

Strasbourg, 27 May 2011

**Greco Eval III Rep (2010) 5E + ANNEX (*Eng. only*)**  
**Theme I**

## **Third Evaluation Round**

### **Evaluation Report on Bosnia and Herzegovina Incriminations (ETS 173 and 191, GPC 2)**

(Theme I)

Adopted by GRECO  
at its 51<sup>st</sup> Plenary Meeting  
(Strasbourg, 23-27 May 2011)

## I. INTRODUCTION

1. Bosnia and Herzegovina joined GRECO in 2000. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2002) 10E) in respect of Bosnia and Herzegovina at its 14<sup>th</sup> Plenary Meeting (7-11 July 2003) and the Second Round Evaluation Report (Greco Eval II Rep (2005) 8E) at its 31<sup>st</sup> Plenary Meeting (4-8 December 2006). The aforementioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
  - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
  - **Theme II – Transparency of party funding:** Articles 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to Bosnia and Herzegovina from 20 to 21 September 2010 and on 9 February 2011, was composed of Mr Atle ROALDSØY, Senior Adviser, Ministry of Justice (Norway) and Mrs Slagjana TASEVA, Professor of Criminal Law ("The former Yugoslav Republic of Macedonia"). The GET was supported by Ms. Laura SANZ-LEVIA and Ms Sophie MEUDAL LEENDERS from GRECO's Secretariat. Prior to the visit the GET experts were provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2010) 9E, Theme I), as well as copies of relevant legislation.
4. The GET met with officials from the following governmental organisations: State level: Ministry of Security, Ministry of Justice, Ministry of the Interior, Court of Bosnia and Herzegovina, State Investigation and Protection Agency. Federation of Bosnia and Herzegovina: Federal Ministry of Justice, Federal Supreme Court, Cantonal Court of Sarajevo, Federal Prosecutor's Office, Cantonal Prosecutor's Office of Canton Sarajevo, Federal Police. Republika Srpska: Ministry of Justice, Supreme Court of Republika Srpska, Basic Court of Banja Luka, Republic Prosecutor's Office. Brčko District: Judicial Commission, Basic Court of Brčko District, Public Prosecutor's Office of the Brčko District, Police. The GET also met with representatives of Transparency International and of the Council of Europe Field Office in Sarajevo.
5. The present report on Theme I of GRECO's 3<sup>rd</sup> Evaluation Round – Incriminations – was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the authorities of Bosnia and Herzegovina in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Bosnia and Herzegovina in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – Transparency of party funding, is set out in Greco Eval III Rep (2010) 9E, Theme II.

## **II. GENERAL OVERVIEW OF POLITICAL AND LEGAL STRUCTURES**

7. The Dayton Agreement established Bosnia and Herzegovina as a State comprising two Entities, each with a high degree of autonomy: the Republika Srpska (RS) and the Federation (FBiH), as well as the Brčko District (BD), which functions as a single administrative unit of self-government existing under the sovereignty of Bosnia and Herzegovina. From a constitutional point of view, the current system bears the features of a very decentralised federal system, with each Entity having its own Constitution, President, Government, Parliament, judicial organisation and penal law. Criminal legislation and criminal procedure legislation have been adopted at BiH, Entity (RS and FBiH) and BD levels. Entity and BD laws apply exclusively before Entity or BD Courts. State level legislation is applied before the State Court. Moreover, according to Article 13 of the Law on Court of BiH, the State judicial structures take over cases from Entities' Courts/Prosecutors when (a) criminal offences endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina; (b) may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the BD. The decisions of the courts and law enforcement bodies at the different levels of government are mutually acknowledged on a reciprocal basis and are valid within the entire national territory.
8. Given the complexity of structures and laws in the country, the report presents a comprehensive overview of the theme under evaluation in Bosnia and Herzegovina, and focuses on a detailed assessment of a particular level of government, whenever necessary, to highlight differences (whether achievements or challenges ahead) of the various institutions and legal systems within the country. In this connection, recommendations are addressed to the country as a whole, to the State level and/or to the Entities and Brčko District, as appropriate.

## **III. INCRIMINATIONS**

### **Description of the situation**

9. Bosnia and Herzegovina ratified the Criminal Law Convention on Corruption (ETS 173) on 30 January 2002. The Convention entered into force in respect of Bosnia and Herzegovina on 1 July 2002. Bosnia and Herzegovina did not make any reservation to this Convention.
10. Bosnia and Herzegovina has not yet signed nor ratified the Additional Protocol to the Criminal Law Convention (ETS 191). However, a decision to ratify the aforementioned instrument was taken by the Presidency of Bosnia and Herzegovina at its 59<sup>th</sup> session (27 July 2009).
11. Penal legislation of Bosnia and Herzegovina has been amended several times to, *inter alia*, better comply with international requirements. The latest reform took place in 2010; it entailed certain adjustments with respect to corruption-related offences (e.g. definition of officials, international dimension of bribery, forfeiture provisions, etc.). In particular, the State level Criminal Code (BiH CC) was amended in December 2009. The Entity and BD CCs were subsequently amended in June-July 2010<sup>1</sup> in order to harmonise their provisions with those of the State level.

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<sup>1</sup> These amendments were adopted by the Brčko district on 17 June, by the Republika Srpska on 6 July and by the Federation on 8 July 2010, respectively. They entered into force at the beginning of August 2010.

## **Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)**

### **Definition of the offence**

12. Active bribery of public officials is criminalised in Article 218 of the BiH Criminal Code (hereafter CC); Article 381 of the FBiH CC; Article 352 of the RS CC; and Article 375 of the BD CC. The criminalisation of active bribery follows a similar structure in the different CCs, whereby two forms of the offence are provided: (1) bribery to induce an official to perform an act s/he should not perform or to omit to perform an act s/he should or could perform within the bounds of his/her official rights (i.e. unlawful acts or omissions: Article 218 (1), BiH CC; Article 381 (1), FBiH CC; Article 352 (1), RS CC; and Article 375 (1), BD CC); (2) bribery to induce an official to perform an act s/he should or could perform or to omit to perform an act s/he is not authorised in any case to perform (i.e. lawful official acts or omissions: Article 218 (2), BiH CC; Article 381 (2), FBiH CC; Article 352 (2), RS CC; and Article 375 (2) BD CC ).

#### **Article 218, BiH Criminal Code – Giving Gifts and Other Forms of Benefits**

*(1) Whoever gives or promises a gift or any other benefit to an official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person or an international official, in order that s/he performs within the scope of his/her official powers of an act, which ought not to be performed by him/her, or abstains from performing of an act which ought to be performed by him/her, or whoever mediates in such bribing of the official or responsible person, shall be punished by imprisonment for a term between six months and five years.*

*(2) Whoever gives or promises a gift or any other benefit to an official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person or an international official, in order that s/he performs within the scope of his official powers an act, which ought to be performed by him/her, or abstains from performing of an act, which ought not to be performed by him/her, shall be punished by a fine or imprisonment for a term not exceeding three years.*

*(3) The perpetrator of the criminal offence referred to in paragraph 1 and 2 of this Article who had given a bribe on request of the official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person or an international official, but reported the deed before it being discovered or before knowing that the deed has been discovered, may be released from punishment.*

*(4) The gifts or any other benefits shall be forfeited, while in case referred to in paragraph 3 of this Article, they can be returned to the giver.*

#### **Article 381, FBiH Criminal Code – Giving Gifts and Other Forms of Benefits**

*(1) Whoever gives or promises a gift or other benefit to an official or responsible person in the Federation, including a foreign official, in order for this official or responsible person to do what s/he would not be allowed to do or not to do what s/he would have to do, within his/her authority, or whoever acts as an intermediary in such bribing of an official or responsible person, shall be punished by a term of imprisonment of six months to five years.*

*(2) Whoever gives or promises a gift or other benefit to an official or responsible person in the Federation, including a foreign official, in order for this official or responsible person to do what s/he would have to do or not to do what s/he would not be allowed to do, within his/her authority, or whoever acts as an intermediary in such bribing of an official or responsible person, shall be punished by a fine or a term of imprisonment not exceeding three years.*

*(3) The perpetrator of a crime referred to in paragraphs 1 and 2 of this Article who gives a bribe at the solicitation of an official or responsible person in the Federation, including a foreign official, but reports the crime before it is discovered or before learning that it has been discovered, may be acquitted.*

(4) The received gift or other benefit shall be seized, and in cases referred to in paragraph 3 of this Article it may be returned to the person who gave the bribe.

**Article 352, RS Criminal Code – Offering Bribe**

(1) Whoever attempts to give or promises a gift or other benefit to an official or responsible person in order for this official or responsible person to perform an act s/he would not be allowed to perform or not to perform an act s/he would have to or be able to perform, within his/her authority, or whoever acts as an intermediary in such bribing of an official, shall be punished by a term of imprisonment of six months to five years.

(2) Whoever gives or promises to give a gift or other benefit to an official or responsible person in order for this official or responsible person to perform an act s/he would have to or be able to perform or not to perform an act s/he would not be allowed to perform, within his/her authority, or whoever acts as an intermediary in such bribing of an official, shall be punished by a term of imprisonment of not exceeding three years.

(3) The perpetrator of a crime referred to in paragraphs 1 and 2 of this Article who gives a bribe at the solicitation of an official or responsible person, but reports the crime before it is discovered or before learning that it has been discovered, may be acquitted.

(4) The received gift or other benefit shall be seized, and in cases referred to in paragraph 3 of this Article it may be returned to the person who gave the bribe.

**Article 375, BD Criminal Code – Giving Gifts and Other Benefits**

(1) Whoever gives or promises a gift or other benefit to an official or responsible person in the Brčko District of Bosnia and Herzegovina, including a foreign official, in order for this official or responsible person to do what s/he would not be allowed to do or not to do what s/he would have to do, within his/her authority, or whoever acts as an intermediary in such bribing of an official or responsible person, shall be punished by a term of imprisonment of six months to five years.

(2) Whoever gives or promises to give a gift or other benefit to an official or responsible person in the Brčko District of Bosnia and Herzegovina, including a foreign official, in order for this official or responsible person to do what s/he would have to do or not to do what s/he would not be allowed to do, within his/her authority, or whoever acts as an intermediary in such bribing of an official or responsible person, shall be punished by a fine or a term of imprisonment not exceeding three years.

(3) The perpetrator of a crime referred to in paragraphs 1 and 2 of this Article who gives a bribe at the solicitation of an official or responsible person in the Brčko District of Bosnia and Herzegovina, including a foreign official, but reports the crime before it is discovered or before learning that it has been discovered, may be acquitted.

(4) The received gift or other benefit shall be seized, and in cases referred to in paragraph 3 of this Article it may be returned to the person who gave the bribe.

13. Criminalisation of passive bribery is provided for under Article 217, BiH CC; Article 380, FBiH CC; Article 351, RS CC; and Article 374 BD CC, which also follow a similar structure. Again, a difference is made between cases in which the act performed pertains to the duties of the public official and cases in which it does not. Provision is also made in these articles for the acceptance or receipt of an undue advantage by the public official after his/her performance of the act (i.e. bribery a posteriori).

**Article 217, BiH Criminal Code – Accepting Gifts and Other Forms of Benefits**

(1) An official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person or an international official, who demands or accepts a gift or any other benefit or who accepts a promise of a gift or a benefit, for himself/herself or another person, in order to perform within the scope of his/her official powers an act, which ought not to be performed by him/her, or for the omission of an act, which ought to be performed by him/her, shall be punished by imprisonment for a term between one and ten years.

(2) An official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person or an international official, who demands or accepts a gift or any other benefit or who accepts a promise of a gift or a benefit, for himself/herself or another person, in order to perform within the scope of his/her official powers an act, which ought to be performed by him/her, or for the omission of an act, which ought not to be performed by him/her, shall be punished by imprisonment for a term between six months and five years.

(3) The punishment referred to in paragraph 1 of this Article shall be imposed on an official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person or an international official, who demands or accepts a gift or any other benefit, for himself/herself or another person, following the performance or omission of an official act referred to in paragraphs 1 and 2 of this Article and in relation to it.

(4) The gifts or any other benefits shall be forfeited.

#### **Article 380, FBiH Criminal Code – Accepting Gifts and Other Forms of Benefits**

(1) An official or responsible person in the Federation, including a foreign official, who solicits or accepts a gift or other benefit for himself/herself or another person, or who accepts the promise of a gift or benefit for himself/herself or another person, in order to do something s/he would not be allowed to do or in order not to do something s/he would have to do, within his/her authority, shall be punished by a term of imprisonment of one to ten years.

(2) An official or responsible person in the Federation, including a foreign official, who solicits or accepts a gift or benefit for himself/herself or another person, or who accepts the promise of a gift or benefit for himself/herself or another person in order to do something s/he would have to do or in order not to do something s/he would not be allowed to do, within his/her authority, shall be punished by a term of imprisonment of six months to five years.

(3) The punishment referred to in paragraph 2 of this Article shall be imposed on an official or responsible person in the Federation, including a foreign official, who after an act of commission or omission referred to in paragraphs 1 and 2 of this Article solicits or accepts a gift or other benefit for himself/herself or another person in relation to that act.

(4) The received gift or other benefit shall be seized.

#### **Article 351, RS Criminal Code – Accepting Bribe**

(1) An official or responsible person who solicits or accepts a gift or other benefit or who accepts the promise of a gift or other benefit in order to perform an act s/he would not be allowed to perform or in order not to perform an act s/he would have to or be able to perform, within his/her authority, shall be punished by a term of imprisonment of one to eight years.

(2) An official or responsible person who solicits or accepts a gift or other benefit or who accepts the promise of a gift or other benefit in order to perform an act s/he would have to or be able to perform or in order not to perform an act s/he would not be allowed to perform, within his/her authority, shall be punished by a term of imprisonment of one to five years.

(3) An official or responsible person who after an act of commission or omission referred to in paragraphs 1 to 3 of this Article solicits or accepts a gift or other benefit in relation to that act shall be punished by a term of imprisonment not exceeding three years.

(4) The received gift or other benefit shall be seized.

#### **Article 374, BD Criminal Code – Accepting Gifts and Other Benefits**

(1) An official or responsible person in the Brčko District of Bosnia and Herzegovina, including a foreign official, who solicits or accepts a gift or other benefit or who accepts the promise of a gift or benefit in order to do something s/he would not be allowed to do or in order not to do something s/he would have to do, within his/her authority, shall be punished by a term of imprisonment of one to ten years.

(2) An official or responsible person in the Brčko District of Bosnia and Herzegovina, including a foreign official, who solicits or accepts a gift or other benefit or who accepts the promise of a gift or any benefit in order to do something s/he would have to do or in order not to do something s/he would not be allowed to do, within his/her authority, shall be punished by a term of imprisonment of six months to five years.

(3) *The punishment referred to in paragraph 2 of this Article shall be imposed on an official or responsible person in the Brčko District of Bosnia and Herzegovina, including a foreign official, who after an act of commission or omission referred to in paragraphs 1 and 2 of this Article solicits or accepts a gift or other benefit in relation to that act.*

(4) *The received gift or other benefit shall be seized.*

## Elements/concepts of the offence

### *“Domestic public official”*

14. The definition of domestic public official is provided in Article 1 (3), BiH CC; Article 2 (3), FBiH CC; Article 147 (3), RS CC; and Article 2 (3), BD CC, respectively. The aforementioned provisions are worded in identical terms, as follows:

#### **Article 1 (3), BiH Criminal Code – Official Person**

*Official person means: an elected or appointed officer to legislative, executive and judicial office within Bosnia and Herzegovina and other national and administrative institutions or services which perform particular administrative, expert and other duties, within the rights and liabilities of the authority that has founded them; a person who continuously or occasionally executes official duty in the aforementioned administrative bodies or institutions, an authorised person in a business enterprise or another legal entity that has been entrusted with the execution of public authorities by law or other regulations based on the law, who performs certain duties within the framework of the given authority; and other persons who are performing specific official duties, with or without remuneration, as stipulated by law or other regulations based on the law.*

#### **Article 2 (3), FBiH Criminal Code – Official Person**

*An official shall be an elected or appointed officer or other official in legislative, executive and judicial bodies and other administrative organs and services of the Federation, cantons, cities and municipalities which carry out specific administrative, professional and other tasks within the rights and duties of the authority which established them; a person who regularly or occasionally executes official duties in these organs and bodies; an authorised person in a business enterprise or other legal entity who under the law or other regulation adopted under the law has been entrusted with the exercise of public powers and who, within those powers, performs a specific function; and a person who performs a specific official function under the authority arising from the law or other regulation adopted under the law.*

#### **Article 147 (3), RS Criminal Code – Official Person**

*An official shall be an elected or appointed officer in legislative, executive and judicial organs of Republika Srpska and in other state and administrative institutions and services which carry out specific administrative, professional and other tasks within the rights and duties of the authority which established them; a person who regularly or occasionally executes official duties in these administrative organs or institutions; an authorised person in a business enterprise or other legal entity who under the law or other regulation adopted under the law has been entrusted with the exercise of public powers and who, within those powers, performs a specific function; and a person who performs a specific official function under the authority arising from the law or other regulation adopted under the law.*

#### **Article 2 (3), BD Criminal Code – Official Person**

*An official shall be an elected or appointed officer in legislative, executive and judicial bodies of the Brčko District and in other state and administrative institutions and services which carry out specific administrative, professional and other tasks within the rights and duties of the authority which established them; a person who regularly or occasionally executes official duties in these administrative organs or institutions; an authorised person in a business enterprise or other legal entity who under the law or other regulation adopted under the law has been entrusted with the exercise of public powers and who, within those powers, performs a specific function; and a person who performs a specific official function with or without compensation under the authority arising from the law or other regulation adopted under the law.*

15. The term “*officer*” cover any person who participates in carrying out a service on behalf of the public and according to public law. The authorities explain that the broad scope of the definition also covers certain individuals (“*authorised persons*”), working for businesses or other legal entities, vested by law with public authority to perform public services (“*entrusted with the execution of public authorities*”), e.g. doctors who fulfil public duties, vehicle inspection and car registration services, teachers and professors, public enterprises, etc.

*“Promising, offering or giving” (active bribery)*

16. The elements of “*promising*” and “*giving*” are expressly contained in all four CCs’ articles (Articles 218 (1) and (2), BiH CC; 381 (1) and (2), FBiH CC; 352 (1) and (2), RS CC; 375 (1) and (2), BD CC) on active bribery of public officials. The “offering” of the undue advantage is not explicitly covered in any of the relevant CCs; however, the authorities indicated to the GET that, in Bosnia and Herzegovina, there is no legal difference between offering and promising since the notion of “*obećanje*”, in the respective national language, covers both a formal “promise” and a mere “offer”.

*“Request or receipt, acceptance of an offer or promise” (passive bribery)*

17. All relevant articles on passive bribery of public officials cover the elements of “request”, “receipt” and “acceptance of a promise” (Articles 217 (1) and (2), BiH CC; 380 (1) and (2), FBiH CC; 351 (1) and (2), RS CC; 374 (1) and (2), BD CC). Again the “acceptance of an offer” is not explicitly covered, but the authorities stressed that it is commonly understood that the term “*obećanje*” would cover both formal promises and mere offers (proposals).
18. These articles do not only cover cases of bribery for an act or omission to be committed by the official in the future, as requested by the Convention, but also extend to the request or receipt of an undue advantage in exchange for an already committed act/omission (Articles 217 (3), BiH CC; 380 (3), FBiH CC; 351 (3), RS CC; 374 (3), BD CC).

*“Any undue advantage”*

19. The relevant provisions concerning bribery in the respective CCs do not explicitly use the term “undue”. In this connection, any “*gift or other advantage or promise*” may come under the scope of the offence if its purpose is to influence a public official’s action in service.
20. Although immaterial advantages are not explicitly mentioned in legislation, the authorities confirmed that the notion of “gift or any other benefit” is understood to be broad enough to cover both material and immaterial advantages.

*“Directly or indirectly”*

21. The relevant provisions in the different CCs concerning active bribery (Article 218, BiH CC; Article 381, FBiH CC; Article 352, RS CC; and Article 375, BD CC) refer explicitly to situations in which the offence is committed directly or through an intermediary.
22. The provisions concerning passive bribery (Article 217, BiH CC; Article 380, FBiH CC; Article 351, RS CC; and Article 374, BD CC) remain silent in this respect. However, the authorities referred to the general rules on participation in criminal offences (aiding and abetting).

*“For himself or herself or for anyone else”*

23. Third party beneficiaries are only specifically covered in the provisions on passive bribery of the BiH and the FBiH CCs (Article 217, BiH CC and Article 380, FBiH CC). No reference to third parties is included in the corresponding passive bribery provisions of the RS and BD. Likewise, the relevant provisions on active bribery of the different CCs remain silent as to the concrete coverage of third parties.

*“To act or refrain from acting in the exercise of his or her functions”*

24. The relevant articles from the four CCs all contain similar elements, covering active or passive bribery in exchange for an act or an omission by the official *“within the scope of his/her official powers”* (Articles 217 and 218, BiH CC)/*“within his/her authority”* (Articles 380 and 381, FBiH CC; Articles 351 and 352, RS CC; and Articles 374 and 375, BD CC).
25. A further distinction is made in all four CCs’ relevant provisions between cases in which the official was bribed to perform an act (or omission) which he/she ought to perform and cases – carrying a heavier sanction – where he/she acted beyond his/her duties.

*“Committed intentionally”*

26. A basic principle of penal legislation in Bosnia and Herzegovina is that an action is punishable only when committed intentionally, subject to provisions to the contrary. Therefore, as the provisions on bribery do not mention that they can be caused by negligence, it can be inferred *a sensu contrario* that they can only be committed intentionally.

## Sanctions

27. Active bribery carries similar penalties in all four CCs. As already mentioned, a similar distinction is drawn between lawful and unlawful acts/omissions:
- In case the official performed an act or omission which he/she ought to perform, the offence is punishable by imprisonment for a term not exceeding three years (Articles 218 (2), BiH CC; 381 (2), FBiH CC; 352 (2), RS CC; 375 (2), BD CC); the BiH, FBiH and BD CCs also provide in this case for finer (generally ranging from 500 to 100,000 BAM, i.e. 256 to 51,310 EUR)
  - In case the official performed an act or omission which he/she ought not to perform, the sanction is imprisonment for a term of between six months and five years in all CCs (Articles 218 (1), BiH CC; 381 (1), FBiH CC; 352 (1), RS CC; 375 (1), BD CC).
28. As regards passive bribery, the same distinction is drawn (lawful/unlawful acts) and the penalties are the same in BiH, FBiH and BD. The RS Criminal Code contains the same distinction, but different penalties:
- In BiH, FBiH and BD, in case the official performed an act or omission which he/she ought to perform, the offence is punishable by a fine or imprisonment for a term of between six months and five years (Articles 217 (2), BiH CC; 380 (2), FBiH CC; 374 (2), BD CC); the applicable sanction according to the RS CC is imprisonment for a term of between one and five years (Article 351 (2), RS CC).
  - In BiH, FBiH and BD, in case the official performed an act or omission which he/she ought not to perform, the offence is punishable by imprisonment for a term of between one and ten years (Articles 217 (1), BiH CC; 380 (1), FBiH CC; 374 (1), BD CC); the applicable sanction

according to the RS CC is imprisonment for a term of between one and eight years (Article 351 (1), RS CC).

29. In addition, disparity in penalties also exists with respect to situations in which the acceptance or receipt of an undue advantage by the public official occurs after his/her performance of the act (bribery *a posteriori*): in FBiH and BD the offence is punishable by imprisonment for a term of between six months and five years (Article 380 (3), FBiH CC; 374 (3), BD CC), the applicable sanction in BiH is imprisonment for a term of between one and ten years (Article 217 (3), BiH CC), while in the RS imprisonment is for a term not exceeding three years (Article 351 (3), RS CC).
30. In all four CCs, these sanctions are similar to those applicable to other comparable offences, such as abuse of power, embezzlement and fraud, which all carry a penalty of imprisonment for between six months and ten years, depending on the value of the property gain (Articles 220 to 222, BiH CC; 383 to 385, FBiH CC; 347 to 349, RS CC; 377 to 379, BD CC).

#### Court decisions/case law

31. The authorities provided the following statistics regarding the number of investigations, prosecutions and convictions for the period 2007-2009:

#### 2007

LEVEL	CHAPTER CC	INVESTIGATIONS	INDICTMENTS		COURT DECISIONS				CONVICTING VERDICTS		
					VERDICTS			Discont.	Prison	Fine	Suspended sentence
					Total no.	Issued	Confirmed				
BIH	Chapter XIX	15	9	8	8	0	0	0	0	1	7
FBiH	Chapter XXXI	868	149	141	107	7	30	23	18	19	70
RS	Chapter XXVII	526	122	117	96	16	36	5	31	20	45
Brčko District	Chapter XXXI	31	13	6	6	0	1	1	5	1	0
<b>TOTAL NUMBER IN 2007</b>		<b>1,440</b>	<b>293</b>	<b>272</b>	<b>217</b>	<b>23</b>	<b>67</b>	<b>29</b>	<b>54</b>	<b>41</b>	<b>122</b>

#### 2008

LEVEL	CHAPTER CC	INVESTIGATIONS	INDICTMENTS		COURT DECISIONS				CONVICTING VERDICTS		
					VERDICTS			Discont.	Prison	Fine	Suspended sentence
					Total no.	Issued	Confirmed				
BIH	Chapter XIX	29	6	6	3	0	0	0	0	0	3
FBiH	Chapter XXXI	939	172	174	89	7	47	19	7	4	78
RS	Chapter XXVII	605	144	133	89	12	32	11	21	16	52
Brčko District	Chapter XXXI	20	5	5	3	0	1	0	2	0	1
<b>TOTAL NUMBER IN 2008</b>		<b>1,593</b>	<b>327</b>	<b>318</b>	<b>184</b>	<b>19</b>	<b>80</b>	<b>30</b>	<b>30</b>	<b>20</b>	<b>134</b>

LEVEL	CHAPTER CC	INVESTIGATIONS	INDICTMENTS		COURT DECISIONS				CONVICTING VERDICTS		
					VERDICTS			Discont.	Prison	Fine	Suspended sentence
					Total no.	Issued	Confirmed				
BIH	Chapter XIX	36	7	6	3	0	0	0	0	0	3
FBIH	Chapter XXXI	804	114	108	86	3	21	16	7	3	76
RS	Chapter XXVII	522	101	104	82	16	41	5	19	24	39
Brčko District	Chapter XXXI	21	7	7	2	0	2	0	1	0	1
TOTAL NUMBER IN 2009		1,383	229	225	173	19	64	21	27	27	119

### **Bribery of members of domestic public assemblies (Article 4 of ETS 173)**

32. Members of domestic public assemblies are considered public officials in the meaning of Articles 1 (3) CC BiH, 2 (3) CC FBIH, 147 (3) RS CC and 2 (3) BD CC, which encompass persons elected or appointed to legislative office or to other national and administrative institutions or services which perform particular administrative, expert and other duties, as well as persons carrying out official duties in such institutions, irrespective of their type of employment. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of domestic public assemblies. There are no court decisions/case law concerning bribery of members of domestic public assemblies.

### **Bribery of foreign public officials (Article 5 of ETS 173)**

33. Foreign public officials are defined as follows:

**Article 1 (7), BiH Criminal Code**

*Foreign official person means a member of a legislative, executive, administrative or judicial body of a foreign state, a public official of an international organisation or of its bodies, a judge or another official person of an international court, serving in Bosnia and Herzegovina, with or without remuneration.*

**Article 2 (8), FBIH Criminal Code**

*A foreign official shall be a member of a legislative, executive, administrative or judicial organ of a foreign state, a public officer of an international organisation or its bodies, a judge or other officer of an international court who is on duty in the Federation and works with or without compensation.*

**Article 147 (6), RS Criminal Code**

*A foreign official shall be a member of a legislative, executive, administrative or judicial organ of a foreign state, a public officer of an international organisation or its organs, a judge or other officer of an international court who is on duty in Republika Srpska and works with or without compensation.*

**Article 1 (7), BD Criminal Code**

*A foreign official shall be a member of a legislative, executive, administrative or judicial organ of a foreign state, a public officer of an international organisation or its organs, a judge or other officer of an international court who is on duty in the Brčko District and works with or without compensation.*

34. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of foreign public officials in BiH, FBIH and BD.

However, there is no provision for foreign officials in the relevant criminalisation of the bribery offence in the RS.

35. There are no court decisions/case law concerning bribery of foreign public officials.

### **Bribery of members of foreign public assemblies (Article 6 of ETS 173)**

36. Members of foreign public assemblies are considered foreign officials in the meaning of Articles 1 (7) CC BiH, 2 (8) CC FBiH, 147 (6) RS CC and 2 (7) BD CC, which refers to members of a legislative, executive, administrative or judicial organs of a foreign State.
37. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of members of foreign public assemblies in BiH, FBiH and BD. However, there is no provision for members of foreign public assemblies in the relevant criminalisation of the bribery offence in the RS.
38. There are no court decisions/case law concerning bribery of members of domestic public assemblies.

### **Bribery in the private sector (Articles 7 and 8 of ETS 173)**

39. The authorities indicate that there are no specific provisions related to bribery in the private sector in Bosnia and Herzegovina; the provisions of Articles 217-218, BiH CC; Articles 380-381, FBiH CC; Articles 351-352, RS CC; and Articles 374-375, BD CC, apply since they not only cover public officials, but also “responsible persons”. The notion of responsible person is (identically) construed in the different CCs as follows:

#### ***Article 1 (5), BiH Criminal Code – Responsible Person***

*Responsible person is a person in a business enterprise or another legal entity who, in the line of duty or on the basis of specific authorisation, has been entrusted with a portfolio related to the implementation of law or regulations based on law or general act of a business enterprise or other legal entities in managing and administrating the property, or is related to managing a productive or some other business process or supervision of such processes. Official person as defined in paragraph 3 of this Article is also considered to be a responsible person when it comes to actions where a responsible person is alleged as a perpetrator, providing that such actions are not stipulated as a criminal offence under the chapter dealing with criminal offences against official and other responsible duties, or as criminal offences of an official person stipulated under some other chapter of this Code or another law of Bosnia and Herzegovina.*

#### ***Article 2 (6), FBiH Criminal Code – Responsible Person***

*A responsible person shall be a person in a business enterprise or other legal entity who, in consideration of his/her duties or on the basis of specific authority, has been entrusted with a range of tasks relating to the application of laws or regulations adopted pursuant to laws or a general act of a business enterprise or other legal entity which regulate the managing and handling of property or the management of production or some other economic activity or control over them. A responsible person shall also be an official within the meaning of paragraph 3 of this Article with regard to acts whose perpetrator is a responsible person and which are not designated as crimes under the provision of the chapter on crimes against official and other responsible functions or under the provisions on crimes whose perpetrator is an official and which are set out in some other chapter of this Code or some other law of the Federation or cantons.*

**Article 147 (4), RS Criminal Code – Responsible Person**

*A responsible person shall be a person in a business enterprise or other legal entity who, in consideration of his/her function or on the basis of specific authority, has been entrusted with a range of tasks relating to the application of laws, regulations adopted pursuant to laws or general acts of a business enterprise or other legal entity which regulate the managing and handling of property or the management of production or some other economic activity or control over them. A responsible person shall also be an official with regard to crimes whose perpetrator is a responsible person and which are not specified in the chapter on crimes against official duties in this Code or as crimes committed by officials in some other chapter of this Code.*

**Article 2 (5), BD Criminal Code – Responsible Person**

*A responsible person shall be a person in a business enterprise or other legal entity who, in consideration of his/her function or on the basis of specific authority, has been entrusted with a range of tasks relating to the application of laws or regulations adopted pursuant to laws or a general act of a business enterprise or other legal entity which regulate the managing and handling of property or the management of a production or some other economic process or control over it. A responsible person shall also be an official within the meaning of paragraph 3 of this Article with regard to acts whose perpetrator is a responsible person and which are not designated as crimes under the provision of the chapter on crimes against official and other responsible functions or under the provisions on crimes whose perpetrator is an official and which are set out in some other chapter of this Code or some other law of the Brčko District.*

40. The material elements of the offence, as well as the applicable sanctions, described under bribery of domestic public officials also apply to bribery in the private sector. Having in mind that private sector entities can only operate and be registered in the territories of the Entities and the BD, the applicable provisions in this area are those contained in the Entity/BD Criminal Codes (i.e. Articles 380-381 CC FBiH, Articles 351-352 CC RS, and Articles 374-375 CC BD).
41. There are no court decisions/case law concerning bribery in the private sector.

**Bribery of officials of international organisations (Article 9 of ETS 173)**

42. Officials of international organisations are considered foreign officials in the meaning of Articles 1 (7) CC BiH, 2 (8) CC FBiH, 147 (6) RS CC and 2 (7) BD CC, which cover public officers of an international organisation or of its bodies, a judge or another official person of an international court, with or without remuneration. In addition, the CCs of BiH and BD refer to “international officers” who are civilian employees working with an international organisation or agency.
43. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to officials of international organisations in BiH, FBiH and BD. However, there is no provision for officials of international organisations in the relevant criminalisation of the bribery offence in the RS.
44. There are no court decisions/case law concerning bribery of officials of international organisations.

**Bribery of members of international parliamentary assemblies (Article 10 of ETS 173)**

45. Members of international parliamentary assemblies are considered foreign officials in the meaning of Articles 1 (7) CC BiH, 2 (8) CC FBiH, 147 (6) RS CC and 2 (7) BD CC, which cover

public officers of an international organisation or of its bodies, a judge or another official person of an international court, with or without remuneration.

46. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to members of international parliamentary assemblies in BiH, FBiH and BD. However, there is no provision for members of international parliamentary assemblies in the relevant criminalisation of the bribery offence in the RS.
47. There are no court decisions/case law concerning bribery of members of international parliamentary assemblies.

### **Bribery of judges and officials of international courts (Article 11 of ETS 173)**

48. Judges and officials of international courts are considered foreign officials in the meaning of Articles 1 (7) CC BiH, 2 (8) CC FBiH, 147 (6) RS CC and 2 (7) BD CC, which cover public officers of an international organisation or of its bodies, a judge or another official person of an international court, with or without remuneration.
49. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to judges and officials of international courts in BiH, FBiH and BD. However, there is no provision for judges and officials of international courts in the relevant criminalisation of the bribery offence in the RS.
50. There are no court decisions/case law concerning bribery of judges and officials of international courts.

### **Trading in influence (Article 12 of ETS 173)**

#### **Definition of the offence**

51. Trading in influence is criminalised by Articles 219, BiH CC; 382 FBiH CC; 353, RS CC; and 376, BD CC, but only as regards the passive side of the offence.

#### ***Article 219, BiH CC – Illegal interceding***

*(1) Whoever accepts a reward or any other benefit for interceding that an official act be or not be performed, taking advantage of his/her official or influential position in the institutions of Bosnia and Herzegovina, shall be punished by a fine or imprisonment for a term not exceeding three years.*

*(2) Whoever by taking advantage of his/her official or influential position in the institutions of Bosnia and Herzegovina, intercedes that an official act be performed, which ought not to be performed, or that an official act be not performed, which ought to be performed, shall be punished by imprisonment for a term between six months and five years.*

*(3) If a reward or any other benefit has been received in return for the criminal offence referred to in paragraph 2 of this Article, the perpetrator shall be punished by imprisonment for a term between one and ten years.*

*(4) A reward accepted or any other gain shall be forfeited.*

#### ***Article 382, FBiH CC – Illegal interceding***

*(1) Whoever accepts a reward or other benefit for acting as an intermediary by using his/her official or influential position in the Federation in order for some official act to be performed or not to be performed shall be punished by a fine or a term of imprisonment not exceeding three years.*

(2) *Whoever acts as an intermediary by using his/her official or influential position in the institutions of the Federation in order to achieve the performance of an official act that would not be allowed to be performed or the non-performance of an official act that would have to be performed, shall be punished by a term of imprisonment of six months to five years.*

(3) *If a reward or any other benefit is received for a crime referred to in paragraph 2 of this Article, the perpetrator shall be punished by a term of imprisonment of one to ten years.*

(4) *The received reward or any other benefit shall be seized.*

**Article 353, RS CC – Illegal interceding**

(1) *Whoever accepts a reward or other benefit for acting as an intermediary by using his/her official or social position or influence in order for some official act to be performed or not to be performed shall be punished by a term of imprisonment not exceeding three years.*

(2) *Whoever acts as an intermediary by using his/her official or social position or influence in order to achieve the performance of an official act that would not be allowed to be performed or the non-performance of an official act that would have to be performed shall be punished by a term of imprisonment of six months to five years.*

(3) *If the crime referred to in paragraph 2 is committed in connection with the initiation or conducting of criminal proceedings against a certain person, the perpetrator shall be punished by a term of imprisonment of one to five years.*

(4) *If a reward or any other benefit is received for intermediary activities referred to in paragraphs 2 and 3 of this Article, the perpetrator shall be punished by a term of imprisonment of two to ten years.*

(5) *The received gift or other benefit shall be seized.*

**Article 376, BD CC – Illegal interceding**

(1) *Whoever accepts a reward or other benefit for acting as an intermediary by using his/her official or influential position in the Brčko District of Bosnia and Herzegovina in order for some official act to be performed or not to be performed shall be punished by a fine or a term of imprisonment not exceeding three years.*

(2) *Whoever acts as an intermediary by using his/her official or influential position in the institutions of the Brčko District of Bosnia and Herzegovina in order to achieve the performance of an official act that would not be allowed to be performed or the non-performance of an official act that would have to be performed, shall be punished by a term of imprisonment of six months to five years.*

(3) *If a reward or any other benefit is received for a crime referred to in paragraph 2 of this Article, the perpetrator shall be punished by a term of imprisonment of one to ten years.*

Elements/concepts of the offence

52. According to the authorities, the constitutive elements of bribery offences largely apply with regard to active and passive trading in influence. However, if reading the relevant provisions on trading in influence in their literal wording, the constitutive elements are somehow different.
53. In particular, the relevant articles of the four CCs do not cover the different material acts comprised in Article 12 of the Convention concerning trading in influence; they merely refer to the “acceptance” of a reward or any other benefit. The authorities explained that the notion of “acceptance” (in the national language “*primi*”) also comprises the receipt of the undue

advantage. Nothing is said in the relevant provisions concerning the “request or the acceptance of the offer or the promise of an undue advantage”.

54. Likewise, there are no explicit references to the direct/indirect commission of the offence, or to third party beneficiaries.

55. As stated above, there is no criminalisation of active trading in influence.

56. In addition, the following particular elements apply with respect to trading in influence:

*“Asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]”*

57. This concept is transposed in the first paragraph of the relevant articles, which refer to the use of the official or social position and influence, so that an official act is or is not performed. The term “improper” is not explicitly transposed and the relevant articles cover both situations implying lawful and unlawful acts or omissions.

58. For the offence of trading in influence to occur, the influence must be real and effectively enable the influence peddler to have the power of intervention or improper influence on the decision-making process; otherwise, the perpetrator can be prosecuted for fraud. However, it is not necessary that the influence is actually exerted and leads to the intended result.

### Sanctions

59. The sanction applicable to passive trading in influence is up to three years’ imprisonment (Article 219 (1), BiH CC; Article 382 (1), FBiH CC; Article 353 (1), RS CC; Article 376 (1), BD CC). This sanction increases to a prison sentence ranging from six months to five years, if the trader in influence exploits his/her position or influences and intervenes for the purpose that an official act that should not have been performed is performed, or that an official act that should or could have been performed is not performed – illegal official acts (Article 219 (2), BiH CC; Article 382 (2), FBiH CC; Article 353 (2), RS CC; Article 376 (2), BD CC). With respect to illegal official acts, the RS CC foresees an additional sanction in those cases where the offence was committed in relation to the initiation or conduct of a criminal proceeding; in such cases, the minimum imprisonment term increases from six months to one year, the maximum remains the same, i.e. five years (Article 353 (3), RS CC).

60. An aggravation of the punishment applies if the perpetrator accepts the advantage; the applicable sanction in this case, at State level, in the Federation and the BD district, consists of imprisonment of between one and ten years (Article 219 (3), BiH CC; Article 382 (3), FBiH CC; Article 376 (3), BD CC). The applicable sanction in such cases in the RS is different; it consists of imprisonment for between two and ten years (Article 353 (4), RS CC).

### Statistics and court decisions

61. There are no court decisions/ case law concerning trading in influence.

**Bribery of domestic arbitrators (Article 1, paragraphs 1 and 2 and Articles 2 and 3 of ETS 191) and bribery of foreign arbitrators (Article 4 of ETS 191)<sup>2</sup>**

62. The term domestic arbitrator is not explicitly provided by law. However, the authorities indicated that domestic arbitrators are considered public officials according to Article 1 (3) BiH CC, Article 2 (3) FBiH CC, Article 147 (3) RS CC, and Article 2 (3) BD CC, which refer to elected and appointed officers performing particular administrative, expert and other duties, as well as other persons who are performing specific official duties, with or without remuneration, as stipulated by law or other regulations based on law.
63. As regards foreign arbitrators, they are not explicitly covered by existing legislation. However, according to the authorities, this category of persons falls under the definition of foreign official referring to members of a legislative, executive, administrative or judicial organ of a foreign State in conjunction with the definition of public official concerning elected and appointed officers performing particular administrative, expert and other duties, as well as other persons who are performing specific official duties, with or without remuneration, as stipulated by law or other regulations based on law.
64. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of domestic arbitrators. There are no court decisions/case law concerning bribery of domestic and foreign arbitrators.

**Bribery of domestic jurors (Article 1, section 3 and Article 5 of ETS 191) and bribery of foreign jurors (Article 6 of ETS 191)**

65. The figure of jurors is unknown to the system of Bosnia and Herzegovina.
66. As regards foreign jurors, they are not explicitly covered by existing legislation. However, according to the authorities, this category of persons falls under the definition of foreign official referring to members of a legislative, executive, administrative or judicial organ of a foreign State in conjunction with the definition of public official concerning elected and appointed officers performing particular administrative, expert and other duties, as well as other persons who are performing specific official duties, with or without remuneration, as stipulated by law or other regulations based on law. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply accordingly to bribery of foreign jurors. There are no court decisions/case law concerning bribery of foreign jurors.

**Other questions**

**Participatory acts (Article 15 of ETS 173)**

67. The different CCs distinguish between co-perpetration, incitement, as well as aiding and abetting. These types of participation are punishable as principal offences.
68. Accomplices are liable within the limits of their intent or negligence. Those soliciting or supporting a crime are liable within the limits of their respective intents.

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<sup>2</sup> As for the offences of bribery of arbitrators and jurors, it has to be noted that Bosnia and Herzegovina is not party to ETS 191.

## Jurisdiction (Article 17 of ETS 173)

69. Jurisdiction is established over acts committed, whether partially or in whole, within the territory of Bosnia and Herzegovina (principle of territoriality), as well as for offences committed aboard a domestic vessel, military or civil aircraft while in flight, regardless of the location of such a vessel or aircraft at the time the criminal offence is committed.

### **Applicability of criminal legislation in the territory of Bosnia and Herzegovina**

#### **Article 8, BiH Criminal Code**

*(1) The criminal legislation of Bosnia and Herzegovina shall apply to anyone who commits a crime in the territory of Bosnia and Herzegovina.*

*(2) The criminal legislation of Bosnia and Herzegovina shall apply to anyone who commits a crime aboard a domestic vessel regardless of where the vessel was located at the time the crime was committed.*

*(3) The criminal legislation of Bosnia and Herzegovina shall apply to anyone who commits a crime aboard a domestic civilian aircraft while in flight or aboard a domestic military aircraft regardless of where the aircraft was located at the time the crime was committed.*

#### **Article 12, FBiH Criminal Code**

*(1) The criminal legislation of the Federation shall apply to anyone who commits a crime in the territory of the Federation.*

*(2) The criminal legislation of the Federation shall apply to anyone who commits a crime aboard a domestic vessel regardless of where the vessel was located at the time the crime was committed.*

*(3) The criminal legislation of the Federation shall apply to anyone who commits a crime aboard a domestic civilian aircraft while in flight or aboard a domestic military aircraft regardless of where the aircraft was located at the time the crime was committed.*

#### **Article 119, RS Criminal Code**

*(1) The criminal legislation of Republika Srpska shall apply to anyone who commits a crime in the territory of Republika Srpska.*

*(2) The criminal legislation of Republika Srpska shall apply to anyone who commits a crime aboard a domestic vessel regardless of where the vessel was located at the time the crime was committed.*

*(3) The criminal legislation of Republika Srpska shall apply to anyone who commits a crime aboard a domestic civilian aircraft while in flight or aboard a domestic military aircraft regardless of where the aircraft was located at the time the crime was committed.*

#### **Article 12, BD Criminal Code**

*(1) The criminal legislation of the Brčko District shall apply to anyone who commits a crime in the territory of the Brčko District.*

*(2) The criminal legislation of the Brčko District shall apply to anyone who commits a crime aboard a domestic vessel regardless of where the vessel was located at the time the crime was committed.*

*(3) The criminal legislation of the Brčko District shall apply to anyone who commits a crime aboard a domestic aircraft while in flight regardless of where the aircraft was located at the time the crime was committed.*

70. With respect to the principle of nationality (jurisdiction over acts committed abroad by citizens of Bosnia and Herzegovina), the respective CCs apply different criteria, as follows.

## **Applicability of criminal legislation when the offence is committed abroad**

### **Article 9, BiH Criminal Code**

(1) *The criminal legislation of Bosnia and Herzegovina shall apply to anyone who while outside its territory commits:*

*- any crime against the integrity of Bosnia and Herzegovina referred to in Chapter XVI (Crimes Against the Integrity of Bosnia and Herzegovina) of this Code;*

*- the crime of counterfeiting or forging securities of Bosnia and Herzegovina, the crime of counterfeiting value signs or counterfeiting trademarks, measures and weights issued under the regulations of the institutions of Bosnia and Herzegovina referred to in Articles 205 to 208 of this Code;*

*- a crime which Bosnia and Herzegovina is bound to punish according to the provisions of international law and international or intergovernmental agreements;*

*- crimes against an official or responsible person in the institutions of Bosnia and Herzegovina in relation to his office.*

(2) *The criminal legislation of Bosnia and Herzegovina shall apply to a citizen of Bosnia and Herzegovina who commits any crime outside the territory of Bosnia and Herzegovina.*

(3) *The criminal legislation of Bosnia and Herzegovina shall apply to a foreign national who while outside the territory of Bosnia and Herzegovina commits any crime against Bosnia and Herzegovina or any of its citizens which is not covered by the provision of paragraph 1 of this Article.*

(4) *The criminal legislation of Bosnia and Herzegovina shall apply to a foreign national who while outside the territory of Bosnia and Herzegovina commits a crime against a foreign state or a foreign national for which a term of imprisonment of five or more years may be imposed under this legislation.*

(5) *In cases referred to in paragraphs 2 and 3 of this Article, the criminal legislation of Bosnia and Herzegovina shall apply only if the perpetrator of the crime is caught in the territory of Bosnia and Herzegovina or is extradited to it, and in cases referred to in paragraph 4 of this Article only if the perpetrator is caught in the territory of Bosnia and Herzegovina and is not extradited to another state.*

### **Article 13, FBiH Criminal Code**

(1) *The criminal legislation of the Federation shall apply to anyone who:*

*a) commits any crime in the territory of Bosnia and Herzegovina against the constitutional order of the Federation referred to in Chapter XV (Crimes Against Constitutional Order) of this Law;*

*b) commits a crime in the territory of Bosnia and Herzegovina against an official or responsible person in connection with his duties.*

(2) *The criminal legislation of the Federation shall apply to a citizen of Bosnia and Herzegovina who outside the territory of the Federation commits any crime other than those specified in paragraph 1 of this Article.*

(3) *The criminal legislation of the Federation shall apply to a foreign national who outside the territory of the Federation commits any crime against Bosnia and Herzegovina or any of its citizens or against the Federation or any of its citizens which is not specified in paragraph 1 of this Article.*

(4) *The criminal legislation of the Federation shall apply to a foreign national who outside the territory of the Federation commits a crime against a foreign state or a foreign national for which a term of imprisonment of five years or more may be imposed under this legislation. Unless otherwise stipulated by law, the court in this case may not impose punishment more severe than that prescribed by the laws of the state in which the crime was committed.*

(5) *In cases referred to in paragraphs 2 and 3 of this Article, the criminal legislation of the Federation shall apply only if the perpetrator of the crime is caught in the territory of the Federation or if he is extradited, and in cases referred to in paragraph 4 of this Article only if the perpetrator is caught in the territory of the Federation and is not extradited to another state.*

**Article 120, RS Criminal Code**

*The criminal legislation of Republika Srpska shall apply to anyone who commits a crime referred to in paragraphs 293 to 311 of this Code outside its territory or abroad.*

**Article 121, RS Criminal Code**

*The criminal legislation of Republika Srpska shall apply to a citizen of Republika Srpska who while abroad commits a crime other than crimes listed in Article 120 of this Code, if he is caught in the territory of Republika Srpska or if he is extradited to Republika Srpska.*

**Article 122, RS Criminal Code**

*The criminal legislation of Republika Srpska shall also apply to a foreign national who while outside the territory of Republika Srpska commits a crime other than crimes listed in Article 120 of this Code, if he is caught in the territory of Republika Srpska or if he is extradited to Republika Srpska.*

*(2) The criminal legislation of Republika Srpska shall also apply to a foreign national who commits a crime against a foreign state or against a foreign national abroad for which a term of imprisonment of five or more years may be imposed under these laws when he is caught in the territory of Republika Srpska and is not extradited to a foreign state. Unless otherwise stipulated by law, the court in this case may not impose punishment more severe than that prescribed by the law of the state in which the crime was committed.*

**Article 123, RS Criminal Code**

*(1) If in cases referred to in Article 119 of this Code criminal proceedings have been instituted or completed in a foreign state, prosecution in Republika Srpska shall only be instituted with the approval of the chief state prosecutor.*

*(2) In cases referred to in Articles 121 and 122 of this Code, prosecution shall not be instituted:*

- 1) if the perpetrator has served the full sentence which was imposed on him abroad,*
- 2) if the perpetrator has been acquitted abroad by a final judicial decision,*
- 3) if the crime prosecuted under a foreign law is prosecuted at the request of the injured party, and no such request has been submitted.*

*(3) In cases referred to in Articles 121 and 122 of this Code, prosecution shall be instituted only when the crime is also punishable under the laws of the state in which the crime was committed. Where in cases referred to in Article 121 and Article 122 (1) of this Code a crime is not punishable under the laws of the state in which the crime was committed, prosecution may only be instituted with the approval of the chief state prosecutor.*

*(4) Only with the approval of the chief state prosecutor may criminal prosecution be instituted in Republika Srpska in cases referred to in Article 122 (2) of this Code, regardless of the laws of the state in which the crime was committed, if the act in question was considered a crime under the general legal principles recognised by the international community at the time it was committed.*

*(5) In cases referred to in Article 119 of this Code the prosecution of a foreign national may be ceded to a foreign state under conditions of reciprocity.*

**Article 13, BD Criminal Code**

*(1) The criminal legislation of the Brčko District shall apply to an inhabitant of the Brčko District who commits a crime abroad, if he is caught in the territory of the Brčko District or if he is extradited.*

*(2) The criminal legislation of the Brčko District shall also apply to a foreign national who outside the territory of the Brčko District commits a crime against it or any of its citizens, if he is caught in the territory of the Brčko District or if he is extradited.*

*(3) The criminal legislation of the Brčko District shall also apply to a foreign national who commits a crime against a foreign state or against a foreign national abroad for which a term of imprisonment of*

*five years or more may be imposed under the laws of that state when he is caught in the territory of the Brčko District. Unless otherwise stipulated by law, the court in this case may not impose punishment more severe than that prescribed by the law of the state in which the crime was committed.*

*(4) If in cases referred to in Article 12 of this Law criminal proceedings have been instituted but not completed by a final court decision in another state, the prosecutor of the Brčko District shall decide whether to institute prosecution.*

*(5) In cases referred to in Article 13 of this Law, prosecution shall be instituted only when the crime is also punishable under the laws of the state in which the crime was committed. Prosecution shall not be instituted in such cases either if under the laws of that state prosecution is instituted at the request of the injured party, and no such request has been submitted.*

*(6) The prosecutor may institute prosecution referred to in Article 13 (3) of this Law, regardless of the laws of the state in which the crime was committed if the act committed was considered a crime under the rules of international law at the time it was committed.*

*(7) In cases referred to in Article 12 of this Law, the prosecution of foreign nationals may be ceded to a foreign state under conditions of reciprocity.*

71. At State level, territoriality jurisdiction is established over criminal offences committed against an official or responsible person in the institutions of BiH in relation to public office (Article 9 (1), BiH CC); criminal offences committed by citizens of Bosnia and Herzegovina (Article 9 (2), BiH CC); criminal offences committed by foreign citizens against Bosnia and Herzegovina or its citizens (Article 9 (3), BiH CC); criminal offences committed by foreign citizens against a foreign State or another foreign citizen for which, under the law in force in the place of crime, a punishment of five years of imprisonment or a more severe penalty may be applied (Article 9 (4), BiH CC). Moreover, it is stated in a general way that penal legislation is applicable to acts committed outside the national territory which Bosnia and Herzegovina has bound itself to abide by through international treaty or convention (Article 9 (1), BiH CC). There is no requirement that the act constitutes a criminal offence under the law in force in the country of perpetration.
72. At FBiH level, territoriality jurisdiction is established over criminal offences committed by citizens of the FBiH (Article 13 (2), FBiH CC); criminal offences committed by foreign citizens against Bosnia and Herzegovina or its citizens, or against the FBiH or any of its citizens (Article 13 (3), BiH CC); criminal offences committed by foreign citizens against a foreign State or another foreign citizen for which, under the law in force in the place of crime, a punishment of five years of imprisonment or a more severe penalty may be applied (Article 13 (4), BiH CC). There is no requirement that the act constitutes a criminal offence under the law in force in the country of perpetration.
73. At RS level, territoriality jurisdiction is established over criminal offences committed by citizens of the RS (Article 121, RS CC); criminal offences committed by foreign citizens against a foreign State or another foreign citizen for which, under the law in force in the place of crime, a punishment of five years of imprisonment or a more severe penalty may be applied (Article 122 (2), RS CC). Dual criminality is required (Article 123 (3), RS CC).
74. At BD level, territoriality jurisdiction is established over criminal offences committed by citizens of the BD (Article 13 (1), BD CC); criminal offences committed by foreign citizens against BD or its citizens (Article 13 (2), BD CC); criminal offences committed by foreign citizens against a foreign State or another foreign citizen for which, under the law in force in the place of crime, a punishment of five years of imprisonment or a more severe penalty may be applied (Article 13 (3), BD CC). Dual criminality is required (Article 13 (5), BD CC).
75. The authorities informed the GET that there had been no court decisions/case law in connection with jurisdiction in respect of corruption offences.

## Statute of limitations

76. The period of limitation depends on the maximum term of imprisonment which can be imposed for the offence in question<sup>3</sup>; if several punishments are prescribed for a criminal offence, the statute of limitations is determined according to the most severe punishment prescribed. These periods are presumed to run from the time of the commission of the offence. The statute of limitations may be interrupted (a new period will start afresh) or suspended, but criminal prosecution is barred when the limitation period has elapsed twice.
77. The following table illustrates the applicable limitation periods for bribery and trading in influence offences:

Article CC	Offence	Sanction (imprisonment)				Statute of limitations (relative)			
		BiH	FBiH	BD	RS	BiH	FBiH	BD	RS
<b>Bribery in the public and private sectors</b>									
Active bribery									
218(1) BiH, 381(1) FBiH, 375(1) BD, 352(1) RS	Unlawful official acts/omissions	6 m – 5 yrs	6 m – 5 yrs	6 m – 5 yrs	6 m – 5 yrs	10 yrs	10 yrs	10 yrs	10 yrs
218(2) BiH, 381(2) FBiH, 375(2) BD, 352(2) RS	Lawful official acts/omissions	Up to 3 yrs	Up to 3 yrs	Up to 3 yrs	Up to 3 yrs	5 yrs	5 yrs	5 yrs	5 yrs
Passive bribery									
217(1) BiH, 380(1) FBiH, 374(1) BD, 351(1) RS	Unlawful official acts/omissions	1 – 10 yrs	1 – 10 yrs	1 – 10 yrs	1 – 8 yrs	15 yrs	15 yrs	15 yrs	15 yrs
217(2) BiH, 380(2) FBiH, 374(2) BD, 351(2) RS	Lawful official acts/omissions	6 m – 5 yrs	6 m – 5 yrs	6 m – 5 yrs	1 – 5 yrs	10 yrs	10 yrs	10 yrs	10 yrs
217(3) BiH, 380(3) FBiH, 374(3) BD, 351(3) RS	Bribery <i>a posteriori</i>	1 – 10 yrs	6 m – 5 yrs	6 m – 5 yrs	Up to 3 yrs	15 yrs	10 yrs	10 yrs	5 yrs
<b>Trading in influence</b>									
Passive trading in influence									
219(1) BiH, 382(1) FBiH, 376(1) BD, 353(1) RS	Lawful official acts/omissions	Up to 3 yrs	Up to 3 yrs	Up to 3 yrs	Up to 3 yrs	5 yrs	5 yrs	5 yrs	5 yrs
219(2) BiH, 382(2) FBiH, 376(2) BD, 353(2) RS	Unlawful official acts/omissions	6 m – 5 yrs	6 m – 5 yrs	6 m – 5 yrs	6 m – 5 yrs	10 yrs	10 yrs	10 yrs	10 yrs
353(3) RS	Unlawful official acts/omissions, in connection with conduct criminal investigation	NA	NA	NA	1 – 5 yrs	NA	NA	NA	10 yrs
219(3) BiH, 382(3) FBiH, 376(3) BD, 353(4) RS	Unlawful official acts/omissions, if reward received	1 – 10 yrs	1 – 10 yrs	1 – 10 yrs	2 – 10 yrs	15 yrs	15 yrs	15 yrs	15 yrs
Active trading in influence (not criminalised)									

\* Key: m = months; yrs = years; NA = Not applicable

<sup>3</sup> A limitation period of 25 years is provided for offences punishable with long-term imprisonment; a limitation period of 20 years is provided for offences punishable by a maximum period of imprisonment exceeding 10 years; a limitation period of 15 years is provided for offences punishable by a maximum period of imprisonment exceeding 5 years; a limitation period of 10 years is provided for offences punishable by a maximum period of imprisonment exceeding 3 years; a limitation period of 3 years is provided for offences punishable by a maximum period of imprisonment exceeding 1 year or by a fine (Article 14, BiH CC; Article 15, FBiH CC; Article 15, BD CC; Article 11, RS CC).

## Defences

78. Criminal liability may be waived in cases of effective regret of the briber (Articles 218 (3), BiH CC; 381 (3), FBiH CC; 352 (c), RS CC; 375 (3), BD CC - active bribery). In such a case, the court is entitled to decide whether the confiscated bribe is to be returned to the briber (Articles 218 (4), BiH CC; 381 (4), FBiH CC; 352 (d), RS CC; 375 (4), BD CC).
79. If the effective regret defence is successfully invoked, the perpetrator will still be considered guilty of the criminal offence, but will be exempted from punishment.

**Article 218 (3) and (4), BiH CC: effective regret**

*The perpetrator of the criminal offence referred to in paragraph 1 and 2 of this Article who had given a bribe on request of the official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person or an international official, but reported the deed before it being discovered or before knowing that the deed has been discovered, may be released from punishment.*

*The gifts or any other benefits shall be forfeited, while in case referred to in paragraph 3 of this Article, they can be returned to the giver.*

**Article 381 (3) and (4), FBiH CC: effective regret**

*The perpetrator of a crime referred to in paragraphs 1 and 2 of this Article who gives a bribe at the solicitation of an official or responsible person in the Federation, including a foreign official, but reports the crime before it is discovered or before learning that it has been discovered, may be acquitted.*

*The received gift or other benefit shall be seized, and in cases referred to in paragraph 3 of this Article it may be returned to the person who gave the bribe.*

**Article 352 (3) and 4, RS CC: effective regret**

*The perpetrator of a crime referred to in paragraphs 1 and 2 of this Article who gives a bribe at the solicitation of an official or responsible person, but reports the crime before it is discovered or before learning that it has been discovered, may be acquitted.*

*The received gift or other benefit shall be seized, and in cases referred to in paragraph 3 of this Article it may be returned to the person who gave the bribe.*

**Article 375 (3) and (4), BD CC: effective regret**

*The perpetrator of a crime referred to in paragraphs 1 and 2 of this Article who gives a bribe at the solicitation of an official or responsible person in the Brčko District of Bosnia and Herzegovina, including a foreign official, but reports the crime before it is discovered or before learning that it has been discovered, may be acquitted.*

*The received gift or other benefit shall be seized, and in cases referred to in paragraph 3 of this Article it may be returned to the person who gave the bribe.*

### **III. ANALYSIS**

80. There are four Criminal Codes (CC) applicable in Bosnia and Herzegovina at the different levels of Government, i.e. State level (BiH), Federation (FBiH), Republika Srpska (RS) and Brčko District (BD). The GET understood that, following international pressure, some consensus had been reached in Bosnia and Herzegovina to align the respective CCs. The GET was told that the latest reform of penal legislation had taken place in 2010 and that all CCs had been aligned since then. The reform was reportedly aimed at better complying with international requirements. In the

anticorruption arena, a number of adjustments had been made, notably with respect to the definition of “officials”, the international dimension of bribery, forfeiture provisions, etc.

81. However, as the analysis below will illustrate, the intended complete harmonisation of the criminal legislative framework within the country has not fully occurred in practice; inconsistencies remain across penal provisions at the different levels of Government. This lack of harmonisation is particularly noticeable with respect to the criminalisation of bribery (material elements of the offence and applicable sanctions) and the issue of jurisdiction. This state of affairs is in clear contravention of one of the main purposes of the Criminal Law Convention on Corruption (hereinafter the Convention), as well as Guiding Principle 2, which both enshrine the need to ensure co-ordinated criminalisation of national and international corruption, including by developing common standards concerning certain corruption offences and harmonising the definition of corruption offences. In the GET’s view, as a matter of priority, it is crucial that legislation is fully harmonised in Bosnia and Herzegovina: incriminations and sanctions need to be identical across the national territory. Such a move would further assist the enhancement of legal certainty vis-à-vis practitioners and the public at large. The absence of alignment in the incrimination of bribery/trading in influence offences, together with the very limited practice and court decisions dealing with these types of offence, have a detrimental effect on the common understanding of the criminalisation of corruption by practitioners, which the GET found to be inconsistent and even contradictory at times. The paragraphs which follow highlight the specific areas where inconsistencies still exist<sup>4</sup> and contain recommendations to address this major area of concern.

## Bribery in the public sector

### *Scope of perpetrators*

82. Concerning the categories of persons covered by the relevant bribery provisions, the GET finds the definition of “an official or a responsible person” rather confusing and notes that several interlocutors had difficulties in explaining its precise content. In particular, the GET notes that the different CCs often refer to the notion of “*public officer/functionary*” (Article 1 (3), BiH CC; Article 2 (3), FBiH CC; Article 147 (3), RS CC; Article 2 (3), BD CC). The GET explored this issue in depth while on-site and tested numerous examples of the different categories of persons who would fall under the definition of public official (e.g. judges and prosecutors, mayors and ministers, public employees without the status of civil servant, etc.). The interlocutors interviewed explained that the concept of “public officer” would cover any person who participates in carrying out a service on behalf of the public and according to public law. This explanation seems to suggest that the concept of “an official or a responsible person” could be interpreted in an extremely wide and flexible manner and could, in principle, encompass the different categories of persons referred to in Article 1.a of the Convention, as well as members of domestic public assemblies who are addressed by Article 4 of the Convention. However, the GET could not identify a common precise understanding as to how the terms were to be interpreted. In the GET’s view, this can lead to situations where a person might not be aware that s/he was considered to be a public official/responsible person for the purpose of the CC; this could also have a bearing on the guilt of the giver of the advantage, if s/he does not realise that the recipient is to be considered a public official/responsible person under the CC. Therefore, the GET recommends **to analyse and to clarify, for the sake of legal certainty, which functions are covered by the notion of “an official or a responsible person”**. When clarifying the concept

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<sup>4</sup> Tables of comparison of the applicable bribery and trading in influence offences in the different Criminal Codes in force in Bosnia and Herzegovina are included in an Annex to this report.

of “responsible person” due attention must be paid to the concerns raised in paragraphs 94 and 95 and, more particularly, the recommendation that follows in paragraph 96.

83. As regards the international dimension of the bribery offences, the definition of foreign officials provided by the relevant CCs (Article 1 (7) and (8), BiH CC; Article 2 (8), FBiH CC; Article 147 (6), RS CC; Article 2 (7) and (8), BD CC) appears to cover the different categories of foreign public officials and international officials envisaged by Article 1.a of the Convention insofar as they are serving in the territory of BiH or its Entities/BD. This is not in line with the Convention, which aims at criminalising corruption wherever it occurs (Explanatory Report, paragraph 49). Moreover, the GET notes that the relevant bribery provisions in the RS CC do not explicitly mention foreign officials, in contrast with the applicable provisions in the BiH, FBiH, and BD which specifically refer to bribery of foreign officials. The GET could not find a satisfactory answer from the RS authorities as to this deficiency in its penal legislation. Consequently, the GET recommends **(i) to ensure that the definition of foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, as well as judges and officials of international courts is not limited in scope to those persons serving in Bosnia and Herzegovina/its Entities or Brčko District; (ii) to ensure that bribery of the aforementioned categories of foreign and international officials is explicitly criminalised in the Criminal Code of the Republika Srpska, in accordance with Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173).**
84. In connection with corruption of jurors and arbitrators, Bosnia and Herzegovina has not yet ratified the Additional Protocol to the Convention (ETS 191)<sup>5</sup>. With respect to domestic jurors, it was explained to the GET that there are no jurors in the domestic legal system. Concerning bribery of domestic arbitrators, the authorities were of the opinion that arbitrators would be covered by the relevant definitions of public officials referring to “persons performing particular administrative, expert and other duties, as well as other persons who are performing specific official duties, with or without remuneration, as stipulated by law or other regulations based on law”. According to the authorities, private arbitrators (i.e. arbitrators in private matters) would also be considered public officials by virtue of the respective Civil Procedure Acts, which give domestic arbitral decisions the same power as domestic court decisions, thus conferring public nature upon arbitrators’ duties. As for the international dimension of these terms, the authorities explained that foreign jurors and arbitrators would be captured by the definition of “foreign public official”, in conjunction with that of “domestic public official”. The interpretation provided by the authorities was not substantiated by any case law or court decision in this respect. The GET notes that the relevant definitions in the CCs referring to foreign public officials appear to be autonomous; none of them refers back to the definition of “domestic official”. If specifically analysing the coverage of the bribery provisions concerning foreign public officials, foreign jurors would be covered to the extent that they are considered in the foreign jurisdiction as “members of a judicial organ of a foreign State”. This interpretation departs from the Additional Protocol, which criminalises bribery of foreign jurors irrespective of their status in the foreign jurisdiction. This would also be questionable with respect to foreign arbitrators who would not necessarily be considered as “members of a legislative, executive, administrative or judicial organ in a foreign State”. The GET recommends **to ensure that bribery of foreign jurors and arbitrators is criminalised unambiguously, in accordance with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), and to sign and ratify this instrument as soon as possible.**

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<sup>5</sup> A decision to ratify the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) was taken by the Presidency of Bosnia and Herzegovina at its 59<sup>th</sup> session (27 July 2009).

### Material act

85. As to the concrete articulation of the bribery offence, it is based on the different types of expected actions/omissions of the public official concerned and their lawful or unlawful nature. The GET considers that the formulation of bribery offences in the different CCs is cumbersome and non-systematic. While refraining from issuing any recommendation in this respect, the GET is of the view that this unnecessarily complicated formulation may negatively affect the application of the law in practice, and thereby hinder successful prosecution and conviction of bribery offences, for example, in relation to meeting the standard of evidence required by the court – which was by some practitioners regarded to be excessive – and the difficulties in proving the offence.
86. More particularly, with respect to the material elements of bribery offences, active bribery may be committed by “giving” and “promising to give” a gift or any other benefit (Article 218, BiH CC; Article 381, FBiH CC; Article 352, RS CC; Article 375, BD CC). One of the three elements contained in Article 2 of the Convention, namely the “offering” is therefore not explicitly mentioned. Passive bribery may be committed by “demanding/soliciting”, “accepting” and “accepting the promise” of a gift or other benefit (Article 217, BiH CC; Article 380, FBiH CC; Article 351, RS CC; Article 374, BD CC). The notion of “acceptance of an offer” as comprised in Article 3 of the Convention is therefore missing. The authorities explained that there is no legal difference between offering and promising (and between the acceptance of an offer and the acceptance of a promise) since the word “*obećanje*” in the national language(s) encompasses the notions of both a formal “promise” and a mere “offer”. The GET has no reason to doubt the explanation given by the authorities (and broadly shared by the practitioners met) in that respect, but it is of the view that, in the context of any future reform of the relevant CCs in BiH, the authorities may wish, for the sake of legal certainty, to refer explicitly to the notions of “offering” and “acceptance of an offer” in the relevant bribery provisions.
87. The GET noted that the relevant CCs go beyond the requirements of the Convention since they also criminalise the reception of the undue advantage after the act has been performed by the public official, without prior offer, request or acceptance, i.e. so-called bribery *a posteriori* (Article 217 (3), BiH CC; Article 380 (3), FBiH CC; Article 351 (3), RS CC; Article 374 (3), BD CC).

### Concept of advantage

88. The authorities confirmed to the GET that all sorts of advantages are covered, irrespective of their value, in so far as the purpose of such advantages would be to influence a public official's action in service. The authorities indicated that corruption offences are offences of “social significance” which have been included in the CC for preventive purposes to protect the objectivity and impartiality of public administration. For this reason, the authorities stressed that, although under administrative law certain gifts may be acceptable<sup>6</sup>, in criminal law, a criterion of zero-tolerance to benefits applies. Specific examples of prosecuted cases involving bribes of very low value were provided. According to the authorities, all forms of corruption are, in principle, liable to prosecution since the resulting social harm is deemed to outweigh any considerations

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<sup>6</sup> According to the existing Laws on Civil Service, civil servants are prohibited from accepting any advantages for themselves or for their close relatives other than those authorised by law. In this connection, only token gifts may be accepted. Additional safeguards are provided by Article 10 of the Law on Conflicts of Interest in Governmental Institutions of Bosnia and Herzegovina, which prescribes that elected officials, executive office holders and advisors may only keep a gift of an amount not exceeding 100 BAM (50 EUR) without having to report it. Any gift that exceeds the afore-mentioned value is to be reported to the Election Commission and subsequently becomes national property. Unlawful acceptance of gifts may lead to sanctions consisting of fines, temporary removal from public office, and the obligation to return the gift or its equivalent value.

based on the size and nature of bribes. The authorities further explained that it is commonly understood that the notion of benefit goes beyond material gain, and thus also extends to immaterial and intangible advantages.

#### *Breach of duty*

89. With respect to the type of acts to be performed or omitted by an official person in the context of a bribery offence, these have to fall “within the scope of the official’s powers/authority”. This could mean in practice that acts and omissions which are outside the official’s competence, or his/her statutory remit, but that s/he has the opportunity to commit because of the function s/he occupies, would not be covered directly by the bribery provisions (e.g. making confidential information available to which the official has access in the exercise of his/her function when the gathering, use or disclosure of such information is not strictly within the scope of competence of the official concerned). In the GET’s view, and as recognised by GRECO’s previous pronouncements on this matter, this concept is narrower than the requirements of Articles 2 and 3 of the Convention which refer to acts and omissions which are made possible in relation to the public official’s function, even if the act is a misuse of the official position. The GET was told that such cases could be prosecuted under the offence of abuse of office. The GET is doubtful that all cases of bribery in the meaning of Articles 2 and 3 of the Convention would be covered by the aforementioned offences: for example, it is highly questionable whether cases where a person unsuccessfully asks an official person to act outside his/her competence would fall under the scope of the relevant abuse of office offences. Moreover, the notion of “competence” adds an – excessively restrictive – element to the criminalisation of bribery, which may make prosecution of the offence more difficult, i.e. by requiring proof that the official was expected to act within his/her official statutory competence. The GET explored the state of affairs with the interlocutors met on site and heard many conflicting views on the issue; in this connection, several interviewees, including judges, admitted that this could potentially constitute a loophole in the system. The GET, therefore, recommends **to ensure that the provisions concerning active and passive bribery in the public sector cover all acts/omissions in the exercise of the functions of an official person, whether or not within the scope of his/her official powers or authority.**

#### *Direct/indirect commission of offence / Third party beneficiaries*

90. The GET notes that concerning the indirect commission of bribery/trading in influence offences, only the relevant provisions on active bribery explicitly provide for the commission of the offence by intermediaries (i.e. Article 218, BiH CC; Article 381, FBiH CC; Article 352, RS CC; and Article 375, BD CC). With respect to passive bribery, the relevant provisions remain silent in this respect, but the authorities indicated that the general rules on participation in criminal offences (aiding and abetting) would apply. In the absence of practical experience, it is difficult for the GET to assess at this stage whether the general provisions on participation will prove to be suitable legal tools to effectively cover instances of bribery through intermediaries. The GET can definitely see challenges, which may well emerge in the not too distant future, in reconciling strict adherence to the principle of legality and a somehow more extensive/far-reaching interpretation of corruption-related provisions.
91. Disparity was also observed with respect to third party beneficiaries who, pursuant to the latest amendments of penal legislation, are only specifically covered in the provisions on passive bribery of the BiH and the FBiH CCs (Article 217, BiH CC and Article 380, FBiH CC). No reference to third parties is included in the corresponding passive bribery provisions of the RS and BD. Likewise, the relevant provisions on active bribery, at the different levels of Government, remain silent as to the concrete coverage of third parties.

92. The GET wishes to stress how important it is for the sake of consistency and clarity that all corruption offences contain the same basic elements. It is therefore of the firm opinion that the legislation applicable to instances of bribery needs to be streamlined in order to cover, without any doubt, the indirect commission of domestic bribery offences, as well as third party beneficiaries. Consequently, the GET recommends **to ensure that the bribery offences are construed in such a way as to cover, unambiguously, instances of bribery committed through intermediaries, as well as instances where the advantage is not intended for the official himself/herself but for a third party.**

#### Bribery in the private sector

93. Turning to private sector bribery, the GET notes that the penal provisions concerning bribery refer to “officials and responsible persons”. Therefore, in principle, persons acting on behalf of private sector entities would be captured by the bribery provisions detailed above (i.e. Articles 380-381, FBiH CC; Articles 351-352, RS CC; and Articles 374-375, BD CC<sup>7</sup>). However, the GET heard conflicting views on the particular coverage of private bribery during the on-site visit. While some interlocutors claimed that bribery in both public and private sectors is covered by the same set of provisions, others expressed their misgivings and were of the opinion that, since bribery offences are regulated in the different CCs in a chapter which targets crimes against public administration, it would be difficult to extend its application to private sector offences. There has been no investigation/prosecution of bribery in the private sector until now; however, the GET could not come to an unequivocal conclusion that the lack of action in this area resulted from a legal lacuna or a lack of knowledge of corruption practices, and their necessary prosecution, in the private sector. In any event, the GET has misgivings about the confusing legal situation. The GET also shares the view expressed by some interlocutors that the system would doubtless benefit from the introduction of separate and clearly identifiable provisions designed specifically to cover private sector bribery; this is also the approach taken by the drafters of the Convention. Consequently, the GET recommends **to (i) clarify beyond doubt that bribery in the private sector is criminalised; and (ii) consider, for the sake of clarity, criminalising bribery in the public and the private sector in separate provisions.**
94. Moreover, the definition of “responsible person” falls short of the requirements of the Convention. Firstly, the aforementioned definition presupposes a certain degree of responsibility within the entity concerned, in that it applies to persons “who, in consideration of their duties, or on the basis of specific authority, have been entrusted with a range of tasks relating to the application of laws or regulations adopted pursuant to laws or a general act of a business enterprise or other legal entity, which regulate the managing and handling of property or the management of production of some other economic activity or control over them”. Again, the GET heard conflicting views as to the understanding of the term “responsible person”, with several interlocutors (including judges and other practitioners) stating that the relevant corruption offences refer to a specific category of public officials with directing/managerial responsibilities. Other interlocutors considered that the notion of “responsible person” would cover persons discharging duties and with burden of responsibilities within the company concerned. Given the contradictory statements of the practitioners met on-site, and the fact that there has been no investigation/prosecution of bribery in the private sector to date, the GET remains unconvinced that the notion of “responsible person” fully covers the different categories of persons envisaged by the Convention, including persons without managerial/directing/supervisory functions, such as employees discharging non-managerial tasks (e.g. secretaries or administrative assistants) or

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<sup>7</sup> Private sector entities can only operate and be registered in the territories of the Entities and the BD; therefore, the applicable provisions in this area are those contained in the Entity/BD Criminal Codes.

low-level employees discharging manual tasks (e.g. maintenance workers, drivers, etc.). The GET further notes that the offences against property (e.g. fraud, embezzlement, abuse of trust), against payment transactions and business operations (e.g. tax evasion, money laundering), and even certain offences against official duty (i.e. embezzlement and unauthorised use of money, securities or other movable items entrusted by virtue of an official duty) establish that the perpetrator of the relevant offences could be “whoever” performs the illegal action/omission in question.

95. Doubts were also expressed on-site as to the coverage of other contractual relationships – different from a traditional employee status – in a private entity (e.g. lawyers, consultants, independent professionals hired by the legal entity for specific tasks on a temporary or ad hoc basis).
96. Lastly, the definition of “responsible person” does not appear to cover persons working in entities without legal personality. By contrast, Articles 7 and 8 of the Convention unambiguously refer to “any persons who direct or work for, in any capacity, private sector entities” without any restrictions as to the functions or responsibilities of the person or the legal status of the private sector entity.<sup>8</sup> In light of the comments made in paragraphs 94 to 96, the GET recommends **to ensure that legislation concerning bribery in the private sector covers in an unequivocal manner the full range of persons who direct or work for, in any capacity, any private sector entity as provided for in Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173).**

#### Trading in influence

97. Only passive trading in influence is criminalised in Bosnia and Herzegovina (Articles 218, BiH CC; 382 FBiH CC; 353, RS CC; and 376, BD CC). According to the authorities, the constitutive elements of the bribery offence largely apply to trading in influence. However, the GET is concerned that the current wording in the different CCs of the offence of passive trading in influence does not include a number of key elements spelled out in Article 12 of the Convention. In particular, they only refer to the “acceptance” of a reward or some other advantage by the influence peddler. The GET accepts the explanation provided by the authorities that the term “acceptance” (“*primi*” in the original languages) covers the simple “receipt” in the meaning of Article 12 of the Convention, as this article only applies to acts committed intentionally and therefore supposes at least some kind of tacit acceptance. By contrast, in the absence of any jurisprudence/case law in this area, the GET is far from convinced that other key elements of the trading in influence offence are effectively covered by the respective CCs, including: the request or the acceptance of the offer or the promise of an undue advantage, the direct/indirect commission of the offence, and third party beneficiaries. There are no explicit references in the relevant CCs concerning the aforementioned elements.
98. Although it is not required that the influence is actually exerted and leads to the intended result, the interlocutors met indicated that the influence needs to be real and effectively enable the influence peddler to have the power of intervention or improper influence on the decision-making process. The GET wishes to stress that the Criminal Law Convention on Corruption covers cases of not only real, but also supposed influence of the influence peddler on other persons. Therefore, according to the Convention, the offence would be deemed to have been committed if an advantage is promised/offered/granted to a person who merely asserts or confirms that s/he is

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<sup>8</sup> Including entities without legal personality, as well as individuals – see the Explanatory report to the Criminal Law Convention, paragraph 54.

able to exert improper influence over the decision-making of the categories of officials covered under Article 12.

99. Finally, as already mentioned, active trading in influence, i.e. the promising, giving or offering of an undue advantage to the influence peddler, is not criminalised. Consequently, the GET recommends **to (i) criminalise active trading in influence; (ii) review the provision on passive trading in influence to unambiguously cover a) the request of the offer or the promise of an undue advantage by the influence peddler; b) the direct and indirect commission of the offence; c) those instances where the advantage is not intended for the briber him/herself but for a third party; and d) instances of alleged influence.**

#### Sanctions and effectiveness in practice, statute of limitations

100. The level of penalties for bribery offences depends on whether they imply a legal or illegal act or omission by the official/responsible person. In their most serious forms, i.e. in cases of illegal acts or omissions, bribery offences generally carry prison sentences of up to 5 (active bribery) or 10 years (passive bribery). Offences of (passive) trading in influence can be punished by prison sentences of up to 5 years, or 10 years in aggravated cases. The aforementioned sanctions appear to conform, in principle, to the requirements established by Article 19 (1) of the Convention. That said, the sanctioning regime varies slightly at the different levels of Government (for specific differences, see paragraphs 28-30, 59-60 and 77). As already stressed above, it is essential that the applicable sanctions for bribery and trading in influence offences are the same throughout the national territory. The GET recommends **to fully harmonise the existing sanctions for bribery and trading in influence offences.**
101. A decisive challenge in fighting corruption in Bosnia and Herzegovina lies with effective application of legislation. There is a general impression in the country that perpetrators of corruption offences often go unpunished. Statistics show rather alarming data on prosecution and adjudication of this type of offence: most cases end up in acquittals or suspended sentences. A recent study of the National Chapter of Transparency International in Bosnia and Herzegovina<sup>9</sup> indicated that the number of reports of corruption triples the corresponding number of indictments; indictments end mostly in acquittals or suspended sentences, fines are seldom applied, there are virtually no imprisonment sentences. The GET was also told during the on-site visit that while during the period 2003-2009, some 30 to 33 large corruption cases were investigated (and 90-95% overturned on appeal); in 2010 virtually no corruption cases had been dealt with by law enforcement agencies. In this connection, the GET shares the concerns of numerous interlocutors met on-site about the rare application of bribery and trading in influence provisions, which is at variance with the public perception that Bosnia and Herzegovina is extensively affected by corruption, and the widespread mistrust in civil society as to the effective deterrent of corruption. The general view is that most investigations deal with petty bribery offences of low and middle ranking officials and that there is no real political will to fight high-level cases of corruption.
102. The GET notes that some positive efforts have been displayed to improve the legislative framework applicable to corruption offences and thereby facilitate their prosecution in practice; for example, new provisions have been introduced in penal legislation to provide for, *inter alia*, extended confiscation, the application of special investigative techniques to all corruption

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<sup>9</sup> Monitoring of Anticorruption Reforms in Bosnia and Herzegovina: a study on the investigation of corruption offences. April 2010.

offences, etc<sup>10</sup>. However, it would appear that the aforementioned legislative measures have so far yielded very few results. The GET wishes to stress that even the most comprehensive laws do not assist in combating corruption if they are not effectively enforced.

103. It has been a challenging exercise for the GET to make a fair and comprehensive analysis of the legal obstacles affecting the implementation of bribery and trading in influence provisions, and more in particular, the reported lack of convictions. During the on-site visit, a number of factors were highlighted to the GET in this respect. In particular, concerns were raised about the understanding of corruption-related provisions and the level of proof required in bribery cases, which was deemed by most practitioners to be excessive. The vast majority of cases referred to during the on-site visit dealt with petty corruption where, for example, the offender had tried to bribe a police or customs officer or where the conviction was based on situations where money had changed (or was changing) hands. Practitioners further indicated that many corruption cases were prosecuted as abuse of office as it was an easier way to substantiate the offence. The GET is aware that bribery offences are often difficult to prove – they typically involve a pact of silence between the parties engaged in the corrupt deal – but considers that other countries have managed to establish a standard of proof allowing prosecutorial authorities to infer evidence from objective factual circumstances. Furthermore, the GET was told during the on-site visit that even the prosecution of abuse of office offences ends up with more than 50% of acquittals.
104. Another cause of concern was that the departure of international judges and prosecutors working in the war crimes as well as in the organised crime and corruption chambers of the State Court and the Bosnia and Herzegovina Prosecutor's Office<sup>11</sup>. These international officials were conducting high-level corruption investigations. The authorities are to gradually provide for the replacement of international judges and prosecutors, but at the time of the on-site visit, most interlocutors pointed at the scarcity of human and material resources to perform successful investigations of corruption cases. The GET was told that cases are not being built properly, if they reach first instance, they are then overturned in second instance. Other problems were highlighted to the GET by the practitioners met during the on-site visit, including the weak coordination of anti-corruption efforts at State level and the conflicts in (internal) jurisdiction that arise among the different courts in Bosnia and Herzegovina (State/Entity levels) in the investigation of corruption offences, the need for strengthening the cooperation between police (which is highly decentralised, operates on a territorial basis at Entity/BD levels, and reportedly works mostly on personal, rather than institutionalised, contacts) and prosecutors, the slow judicial follow-up and the lack of prioritisation of corruption cases, etc.
105. Generally, the time limit for the prosecution of bribery and trading in influence offences is 5 to 10 years (for aggravated offences it can run up to 15 years). The statute of limitations may be interrupted and suspended, but the absolute limitation period expires when twice the prescribed time lapses. The length of the statute and the way it is calculated are in line with the situation in most other GRECO member States evaluated to date. Despite that, prosecutions are sometimes discontinued because they are time-barred and above all because they take an unreasonable time. Practitioners explained this in terms of the sometimes limited resources available in a given case. The GET was told that prosecutors and courts are overloaded; the GET was further provided with disquieting figures in this respect: a 2 million case backlog in courts; with an average of 700-800 cases per year and 400-500 appearances in court per year, prosecutors

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<sup>10</sup> See Compliance Report to the Second Evaluation Round on Bosnia and Herzegovina and its Addendum (Greco RC-II (2008) 7E).

<sup>11</sup> The mandate of the international judges and prosecutors working in the war crimes as well as in the organised crime and corruption chambers of the State Court and the Bosnia and Herzegovina Prosecutor's Office expired in December 2009; some of them have stayed on in an advisory capacity.

were giving priority to detention related cases. The aforementioned overload of the judiciary results in lengthy delays for concluding corruption cases, which, in turn, allows lawyers to use delaying tactics to drag proceedings out until the time limit expires. It is obvious that sanctions lose much of their dissuasive character where justice is so seriously delayed that the accused person has a very good chance of avoiding a trial as a result of expiry of the limitation period. This state of affairs should be carefully analysed (and thereby addressed).

106. The GET takes the view that the legislative adjustments recommended in this report will be an important, but not in itself sufficient, contribution to more efficiently fighting corruption. The legislative framework needs to be accompanied by measures to promote its use in practice. The GET is firmly convinced, that the difficulties in investigating and adjudicating corruption offences highlighted above warrant further analysis and reflection on possible solutions. The GET therefore recommends **to (i) carry out a proper overall survey and assessment of the obstacles affecting the implementation of bribery and trading in influence provisions; (ii) to adopt a specific plan to address and solve, within a specified timescale, any such obstacles identified by the assessment and thereby improve effectiveness of the criminal legislation on corruption; (iii) make the results of this exercise publicly available.**
107. Moreover, as indicated above, much reform has taken place since 2003 in this field. As recommended by GRECO and other international institutions, the legislative reform has been coupled with training of the officials who are to apply the law. Against this background, the GET noted, in the course of the interviews performed during the on-site visit, that there was an absence of common understanding of key aspects of corruption incriminations among practitioners. The GET was made aware of a number of ongoing/planned technical assistance projects which will provide further training to law enforcement authorities. The GET very much hopes that such training programmes will efficiently address the aforementioned challenges in order to support the full implementation of the existing incriminations of corruption offences. It is necessary to develop a common understanding of legal concepts which are not sufficiently clarified by law or by binding court decisions. Much more needs to be done in this respect. Therefore, the GET recommends **to take additional measures (e.g. training, guidelines, circulars, etc.) to raise the awareness of the professionals who are to apply the criminal legislation on corruption.**

#### Effective regret

108. The special defence of effective regret exempts the bribe-giver from punishment in cases of active bribery, provided that s/he gives the bribe at the request of an official person and reports the offence before it is discovered or before s/he learns that the offence has been discovered (Article 218 (3), BiH CC; Article 381 (3), FBiH CC; Article 352 (3), RS CC; Article 375 (3), BD CC). In such cases, the perpetrator may be remitted from punishment if s/he reports the offence before its detection. The decision to exempt the perpetrator from punishment is at the discretion of the court. The active briber, who effectively regrets his/her action would be exempted from punishment, but s/he would still be considered guilty of the criminal offence with the possibility for the court to impose on him/her other accessory measures. The GET was told that the special defence of effective regret is meant to cover cases of solicitation. Accordingly, where bribe-givers are extorted by bribe-takers who would otherwise refuse to perform their duties, it was considered useful to have provisions on effective regret in place to dissuade and to detect this kind of behaviour; particular examples were provided to this effect (e.g. doctors refusing to provide treatment unless they receive a gratuity). Reference was also made to the strong deterrent role that the effective regret provision could play in corruption cases (although no concrete details were provided as to whether the defence had ever been invoked/granted in

practice). The GET accepts the explanations provided by the authorities on the necessity of this type of defence and the safeguards provided by law against its potential misuse: the relevant provisions are rather limited in scope and have a discretionary nature, which the court may decide to apply or not to apply. More questionable is, however, the possibility provided by all relevant CCs to restore the bribe to the bribe-giver (Article 218 (4) BiH CC; Article 381 (4), FBiH CC; Article 352 (4), RS CC; Article 375 (4), BD CC); for this reason, the GET recommends to **abolish the possibility provided by the special defence of effective regret to return the bribe to the bribe-giver who has reported the offence before it is uncovered.**

### Jurisdiction

109. The jurisdictional principle of territoriality applies to all bribery and trading in influence offences, in line with Article 17, paragraph 1.a of the Convention. In particular, jurisdiction is established over all offences committed on the national territory or Bosnia and Herzegovina ships or aircrafts, by national or foreign citizens (Article 8, BiH CC; Article 12, FBiH CC; Article 119, RS CC; Article 12, BD CC). The Criminal Code does not explicitly state whether territorial jurisdiction covers offences only partly committed in Bosnia and Herzegovina, but the authorities explained during the on-site visit that the principle of territoriality is interpreted broadly and therefore jurisdiction may also be established when the bribery offence is in part committed within the national territory. Moreover, according to general rules, offences are deemed to be committed both in the place where the perpetrator was acting and in the place where the unlawful consequence, fully or partially, occurred. Likewise, the nationality of the briber or the person who is bribed is immaterial.
110. The applicable rules on nationality jurisdiction (acts committed abroad by citizens of Bosnia and Herzegovina) are, however, far from homogeneous across the different levels of Government.
111. All CCs allow the establishment of jurisdiction over criminal acts committed abroad by citizens of Bosnia and Herzegovina (principle of nationality), if they are arrested on the territory of Bosnia and Herzegovina (or any of its Entities or the BD) or extradited to it (Article 9(2), BiH CC; Article 13(2), FBiH CC; Article 121, RS CC; Article 13(1), BD CC). This is in line with part of Article 17, paragraph 1.b of the Convention establishing jurisdiction committed by nationals abroad. However, the GET notes that the aforementioned provision in the Convention also extends nationality jurisdiction to public officials and members of domestic public assemblies of member States – i.e. not necessarily nationals. This extension is not fully reflected in the different CCs, which generally require BiH citizenship. Domestic officials and members of domestic public assemblies who are not at the same time citizens of Bosnia and Herzegovina would therefore not be covered. The authorities indicated, however, that such situations could not arise as in Bosnia and Herzegovina public officials have to be citizens. The GET accepts this explanation but wishes to stress that in the case of future legislative changes to this nationality requirement on public officials the jurisdictional rules would have to be adjusted accordingly (this could well be the case if Bosnia and Herzegovina becomes a Member State of the European Union; in such a case, it would be possible for citizens of other EU countries to serve as officials of Bosnia and Herzegovina or as elected representatives in a municipal assembly of Bosnia and Herzegovina).
112. With particular reference to certain situations covered by Article 17, paragraph 1.c of the Convention, i.e. offences committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies and officials of international courts who are – at the same time – BiH nationals, it appears that Bosnia and Herzegovina would retain nationality jurisdiction only if the offence is directed against a domestic official/responsible person (Article 9(1), BiH CC), against the country/Entities/BD (Article 9(3), BiH CC; Article 13(3),

FBiH CC; Article 13(2), BD CC) or if the offence carries a punishment of at least 5 years' imprisonment (Article 9(4), BiH CC; Article 13(4), FBiH CC; Article 122(2), RS CC; Article 13(3), BD CC). The GET is concerned that these additional requirements do not cover the different situations foreseen in Article 17, paragraph 1.c of the Convention: for example, there may well be cases of corruption offences committed abroad by a foreigner and involving a public or international official of BiH nationality, where it is difficult to prove that the offence was directed against Bosnia and Herzegovina. Likewise, some bribery/trading in influence offences carry a punishment of less than 5 years' imprisonment.

113. Finally, the requirements of dual criminality and reciprocity are applicable in the BD and RS CCs. If the act does not constitute a criminal offence under the law in force in the country of perpetration, criminal proceedings may be instituted only upon the approval of the prosecutor/chief state prosecutor (Article 13(5), BD CC and Article 123(3), RS CC). Both CCs allow for the possibility of lifting the dual criminality requirement if the offence in question is considered a crime under the rules of international law at the time it was committed (Article 13(6), BD CC and Article 123(4), RS CC). The GET considers that the condition of dual criminality, as required by the BD and RS CCs, constitutes an unnecessary restriction which deviates from the Convention; Bosnia and Herzegovina has not made any reservation in this respect.
114. The authorities indicate that the aforementioned deficiencies do not apply at the State level, since Article 9 of the BiH CC states that jurisdiction is established over criminal offences committed abroad which Bosnia and Herzegovina is obliged to penalise according to the provisions of international law and international treaties or inter-state agreements. The authorities have explained that this means that Article 17 of the Convention, which has been ratified without reservation, is fully applicable at State level. In light of GRECO's previous pronouncements on this matter, the GET accepts this explanation with respect to the State level CC, but notes that the loopholes in jurisdiction described above are still relevant to Entities/BD legislation. Therefore, the GET recommends **to fully harmonise the existing jurisdiction provisions, notably by (a) abolishing the requirement of dual criminality with respect to the offences of bribery and trading in influence committed abroad, when applicable; (b) establishing jurisdiction over acts of corruption committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies and officials of international courts who are, at the same time, nationals of Bosnia and Herzegovina.**

#### **IV. CONCLUSIONS**

115. Bosnia and Herzegovina has made some efforts to align its penal legislation with international anticorruption standards in the recent years. However, a key shortcoming of the system is the lack of harmonisation of the four existing Criminal Codes in the country (State level, Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District). This lack of consistency is particularly noticeable with respect to the criminalisation of bribery (material elements of the offence and applicable sanctions) and the issue of jurisdiction. As a matter of priority, it is essential that legislation is fully aligned in Bosnia and Herzegovina: incriminations and sanctions should be identical across the national territory. Such a move would no doubt strengthen legal certainty for the benefit of practitioners and the public at large and thus help making legislation work more effectively in practice.
116. In addition, all Criminal Codes share a number of deficiencies when compared with the provisions of the Criminal Law Convention on Corruption (ETS 173) under review. In particular, it must be ensured that the offences of active and passive bribery in the public sector cover all

acts/omissions occurring in the exercise of a public official's duties, whether or not within the scope of his/her official competences. The definition of foreign and international officials is to be expanded since at present it only covers those persons serving in Bosnia and Herzegovina. The lack of court decisions concerning private sector bribery results in conflicting interpretations of the existing provisions and their scope, to the extent that it is doubtful whether private sector bribery is indeed covered by national law. Likewise, active trading in influence needs to be criminalised. The possibility of returning the bribe to the bribe-giver, who declares the offence to the competent authority before it is uncovered, should be abolished in order to limit any risk of abuse. Finally, Bosnia and Herzegovina should, as soon as possible, become a Party to the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191).

117. Leaving the abovementioned deficiencies in the legislation aside, the main challenge in fighting corruption in Bosnia and Herzegovina lies with the effective application of legislation. Statistics show rather alarming data on prosecution and adjudication of this type of offence: most cases end up in acquittals or suspended sentences. Some of the concerns raised in this area relate to the poor understanding of corruption-related provisions among practitioners (which is at great variance and often in discord), the level of proof required in bribery cases, the scarcity of human and material resources to perform successful investigations, the slow judicial follow-up and the lack of prioritisation of corruption cases, unclear procedures to attribute jurisdiction to State/Entity courts, delaying tactics to exhaust limitation periods, etc. It is important that an assessment of the impact of the obstacles affecting the implementation of bribery and trading in influence provisions be undertaken and concrete measures be put in place to address the problems identified. Furthermore, it is crucial that a more proactive approach to the detection, prosecution and punishment of corruption be pursued in Bosnia and Herzegovina.

118. In view of the above, GRECO addresses the following recommendations to Bosnia and Herzegovina:

- i. **to analyse and to clarify, for the sake of legal certainty, which functions are covered by the notion of “an official or a responsible person” (paragraph 82);**
- ii. **(i) to ensure that the definition of foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, as well as judges and officials of international courts is not limited in scope to those persons serving in Bosnia and Herzegovina/its Entities or Brčko District; (ii) to ensure that bribery of the aforementioned categories of foreign and international officials is explicitly criminalised in the Criminal Code of the Republika Srpska, in accordance with Articles 5, 6, 9, 10 and 11 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 83);**
- iii. **to ensure that bribery of foreign jurors and arbitrators is criminalised unambiguously, in accordance with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), and to sign and ratify this instrument as soon as possible (paragraph 84);**
- iv. **to ensure that the provisions concerning active and passive bribery in the public sector cover all acts/omissions in the exercise of the functions of an official person, whether or not within the scope of his/her official powers or authority (paragraph 89);**
- v. **to ensure that the bribery offences are construed in such a way as to cover, unambiguously, instances of bribery committed through intermediaries, as well as**

instances where the advantage is not intended for the official himself/herself but for a third party (paragraph 92);

- vi. to (i) clarify beyond doubt that bribery in the private sector is criminalised; and (ii) consider, for the sake of clarity, criminalising bribery in the public and the private sector in separate provisions (paragraph 93);
  - vii. to ensure that legislation concerning bribery in the private sector covers in an unequivocal manner the full range of persons who direct or work for, in any capacity, any private sector entity as provided for in Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 96);
  - viii. to (i) criminalise active trading in influence; (ii) review the provision on passive trading in influence to unambiguously cover a) the request of the offer or the promise of an undue advantage by the influence peddler; b) the direct and indirect commission of the offence; c) those instances where the advantage is not intended for the briber him/herself but for a third party; and d) instances of alleged influence (paragraph 99);
  - ix. to fully harmonise the existing sanctions for bribery and trading in influence offences (paragraph 100);
  - x. to (i) carry out a proper overall survey and assessment of the obstacles affecting the implementation of bribery and trading in influence provisions; (ii) to adopt a specific plan to address and solve, within a specified timescale, any such obstacles identified by the assessment and thereby improve effectiveness of the criminal legislation on corruption; (iii) make the results of this exercise publicly available (paragraph 106);
  - xi. to take additional measures (e.g. training, guidelines, circulars, etc.) to raise the awareness of the professionals who are to apply the criminal legislation on corruption (paragraph 107);
  - xii. to abolish the possibility provided by the special defence of effective regret to return the bribe to the bribe-giver who has reported the offence before it is uncovered (paragraph 108);
  - xiii. to fully harmonise the existing jurisdiction provisions, notably by (a) abolishing the requirement of dual criminality with respect to the offences of bribery and trading in influence committed abroad, when applicable; (b) establishing jurisdiction over acts of corruption committed abroad by foreigners, but involving officials of international organisations, members of international parliamentary assemblies and officials of international courts who are, at the same time, nationals of Bosnia and Herzegovina (paragraph 114).
119. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Bosnia and Herzegovina to present a report on the implementation of the above-mentioned recommendations by 30 November 2012.
120. Finally, GRECO invites the authorities of Bosnia and Herzegovina to authorise, as soon as possible, the publication of the report, to translate the report into the national languages and to make these translations public.