bosnia and Herzegovina.

3. Who will be in charge of safekeeping, managing and ultimately selling the frozen or seized property?

Bosnia and Herzegovina and legal experts in Bosnia and Herzegovina will have to address the problems surrounding the adoption of this Law or establishment of a special procedure by which illegally obtained property shall be seized in accordance with the existing provision of the Criminal Code of Bosnia and Herzegovina, and even more so because Bosnia and Herzegovina identified adoption of the Law on Seizure of Illicitly Obtained Property and establishment of the Agency for Management of the Temporary Seized Property as long-term objectives in its Draft Strategy for Joint Financial and Criminal Investigations

Finally, I would like to emphasise that by 30 November 2005, the Public Prosecutor's Office of BiH had brought charges against a total of 26 persons. Twenty of these persons had been passed judgment on, two are still being tried before the Court of Bosnia and Herzegovina, while the Court of Bosnia and Herzegovina transferred authority for the remaining four persons to other courts in Bosnia and Herzegovina.

CHIEF PROSECUTOR
Marinko Jurčević

TRANSPARENCY INTERNATIONAL
9th December
UN International Anti-Corruption Day

STABILITY PACT ANTI-CORRUPTION INITIATIVE (SPAI)

REGIONAL SECRETARIAT LIAISON OFFICE (RSLO)

UN Convention against Corruption

Sarajevo, 9 December 2005

> *"Although its impacts are perhaps more visible today in a globalising world, corruption is not a new problem […]. We do not expect to solve it tomorrow. I do, however, expect the international community to rise to the challenge of dealing more effectively with this global challenge, and in this I am very much an optimist."*
>
> *(Antonio Maria Costa, United Nations Under-Secretary-General)*

Today, on 9 December 2005, we are celebrating the second anniversary of the signing of the United Nations Convention against Corruption, also known as the Mérida Convention – entitled so because of the town in Mexico where this first global anticorruption instrument was signed by 111 countries at an international conference that was held on 9 and 10 December 2003.

After more than 30 ratifications, in accordance with Article 68, Paragraph 1 of the Convention, this international document will enter into force on 14 December 2005.

Bosnia and Herzegovina signed the UN Convention against Corruption in the year that marked the 60th anniversary of the United Nations.

The UNCAC is unique as compared with other conventions not only in its global coverage but also in the extensiveness and detail of its provisions. In its eight Chapters and 71 articles, the UNCAC obliges the States Parties to implement a wide and detailed range of anticorruption measures affecting their laws, institutions and practices.

The Convention lays particular emphasis on the necessity of establishing special anticorruption agencies, enhancing transparency of political party funding and election campaigns, adopting codes of ethics for all categories of civil servants and public officials, and defining public procurement procedures. Unlike penal and repressive policies of the

States Parties, the Convention introduces a broad definition of punishable corruption offences, defines liability of legal persons for criminal offences of corruption, and promotes international legal assistance. The Convention also obliges the States Parties to provide effective protection of witnesses and victims of corruption, while placing special emphasis on seizure of property obtained through commission of corruption offences as the Convention's fundamental principle, whose implementation requires intensive and direct cooperation and mutual assistance between the States Parties. Moreover, in the context of preventive anticorruption policy, the Convention points to the necessity of taking adequate measures with the aim of preventing conflict of interest and money laundering, ensuring free access to information and mobilising the private sector and civil society to actively participate in anticorruption combat.

Although it still has not ratified this international instrument, Bosnia and Herzegovina had much earlier started to take steps towards implementation of the Mérida Convention through comprehensive legislation reforms and implementation of new pieces of legislation and relevant international standards.

In the forthcoming period, the competent authorities at all levels are expected to intensify their activities towards urgent and full harmonisation of the domestic legislation with the mandatory provisions of the Convention. In this context, it is necessary to continue upgrading the legal system as well as educating and training representatives of authorities and institutions that will be directly involved in implementation of this international document, which will, as in all the activities implemented so far, be realised in cooperation with and with the support of the Council of Europe, OSCE, OECD, USAID, UNDP, UNODC (United Nations Office against Drugs and Crime), SPAI RSLO (Stability Pact Anti-Corruption Initiative - Regional Secretariat Liaison Office) and other international organisations and institutions dealing with anticorruption combat.

I would like to emphasise that the Convention has been signed by all the countries in the region and ratified by Croatia, Romania, Montenegro and Serbia. Its comprehensive implementation remains top priority of our Secretariat. I hope that by working together with authorities and institutions in Bosnia and Herzegovina, international organisations, civil society and nongovernmental sector, we will actively contribute to urgent ratification of this highly significant international instrument and its implementation into institutional policy and practice.

SPAI RSLO
Executive Secretary

Mr Veselin Šuković

Public procurement: legal standards and application

INTRODUCTION

In 2001 the World Bank prepared the BiH CPAR project (Country Procurement Assessment Report). This report covered the state level, Entities, 3 pilot cantons in FBiH and 5 pilot municipalities in RS. During the screening of the situation in this field, Republika Srpska adopted the Law on Procedures for Procurement of Goods, Services and Works of Republika Srpska, which is based on the UNCITRAL Model Law and whose legal provisions are very similar to those contained in the Decree on Procedures for Procurement of Goods, Services and Works of the Federation BiH.

The Country Procurement Assessment Report was presented to the public in June 2002 with the following findings:

- Very high level of corruption in public procurement;
- Lack of regulations in the field of public procurement, and where there are regulations, they are not applied;
- Inadequate legal protection of bidders;
- Lack of coordinated public procurement system at all levels;
- Lack of procurement plans in institutions and public enterprises;
- Inadequate training of the staff who participate in the preparation of technical specifications of tender documentation, etc.

The recommendations offered in the Report are as follows:

- to regulate the field of public procurement,
- to adopt public procurement legislation,
- to set up mechanisms and criteria for mandatory application of the relevant regulations in this field,
- to train the staff working in public procurement,
- to establish public procurement departments in the Ministry of Treasury of BiH as well as in the entity ministries of finance.

In August 2003, Bosnia and Herzegovina prepared answers to the set of questions contained in the Feasibility Study for the European Commission. The answers gave an overview of the public procurement situation in Bosnia and Herzegovina. Based on these answers, the European Commission gave recommendation for adoption of the public procurement law of BiH and establishment of relevant institutions in accordance with the EU directives, which was identified as condition 15b for the opening of negotiations with BiH on a Stabilisation and Association Process (SAP).

In February 2004 a conference was held on public procurement reform, where the representatives of international and domestic institutions gave full support to reforms in this field, adoption of the new Law on Public Procurement of Bosnia and Herzegovina, institutional solutions provided for by the new law as well as education and training of procurement staff.

The Law is based on the principles that are contained in the EU directives:

- efficient public spending,
- transparency,

- competitiveness,
- non-discrimination and fair treatment of all participants in public procurement procedures.

The following elements governed by the Law are in complete conformity with the EU directives:
- Procedures for public procurement that are governed by the Law,
- Institutional solutions that are established in accordance with the Law,
- Definition of contractual parties.

Application of these regulations in practice will result in the following:
- Prevention of abuses,
- Strengthened competition, increased savings in public expenditures, and procurements of appropriate value for money,
- Strengthened credibility of institutions and the system as a whole;
- Genuine acceptance of and support to the public procurement system on the part of the general public in BiH;
- Domestic public procurement practice brought in line with that in EU.

PRINCIPLES UNDERLYING THE LAW ON PUBLIC PROCUREMENT OF BiH

1. Create a "single economic space" in Bosnia and Herzegovina, as a constitutional category, which has not been the case so far in the markets that were fragmented and divided by administrative boundaries.
2. Ensure transparent spending of public funds through procurement procedures that are conducted in accordance with the Law.
3. Ensure fair treatment of all actors in procurement procedures by enabling all potential suppliers, both national and international, to participate in procurement procedures.
4. Ensure competitiveness in procurement procedures, which will enable public procurement that is based on the principle of adequate exchange of quality items for appropriate amount of money.
5. Ensure appropriate legal protection of all actors in procurement procedures through a three-instance system (complaint, appeal, legal action).

CURRENT SITUATION

The BiH Law on Public Procurement became effective in November 2004, which is when its implementation in BiH institutions began. Brčko District and Federation BiH repealed their public procurement regulations within 60 following the entry into force of the said Law. Application of this Law in Republika Srpska began on 30 April 2005.

Since the Law became effective, a series of implementing regulations have been adopted and a set of documents have been prepared (standard tender documentation, notice forms, competition application form, etc.) whose application and use will begin when approved by the competent authorities.

The Law is implemented in all institutions and public enterprises that are required to apply the procedures established under the Law. Complex and lengthy procedures often pose a problem for contracting authorities because there are no procurement plans, which is one of the basic preconditions for successful conduct of procurement procedures. According to EU

experiences, even if there are procurement plans, the total percentage of effected procurement procedures in one year is around 50%.

Furthermore, Bosnia and Herzegovina must educate procurement staff so that each institution has a trained official who will be in charge of monitoring procurements in this institution. It is also important to launch an initiative for the conduct of joint public procurements at all levels of administration, either as mandatory procedures or at the initiative of several contracting authorities that express interest in conducting joint procurement procedures.

PUBLIC PROCUREMENT AGENCY

The Agency is responsible for proper implementation of the Public Procurement Law BiH. Its functions include, among others:

- publishing procurement manuals and guidelines and development and maintenance of standard forms and models,
- providing technical assistance and advice to both contracting authorities and suppliers on the application and interpretation of the provisions of this Law and its Implementing Regulations,
- publishing, collecting and analyzing information on procurement procedures and awarded public contracts,
- initiating and supporting development of electronic procurement and communication within the field of public procurement,
- publishing training information, manuals and other aids for professional development in public procurement,
- maintaining a register of accredited trainers in public procurement, etc.

PROCUREMENT REVIEW BODY

The Procurement Review Body decides on appeals in the second instance, while the Court of BiH decides in the third instance on contentious administrative remedies. This ensures full legal protection of all actors in procurement procedures.

The Procurement Review Body, when it decides on appeals, has a significant role in procurement procedures for several reasons, most important of which are:

- it ensures equal legal protection of all actors in a procurement procedure, irrespective of where in BiH this procedure is conducted;
- it can make an award for damages to the complainant who as a tenderer has suffered loss or damage as a result of a breach of this Law on the part of the contracting authority;
- it can impose sanctions against the responsible person of the contracting authority as well as penalties in the form of fines;
- submit offence or criminal charge to the relevant court if it finds that there are elements for offence or criminal prosecution;

CONCLUSION

Although the Law has been effective for a year and in Republika Srpska for half a year, certain effects are already visible, e.g. procurement notices are published in one place. Over 10 000 procurement notices have been published since the Law became effective.

Furthermore, procurement notices are also published in the Official Gazette of BiH and they are required to contain clear information about the specific procurement.

Reports on the procurement procedure below domestic value thresholds (KM 30 000 in the case of goods and services and KM 60 000 in the case of works) are submitted to the Ministry of Treasury and Finance of BiH, which performed the tasks of the Public Procurement Agency during the transitional period, i.e. before the Agency was set up.

The data collected and monitored by the Agency will constitute a basis for statistical reports on procurements disaggregated by contractual authorities, levels of administration, public enterprises, etc., which will give us a clear picture of how public funds are spent.

Finally, it is important to say that the adoption and enforcement of public procurement legislation has created a basis for further upgrades through education of staff, improvement and development of laws and their implementing regulations, and establishment and advancement of electronic procurement. Bosnia and Herzegovina must, for the sake of its citizens, SAP negotiations and future generations, continue building and improving its public procurement system. The building of any system is a very time-consuming process. Being at the very beginning of such a process, we all have to give it our support and contribute to its development with a proactive approach.

Ms Đinita Fočo,

Director of the Public Procurement Agency