COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Manual
Criminal Prosecution of
Corruption and Economic Crime Offences

Council of Europe

PACO

Programme against corruption and organised crime in South-eastern Europe

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PREFACE

The need to address corruption and organized crime as an obstacle to democratic stability, the rule of law and social and economic development in South-eastern Europe has been raised by the Council of Europe and other organizations in numerous occasions. Countries of South-eastern Europe have taken up this challenge and made progress in term of adopting European standards and relevant legislation, joining international monitoring mechanisms (that is, the Group of States against Corruption –GRECO), elaborating national anti-corruption plans, and establishing specialised anti-corruption services.

The PACO Impact project, financed by Swedish Development Cooperation Agency (Sida), launched in March 2004, is a regional project aimed at the implementation of national anti-corruption plans in south-eastern Europe. This project provides technical assistance directly to seven project areas in south-eastern Europe - Albania, Bosnia and Herzegovina, Croatia, "the Former Yugoslav Republic of Macedonia", Kosovo (S&M), Montenegro, Serbia (S&M). It follows up on assessments carried out under the Stability Pact Anti-corruption Initiative (SPAI) as well as on recommendations resulting from GRECO evaluations. It furthermore builds on the commitments made by these countries at the London Ministerial Conference on Organised Crime (November 2002), and takes into account the anti-corruption measures identified within the Stabilisation and Association process and other agreements with the European Union.

The project, while taking into account the specific needs of each project area, also contains a strong element of regional interaction, and facilitates experience exchange and networking among anti-corruption institutions.

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1 INTRODUCTION

This Manual has been prepared within the framework of the Council of Europe technical assistance regional project: PACO Impact (Implementation of Anti-corruption Plans in South East Europe). The purpose of this Manual is to assist prosecutors and officials of law enforcement agencies in their daily duties of criminal prosecution of economic and corruption related crimes. At the same time, this Manual may also be found useful by judges who will conduct proceedings for economic and corruption related crimes.

The fact that economic and corruption offences represent a serious social threat to Bosnia and Herzegovina and its economic stability, and the fact that Bosnia and Herzegovina is going through transition which is often a fertile soil for such offenders, with the simultaneous emergence of new offences in this domain, have brought up the attention for the preparation of such a manual to assist prosecutors and authorised officials to act in the most effective way possible and to implement in the best and most useful way the existing mechanisms in ordeer to carry out effective criminal proceedings.

This Manual provides a thorough and systematic overview of relevant provisions of the criminal codes and criminal procedure codes applicable in Bosnia and Herzegovina. Through a prism of offences in the field of corruption and economic crime, analysis and comparison of specific provisions relevant for criminal proceedings of these offences are provided in accordance to all criminal codes and criminal procedure codes, aiming to offer to the user all necessary knowledge in this field at one place, as well as the means of effective application of available mechanisms and institutes of criminal proceedings in practice.

This Manual is intended to offer an extensive overview of all provisions of substantive criminal legislation in Bosnia and Herzegovina relating to economic and corruption related crimes,,and an overview of the applicable provisions on those proceedings with a special focus on the relevant crimes.

1.1 How to Use the Manual

This Manual is composed of three main parts:

(1) Relevant provisions of the criminal procedure codes;
(2) Relevant provisions of criminal codes; and
(3) Proper and effective use of the mechanisms and institutes of criminal prosecution.

The first part contains relevant provisions of the criminal procedure codes in force in Bosnia and Herzegovina which are the following:

Criminal Procedure Code of BiH;
Criminal Procedure Code of Republika Srpska;
Criminal Procedure Code of the Federation of BiH; and
Criminal Procedure Code of the Brcko District.

This last one will not deal in detail with all provisions of the criminal procedure codes, but will address those provisions that are particularly important for criminal prosecution of economic and corruption offenders, with an emphasis on possible discrepancies among the applicable criminal procedure codes in Bosnia and Herzegovina and the relevance of such discrepancies. The application of these procedural rules is dealt with in the third part of the Manual.

Given the importance this Manual may have in the practice of criminal prosecution of these crimes, which, in addition to being effective, must also fully respect international human rights standards,

comments will be given on possible departures from these standards. The third part will also indicate how to use properly the provisions that might sometimes seem not clear and in relation to their compliance with international standards.

The second part gives an overview of the most relevant and most frequent comic and corruption offences in Bosnia and Herzegovina as established by the applicable criminal codes (BIHCC, RSCC, FBIHCC and BDCC).

This part also refers to relevant general criminal law institutes having specific manifestations and meanings in respect of these criminal offences, as well as a comparative overview that will point out certain differences among same criminal offences in the criminal codes listed above, and will show the importance of such differences in interpretations of the existence or non-existence of a criminal offence and criminal liability of the perpetrator. As a separate part, criminal regulation of legal persons' liability is also dealt with.

All paragraphs of the first chapter will contain a reference to the relevant international standards in the domain concerned, with an indication as to possible compliance or incompliance of domestic criminal legislation with the international standards. It is good to know what these standards are, not only for the purpose of a possible recommendation to the legislator in the future as to what could be changed in the legislation, but also, as the primary purpose of this Manual: to help in using and better understaning the criminal code, wherever it is possible and allowed, in accordance with the international standards in the daily performance of duties of prosecutors and all others for whom this Manual is intended.

The third part refers to the course and procedure of criminal prosecution with specificities of prosecutions of some criminal offences, the possibilities and relevance of the conduct of financial investigation within the criminal procedure codes, includes a reference to the importance of the application of temporary security measures and the importance of the procedure of establishment and confiscation of proceeds from a criminal offence. This part of the Manual is an essential, applicative part of the Manual allowing the user to consult the certain steps that need to be taken for an effective prosecution of these offences and referring to proper application of mechanisms and institutes of criminal law and criminal procedure law in practice.

1.2 Domestic legislation

- Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05)
- Criminal Procedure Code of the Federation of BiH (Official Gazette of the Federation of BiH, 35/03, 37/03, 56/03, 78/04)
- Criminal Procedure Code of Republika Srpska (Official Gazette of RS, 50/03, 111/04, 115/04)
- Criminal Procedure Code of Brcko District (Official Gazette of Brcko District, 7/00, 1/01, 10/03, 48/04)
- Criminal Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 3/03, 32/03, 37/03, 54/04, 61/04)
- Criminal Code of the Federation of BiH, (Official Gazette of the Federation of BiH, 36/03, 37/03, 21/04, 69/04, 18/05)
- Criminal Code of Republika Srpska (Official Gazette of RS, 49/03)
- Criminal Code of Brcko District (Official Gazette of Brcko District, 1/01, 3/03, 10/03, 6/05)

1.3 United Nations Conventions

The United Nations Convention against Corruption adopted on 1 September, 2005 and signed by Bosnia and Hercegovina on 16 September, 2005.

1.4 Council of Europe Conventions

- The Council of Europe - Civil Law Convention on Corruption (CETS No. 174), adopted on 4 November, 1999 and entered into force on 1 November, 2003. This Convention was signed by Bosnia and Herzegovina on 1 March, 2000 and ratified on 30 January, 2002.
- The Council of Europe – Criminal Law Convention on Corruption (CETS No. 173), adopted on 27 January, 1999 and entered into force on 1 July, 2002. This Convention was signed by Bosnia and Herzegovina on 1 March, 2000 and ratified on 30 January, 2002.
- Additional Protocol (CETS No. 191) of January 2003, which entered into force on 15 May, 2003, extended the scope of the Convention. This Protocol has not yet been ratified by Bosnia and Herzegovina.
- European Convention on Extradition (CETS No. 024), Additional Protocol to the European Convention on Extradition (CETS No. 086) and Second Additional Protocol on Extradition (CETS No. 098), signed on 30 April, 2004, ratified on 25 April, 2005, entered into force on 24 July, 2005.
- European Convention on Mutual Assistance in Criminal Law Matters (CETS No. 030), signed on 30 April, 2004, ratified on 25 April, 2005, entered into force on 24 July, 2005.
- European Convention on the Transfer of Proceedings in Criminal Matters (CETS No. 073); signed on 30 April, 2004, ratified on 25 April, 2005, entered into force on 26 July, 2005.

- Convention on the Transfer of Sentenced Persons (CETS No. 112), signed on 30 April, 2004, ratified on 15 April, 2005, entered into force on 1 August, 2005.

- The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS No. 141), signed on 30 March, 2004, ratified on 30 March, 2004, entered into force on 1 July, 2004.

2 PART ONE: CRIMINAL PROCEDURE CODE

2.1 Specific Provisions of the Criminal Procedure Code

Since there are no essential differences among the applicable provisions of the four criminal procedure codes in Bosnia and Herzegovina, this Manual will use the text of the Criminal Procedure Code of Bosnia and Herzegovina, indicating the numbering of the same articles in the other three codes and showing the differences in the legal texts, if any. This overview of the procedural provisions is based solely on an author's evaluation as to their relevance within the context of criminal prosecution of the criminal offences of economic crime and corruption.

Article 10
Legally Invalid Evidence
(Art. 11 FBIHCPC, Art. 10 RSCPC, Art. 10 BDCPC)

(1) It shall be forbidden to extort a confession or any other statement from the suspect, the accused or any other participant in the proceedings.

(2) The Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of this Code.

(3) The Court may not base its decision on evidence derived from the evidence referred to in Paragraph 2 of this Article.

Given the fact that it is forbidden to extort a confession or any other statement from the suspect, the accused or any other person, and that evidence so obtained cannot be used in criminal proceedings, and, since evidence obtained through violation of laws and fundamental human rights and freedoms is legally invalid and cannot be used at any stage of criminal proceedings, this issue needs to be given special attention at all stages of investigation.

Generally, in respect of legally invalid evidence, we speak of three basic categories as follows:

a) evidence obtained through violation of human rights and fundamental freedoms,
b) evidence explicitly provided by this Code not to be considered in judicial decision making in criminal proceedings,
c) evidence which the corpus of criminal proceedings would not have reached without information from legally invalid evidence («fruit of the poisonous tree»).

In investigations of the criminal offences dealt with by this Manual, which are often very complex and difficult to prove, the prosecutor must ensure consistent compliance with the provisions quoted above, both in his or her work and in the work of authorised officials who act under the prosecutor's order. It is also necessary to keep constantly in mind that evidence classified under c) above, collected in a legal manner but reached through the use of legally invalid evidence, is also legally invalid evidence. It is particularly important to secure initial information (evidence) from which other evidence will arise, in a manner permitted by law. Otherwise, all efforts and evidence collected will be useless and such investigation will be destined to fail.

Article 14
Equality of Arms
(Art. 15 FBIHCPC, Art. 14 RSCPC, Art. 14 BDCPC)

The Court, the Prosecutor and other bodies participating in the proceedings are bound to objectively study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused.

It is a duty of all parties participating in the proceedings and bearing the burden of proof and of application of law to collect all legally relevant facts relating to the criminal proceedings. In other words, the Court will evaluate all legally relevant facts whether they are exculpatory or inculpatory for the suspect or the accused. Also, the Prosecutor is bound to establish in the Prosecutor's files such evidence that is in favour of the suspect or the accused and that has been obtained through the collection of evidence incriminating the suspect or the accused. However, the Prosecutor is not obliged to aim at collecting such evidence that will be exculpatory for the suspect, which directly arises out of the prosecutor's role in the proceedings.

When it comes to economic and a corruption criminal offence, a justified question is raised as to how realistic this situation in a real life is. Namely, given the complexity and sophisticated nature of many criminal offences in this field (e.g. abuse of office, giving and accepting bribe, fraud and abuse in economic business operations, etc.), as well as the expertise and skills of potential perpetrators, the Prosecutor is inherently in a difficult situation concerning the collection of evidence incriminating the suspect. It is often the case that, while investigating a criminal offence of this kind, the Prosecutor comes upon more evidence in favour of the suspect or the accused. This should not mean that the Prosecutor should stop collecting further evidence, but simply that the Prosecutor examine and establish with equal attention this kind of evidence in taking a Prosecutor's decision to bring or not an indictment.

Article 15
Free Evaluation of Evidence
(Art. 16 FBIHCPC, Art. 15 RSCPC, Article 15 BDCPC)

The right of the Court, Prosecutor and other bodies participating in the criminal proceedings to evaluate the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules.

Evaluation of evidence is based on the principle of free assessment whereby standards establishing a quantitative and qualitative value of evidence are not and cannot be set in advance. The only limitations exist in respect of prohibitions relating to evidence that are specified by law, as well as the cases of the application of the principle of legal validity of evidence and of establishment of truth in criminal proceedings. Given the absence of a strict procedure and formal evidentiary rules for the assessment of the existence or non-existence of evidence and facts, or the value of evidence and facts that are being established, a procedure of and rules for evaluation of evidence and facts will be defined in each criminal proceeding, which will largely depend on the nature of the criminal offence itself.

Taking into account the nature and character of economic crimes and corruption offences, material evidence is particularly relevant (business and other documentation, computer data from computer systems and other data from automatic data processing devices and so on).

When it comes to material evidence, on the issue of business documentation, the legislator provides that only original documentation or authenticated copies may be used as evidence, which can sometimes create difficulties in a case when such documentation is hidden or destroyed (it should be noted that there is a general obligation for economic entities to keep business documentation for five years).

That is why the third possibility provided by the criminal procedure code with respect to documentation should be used, which is unauthenticated copies of documentation whose authenticity or non-modified character in comparison to the original can be verified in another way.

The law does not enumerate methods in which such authenticity may be established, but only provides for «another manner», which includes any evidentiary procedure or any measure that can establish the authenticity of such unauthenticated copies. To that end statements of witnesses, of the suspect, graphology and graphic expert analyses etc. can be used.

When it comes to the collection of such documentation, a search should be applied, since that is the most certain method to prevent such documents from being destroyed or hidden (e.g. in the case of an order for seizure of objects when the suspect or another person can refuse to hand over such documentation and destroy it until the time when a search warrant is issued, irrespective of the consequences established by law for such destruction, both of a procedural and substantive legal nature).

In conducting a search and seizure of documents, it is useful to make a video recording and photography of the search to prevent any objections by the defence challenging the legality of the search and the evidence concerned.

As to the data in computer systems and similar computer and electronic devices for automated data processing, such data are highly important for the prosecution of these offences, since modern business operations are practically inconceivable and impossible without the use of computers and similar devices. Therefore, a request for the issuance of a search warrant should always include the request for seizure and search of the computer systems and devices for storage of computer and electronic data.

In conducting a search, the assistance of a professional should be secured in order to access secret information (invisible and password protected or deleted data).

It should be emphasised again that inspection of the content of the computer systems and similar devices for electronic data storage is not an expert witness evaluation (as it can sometimes be wrongly interpreted in practice), but it is included in the measure of search of immovable property, since the purpose of this measure is only to find information, and not to interpret its meaning.

Article 16
Accusatory Principle
(Art. 17 FBiHCPC, Art. 16 RSCPC, Art. 16 BDCPC)

Criminal proceedings may only be initiated and conducted upon the request of the Prosecutor.

This provision introduces the application of the accusatory principle, which is the principle according to which criminal proceedings may not be initiated or conducted without a request of the Prosecutor. This principle also implies the division of the functions in criminal proceedings: the prosecutor – the defence – the court. The Prosecutor's request must be concise in establishing the person against whom proceedings are conducted and the criminal offence with which the suspect or the accused is charged.

2.2 Differences among the Provisions

The Criminal Procedure Code of Brcko District, Article 16, includes an additional provision in comparison to other codes. Namely:

Paragraph 2 of Article 15 explicitly provides for a duty of the Prosecutor to prove the guilt of the accused: *The Prosecutor shall have a duty to prove the guilt of the accused*.

This wording simply further develops the principle *in dubio pro reo*, according to which a person is considered innocent of a crime until found guilty by a final judgment, and is also an explicit development of the role and the duty of the Prosecutor. In essence, this means emphasising the burden of proof which in criminal proceedings falls upon the Prosecutor.

Article 17

Principle of Legality of Prosecution
(Art. 18 of FBIHCPC, Art. 17 of RSCPC, Art. 17 of BDCPC)

The Prosecutor is obligated to initiate a prosecution if there is evidence that a criminal offence has been committed unless otherwise prescribed by this Code.

In all cases when the Prosecutor has evidence that a criminal offence has been committed, he must initiate a prosecution. As the law does not precisely define the quality and the quantity of evidence (the principle of free evaluation of evidence), it should be considered that the Prosecutor must initiate a prosecution when there is sufficient evidence that constitutes grounds for suspicion.

The following situations specified by law are an exception to the obligation to prosecute: legal obstacles to prosecution (amnesty and statutes of limitation), exceptions to the application of the principle of legality (criminal offences prosecuted upon an approval, criminal offences for which there are special conditions for prosecution, criminal offences the prosecution of which can be relinquished to other states, criminal offences for which the Prosecutor can grant immunity to the witness, less serious criminal offences committed by minors and criminal offences heard in the proceedings against legal persons), as well as in the cases which apply the principle of proportionality (in case of minors and in those cases where the Prosecutor considers that the reasons for prosecution have ceased to exist (the principle of mutability).

Article 18
Consequences of Initiation of the Proceedings
(Art. 19 of FBIHCPC, Art. 18 of RSCPC, Art. 18 of BDCPC)

When it is prescribed that the initiation of criminal proceedings entails the restriction of certain rights, such restrictions, unless this Code specifies otherwise, shall commence when the indictment is confirmed. And for the criminal offences for which the principal penalty prescribed is a fine or imprisonment up to five (5) years, those consequences shall commence as of the day the verdict of guilty is rendered, regardless of whether the verdict has become legally binding.

From the point of view of criminal prosecution and processing of criminal offences addressed by this Manual, and in particular, from the point of view of corruption offences, the above quoted provision is especially important. Namely, as immediately seen from the provision, there are two situations which entail legal consequences of the initiation of criminal proceedings. These consequences are manifested as the restriction of certain rights of the person being prosecuted. In criminal proceedings for criminal offences punishable by the imprisonment for a term exceeding five years and when the law does not prescribe otherwise, legal consequences of the initiation of criminal proceedings commence when the indictment is confirmed. In the case of a criminal offence for which the penalty prescribed is a fine or imprisonment for a term up to five years, the consequences commence as of the day the verdict of guilty is rendered, regardless of whether the verdict has become legally binding.

The restrictions of the rights of the person against whom criminal proceedings is conducted are established by other laws as well, among which the most relevant are: *Law on Civil Service* and *Law on Travel Documents of BiH*. For instance, the Law on Civil Service prescribes that the competent authority shall suspend a civil servant who has been ordered to detention immediately upon having learned about the order of detention. Since the CPC is silent on the moment of the initiation of criminal proceedings, and special laws prescribing the restrictions of rights as a result of the initiation of proceedings use the term «the initiation of criminal proceedings», it should be considered that the restrictions of the rights of the person against whom criminal proceedings are conducted should commence only in the above mentioned cases. Unless specifically prescribed by another law, the initiation of an investigation by issuing an order to conduct a prosecution will not constitute a legal basis for the commencement of the consequences of the initiation of criminal proceedings and the restriction of the rights of the person

against whom the proceedings is conducted. In other words, opening of an investigation for corruption offences (accepting and giving bribe, abuse of office and so on) does not suffice to deprive a person being prosecuted of certain rights, such as the right to continue holding his or her position or office.

Article 35
Rights and Duties
(Art. 45 of FBIHCPC, Article 43 of RSCPC, Art. 35 of BDCPC)

(1) The basic right and the basic duty of the Prosecutor shall be the detection and prosecution of perpetrators of criminal offences falling within the jurisdiction of the Court.
(2) The Prosecutor shall have the following rights and duties:

- *a. as soon as he becomes aware that there are grounds for suspicion that a criminal offence has been committed, to take necessary steps to discover it and investigate it, to identify the suspect(s), guide and supervise the investigation, as well as direct the activities of authorized officials pertaining to the identification of suspect(s) and the gathering of information and evidence;*
- *b. to perform an investigation in accordance with this Code;*
- *c. to grant immunity in accordance with the law;*
- *d. to request information from governmental bodies, companies and physical and legal persons in Bosnia and Herzegovina;*
- *e. to issue summonses and orders and to propose the issuance of summonses and orders as provided under this Code;*
- *f. to order authorized officials to execute an order issued by the Court as provided by this Code;*
- *g. to propose the issuance of a warrant for pronouncement of the sentence pursuant to Article 334 of this Code;*
- *h. to issue and defend indictment before the Court;*
- *i. to file legal remedies;*
- *j. to perform other tasks as provided by law.*

(3) In accordance with Paragraphs 1 and 2 of this Article, all bodies participating in the investigative procedure are obligated to inform the Prosecutor on each undertaken action and to act in accordance with every Prosecutor's request.

In addition to criminal prosecution, as the basic right and the basic duty, the Prosecutor has the right and the duty to take necessary steps to discover a criminal offence. This function of the Prosecutor is often a subject of discussion, since it is viewed as equalling the discovering of criminal offences by the police. If this provision were to be understood literally, Prosecutor's actions would have characteristics of police actions and would be more appropriate for actions of the law enforcement agencies and not of the role of the Prosecutor in accordance with the provisions of the Criminal Procedure Code. Therefore, one should make difference between police actions on detecting criminal offences in accordance with the provisions governing the basic functions of the police, and the procedural role of the Prosecutor concerning detection of criminal offences. The Prosecutor takes necessary steps to detect a criminal offence exclusively on the basis of the existence of grounds for suspicion that a criminal offence has been committed.

Collection and discovery of information and evidence to constitute grounds of suspicion that a criminal offence has been committed are the activities falling exclusively within the competence of police bodies within the scope of their powers. Consequently, detection of a criminal offence that the Prosecutor performs is a detection of the criminal offence directed at the event, i.e. further uncovering of the criminal offence based on the already obtained information that there is an event incorporating a ground for suspicion that a criminal offence has been committed, unlike the police detection of a criminal offence where the detection of grounds for suspicion that a criminal offence has been committed is an essential consequence of usual activities that were not directed at an event incorporating the ground of suspicion that a criminal offence had been committed.

The above implies that the Prosecutor does not have any function in respect of actions of police and other law enforcement agencies related to detection of criminal offences and prevention and suppression of crime until the moment of the establishment of grounds for suspicion that a criminal offence has been committed. This is also supported by the fact that the basic legislation regulating activities of the police service, such as the Laws on Internal Affairs, the Law on State Investigation and Protection Agency, the Law on the State Border Service, etc, specify as a main function of these services the duty to detect and prevent criminal offences.

In all cases where there is a ground for suspicion (a lower degree of suspicion) that a criminal offence has been committed, the Prosecutor has the duty to take all necessary steps to document the criminal offence, to discover the perpetrator of the offence and evidence of the offence committed. To that end, there is also the exclusive right and the duty of the Prosecutor to manage an investigation, to direct the activities of investigating bodies and exercise supervision over their application.

Of particular importance is the power of the Prosecutor to grant immunity to a witness in the cases under Article 84 of BiHCPC. In deciding to grant immunity from prosecution, the Prosecutor primarily considers the balance between what the witness is granted immunity for (the quantity and the type of incriminated conduct of the witness) and the value of the testimony (statement) that the witness offers in return. Proper application of immunity as a procedural institute is a highly important evidentiary mechanism, especially in the case of corruption offences where there is a mutual interest of the active and passive participants in keeping the offence undetected.

Article 36
Taking Actions
(Art. 47 of FBIHCPC, Art. 44 of RSCPC, Art. 36 of BDCPC)

The Prosecutor shall take all actions in the proceedings for which he is himself authorized by law or through the persons who are authorized pursuant to the law to act on his request in criminal proceedings.

The Criminal Procedure Code does not draw distinction between the Chief Prosecutor and other Prosecutors employed with the Prosecutor's Office. Any Prosecutor is autonomous in carrying out his duty and the Prosecutor's duty does not rest on an institution but on an individual. The actions for which he is authorised, the Prosecutor takes himself, or through the persons who are obliged to act on the Prosecutor's request. This primarily concerns the authorised officials as specified by the Criminal Procedure Codes.

Article 37
Giving Instructions
(Art. 50 of FBIHCPC, Art. 37 of BDCPC)

In order to exercise his rights and duties, the Prosecutor may, in concrete cases, give necessary instructions to the Prosecutor's offices in the Federation of Bosnia and Herzegovina, Republika Srpska and Brcko District of Bosnia and Herzegovina.

In giving instructions there is a big difference between the powers of the Chief Prosecutor of BiH and the Entity Chief Prosecutors. Namely, the Chief Prosecutor of BiH does not have powers to issue binding instructions to other prosecutors in BiH, whereas the chief Federation Prosecutor does have such authority in respect of the subordinated prosecutor's offices. This situation comes from the fact that the Prosecutor's Office of BiH is a sui generis prosecutor's office which is not organised on the principle of vertical subordination, which is not the case with the organisation of prosecutor's offices in the Entities. This provision does not exist in RSCPC, while in the case of Brcko District; this authority is given to the Prosecutor in respect of authorised officials.

Article 38
Abandoning Prosecution
(Art 52 of FBiHCPC, Art. 46 of RSCPC, Art. 38 of BDCPC)

The Prosecutor may abandon prosecution before the end of a main trial or during the proceedings before the Panel of the Appellate Division when provided by this Code.

By applying the principle of mutability, the Prosecutor has the exclusive right to abandon prosecution completely at any stage of the proceedings. Depending on the stage of the proceedings, a different method in which the Prosecutor can abandon prosecution applies. Thus in such cases where the indictment has not been confirmed, the Prosecutor abandons the prosecution by issuing the order to cease the investigation or by the decision to withdraw the indictment that has not been confirmed yet. This order of the Prosecutor may not be appealed, but the injured is allowed to raise objection. When the indictment has already been confirmed and the Prosecutor seeks to abandon the prosecution, it is necessary that the preliminary hearing judge who has confirmed the indictment approves the abandonment of the prosecution.

During the main trial, if the Prosecutor abandons the prosecution, a verdict will be rendered that the charge has been dismissed. The Panel of the Appellate Division will do the same in the proceedings following an appeal filed.

Article 65
Order for Seizure of Objects
(Art. 79 of FBIHCPC, Art. 129 of RSCPC, Art. 65 of BDCPC)

(1) Objects that are the subject of seizure pursuant to the Criminal Code or that may be used as evidence in the criminal proceedings shall be seized temporarily and their custody shall be secured pursuant to a Court decision.
(2) The seizure warrant shall be issued by the preliminary proceedings judge on the motion of the Prosecutor or on the motion of authorized officials who have been approved by the Prosecutor.
(3) The seizure warrant shall contain the name of the Court, legal grounds for undertaking the action of seizure of objects, indication of the objects that are subject to seizure, the name of persons from whom objects are to be seized, place where the objects are to be seized, a timeframe within which the objects are to be seized, and notification of the right of the affected person to a legal remedy.
(4) The authorized official shall seize objects on the basis of the issued warrant.
(5) Anyone in possession of such objects must turn them over at the request of the preliminary proceedings judge. A person who refuses to surrender articles may be fined in an amount up to 50.000 KM, and may be imprisoned if he persists in his refusal. Imprisonment shall last until the article is surrendered or until the end of criminal proceedings, but no longer than 90 days. An official or responsible person in a state body or a legal entity shall be dealt with in the same manner.
(6) The provisions of Paragraph 5 of this Article shall also apply to the data stored in devices for automated or electronic data processing. In obtaining such data, special care shall be taken with respect to regulations governing the maintenance of confidentiality of certain data.
(7) An appeal against a decision on fine or on imprisonment shall be decided by the Panel. An appeal against the decision on imprisonment shall not stay execution of the decision.
(8) When articles are seized, a note shall be made of the place where they were found, and they shall be described, and if necessary, establishment of their identity shall also be provided for in some other manner. A receipt shall be issued for articles seized.
(9) Forceful measures referred to in Paragraph 5 and 6 of this article may not be applied to the suspect or to persons who are exempt from the duty to testify.

Seizure of objects as an action aimed at obtaining evidence is an especially important procedural action which can be taken both during the investigation and before the formal institution of the investigation. Namely, seizure of objects not only secures evidence which is important for a successful conduct of criminal proceedings, but there are other aspects of this action, such as providing safety to persons (removing dangerous objects and substances to preclude the perpetration of a criminal offence) and increasing effectiveness and efficiency of the proceedings.

Objects that are the subject of seizure include, first of all, such objects that can be used or that have been used for the perpetration of a criminal offence, or resulting from the perpetration of the offence. An assessment as to what needs to be seized is made on a case-to-case basis and will depend on the characteristics of the case, i.e. of the criminal offence. Thus, for example, the cases involving complex financial investigation of legal persons will sometimes require that large quantities of business documentation belonging to the legal person should be seized, so that only at the next stage of the proceedings will an analysis of the documentation be made in order to make a selection as to what can be relevant for further investigation and what can be used as a corpus delicti in the further proceedings, as well as to what is not needed and can be returned to the legal person from whom the business documentation was taken.

Given the large volume of the documentation that legal persons have and use in their operations, in complex investigations it is necessary to make a careful assessment as to which parts need to be forfeited and whether it is necessary at all to forfeit the complete documentation, since that complicates the course of the investigation and unnecessarily infringes the legal person's right to operate by taking away the entire documentation needed for its smooth operation. It is sometimes necessary to forfeit the entire documentation, including the accessory records (notebooks, journals, etc.) and in such cases the Prosecutor should act expediently while inspecting those documents, and decide as soon as possible which documents are needed for further investigation and which can be returned to the legal or natural person from which the documents have been forfeited.

Seizure of objects is an action aimed at obtaining evidence that also concerns the computer systems and similar devices for automated data processing, as well as electronic data stored in the computer systems and similar devices for electronic data processing (cellular phones, hand-held data organisers etc.).

Actual seizure of objects is executed by authorised officials upon the issued Court warrant. The Court issues a seizure warrant upon the Prosecutor's substantiated request, or on the request of authorised officials who have obtained the Prosecutor's approval. Seizure of objects is a temporary measure and cannot be in force longer than the criminal proceedings, by the end of which the Court must take a final decision either to confiscate or return the objects to the person from whom they have been seized.

Article 66
Seizure without the Seizure Warrant
(Art. 80 of FBIHCPC, Art. 130 of RSCPC, Art. 66 of BDCPC)

(1) If there is a risk of delay, items referred to in Paragraph 1 of Article 65 of this Code may be seized even without the Court order. If the person affected by the search explicitly opposes the seizure of items, the Prosecutor shall, within 72 hours following the completion of the search, put forward to a preliminary proceedings judge a motion for a subsequent approval of the seizure of items.
(2) *If the preliminary proceedings judge denies the Prosecutor's motion, the items seized may not be used as evidence in the criminal proceedings. The seized items shall be immediately returned to the person from whom they have been seized.*

Objects that may be used as evidence in criminal proceedings can be seized even without a Court order if there is a risk of delay. This risk must be real and based on the circumstances indicating that a delay in seizing of objects could cause their disappearance, destruction, modification or similar. If there is no explicit objection by the person from whom the objects are seized, the Prosecutor or the authorised official does not need to obtain a subsequent approval of the Court. The fact that the person from whom the objects are seized does not oppose must be clearly indicated in the record on the temporary seizure of objects. Otherwise, the Prosecutor will request a subsequent issuing by the Court of the seizure warrant, within 72 hours. In the absence of such warrant within this deadline, the seized objects must be immediately returned to the person from whom they have been seized.

Article 67
Seizure of Mail and Telegrams and other Consignments

(Art. 81 of FBiHCPC, Art. 131 of RSCPC, Art. 67 of BDCPC)

(1) Seizure may be performed with respect to the mail and telegrams that are addressed to or sent by the suspect or the accused and that are found with a company or persons engaged in postal and telecommunication activities.
(2) The seizure may also be performed with respect to the mail and telegrams referred to in Paragraph 1 of this Article when it can reasonably be expected that they shall serve as evidence in the proceedings.
(3) A seizure warrant for the temporary seizure of objects referred to in Paragraph 1 of this Article shall be issued by the preliminary proceedings judge on the motion of the Prosecutor.
(4) A warrant for the temporary seizure of objects may also be issued by the Prosecutor, should a delay pose a risk. Such warrant must, however, be confirmed by the preliminary proceedings judge within 72 hours following the seizure.
(5) If the warrant fails to be confirmed pursuant to the provision of the Paragraph 4 of this Article, the seized objects may not be used as evidence in the proceedings.
(6) The measures undertaken as provided under this Article shall not apply to the mail exchanged between the suspect or the accused and his or her defence attorney.
(7) A seizure warrant referred to in Paragraph 3 of this Article shall include: information on the suspect or the accused whom the warrant concerns, the manner of execution of the warrant and the duration of the measure, and the company that will execute the measure imposed. The measures taken may not last longer than three (3) months, but for an important reason, the preliminary proceedings judge may extend the measures for three (3) additional months. The measures taken shall, however, be terminated as soon as the reasons for taking them cease to exist.
(8) If the interests of the proceedings permit, the suspect or the accused who is the subject of the measures referred to in Paragraph 1 shall be informed of those measures taken.
(9) Mail delivered shall be opened by the Prosecutor in the presence of two witnesses. In opening the mail, care shall be taken not to break the seal and the packaging and the address shall be kept. A record shall be made regarding the opening.
(10) The content of a part of the mail or the mail, as applicable, shall be communicated to the suspect or the accused or the recipient, and a part of the mail or the mail shall be handed over to that person, unless the Prosecutor, exceptionally, considers the transfer to be detrimental to the success of the criminal proceedings. If the suspect or the accused is absent, his family members shall be notified of the mail delivery. If the suspect or the accused does not request the delivery of the mail thereafter, the mail shall be returned to the sender.

In accordance with the provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR) (Art. 8), every person shall be guaranteed the right to correspondence and privacy of letters and other means of communication.

The provision of Article 67 provides for the restriction of this right and a procedure for its implementation, which is compliant with the provision of Article 8 of ECHR. For instance, mail and other consignments are temporarily seized from a company or persons engaged in postal and telecommunication activities and not directly from the person sending or receiving the mail or telegram. Taking of this action aimed at obtaining evidence is possible only on the basis of the Court order and on the Prosecutor's substantiated request. It is important to note that this literally means to retain mail, telegram or other consignment, which can be full or partial retention, i.e. mail or other consignment can be retained for good and not delivered, or only a part of its content can be delivered or/and retained.

Article 68
A Written Inventory of the Seized Objects
(Art. 82 of FBIHCPC, Art. 132 of RSCPC, Art. 68 of BDCPC)

(1) After the seizure of objects and documentation, an inventory list of the temporarily seized objects and documents shall be made and a receipt concerning the objects and documents seized shall be written.
(2) If making an inventory list of objects and documentation is impossible, the objects and documentation shall be wrapped and sealed.
(3) Objects seized from a physical person or legal person may not be sold, given as a gift or otherwise transferred.

In the case of seizure of objects, a list of the seized objects and documents should be made and included in the records and a receipt concerning the objects seized should be written. In making a list of objects seized, each object should be described in detail, indicating its individual characteristics (distinctive marks).

If cases when the making of an inventory list is not possible, the seized objects must be wrapped and sealed. These objects will be opened in accordance with the provisions of the CPC on opening and inspection of the seized objects and documentation.

In all cases, attention must be paid that no unauthorised person comes into possession of the seized objects or that no unauthorised person gets the insight into their contents.

Article 70
Safekeeping of the Seized Objects and Documentation
(Art. 84 of FBIHCPC, Art. 134 of RSCPC, Art. 70 of BDCPC)

The seized objects and documentation shall be deposited with the Court, or the Court shall otherwise provide for their safekeeping.

The Court has the exclusive right to dispose of the seized objects, i.e. the exclusive right to take decisions concerning their disposal. For the duration of the Court's disposal of the seized objects the Prosecutor and the defence are not denied access to and the inspection and use of the seized objects and documentation. In practice, the most often case is that the Court entrusts the Prosecutor with safekeeping of the seized objects and documentation. This situation is understandable as the actual seizure of objects and documentation is performed on the request of the Prosecutor and the seized objects, and in particular the documentation in investigations of economic crimes and corruption, are yet to be inspected and analysed.

Article 71
Opening and Inspection of the Seized Objects and Documentation
(Art. 85 of FBIHCPC, Art. 135 of RSCPC, Art. 71 BDCPD)

(1) The opening and inspection of the seized objects or documentation shall be done by the Prosecutor.
(2) The Prosecutor shall be bound to notify the person or the business enterprise from which the objects were seized, the preliminary proceedings judge and the defence attorney about the opening of the seized objects or documentation.
(3) When opening and inspecting the seized objects and documents, attention shall be paid that no unauthorized person gets the insight into their contents.

The Prosecutor is the one who will proceed with the opening and inspection of the seized objects and documentation after he has been entrusted with their safekeeping by the Court.

The Prosecutor must notify the person or the representative of the business company from which the objects have been seized, the preliminary proceedings judge and the defence attorney, about the opening of the seized objects and documentation.

However, failure of the relevant persons to appear will not be an obstacle for the the Prosecutor to open the seized objects and documentation if they have been duly notified. No unauthorised person may attend the opening of the seized objects and documentation.

Article 72
Order Issued to a Bank or to Another Legal Person

(Art. 86 of FBIHCPC, Art. 136 of RSCPC, Art. 72 of BDCPC)

(1) If there are grounds for suspicion that a person has committed a criminal offence related to acquisition of material gain, the preliminary proceedings judge may at the motion of the Prosecutor issue an order to a bank or another legal person performing financial operations to turn over information concerning the bank accounts of the suspect or of persons who are reasonably believed to be involved in the financial transactions or affairs of the suspect, if such information could be used as evidence in the criminal proceedings.
(2) The preliminary proceedings judge may, on the motion of the Prosecutor, order that other necessary measures referred to in Article 116 of this Code be taken in order to enable the detection and finding of the illicitly gained property and collection of evidence thereupon.
(3) In case of an emergency, any of the above mentioned measures may be ordered by the Prosecutor on the basis of an order. The Prosecutor shall immediately inform the preliminary proceedings judge who shall issue a court warrant within 72 hours. The Prosecutor shall seal the obtained information until the issuance of the court order. In case the preliminary proceedings judge fails to issue the said order, the Prosecutor shall be bound to return such information without accessing it.
(4) The Court may issue a decision ordering a legal or physical person to temporarily suspend a financial transaction that is suspected to be a criminal offence or intended for the perpetration of the criminal offence, or suspected to serve as a disguise for a criminal offence or disguise of a gain obtained by a criminal offence.
(5) The decision referred to in the previous Paragraph shall order that the financial resources designated for the transaction referred to in Paragraph 4 of this Article and cash amounts of domestic or foreign currency be temporarily seized pursuant to Article 65 Paragraph 1 of this Code and be deposited in a special account and kept until the end of the proceedings or until the conditions for their return are met.
(6) An appeal may be filed against a decision referred to in Paragraph 4 of this Article by the Prosecutor, the owner of the cash in domestic or foreign currency, the suspect, the accused and the legal or physical person referred to in Paragraphs 4 and 5 of this Article.

The issuing of an order to a bank or another legal person performing financial operations is a novelty in the procedural legislation in Bosnia and Herzegovina. The purpose of such order is that during the investigation the Prosecutor, on the basis of the Court's decision, temporarily restricts the right to dispose of property (financial resources) of a person (either physical or legal), in other words, to obtain information concerning the possession of financial resources by the physical or legal person and the information concerning the transactions of those resources. The Prosecutor can request from the Court the execution of such order for the purpose of obtaining the information about bank deposits and other financial transactions in respect of a person when there are grounds for suspicion that such person has committed a criminal offence related to acquisition of material gain or in respect of persons who are reasonably believed to be involved in the financial transactions or affairs of the suspect. An additional condition for the issuing of this order is the belief that the information collected can be used as evidence in the criminal proceedings.

What partially undermines effective implementation of this action aimed at obtaining evidence, in the part relating to the collection of information, is the restriction in respect of the type of criminal offences for which this order may be issued. Namely, the provision reading “a criminal offence related to acquisition of material gain” can cause a difficulty in practice, since it is not made clear whether it exclusively concerns the criminal offences committed with the aim to acquire material gain or the offences the perpetration of which allows acquisition of material gain, or this provision includes a wider catalogue of criminal offences including also the criminal offences by the perpetration of which no direct material gain is acquired but which does contribute to and/or allows the perpetration of another criminal offence resulting in the acquisition of material gain. We are of an opinion that this provision should be broadly interpreted and that its application is possible in respect of those offences by the perpetration of which no direct gain is acquired, but the perpetration of another offence is allowed, in other words, in respect of situations where the information collected in this manner would allow obtaining of evidence of the perpetration of certain criminal offence. This interpretation is in line with the provisions of Article 1, items a) and b) of the Council of Europe Convention on Prevention of Money Laundering.

On the other hand, the possibilities in respect of issuing a decision ordering the temporary suspension of a financial transaction are set on a much wider basis. In that case the Court will suspend, by issuing a

decision, a financial transaction when it is suspected to be a criminal offence (e.g. money laundering and tax fraud) or intended for the perpetration of the criminal offence (e.g. the preparation of a terrorist act), or when it is suspected to serve as a disguise for a criminal offence or a disguise of a gain obtained by a criminal offence. In acting in this manner, the resources the transfer of which is suspended are considered as seized objects (Art. 65 of BIHCPC), and will be deposited in a special account and kept until the end of the proceedings, or until the conditions for their return are met.

There are no legal obstacles to the Prosecutor's request for issuing this order also on the basis of a request for international assistance, based on the provisions of the domestic legislation (CPC), or on the basis of applicable international conventions, bilateral or multilateral agreements.

Also, this Article enables the Court to approve, upon a substantiated request of the Prosecutor, the simultaneous application of special investigative measures as referred to in Art. 116 of BiHCPC. For instance, this applies in those cases when it is necessary to establish the ownership, amount and type of illegally gained property and to discover the location of the property.

It is important to note that the Prosecutor has the power to issue himself an order to a bank or another legal person to collect information about bank deposits and financial transactions in case of an emergency, with the Court's approval to be obtained subsequently within 72 hours..

Article 73
Temporary Seizure of Illicitly Gained Property and Arrest in Property
(Art. 87 of FBIHCPC, Art. 137 of RSCPC, Art. 73 of BDCPC)

(1) At any time during the proceedings, the Court may, upon the motion of the Prosecutor, issue a temporary measure seizing the illicitly gained property under the Criminal Code of Bosnia and Herzegovina, arrest in property or shall take other necessary temporary measures to prevent any use, transfer or disposal of such property.
(2) If there is a risk of delay, an authorized official may temporarily seize property referred to in Paragraph 1 of this Article, may carry out an arrest in property or take other necessary temporary measures to prevent any use, transfer or disposal of such property. An authorized official shall immediately inform the Prosecutor about the measures taken and the measures taken must be confirmed by the preliminary proceedings judge within 72 hours following the undertaking of the measures.
(3) If the preliminary proceedings judge denies the approval, the measures taken shall be terminated and the objects or property seized returned immediately to the person from whom they have been seized.

At all stages of the proceedings, the Court has the power to issue a temporary measure seizing the property, as a security mechanism, that may be the subject of confiscation in the criminal proceedings, arrest in property or any other necessary temporary measure to prevent any use, transfer or disposal of that property. These measures are ordered on the motion of the Prosecutor and in case of an emergency this power is also given to authorised officials, who must immediately inform the Prosecutor about the measures taken, who will request a subsequent approval of the Court.

As this Article uses the wording "*seizing the illicitly gained property under the Criminal Code of Bosnia and Herzegovina"*, it is necessary to clarify what situations are covered by this provision. The provision of Article 110 of the Criminal Code of Bosnia and Herzegovina provides that "nobody is allowed to retain material gain acquired by the perpetration of a criminal offence", therefore, it should be considered that a measure of temporary seizure will be ordered in the situations when there is a suspicion (it will depend on a stage of proceedings whether it is grounds for a suspicion or a grounded suspicion) that a criminal offence has been committed, !i.e. that material gain has been obtained from the perpetration of a criminal offence!. However, nowhere else in the Criminal Procedure Code is there a reference to the measure of arrest in property and it is not completely clear what this measure actually represents. It is very likely that this is a linguistic issue, since the English language uses the term confiscation for permanent deprivation of property and the term seizure for limited or temporary deprivation of property.

Since this provision clearly speaks of a temporary character of the measure of taking away of property, it is obvious that the term "arrest in property" is redundant in this provision, since the measure of temporary taking away of property is nothing but the measure of arrest in property (Eng. seizure). If this was not the case, it would be then permanent deprivation of property (Engl. confiscation), which is not the purpose of this provision.

When it comes to other necessary measures to prevent any use, transfer of disposal of property, these measures can be considered to include, among other, prohibition to use business facilities for making profit, freezing of funds in bank accounts, prohibition to transact in shares and securities, prohibition of changes to and transfer of ownership in land registers, seizure of movable property, such as motor vehicles, yachts and other means of transportation.

The law does not explicitly provides for a form in which the Court issues a decision on temporary seizure of property, but it should be considered to be the form of an order against which no appeal is allowed, corresponding to the action of the Court in the case of issuing an order to seize objects and documentation.

Since the code does not provide for a standard for seizure of property pertaining to private property, protected by the ECHR, a question arises as to what standards should be taken into account, or respected, in the application of this provision. The provisions of this Article are further developed on the issue of the rights of the property owner, or the objects that are subject of seizure.

The first of the main questions is which standard (level) of proof is required in order to use this measure. The law provides that "at any time during the proceedings, the Court may, issue a temporary measure…", without specifying whether the issuing of this measure is possible even before the initiation of the investigation, which should be the case for this measure to be effective. In principle, security measures of this kind are used at early stages of proceedings, when the perpetrator is not yet aware that he is the subject of investigation and thus is not in a position, before the state intervenes, to dispose of or hide the property that can be the subject of later confiscation. However, it is important that, right because of the early intervention of the state, before the institution of an investigation of the area of private ownership of physical and legal persons, a standard of proof to be met should be defined in order for this measure to be allowed to be used. In respect of the standards of BiHCPC and comprehending the essence of this measure and the degree of its intrusiveness, it needs to be established whether the prerequisite for its ordering is a suspicion, grounds for suspicion, grounded suspicion or another specified degree of probability that the property which is the subject of seizure has been acquired by a criminal offence. If the legislator does not complete these provisions in accordance with the above presented, a response to this question will have to be given by the case law, with the substantiated application of the measure to that end. By way of illustration, we will list a number of States that require different standards for the application of this measure: Sweden – a reasonable presumption, Finland, Germany, Belgium – that there are reasons serving as a basis to presume, Austria – a suspicion, Canada – reasonable grounds to believe.The second issue, which has not been solved in this Article but we believe should be, is the issue of the (longest) time-limit for which this measure can be ordered. Temporary measures of this kind cannot last indefinitely, so contemporary legislation usually prescribes at least the longest possible time-limit after the expiry of which the measure must cease in any case (the longest time-limit in Europe is prescribed in Belgium – five years and can be extended for the same period, whereas other States provide for shorter time-limits – mostly between two and four years. What is more important than the mere provision for an absolute time-limit is to reach, at the earliest stages of proceedings with the seized property, a higher standard of proof as soon as possible, i.e. to enter the next stage of proceedings. At the main trial stage, with the existence of a grounded suspicion or the higher level of probability that the seized property derives from a criminal offence, it is easier to legitimise a longer duration of this measure than during investigative procedure, since the measure in that procedure runs on the basis of grounds for suspicion that a criminal offence has been committed. The Court will have to take into consideration that in pre-investigative proceedings this measure can be ordered for a limited period (e.g. for six months) after which either investigation must start and the measure extended or the measure must be terminated. In future, the law will most

probably have to provide for different time-limits for this measure, in relation to individual stages of proceedings, and at this moment, its proper application is the responsibility of the Court.

In implementing these provisions, at least two more issues need to be addressed: 1) In the case of temporary seizure of property, the Court will have to evaluate if there is proportionality between the measure used and the aim sought to be achieved by seizing the property originating from a criminal offence, whereby the existential circumstances concerning the property owner will have to be taken into consideration or whether the seizure of his property will seriously affect or make impossible his existence. The second issue relates to legal remedies. There has to be an effective remedy for the property owner against the Court's decision on seizure of property as a security mechanism, in the form of an appeal, which arises from the CPC general rules on admissibility of an appeal against a decision. Yet, such appeal should not stay the execution of the measure, so the decision will, as a rule, be served on the property owner or the suspect only when the measure has already been executed, or during its execution.

Article 74
Return of the Seized Property
(Art. 88 of FBIHCPC, Art. 138 of RSCPC, Art. 74 of BDCPC)

Objects that have been seized during the criminal proceedings shall be returned to the owner or possessor once it becomes evident during the proceedings that their retention runs contrary to Article 65 of this Code and that there are no reasons for their seizure (Article 391).

Objects that have been seized should be returned to the owner or the person from whom they have been seized in the case where there are no longer reasons for their seizure, or when their retention runs contrary to Article 65 of this Code, while at the same time there are no conditions for their confiscation (there has been no verdict which declares the accused guilty and it is not required by the interests of general security).

These provisions should similarly apply to the cases where the Court has issued a decision on seizure of property as a security mechanism.

Article 94
Aid of an Expert Witness or a Specialist
(Art. 108 of FBIHCPC, Art. 158 of RSCPC, Art. 94 of BDCPC)

(1) A crime scene investigation or reconstruction shall be conducted with an aid of a specialist in criminalistics or some other discipline who shall assist in finding, protecting and describing traces, take certain measurements or photographs, or make sketches or photo-records or gather other data.
(2) An expert witness may also be invited to the crime scene investigation or reconstruction if his presence would be useful for opinions and findings.

Article 95
Ordering Expert Evaluation
(Art. 109 of FBIHCPC, Art. 159 of RSCPC, Art. 95 of BDCPC)

Expert evaluation shall be ordered when the findings and opinion of a person possessing the necessary specialized knowledge are required to establish or evaluate some important facts. If scientific, technical or other specialized knowledge will assist the Court in understanding the evidence or determining facts,

an expert as a special witness may testify by providing his findings on the facts and opinion that contains the evaluation of the facts.

When conducting investigative and other actions aimed at obtaining evidence, the participation of specialists whose expertise will contribute to better and more effective taking of investigative actions is often required. These specialists include experts in finance, tax, bookkeeping, accounting, audit, information technologies and similar. This is especially important in taking these actions in complex investigations of economic and corruption criminal offences. When necessary, the participation of experts in these fields can be required in conducting a crime scene investigation. In those cases, an expert will provide his findings and opinion, which then can be used as evidence in criminal proceedings.

Although the provision of Article 95 refers to requiring an expert or a specialist during the conduct of a crime scene investigation and reconstruction of events, this does not mean that the Prosecutor cannot rely on the assistance of these professionals at any stage of the investigation. It will often be required that the Prosecutor, during an investigation, obtains additional specialised knowledge that he does not possess in order to properly understand and adequately plan the conduct of the investigation and collection of evidence. Whenever possible, experts and specialists of the law enforcement agencies should be engaged, as well as of other state-level and other authorities in Bosnia and Herzegovina, in accordance with the principles of providing legal assistance and official co-operation (Art. 22 of BIHCPC).

Article 111
Audit of Business Books
(Art. 125 of FBIHCPC, Art. 175 of RSCPC, Art. 111 of BDCPC)

(1) If an audit of business books is required, the body before which the proceedings are conducted shall indicate to the auditors the line of inquiry and the scope of the audit and other facts and circumstances that are to be determined.
(2) If the books of a business enterprise, other legal entity or an individual entrepreneur first need to be put in order before being audited, the costs of putting books in order shall be charged to their account.
(3) The decision to put books in order shall be made by the authority conducting proceedings on the basis of the written documented report of the experts ordered to audit the business books. The decision shall also indicate the amount that the legal entity or the individual entrepreneur must deposit with that authority as an advance against the cost of putting its books in order.
(4) The costs, if their amount has not been advanced, shall be collected and credited to the authority that has already paid the costs and compensated the experts.

When an expert is engaged for an audit of business books, he needs to be given guidance as to the direction and scope of the evaluation needed. This fact is established based on the circumstances of a specific case and should only pertain to that direction and that scope the evaluation of which will contribute to the establishment of the facts, or which will gather sufficient evidence to prove the existence of the criminal offence and the elements of criminal responsibility of the perpetrator of the criminal offence, including the audit of the entire business operation in those cases in which the direction and the scope of the audit cannot be clearly defined.

If an audit of business books requires that the books of the company be first put in order, the costs of putting books in order are to be covered by the business company whose business documentation is the subject of the audit. This legal provision derives from legal obligations of any business company to keep business books in order (e.g. pursuant to the accounting law). As the putting the books in order is often a more demanding job than the audit itself, it is easy to understand that the law provides for the business company to cover the costs of that job. In order to secure that the company actually covers the costs, the body ordering the audit will also specify the amount that the company has to pay in advance of the putting of the books in order.

Article 116
Types of Special Investigative Actions and Conditions of Their Application
(Art. 130 of FBIHCPC, Art. 226 of RSCPC, Art. 116 of BDCPC)

(1) If evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he has committed or has along with other persons taken part in committing or is participating in the perpetration of an offence referred to in Article 117 of this Code.
(2) Measures referred to in Paragraph 1 of this Article are as follows:
a) surveillance and technical recording of telecommunications;
b) access to the computer systems and computerized data processing;
c) surveillance and technical recording of premises;
d) covert following and technical recording of individuals and objects;
e) use of undercover investigators and informants;
f) simulated purchase of certain objects and simulated bribery;
g) supervised transport and delivery of objects of criminal offence.
(3) Measures referred to in Item a) of Paragraph 2 of this Article may also be ordered against persons against whom there are grounds for suspicion that he will deliver to the perpetrator or will receive from the perpetrator of the offences referred to in Article 117 of this Code information in relation to the offences, or grounds for suspicion that the perpetrator uses a telecommunication device belonging to those persons.
(4) Provisions regarding the communication between the suspect and his or her defence attorney shall apply accordingly to the discourse between the person referred to in Paragraph 1 of this Article and his or her defence attorney.
(5) In executing the measures referred to in Items e) and f) of Paragraph 2 of this Article police authorities or other persons shall not undertake activities that constitute an incitement to commit a criminal offence. If nevertheless such activities are undertaken, this shall be an instance precluding the criminal prosecution against the incited person for a criminal offence committed in relation to those measures.

Article 117
Criminal Offences as to Which Undercover Investigative Measures May Be Ordered
(Art. 131 of FBIHCPC, Art. 227 of RSCPC, Art. 117 of BDCPC)

Measures referred to in Paragraph 2 of Article 116 of this Code may be ordered for following criminal offences:
a) criminal offences against the integrity of Bosnia and Herzegovina;
b) criminal offences against humanity and values protected under international law;
c) criminal offences of terrorism;
d) criminal offences for which, pursuant to the law, a prison sentence of minimum of three (3) years or more may be pronounced.

Article 118
Competence to Order the Measures and the Duration of the Measures
(Art. 132 of FBIHCPC, Art. 228 of RSCPC, Art. 118 of BDCPC)

(1) Measures referred to in Article 116 Paragraph 2 of this Code shall be ordered by the preliminary proceedings judge in an order upon the properly reasoned motion of the Prosecutor containing: the data on the person against which the measure is to be applied, the grounds for suspicion referred to in Paragraphs 1 or 3 of Article 116 of this Code, the reasons for its undertaking and other important circumstances necessitating the application of the measures, the reference to the type of required measure and the method of its implementation and the extent and duration of the measure. The order shall contain the same data as those featured in the Prosecutor's motion as well as ascertainment of the duration of the ordered measure.
(2) Exceptionally, if a written order cannot be received in due time and if delay poses a risk, the execution of a measure referred to in Article 116 of this Code may commence on the basis of a verbal order pronounced by the preliminary proceeding judge. The written order of the Court must be obtained within 24 hours following the issue of the verbal order.

(3) Measures referred to in Items a), through d) and g) of Paragraph 2 of Article 116 of this Code may last up to one (1) month, while on account of particularly important reasons the duration of such measures may upon the properly reasoned motion of the Prosecutor be prolonged for a term of another month, provided that the measures referred to in items a), b) and c) last up to six (6) months in total, while the measures referred to in items d) and g) last up to three (3) months in total. The motion as to the measure referred to in Item f) of Paragraph 2 of Article 116 may refer only to a single act, whereas the motion as to each subsequent measure against the same person must contain a statement of reasons justifying its application.

(4) The order of the preliminary proceeding judge and the motion of the Prosecutor referred to in Paragraph 1 of this Article shall be kept in a separate envelope. By compiling or transcribing the records without making references to the personal data therein about the undercover investigator and informant, or in another appropriate way, the Prosecutor and the preliminary proceedings judge shall prevent unauthorized officials as well as the suspect and his defence attorney from establishing the identity of the undercover investigator and of informant.

(5) By way of a written order the preliminary proceedings judge must suspend forthwith the execution of the undertaken measures if the reasons for previously ordering the measures have ceased to exist.

(6) The orders referred to in Paragraph 1 of this Article shall be executed by the police authorities. The companies performing the transmission of information shall be bound to enable the Prosecutor and police authorities to enforce the measures referred to in Item a) of Paragraph 2 of Article 116 of this Code.

The application of special investigative measures as actions aimed at obtaining evidence is conditioned upon the cumulative meeting of the two basic prerequisites: the existence of a grounded suspicion that a person is participating or has participated in the perpetration of the criminal offence as to which special investigative measures may be applied (Art. 117) and that evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties.

Special investigative measures provided by BIHCPC are as follows:

a) surveillance and technical recording of telecommunications;
b) access to the computer systems and computerized data processing;
c) surveillance and technical recording of premises;
d) covert following and technical recording of individuals and objects;
e) use of undercover investigators and informants;
f) simulated purchase of certain objects and simulated bribery;
g) supervised transport and delivery of objects of criminal offence.

All these measures can also be applied against the person against whom there are grounds for suspicion that he will deliver to the perpetrator or will receive from the perpetrator of the offence information in relation to the offence, or grounds for suspicion that the perpetrator uses a telecommunication device belonging to that person.

As a rule, the communication between the suspect and his defence attorney cannot be the subject of application of special investigative measures. An exception to this rule can be the case where the defence attorney acts beyond the limits of defence or when, aiming to release the defendant from the charges, the defence attorney acts as a perpetrator or accomplice of the criminal offence for which special investigative measures can be ordered pursuant to the law. Thus, for example, special investigative measures can be used in the case where the defence attorney acts as the perpetrator of the criminal offence of "obstruction of justice" referred to in Article 241 of BiHCC in conjunction with Article 250 of BiHCC (organised crime), in the interest of the defendant/s who is/are suspected of having committed an "organised crime" referred to in Article 250 of BIHCC, on the ground that the perpetration of that crime has been perpetrated with the intention to protect interests of an organised criminal group (in the theory and practice of mafia organisations this is known as the function of a legal counsellor – *consigliere* in Italian) and the defence counsel in this case acts as a member of a criminal group whose scope of duty within the organisation is legal protection of the organisation and its members, therefore, the defence counsel has committed a criminal act of organised crime by committing an offence of obstruction of justice.

In executing special investigative measures authorised police officials must not act in such a manner as to incite the perpetration of a criminal offence.

Special investigative measures are the most effective actions aimed at obtaining evidence and very often the only possible way to prove certain criminal offences. However, the provision of Article 117 of BIHCC, concerning the catalogue of the criminal offences for which the application of special investigative measures can be requested, is an obvious procedural obstacle to the application of these measures to a larger number of criminal offences. The wording "*a prison sentence of minimum of three (3) years or more may be pronounced"* as a requirement for the application of special investigative measures has resulted in significantly different interpretations and applications of this provision in the case-law of the courts in the territory of Bosnia and Herzegovina. Thus the courts in the Republika Srpska interpret and apply this provision extensively so that they apply it to all criminal offences for which a prison sentence of three years or more can be pronounced. On the other hand, the Court of Bosnia and Herzegovina and the courts in the Federation of Bosnia and Herzegovina and the Brcko District interpret this provision restrictively and apply it only to the criminal offences for which a special minimum of three years and more is prescribed.

In the case of a restrictive interpretation of the said provision, these measures can only be applied to the criminal offences for which, pursuant to the law, a prison sentence of minimum three years and more can be pronounced, which significantly reduces the possibility to apply these measures, since these criminal offences are not many. It is especially obvious in the case of economic and corruption offences.

Thus, the Criminal Code of BiH provides that these measures can be applied to seven cases, for the following criminal offences: counterfeiting of securities (Art. 206/2), tax evasion (Art. 210/3), organising a group or association for smuggling or distribution of goods on which duties were not paid (Art. 215/1), customs fraud (Art. 216/3), abuse of office or official authority (Art. 220/3), embezzlement in office (Art. 221/3) and fraud in office (Art. 222/3). The Criminal Code of the Republika Srpska provides for this possibility in the case of two criminal offences only – tax and contribution evasion (Art. 287/3) and illegal banking (Art. 284/2), since for other criminal offences there is no requirement of a legal minimum of the punishment prescribed. The Criminal Code of the Federation of BiH provides for four criminal offences in said domain to which special investigative measures can be applied: tax evasion (Art. 273/3), abuse of office or official authority (Art. 383/3), embezzlement in office (Art. 384/3) and fraud in office (Art. 385/3). All these cases concern a qualified form of a criminal offence conditioned by the degree of the harmful consequence. This fact further aggravates the meeting of the conditions for the application of special investigative measures, since it requires prior possession of the knowledge that will indicate this fact, which in many cases is a serious difficulty and something that could perhaps only be established by applying special investigative measures.

2.3 Differences among the Provisions

Article 131 of FBIHCPC and Article 117 of BDCPC provide that special investigative measures can only be applied to the criminal offences for which a prison sentence of minimum three years and more can be pronounced, unlike the other two codes (BIHCPC and RSCPC) which, in addition to this requirement, list a catalogue of criminal offences to which special investigative measures can be applied. RSCPC does not provide for the use of (undercover) informant as a special investigative measure, whereas this possibility is foreseen in the other three codes.

Article 120
Incidental Findings
(Art. 134 of FBIHCPC, Art. 230 of RSCPC, Art. 120 of BDCPC)

No data or information received through the undertaking of actions referred to in Article 116 of this Code shall be used as evidence if they are not related to a criminal offence referred to in Article 117 of this Code.

An exception to the general rule according to which no information received through the undertaking of special investigative measures can be used as evidence if such measures are not related to the criminal offence for which they have been ordered, is the case where such «incidental findings» relate to another criminal offence for which special investigative measures can be ordered pursuant to the provisions of Article 117 of BIHCPC.

Article 121
Acting Without the Court Order or Beyond Its Extent
(Art. 135 of FBIHCPC, Art. 231 of RSCPC, Art. 121 of BDCPC)

If the measures referred to in Article 116 of this Code have been undertaken without the order of the preliminary proceedings judge or against the same, the Court cannot base its decision on the data or evidence thereby obtained.

This provision is in line with the general procedural rule against the use of legally invalid evidence, since evidence obtained through the application of illegally ordered actions aimed at obtaining evidence are considered as illegal evidence, and the Court cannot base its decision on such evidence.

Article 122
Admissibility of Evidence Obtained through the Undertaking of Special Measures
(Art. 136 of FBIHCPC, Art. 232 of RSCPC, Art. 122 of BDCPC)

Technical recordings, documents and objects obtained as provided under the conditions and in the manner prescribed by this Code may be used as evidence in the criminal proceedings. The undercover investigator and informant referred to in Article 116 Paragraph 2 Item e) and the persons who have undertaken the measures referred to in Article 116 Paragraph 2 Item f) of this Code may be questioned as witnesses on the course of the undertaking of the measures.

If needed and only if necessary, the undercover investigator and informant and the persons who have undertaken the measures of simulated purchase of objects and simulated bribery can be questioned as witnesses in the proceedings. In those cases their hearing should be conducted according to the hearing procedures applicable to protected witnesses (the protection of the identity of the investigator and informant), and they should testify on the course of the undertaking of the measures, which can include the facts concerning the persons against whom the measures were undertaken.

Article 209
Approval to Prosecute
(Art. 223 of FBIHCPC, Art. 205 of RSCPC, Art. 209 of BDCPC)

When the law states that prior approval of the competent governmental body is required for prosecution of certain persons, the Prosecutor may not conduct an investigation nor bring charges without submitting evidence that the approval has been granted.

Criminal Codes in Bosnia and Herzegovina are silent on the issue of immunity for its citizens, as no one in Bosnia and Herzegovina enjoys an absolute immunity from prosecution. There is also officeholder immunity for the categories specified in the immunity laws, although such immunity is not a hindrance to instituting a criminal prosecution. To the cases that have foreign elements the provisions of Article 413 of BIHCPC apply, or the analogous provisions of the other three criminal procedure codes. If a person enjoying the functional immunity invokes such immunity, the matter is decided by the competent court pursuant to law. An appeal against such decision is not allowed, but an appellation may be submitted to

the competent constitutional court seeking an assessment of legality of the proceedings and of the decision of the Court.

2.4 Differences among the Provisions

RSCPC provides for criminal prosecution upon a motion of the injured party, in case of which the injured party can propose a criminal prosecution within three months after he or has learnt of the criminal offence and the perpetrator.

Article 216
Order for Conducting an Investigation
(Art. 231 of FBIHCPC, Art. 216 of RSCPC, Art. 216 of BDCPC)

(1) The Prosecutor shall order the conduct of an investigation if grounds for suspicion that a criminal offence has been committed exist.
(2) The order on conducting the investigation shall contain: data on perpetrator if known, descriptions of the act pointing out the legal elements which make it a crime, legal name of the criminal offence, circumstances that confirm the grounds for suspicion for conducting an investigation and existing evidence. The Prosecutor shall list in the order which circumstances need to be investigated and which investigative measures need to be undertaken.
(3) The Prosecutor shall not order the investigation if it is evident from the report and supporting documents that a reported act is not a criminal offence, if there are no grounds to suspect that the reported person committed the criminal offence, if the statute of limitation is applicable or if the criminal offence is a subject to amnesty or pardon or if any other circumstances exist that preclude criminal prosecution.
(4) The Prosecutor shall inform the injured party and the person who reported the offence within three (3) days of the fact that the investigation shall not be conducted, as well as the reasons for not doing so. The injured party and the person who reported the offence have a right to file a complaint with the Prosecutor's Office within eight (8) days.

In accordance with the procedural role of the Prosecutor in the criminal legislation of Bosnia and Herzegovina, the Prosecutor only is authorised to issue an order for conducting an investigation. The order for conducting an investigation is issued based on the existence of grounds for suspicion (a lower degree of probability that a criminal offence has been committed) and, since it is an internal act of the Prosecutor, no appeal or objection can be submitted against it.

The order on conducting an investigation should contain a factual description including data and information, both on the perpetrator if known and on the criminal offence itself. If the perpetrator is not known, that will not be an obstacle to the issuing of an order and to the actual conducting of an investigation. Also, the order should contain reasons as to the direction that the investigation should take and the circumstances that need to be investigated and evidence to be collected. However, the Prosecutor is not bound to observe the legal qualification of the criminal offence defined at the beginning of the investigation, but the investigation can be changed. In the case of a change, a new order must be issued. Since the law does not provide for an obligation for the Prosecutor to notify the person who is the subject of investigation, it is considered that, in accordance with the principle of respecting human rights and fundamental freedoms, the suspect should be notified thereof as soon as the interests of the investigation so allow. In any case, before the end of the investigation, the suspect must be notified thereof, which results from the provision that the suspect must present his or her defence before the filing of an indictment.

In the circumstances where there is a formal report or official information of a criminal offence committed and the accompanying documents and available information do not reveal any grounds for suspicion, the Prosecutor will issue a decision on non-conducting an investigation and will inform thereof the person who filed the report and the injured person within a time-limit as provided by law. This decision will also be taken in all other cases where there are reasons for suspension

or non-conduct of criminal proceedings, on any basis as provided for in the criminal procedure codes. In those cases, the Prosecutor is bound to, within three days of the decision on non-conducting an investigation, notify thereof the injured person and the person who filed the report, who are entitled to submit a complaint to the Prosecutor's Office. Such complaint will be decided by the Prosecutor's Office Collegium.

The relevance, the form and the content of the order for conducting an investigation will be dealt with in more detail in the third part of the Manual.

Article 217
Conducting an Investigation
(Art. 232 of FBIHCPC, Art. 217 of RSCPC, Art. 217 of BDCPC)

(1) In the course of investigation, the Prosecutor may undertake all investigative actions, including the questioning of the suspect and hearing of the injured party and witnesses, crime scene investigation and reconstruction of events, undertaking special measures to protect witnesses and information and may order the necessary expert evaluation.
(2) The record on the undertaken investigative measures shall be made in accordance with this Code.

The provisions of this article additionally reinforce and specify the Prosecutor's authorities during investigation which derive from his or her fundamental rights and duties. The Prosecutor is thus authorised to undertake all investigative actions (aimed at obtaining evidence), the questioning of the suspect, hearing of the suspect and the injured party and witnesses, crime scene investigation and reconstruction of events, as well as to undertake special measures to protect witnesses and information and to order the necessary expert evaluation. Actions aimed at obtaining evidence are undertaken by the Prosecutor himself or on the basis of the Court's approval in case of the actions requiring such approval. Regarding crime scene investigations, they are undertaken by authorised officials pursuant to Article 221 of BIHCPC, whereby, pursuant to his powers, the Prosecutor can decide to attend and direct a crime scene investigation. On the issue of witness and injured party protection measures, the Prosecutor is not limited only to those measures provided by the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, but he can also apply other necessary measures with a view of protection of the information of the witness contained in the Prosecutor's files, the technical protection measures, even the measures including surveillance and audio recording of the telecommunication addresses possessed by the witness or the injured if such measures will contribute to their protection and safety.

Article 218
Prosecutor Supervising the Work of the Authorised Officials
(Art. 233 of FBIHCPC, Art. 218 of RSCPC, Art. 218 of BDCPC)

(1) If there are grounds for suspicion that a criminal offence has been committed that carries a prison sentence of more than five (5) years, an authorized official shall immediately inform the Prosecutor and shall under the Prosecutor's direction take the steps necessary to locate the perpetrator, to prevent the suspect or accomplice from hiding or fleeing, to detect and secure the clues to the criminal offence and objects which might serve as evidence, and to gather all information that might be of use for the criminal proceedings.
(2) If there are grounds for suspicion that the criminal offence referred to in Paragraph 1 of this Article has been committed, and the delay would pose a risk, an authorized official is obligated to carry out necessary actions in order to fulfil the tasks referred to in Paragraph 1 of this Article. When carrying out these actions, the authorized official is obligated to act in accordance with this Code. The authorized official shall be bound to inform the Prosecutor on all taken actions immediately and deliver the collected items that may serve as evidence.
(3) If there are grounds for suspicion that a criminal offence has been committed that carries a prison sentence of up to five (5) years, an authorized official shall inform the Prosecutor of all available information, actions and measures performed no later than seven (7) days after forming the grounds for suspicion that a criminal offence has been committed.
(4) In cases referred to in Paragraph 1 through 3 of this Article, the Prosecutor shall issue an order on conducting the investigation if he considers it necessary.

This article provides for a duty of authorised officials to inform the Prosecutor if there are grounds for suspicion that a criminal offence has been committed. It also establishes various procedures to be

applied depending on the punishment prescribed for the criminal offence concerned. Therefore, in the case of a criminal offence carrying a prison sentence of up to five years, the authorised officials have a time-limit of seven days to inform the Prosecutor about the criminal offence after forming the grounds for suspicion that the criminal offence has been committed. For criminal offences carrying a prison sentence of more than five years, the authorised officials must inform the Prosecutor immediately after they have learned of the criminal offence committed, and are authorised, under the Prosecutor's direction, to take necessary steps to locate the perpetrator, to prevent the suspect and accomplice from hiding or fleeing, to detect and secure the clues to the criminal offence and objects which might serve as evidence, and to gather all information that might be of use for the criminal proceedings. If there is a risk of delay, these steps can be taken immediately and without the Prosecutor's direction.

This legal solution could cause serious difficulties in the actual application or in the day-to-day work of the authorised officials. Namely, it raises several issues that need to be addressed:

The first issue concerns the type, scope and method of the exercise of the Prosecutor's direction of the work of the authorised officials. Given the fact that the Prosecutor is responsible for conducting an investigation, it is logical that the Prosecutor exercises some form of supervision over the work of those who act under his direction and within the scope of the investigation. It can therefore be established that the supervision of the Prosecutor over the work of the authorised officials is not actual (substantial) supervision relating to fundamental acting of the authorised officials within their institutions and scope of duties. The Prosecutor's supervision is exercised in a limited scope and only in respect of those steps that are undertaken during investigation, or as the meeting of the role and duties of the Prosecutor in accordance with the rights and duties specified by law. In other words, the Prosecutor, through this supervision, must ensure legality of actions of the authorised officials, the respect for human rights and freedoms and the legality in the collection of statements, evidence and information relevant for the conduct of criminal proceedings or investigation. The Prosecutor has also the function to liaise between the authorised officials and the court and to enable that their requests and motions for undertaking actions aimed at obtaining evidence and special investigative measures are forwarded to the court in those cases where the Prosecutor has so approved. It is important to underline that through the exercise of the supervision the Prosecutor by no means interferes with the principles of operational and functional management and administration of the police nor does this represent an intervention in internal organisation of those institutions.

The other issue relates to establishing the existence of grounds for suspicion that a criminal offence has been committed. While for some criminal offences such existence is relatively easy to establish (e.g. robbery, murder, theft, etc.), there is a number of criminal offences the manifestations of which (the method of perpetration and the manner of occurrence of a harmful consequence) are not visible and easily seen. On the other hand, there will be situations when the same facts will imply grounds for suspicion of more than one criminal offence carrying different type and severity of sentence. In all these cases, it is advisable that the authorised officials contact the Prosecutor and consult about the circumstances of a specific case.

Article 219
Collection of Information and Collection of Other Evidence
(Art. 234 of FBIHCPC, Art. 219 of RSCPC, Art. 219 of BDCPC)

(1) In order to perform the tasks referred to in Article 218 of this Code, authorized officials may obtain the necessary information from persons; may make a necessary examination of vehicles, passengers and luggage; may restrict movement in a specified area during the time required to complete a certain action; may take the necessary steps to establish identity of persons and objects; may organize search to locate an individual or items being sought; may in the presence of a responsible individual search specified structures and premises of state authorities, public enterprises and institutions, examine specified documents belonging to state authorities or public enterprises or institutions, and take other necessary steps and actions. A record or official notes

shall be kept of facts and circumstances ascertained in the taking of various actions and also concerning items which have been found or forfeited.

(2) *In gathering information from persons, an authorized official may issue a written request to a person to appear at the police station, provided that the request designates the reasons for requesting the person's appearance. A person is not obligated to give a statement or respond to any question posed by the authorized official, other than to give his own identity data. The authorized official shall inform the person about this right.*

(3) *In gathering information from persons, the authorized official shall act in accordance with Article 78 of this Code or in accordance with Article 86 of this Code. In that case, the records on gathered information may be used as evidence in the criminal proceedings.*

(4) *A person against whom any of the actions or measures referred to in this Article have been taken shall be entitled to file a complaint with the Prosecutor's Office within a period of three (3) days. The Prosecutor shall verify the grounds of the allegations and if it is determined that the applied steps or measures contain the features of a criminal offence or a violation of the work obligation, the complaint shall be processed in accordance with the law.*

(5) *The authorized official shall complete a criminal report based on the information and evidence gathered. The criminal report shall be submitted along with physical articles, sketches, photographs, reports obtained, records of the measures and actions taken, official notes, statements taken and other materials, which could contribute to the effective conduct of proceedings, including all facts or evidence in favour of the suspect. If the authorized official learns of new facts, evidence or clues to the criminal offence after submitting the criminal report, they shall have a continuing duty to gather the necessary information and shall immediately submit a supplemental report to the Prosecutor.*

(6) *The Prosecutor may gather information from persons in custody if this is necessary to detect other criminal offences committed by the same person or his accomplices, or criminal offences of other suspects.*

This article establishes as such the fundamental authorities that carry such actions as the authorised officials in criminal proceedings and their scope of activity, or the basis for their action in order to fulfil the requirements of Article 218 of BIHCPC. Based on the measures taken and statements and other evidence collected, an authorised official will complete a report on the criminal offence committed along with all the evidence gathered. These authorities, as a principle, supplement the authorities which the authorised officials possess pursuant to legal provisions governing their work (e.g. the Law on Police Officials, the Internal Affairs Laws, the Law on the State Investigation and Protection Agency, etc.), and they represent a procedural basis for the action of the authorised officials in criminal proceedings.

Article 224.
Cessation of Investigation
(Art. 239 of FBIHCPC, Art. 224 of RSCPC, Art. 224 of BDCPC)

(1) The Prosecutor shall order the investigation of a suspect to cease if it is established:
- *a) the act committed by the suspect is not a criminal offence;*
- *b) there is insufficient evidence that the suspect committed a criminal offence;*
- *c) that the act is covered by amnesty, pardon or statute of limitations or if there are some other obstacles that preclude prosecution.*

(2) The Prosecutor shall inform the injured party, who enjoys the rights prescribed by the Article 216 of this Code, on cessation of the investigation.

(3) The Prosecutor may, in the cases stated in Item b) of Paragraph 1 of this Article, at a later date reopen the investigation if additional information is obtained and such information provide sufficient reasons to believe that the suspect committed a criminal offence

Of particular importance is the provision of this article about cessation of an investigation because of insufficient evidence that the suspect has committed a criminal offence. Namely, in a case where there is insufficient evidence that a suspect has committed a criminal offence, or where current circumstances in the investigation do not allow for collection of necessary evidence, cessation of an investigation should be considered. That would then not be cessation of an investigation, since there would be a possibility to continue the investigation if new information indicating that the suspect has committed a criminal offence has been obtained. The application of this possibility is in accordance with the best practice of observation of human rights, since the suspect has been, in a way, released of a burden of

the role of a suspect, in other words, the suspect has been relieved of some obligations deriving from that status, such as to hire a defence attorney (entailing the issue of unnecessary expenses) and so on. A decision on cessation of the investigation should be communicated to the suspect.

Article 225
Completion of Investigation
(Art. 240 of FBiHCPC, Art. 225 of RSCPC, Art. 225 of BDCPC)

(1) The Prosecutor shall order a completion of investigation after he concludes that the status is sufficiently clarified to allow the bringing of charges. Completion of the investigation shall be noted in the file.
(2) Prior to the completion of the investigation, the Prosecutor shall question the suspect if this has not been done previously.
(3) If the investigation has not been completed within six (6) months after the order on its conducting has been issued, the Collegium of the Prosecutor's Office shall undertake necessary measures in order to complete the investigation.

When is established during an investigation that sufficient evidence has been collected constituting a require degree of probability (a grounded suspicion) that a suspected person has committed a criminal offence, the Prosecutor will complete the investigation by submitting an indictment for confirmation. Whether the Prosecutor's belief that there is a grounded suspicion is justified will be evaluated and established by the preliminary hearing judge in confirming the indictment.

It is an obligation of the Prosecutor before filing an indictment to hear the suspect, if this has not been done previously. This will ensure that the suspect has exercised his or her right to present defence, and the right to be informed of charges against him.

The time-limit of six months referred to in the provisions of this article is not an absolute and binding time-limit. Introducing this time-limit introduces a duty of the Prosecutor to act without delay and creates a possibility that a delay is decided by the Collegium of the Prosecutor's Office, who can take a decision on the matter in terms of taking necessary steps.

Article 231
Plea Bargaining
(Art. 246 of FBiHCPC, Art. 238 of RSCPC, Art. 231 of BDCPC)

(1) The suspect or the accused and the defence attorney, may negotiate with the Prosecutor on the conditions of admitting guilt for the criminal offence with which the accused is charged.
(2) In plea bargaining with the suspect or the accused and his defence attorney on the admission of guilt pursuant to Paragraph 1 of this Article, the Prosecutor may propose an agreed sentence of less than the minimum prescribed by the Law for the criminal offence(s) or a lesser penalty against the suspect or the accused.
(3) An agreement on the admission of guilt shall be made in writing. The preliminary hearing judge, judge or the Panel may sustain or reject the agreement in question.
(4) In the course of deliberation of the agreement on the admission of guilt, the Court must ensure the following:
    a) that the agreement of guilt was entered voluntarily, consciously and with understanding, and that the accused is informed of the possible consequences, including the satisfaction of the claims under property law and reimbursement of the expenses of the criminal proceedings;
    b) that there is enough evidence proving the guilt of the suspect or the accused;
    c) that the suspect or the accused understands that by agreement on the admission of guilt he waives his right to trial and that he may not file an appeal against the pronounced criminal sanction.

(5) If the Court accepts the agreement on the admission of guilt, the statement of the accused shall be entered in the record. In that case, the Court shall set the date for pronouncement of the sentence envisaged in the agreement referred to in Paragraph 3 of this Article within three (3) days at the latest.
(6) If the Court rejects the agreement on the admission of guilt, the Court shall inform the parties to the proceeding and the defence attorney about the rejection and say so in the record. Admission of guilt given before the preliminary proceeding judge, preliminary hearing judge, the judge or the Panel is inadmissible as evidence in the criminal proceeding.
(7) The Court shall inform the injured party about the results of the negotiation on guilt.

An agreement on the admission of guilt is a form of quasi-judicial proceedings, that is, proceedings without a main trial. This agreement is an expression of a consensual arrangement of different wills – the suspect, or the accused and the Prosecutor. The focus and the point of reaching a plea bargain are the conditions of admitting guilt by the suspect or the accused for the criminal offence with which he or she is charged. As to the conditions, they can be classified as the conditions on the part of the Prosecutor and the conditions on the part of the suspect or the accused. The most frequent conditions that the Prosecutor can put before the suspect or the accused are to co-operate with the Prosecutor by testifying against other suspects, or accused persons in the same proceedings, or to request the co-operation by rendering assistance to the Prosecutor in finding other necessary evidence for the criminal proceedings or for detecting new criminal offences and their perpetrators.

On the other hand, the suspect can have several motives to accept the conditions of the admission of guilt. The most usual ones are better terms of a criminal sanction, possibility to be granted immunity from criminal prosecution, acceleration of the proceedings and so on. It is this area of negotiation of conditions of the admission of guilt that offers a great potential to use this procedural institute as an instrument to detect and prosecute perpetrators of criminal offences, or to suppress and control crime as a whole. Namely, in the case of certain criminal offences, such as corruption offences, where there is a specific subjective relationship among participants in the perpetration of a corruption offence, i.e. creating a joint interest that the offence remains undetected, it is especially difficult to uncover these offences and collect necessary evidence to prove them.

What the Prosecutor must bear in mind at all times during negotiations of the conditions of the admission of guilt is not to break law by meeting one of the conditions, or not to violate legal and human rights of both the suspect or the accused and of the injured party or other suspects and accused persons, or third parties.

Article 391
Forfeiture of Items
(Art. 412 of FBIHCPC, Art. 402 RSCPC, Art. 391 of BDCPC)

(1) The items that need to be forfeited under the Criminal Code of Bosnia and Herzegovina shall be forfeited also when the criminal procedure is not completed by a verdict, which declares the accused guilty, if this is required by the interests of general security. A separate ruling shall be issued on this.
(2) The ruling referred to in Paragraph 1 of this Article shall be issued by the Court at the moment when the procedure is completed or when it is adjourned.
(3) The ruling on forfeiture of items referred to in Paragraph 1 of this Article shall be issued by the Court when the verdict, which declares the accused guilty, fails to issue such a decision.
(4) A certified copy of the decision on forfeiture of items shall be delivered to the owner of the items concerned if the owner is known.
(5) The owner of the items may appeal the ruling from Paragraphs 1, 2 and 3 of this Article on the ground of the lack of a legal basis for forfeiture of items.

Article 392
Forfeiture of Property Gain Obtained by Perpetration of Criminal Offence

(Art. 413 of FBIHCPC, Art. 403 of RSCPC, Art. 392 of BDCPC)

(1) The property gain obtained by perpetration of a criminal offence shall be established in a criminal procedure ex officio.
(2) The Prosecutor shall be obligated to collect evidence during the procedure and examine the circumstances that are important for the establishment of the property gain obtained by perpetration of a criminal offence.
(3) If the injured party submitted a claim under property law for repossession of items obtained through a criminal offence, or the amount that is equivalent to the value of such items, the property gain shall be established only in the part that is not included in the claim under property law.

Article 393
Procedure for Forfeiture of Property Gain Obtained by Perpetration of Criminal Offence
(Art. 414 of FBIHCPC, Art. 404 of RSCPC, Art. 393 of BDCPC)

(1) When the forfeiture of property gain obtained through a criminal offence is a possibility, the person to whom the property gain is transferred and the representative of the legal person shall be summoned to the main trail for hearing. They shall be warned in the subpoena that the procedure shall be conducted without their presence.
(2) A representative of the legal person shall be heard at the main trial after the accused. The same procedure shall apply to the person to whom the property gain was transferred if that person is not summoned as a witness.
(3) The person to whom the property gain is transferred as well as the representative of legal person shall be authorised to propose evidence in relation to the establishment of property gain and to question the accused, witnesses and expert witnesses upon approval by the judge or the presiding judge.
(4) The exclusion of the public at the main trial shall not refer to the person to whom the property gain is transferred and the representative of the legal person.
(5) If during the main trial the Court establishes that the forfeiture of property gain is a possibility, the Court shall adjourn the main trial and shall summon the person to whom the property gain was transferred, and a representative of the legal person.

Article 394
Establishment of Property Gain Obtained by Perpetration of Criminal Offence
(Art. 415 of FBIHCPC, Art. 405 of RSCPC, Art. 394 of BDCPC)

The Court shall establish the value of property gain by a free estimate if the establishment would be linked to disproportional difficulties or a significant delay of the procedure.

Article 395
Temporary Security Measures
(Art. 416 of FBiHCPC, Art. 406 of RSCPC, Art. 395 of BDCPC)

When the forfeiture of property gain obtained by perpetration of criminal offence is a possibility, the Court shall ex officio and under the provisions applicable to the judicial enforcement procedure define temporary security measures. In that case, the provisions of Article 202 of this Code shall apply.

Article 397.
Request for a Renewed Procedure With Respect to the Measure of Forfeiture of Property Gain
(Art. 418 of FBIHCPC, Art. 408 of RS CPC, Art. 397 of BDCPC)

The person referred to in Article 393 of this Code may file a request for a renewed criminal proceeding related to the decision on forfeiture of property gain obtained by perpetration of criminal offence.

Article 399
The Appropriate Application of Other Provisions of the Law
(Art. 420 of FBiHCPC, Art. 410 of RSCPC, Art. 399 of BDCPC)

If the provisions of this Chapter do not stipulate otherwise, the procedure for application of security measures or forfeiture of property gain obtained by perpetration of criminal offence, other relevant provisions of this Code shall be applied appropriately.

3 PART TWO –PROVISIONS OF THE CRIMINAL CODES IN BIH

ABBREVIATIONS:

1. **Criminal Code of BiH – BIHCC**
2. **Criminal Code of RS – RSCC**
3. **Criminal Code of Federation of BiH – FBIHCC**
4. **Criminal Code of Brcko District BiH – BDCC**

3.1 Corruption Offences

3.1.1 Abuse of Office or Official Authority

Article 220 BIHCC
Abuse of Office or Official Authority

(1) An official or responsible person in the Bosnia and Herzegovina institutions who, by taking advantage of his office or official authority, exceeds the limits of his official authority or fails to execute his official duty, and thereby acquires a benefit to himself or to another person, or causes damage to another person or seriously violates the rights of another,

shall be punished by imprisonment for a term between six months and five years.

(2) If a property gain acquired by the perpetration of the criminal offence referred to in paragraph 1 of this Article exceeds the amount of 10.000 KM, the perpetrator

shall be punished by imprisonment for a term between one and ten years.

(3) If a property gain acquired by the perpetration of the criminal offence referred to in paragraph 1 of this Article exceeds the amount of 50.000 KM the perpetrator

shall be punished by imprisonment for a term of not less than three years.

Article 347 RSCC
Abuse of Office or Official Authority

(1) An official or responsible person who, with the intent to acquire for himself or another a non-material gain or to cause damage to another, abuse his office or official authority, by overstepping his official authority or fails to execute his official duty,

shall be punished by imprisonment for a term between three months and three years.

(2) If the offence referred to in Paragraph 1 of this Article resulted in serious damage to another or seriously violation of the rights of another,
the perpetrator shall be punished by imprisonment for a term between six months and five years.

(3) An official or responsible person who, with the intent to acquire for himself or another a material gain, abuse his office or official authority, by overstepping his official authority or fails to execute his official duty
shall be punished by imprisonment for a term between six months and five years.

(4) If the material gain acquired in the course of the perpetration of the offence referred to in Paragraph 3 of this Article exceeds 10,000 KM the perpetrator shall be punished by imprisonment for a term between one and eight years and if the material gain exceeds 50,000 KM,
the perpetrator shall be punished by imprisonment for a term between two and ten years.

Article 383 FBIHCC
Abuse of Office or Official Authority

Identical to Article 220 BIHCC

Article 377 BDCC
Abuse of Office or Official Authority

Identical to Article 220 BIHCC

The criminal offence of abuse of office is characterised by the fact that a perpetrator of this offence can only be a person who has a capacity of an official (in BIHCC, FBIHCC and BDCC) or of official and responsible person (RSCC).

The act of perpetration is manifested as action or omission to act. The first form of perpetration of this criminal offence is action that includes abuse of office or overstepping of official authority, although it is possible to cumulate the actions of abuse and overstepping of official authority. The other form of perpetration is omission to act or omission to execute a certain official duty or authority. In the case of perpetration by omission to act, it is required that an official or responsible person has a duty to act, or that there is an official duty to be executed which the perpetrator of the criminal offence has intently omitted to execute.

The consequence of this criminal offence, although differently provided for by BIHCC, FBIHCC and BDCC on one hand and by the RSCC on the other hand, is essentially the same in all Criminal Codes in BiH. Therefore, all Criminal Codes in Bosnia and Herzegovina have included in the consequence of this criminal offence both material and non-material gain, or a damage to another person or a violation of another person's right, only in a different manner.

As to the gain concerned, it is not required to be illegal, so any gain is included in the consequence of this criminal offence. In respect of a different manner of including a material and non-material gain, it is expressed in the fact that all Criminal Codes in BIH include in the consequence of this criminal offence any gain or causing of damage to another person or a serious violation of another person's right, whereas only RSCC stresses and differentiate the two forms – a non-material gain is referred to in Paragraph 1 and a material gain in Paragraphs 3 and 4. What is very important, arising from the manner in which this criminal offence is established in RSCC, is the incrimination of the very action of abuse, overstepping of office and official duty or omission to execute an official duty (provided there is an intent to acquire for himself or another person a material or non-material gain), and paragraphs 1 and 3 do not require the occurrence of the consequence expressed as the occurrence of a gain or damage, but the criminal offence referred to in paragraphs 1 and 3 of RSCC is **completed** by the mere proceeding with the perpetration, with the requirement of the subjective element of a perpetrator's intent to acquire a material or non-material gain or to cause damage. Paragraph 1 has obtained in the second paragraph – the same as Paragraph 3 in the fourth paragraph - a qualified form of the offence with the occurrence of the consequence expressed as the occurrence of a serious damage to another person or serious violation of another person's right in the second paragraph, and of a material gain exceeding KM 10,000 or KM 50,000 (in paragraph 4). This is not valid for BIHCC, FBIHCC and BDCC, which all establish this activity as a criminal offence by establishing in incrimination itself a condition for the existence of this offence and by providing for the actual occurrence of a gain or damage, or by comparing rights of another person, and in all these cases the offence is completed not by the mere abuse, overstepping of office or failure to execute an official duty, but the cumulative occurrence of one of the consequences, i.e. the gain, damage or violation, is an imperative.

A qualified form of this criminal offence is a material gain exceeding KM 10,000 or KM 50,000 (a material gain is not required to be unlawful).

As to guilt of a perpetrator, a common characteristic of all Criminal Codes in BiH is that they provide for intent only. However, on the issue of standards and types of intent, they are differently provided by BIHCC, FBIHCC and BDCC on one hand and by RSCC on the other hand. While RSCC requires«intent», or exclusively a direct intent, for this criminal offence to exist, such requirement does not exist in BIHCC, FBIHCC and BDCC. Yet, having in mind the different manner in which this criminal offence is established as such in the Criminal Codes, which has been dealt with in more detail in the preceding part addressing the issue of consequence, this difference has most probably arisen from the different manner of incrimination of this offence. As for RSCC, in order for an intent concerning this criminal offence to exist, a perpetrator is required to be aware of abuse, overstepping of official authority or failure to execute an official duty, and the awareness of the gain for himself or another person or damage to another person or a violation of another person's right as a result of such action or failure to act, and the volition and agreement to the abuse, overstepping of official authority or failure to execute an official duty, or the willingness of and agreement to the gain for himself or another person or damage to another person or a violation of another person's right.

As for the punishment prescribed, BIHCC, FBIHCC and BDCC provide for a term of imprisonment between six months and twenty years, that is, in the most severe qualified form of this offence, the punishment of imprisonment is prescribed only by a special minimum, therefore, a general maximum applies. RSCC provides for a term of imprisonment between three months and ten years, that is, the most severe qualified form of this offence is punishable by a special minimum of two years and a special maximum of ten years.

This is one of the basic corruption offences, which is a *sui generis* of all corruption offences. This is also the corruption offence which takes most manifestations, since it incriminates any intended abuse of official (or responsible as in RSCC) authority for the purpose of acquiring non-transparent advantages for himself or another person, or acquiring a material gain for himself or another person, or abuse of official authority for the purpose of intently causing damage to another person. This concerns the abuse of official (or responsible as in RSCC) duty contrary to its nature, character and purpose. Different incrimination of this criminal offence, on one hand, in respect of the status of an official or a responsible person expands the circle of potential perpetrators of this offence to also include responsible persons in RS, that is, persons outside the circle of institutions and organisations exercising public authority, unlike in BIHCC, FBIHCC and BDCC, which narrow potential perpetrators of this offence to include only officials in the institutions of BiH, FBIH or BD or the organisations exercising public authority, while, on the other hand, a different standard concerning the required intent of the perpetrator results in more difficult proving and prosecuting of this offence, and a much higher level of a voluntary component of intent is required for this criminal offence to exist. This creates legal inequality of citizens in Bosnia and Herzegovina in respect of the same criminal offence. Also, different punishments prescribed have resulted in the fact that in RS this criminal offence falls within the jurisdiction of basic courts (the most severe qualified forms), so it is practically impossible to have views of the Supreme Court of RS regarding this criminal offence given the present problem of extraordinary remedies, while in FBIH this criminal offence is tried by the Cantonal Courts, which allows for creation of a case-law of the Supreme Court of FBiH.

3.1.2 Accepting Bribe

Article 217 BIHCC
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, who demands or accepts a gift or any other benefit or who accepts a promise of a gift or a benefit in order to perform within the scope of his official powers an act, which ought not to be performed by him, or for the omission of an act, which ought to be performed by him,

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, who demands or accepts a gift or any other benefit or who accepts a promise of a gift or a benefit in order to perform within the scope of his official powers an act, which ought to be performed by him, or for the omission of an act, which ought not to be performed by him,

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, who demands or accepts a gift or any other benefit 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 351 RSCC
Accepting Bribe

(1) An official or responsible person who demands or accepts a gift or any other benefit or who accepts the promise of a gift or a benefit in order to perform, in the course of his official duties, an act, which ought not to be performed by him, or not to perform an act, which ought to be performed by him,

shall be punished by imprisonment for a term between one and eight years.

(2) An official or responsible person, who demands or accepts a gift or any other benefit or who accepts the promise of a gift or a benefit in order that he performs, in the course of his official duties, an act, which ought to be performed by him, or not to perform an act, which ought not to be performed by him,

shall be punished by imprisonment for a term between one and five years.

(3) An official or responsible person, who demands or accepts a gift or any other benefit after the performance or failure to perform an official duty referred to in Paragraphs 1 through 3 of this Article in connection with the performance or failure to perform,
shall be punished by imprisonment for a term not exceeding three years.

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

Article 380 FBIHCC
Accepting Gifts and Other Forms of Benefits

Identical to Article 217 BIHCC

Article 374 BDCC
Accepting Gifts and Other Forms of Benefits

Identical to Article 217 BIHCC

As for the criminal offence of accepting bribe (accepting gifts and other forms of benefits), a special status of a perpetrator of this criminal offence is also required, that is, the status of an official or a responsible person, only that BIHCC, BIHCC and BDCC include foreign officials as well.

The act of perpetration of this criminal offence is defined in a several ways and it includes a) demanding or accepting of a gift or another benefit, b) accepting the promise of a gift or another benefit. What is common to all manifestations of this criminal offence in respect of perpetration in all Criminal Codes in BiH is the cumulative meeting of at least one more of the established objectives of demanding or accepting a gift or another benefit expressed as: a) the performance within the scope of his official powers of an act which ought not to be performed by him, or the omission of an act which ought to be performed by him (Paragraph 1 of all Codes); b) the performance within his official powers of an act which ought to be performed by him or the omission of an act which ought not to be performed by him (Paragraph 2 of all Codes in BiH). Also, Paragraph 3 of all Codes provides for subsequent demanding or accepting of a gift or another benefit, or demanding or accepting of a gift or another benefit after the perpetrator has already performed an act that is the cause for a bribe in its both manifestations. Consequently, it is clear that this incrimination covers a broad spectrum of bribery, which includes any demanding or accepting of both gifts and other benefits, or the promise of such gift or other benefits. In that respect, the reference to demanded or accepted gifts or other benefits or the promise of such gifts or other benefits provides for a motivating mechanism driving the perpetrator to take the action referred to in Paragraphs 1 and 2, while Paragraph 3 incriminates non-motivated accepting of a gift or another benefit by an official or a responsible person which is in a causal relation with the performance (the omission) of the act referred to in Paragraphs 1 and 2 and which presents a reward for the perpetrator for the performed act. Therefore, Paragraph 3 does not require a prior promise of a gift or another benefit, which means that at the moment of the performance (or the omission) the perpetrator does not have to know that after the performance or the omission to perform a certain official act he will receive a gift or another benefit for it. As arises from the incrimination of this offence in all Criminal Codes in BiH, any official act performed or omitted by an official or a responsible person, either permitted or prohibited if in connection with the same a gift or another benefit, or the promise of such gift or another benefit has been demanded or accepted, whether such gift or other benefit has been demanded or accepted after the performance or omission of any official duty, is covered by this criminal offence. A gift or another benefit demanded or accepted, or promised, does not have to be pecuniary, but can be any non-material or material gain. It should be noted that this criminal offence can only exist if between the demand and acceptance of a gift or another benefit or the promise of such gift or other benefit there is causality, i.e. if there is a dialectic relation between the performance or omission of an official act and the demand and acceptance of a gift or another benefit or the promise of the same.

As for guilt of the perpetrator, it is specified in the same manner in all Criminal Codes in BiH and requires the existence of intent of the perpetrator, which can be either direct or possible. In other words, the perpetrator must be aware of demanding or accepting a gift or another benefit or the promise of the same, and of the performance of an official act and of the causality between them, and must possess willingness or agreement to it. However, in the cases referred to in Paragraph 3 of all Criminal Codes, it suffices to have the awareness and willingness about the demand and acceptance of a gift or another benefit and the awareness of the causal connection with the official act already performed which at the moment of the performance does not need to be included in the intent of the perpetrator, but it is sufficient that the perpetrator, during the demand or acceptance of a gift or another benefit, has awareness and willingness in relation to the official act already performed which serves as a basis for such demand or acceptance of a gift or another benefit.

The punishment prescribed is different because of the type of act performed or the fact whether an official act performed or omitted is prohibited or permitted, or depending on the fact whether a bribe is demanded or accepted before or after the act already performed, therefore, BIHCC, FBIHCC, BDCC provide for a term of imprisonment between one and ten years for the cases of the performance of a prohibited act, and a term of imprisonment between one and five years in the cases of the performance of a permitted act. These Criminal Codes do not make distinction in respect of the subsequent demand or acceptance of a bribe whether the case concerns the performance of a prohibited or permitted official act referred to in Paragraph 1, in fact, these cases carry the imprisonment for a term between one and

ten years. Thus this Paragraph 3, without an obvious reason, increases the punishment for the cases referred to in Paragraph 2 (the performance of a permitted official act) only because of the fact that the bribe has been demanded or accepted after the performance of a certain official act. RSCC prescribes the punishment ranging from the general minimum of a prison sentence to the imprisonment for a term up to 3 years in Paragraph 3, and between one and eight years for the cases of the performance of a prohibited official act, while Paragraph 2 prescribes a term of imprisonment between six months and five years (the performance of a permitted official act). Furthermore, all Criminal Codes in BiH provide in Paragraph 4 that accepted gifts or any other benefits shall be forfeited.

In respect of the differences concerning the manner of incriminating this offence, two differences are obvious. Namely, BIHCC, FBIHCC and BDCC incriminate this offence in the same manner and foreign officials are also included, while RSCC does not provide for them. The other difference is reflected in punishing the subsequent demanding or accepting of a bribe in all Criminal Codes in BiH, so RSCC treats it as a less severe form of this criminal offence (the prescribed imprisonment for a term up to three years), while BIHCC, FBIHCC and BDCC establishes this criminal offence as the same or as a more severe form of perpetration in relation to Paragraph 2 (the performance of a prohibited official act) and the punishment by imprisonment in relation to subsequent demanding or accepting of a bribe for the permitted official act is the same as in Paragraph 1, while, compared to Paragraph 2 (the performance of the permitted official act), the punishment has been increased to correspond to the range referred to in Paragraph 1, that is, from the range between one and five to the range between one and ten years.

The relevant provisions of the above paragraphs and even the subsequent articles, incriminating an active form of bribery, refer to gifts, benefits and other advantages. Particularly important for us is the term «advantage», which is not defined in the Criminal Codes, so it needs to be interpreted in respect of international documents as well, which are binding on BiH. These documents in principle use the term of «undue» advantage and at the same time they require that domestic legislation incriminate accepting and other forms of disposing of a material and non-material gain. The term «gain» in our opinion should include any benefit, material or non-material, irrespective of its amount or form. An advantage can also refer to data, information or advice, or, for example, to getting a child into a school for which he or does not fulfil academic requirements. On the other hand, the term «gain» has a broader scope than the term «undue advantage», but it should not create a difficulty, since it is quite logical that any advantage, given, accepted, promised, and so on, in the circumstances referred to in the provisions incriminating the accepting and giving of a gift, bribe and other forms of advantage, is undue or illegal.

There might also be difficulties in comparing the definitions concerned with the obligation established in Article 3 of the Council of Europe Criminal Law Convention on Corruption, which obliges the Member States to, among other requirements, incriminate the receipt of any gift, bribe or other advantages by an official not only for himself/herself but also for anyone else. The question is whether the courts in BiH will allow an extensive interpretation of the relevant provisions to that end, so it would be useful to initiate amendments to the codes to that end, not only for the reason of meeting the international obligations, but also (which is certainly more important) to penalise also this form of the perpetration of the criminal offence whereby an advantage is not intended for the official concerned but directly for a third party.

3.1.3 Giving Bribe

Article 218 BIHCC
Giving Gifts and Other Forms of Benefit

(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, in order that he performs within the scope of his official powers of an act, which ought not to be performed by him, or abstains from performing of an act which ought to be performed by him, 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, in order that he performs within the scope of his official powers an act, which ought to be performed by him, or abstains from performing of an act, which ought not be performed by him, 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, 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 352 RSCC
Offering Bribe

(1) Whoever gives, attempts to give or promises a gift or any other benefit to an official or responsible person in order that he performs, in the course of his official duties, an act which ought not to be performed by him, or abstains from performing an act which he ought to perform, or whoever mediates in the 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 order that he performs, in the course of his official duties, an act which he ought to perform, or abstains from performing an act, which he ought not to perform, or whoever mediates in the bribing of the official or responsible person,
shall be punished by imprisonment for a term not exceeding three years.
(3) The perpetrator of the offence referred to in Paragraphs 1 and 2 of this Article who gave a bribe at the request of an official or responsible person, and reported the offence before it was been discovered or before knowing that the offence was discovered,
may be released from punishment.
(4) Given gifts or any other property gain shall be forfeited, and in the case referred to in Paragraph 3 of this Article, they may be returned to the donor.

Article 381 FBIHCC
Giving Gifts and Other Benefits

Identical to Article 218 BIHCC

Article 375 BDCC
Giving Gifts and Other Benefits

Identical to Article 218 BIHCC

It should be stated at the beginning that the content of this criminal offence is identical to the content of the criminal offence of accepting a bribe, only that the former includes as an active participant of the criminal offence the person who gives a bribe and the act of perpetration characterised as giving or promising of a gift or another benefit is expanded to include the mediation in such bribery.

A perpetrator of this criminal offence can be anyone, only that a bribe has to be intended for an official or a responsible person, with a remark that BIHCC, FBIHCC and BDCC also cover a foreign official, which is not the case with RSCC.

The act of perpetration of this criminal offence includes giving or promising of a gift or another benefit in order for a specific official or responsible person to perform a specific official duty within the scope of his or her official powers, and in respect of the content of the bribe, it is provided for in the same manner as in the case of the criminal offence of accepting a bribe. The official action or omission itself requested from the official or responsible person can be permitted (Paragraph 1) or prohibited (Paragraph 2), in other words, it is identical to the provision for the criminal offence of accepting a bribe. However, the act of the perpetration of this criminal offence can also constitute mediation in such bribery, which requires that the giver of a bribe and the official or responsible person be brought together with a view of bribery, or that the actions that can be characterised as the mediation between the giver of a bribe and the official or responsible person with a view of bribery be taken. In respect of this manner of perpetration by mediation, the mediator has to be aware that the reason of bringing together the giver of a bribe and the official or responsible person is bribery.

When Paragraph 3 is considered, all Criminal Codes in BiH provide for the situation where a giver of a bribe gives the bribe at the request of an official or responsible person, therefore, this Paragraph requires an initiative of bribery given by an official or responsible person as the receiver of the bribe, and reporting of the bribe by the giver, in this case before the act has been discovered, or before the giver in such case has learned that the act has been discovered, and provides for the possibility of the giver of the bribe to be freed from punishment. This is an encouragement for reporting of this criminal offence by persons who have been incited, in a way, to commit this criminal offence by officials or responsible persons, as the primary perpetrator in respect of the connection between the criminal offence of giving and accepting a bribe, who is a holder of certain official authority, and who demands a bribe, from the position of the authority, to perform certain official act either permitted or prohibited, since the accepting of a bribe by an official or responsible person carries a higher risk than the giving of a bribe, which is demonstrated by the punishment prescribed for these criminal offences.

As for guilt of the perpetrator, it is established identically in all Criminal Codes in BiH, and requires an intent which can be direct or possible, or in the first form of the perpetration of this criminal offence by giving or promising a gift or another benefit, the perpetrator must have awareness and volition (willingness or consent) that he or she gives or promises a gift or another benefit to an official or responsible person in order for that person to perform or omit a certain official act, either prohibited (Paragraph 1) or permitted (Paragraph 2). In that regard, it is not decisive that the perpetrator understands that the official act for which a gift or another benefit is given or promised is prohibited or permitted, but the form of the perpetration of this criminal offence arises from objective circumstances, or depends on the fact whether the official act whose performance or omission is requested is permitted or prohibited by a regulation or another act. In respect of the other form of perpetration of this criminal offence, constituting in the mediation in such bribery, the perpetrator must have awareness and volition (willingness or consent) to bring together the giver of a bribe and the official or responsible person and that such connection is made with a view of bribery.

The punishment prescribed is also identical in all Criminal Codes in BiH and in its basic form in Paragraph 1 (a prohibited official act) this criminal offence carries the imprisonment for a term between six months and five years, while Paragraph 2 (a permitted official act) provides for the imprisonment for a term up to three years, only that RSCC provides in the same paragraph for a monetary sanction or the imprisonment for a term up to three years. All Criminal Codes in BiH provide in Paragraph 3, as mentioned above, for a possibility of release from punishment, and in Paragraph 4, for forfeiture of gifts or other benefits, while in the case referred to in Paragraph 3, all Criminal Codes provide for a possibility to return the bribe to the giver, at the request of the official or responsible person.

It should be noted that the only difference between BIHCC, FBIHCC and BDCC on one hand and RSCC on the other hand, constitutes in expanding of incrimination concerning the person who is given or promised a bribe to include foreign officials as well, in the same way as in the case of the criminal

offence of accepting a bribe. The second difference concerns the fact that RSCC also treats an attempt to give or promise a bribe as part of the act of perpetration.

BIHCC, FBIHCC and BDCC: "…*gives or promises a gift or any other benefit*..."

RSCC: "…gives*, attempts to give or promises a gift or any other benefit*..."

It is obvious that the acts of perpetration of this criminal offence are not incriminated to such an extent to fully meet the obligation arising from Article 2 of the Council of Europe Criminal Law Convention on Corruption, requiring that the State Members establish as a criminal offence, in addition to the giving and promising of a benefit, the offering of a benefit as an autonomous act of perpetration, so this will be a task for the legislative authorities of BiH in a near future.

In order for a criminal offence as established in BIHCC, FBIHCC and BDCC to be completed, the acts of giving (action) or promising should reach an official, while further steps of the official person concerning the gift given or promised (the acceptance or rejection of a gift or similar) are completely irrelevant for the existence of a completed criminal offence. In the case that a gift or the promise of a gift does not reach the subjective sphere of the official, meaning that the official is not aware of that fact, the criminal act should be qualified as an attempt of the criminal offence concerned.

The situation is different than the one described in RSCC, which establishes an attempt to give a gift or another benefit as one of the acts of perpetration. In the above mentioned case, where the act has been started by the perpetrators of that criminal offence but the gift or the promise of a gift does not reach the subjective sphere of the official, RSCC does not establish it as an attempt, but as a completed criminal offence.

The Council of Europe Criminal Law Convention on Corruption requires in Art. 2 and 3 that the Member States establish as a criminal offence the giving and accepting of a gift, bribe or other benefits even in the cases where these acts have been committed indirectly, through a mediator or third persons. We are of opinion that these cases should be included in the current provisions and that the case-law should not have any special difficulties with that principle (the situation can be illustrated with a situation when a third person is only a tool in the hand of the perpetrator; in that case it is absolutely clear that, although the criminal offence has objectively been committed by a third party, the perpetrator is a person leading him or her, and the third person is liable within the limits of his or her potential guilt or responsibility.

It seems that the incrimination of an additional act of perpetration –mediation in active bribery, will bring additional doubts and difficulties, especially in delineation between this act and certain forms of a separate criminal offence of illegal interceding. Let us assume a situation in which a person, taking advantage of his or her informal (social) influence interposes with an official who receives a bribe for his or her act or omission, and the mediator also receives a benefit in return for the mediation. In this case, the criminal offence should probably be qualified as illegal interceding in its qualified form; otherwise, in an identical case, but without a benefit for the mediator, the act should be qualified as the giving of a gift or other forms of benefit, or the giving of a bribe. It seems that the legal descriptions overlap and that the mediation included in the criminal offence of the giving of a gift and other forms of benefit, or the giving of a bribe, is even completely incorporated in the special criminal offence of illegal interceding. If nothing else, the legal practice in BiH should be harmonised at least on this issue.

3.1.4 Illegal Interceding

Article 219 BIHCC

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 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 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.

Article 353 RSCC
Illegal Mediation

(1) Whoever accepts a reward or any other benefit in return for mediating that an official duty is or is not performed by using his office or social status
shall be punished by imprisonment for a term not exceeding three years.
(2) Whoever, by using his office or social status mediated that an official duty, which ought not to be performed, is performed, or that an official duty, which ought to be performed, is not performed.
shall be punished by imprisonment for a term between six months and five years.
(3) If the offence referred to in Paragraph 2 of this Article was committed in relation to institution or conducting of criminal proceedings against certain person,
the perpetrator shall be punished by imprisonment for a term between one and five years.
(4) If a reward or any other benefit has been received in return for mediation referred to in Paragraphs 2 and 3 of this Article,
the perpetrator shall be punished by imprisonment for a term between two and ten years.
(5) The reward and property gain shall be forfeited.

Article 382 FBIHCC
Illegal Interceding

Identical to Article 219 BIHCC.

Article 376 BDCC
Unlawful Intermediation

Identical to Article 219 BIHCC.

It should be noted in the beginning that this criminal offence is more far-reaching than the criminal offence of the accepting of a bribe, and it generally includes any taking advantage of one's official or social position or influence in order to intercede that an official act that ought not to be performed be performed or that an official act that ought to be performed not be performed, irrespective of whether a gift or another benefit or another form of material gain has been received or promised for such interceding, (Paragraph 2 of all Criminal Codes in BiH), and also includes the receipt of a reward or another benefit in return for the interceding, by taking advantage of the official or social position or influence, in the performance or omission of an official act either prohibited or permitted.

Namely, the perpetrator of this criminal offence can be any person whom his or her social or official position enables to intercede that another official performs or fails to perform a certain official act. In this

way, clear differentiation is made from the criminal offence of the accepting of a bribe, since the mediator takes advantage not only of his or her official but also of social position and influence to intercede that another official performs or fails to perform a certain official act. Consequently, unlike the criminal offence of accepting a bribe in which the official or responsible person acts within his or her scope of official authority and appears as a direct perpetrator of the official act the performance or omission of which is requested, in this criminal offence, the perpetrator does not act within the scope of his or her official authority nor directly performs or omits the official act, but intercedes, by taking advantage of his or her official or social position and influence, that another person performs or omits such official act within his or her scope of official authority.

The act of perpetration of this criminal offence is established depending on whether a reward or another benefit is received for such mediation, in which case any mediation is incriminated irrespective of whether the official act whose performance or omission is requested through the mediation is permitted or prohibited (Paragraph 1 of all Criminal Codes in BiH), or on whether such mediation is made without a reward or another benefit or the promise of such benefit, in which case only mediation for the performance or omission of certain official act which is prohibited is incriminated, or, through mediation, the performance of an official act that ought not to be performed, or the omission of an official act that ought to be performed, is requested (Paragraph 2 of all Criminal Codes in BiH), in which case the receipt of a reward or another benefit for such mediation constitutes a qualifying circumstance of the offence (Paragraph 3 of BIHCC, FBIHCC and BDCC, and Paragraph 4 of RSCC).

Consequently, in the first case where a reward is received for the mediation, the act of perpetration consists in taking of certain steps from the position of the official or social position or influence which is used for mediation between the person who gave a reward or another benefit and the official person who should perform or omit a certain official act, irrespective of whether such performance or omission of the official act is prohibited or permitted. Therefore, by this incrimination, causality between the receiving of a reward by the mediator (as a driving mechanism for the mediator) and the mediating by the person who has certain official or social position or influence with another official, in order for the latter to perform certain official act within the scope of his or her authority, has been established.

In the other case, where no reward or other benefit or the promise of such reward is received, the act of perpetration consists in taking certain steps from the position of the official or social position or influence which are used for an attempt of interceding that another official or responsible person, within the scope of that person's authority, performs or omits certain official act which ought not to be, or ought to be, performed.

However, if a reward or another benefit has been received for such mediation, then it constitutes a qualifying circumstance of the offence, which carries a more severe punishment.

RSCC provides in Paragraph 3 for a special qualifying circumstance of Paragraph 2 (interceding that an official act that ought not to be, or that ought to be performed, is performed or omitted) which is not provided for by other criminal codes in BiH and consists in the circumstance that the same has been done in relation to the instituting or conducting criminal proceedings against an individual.

As for guilt of the perpetrator of this offence, an intent is required, both direct and possible, or the perpetrator of this offence must have awareness and volition (willingness or agreement), to intercede, in order to receive a reward, by taking advantage of his or her official or social position or influence in respect of another person, that this other official person performs or omits an official act whether permitted or prohibited (Paragraph 1 of all Criminal Codes in BiH) or must have awareness and volition (willingness or agreement) to, by taking advantage of his or her official or social position or influence in respect of another person, intercedes that that official or responsible person performs an official act that ought not to perform, or omits an official act that ought to perform, whereby the perpetrator of the offence does not have to be aware of the prohibited character of that official act the performance or

omission of which is requested. The reason is that the value protected by law against this criminal offence is the official or responsible duty, or the official or social position or influence that the perpetrator exercises on the account of his or her official or social position, so that any taking advantage of such position or influence under this objective condition of incrimination (prohibited character of the official act) is included in this criminal offence. The awareness of the prohibited character of this offence can possibly constitute an aggravated circumstance in this criminal offence.

The punishment prescribed for this criminal offence ranges between the monetary sanction or the imprisonment for a term up to three years in Paragraph 1 (RSCC does not provide for a monetary sanction) and the imprisonment for a term between six months and five years for Paragraph 2, while the qualified form of this offence carries the imprisonment for a term between one (in CCS two) and ten years.

In respect of the criminal offence of illegal interceding, it should nevertheless be noted that Article 12 of the Criminal Law Convention on Corruption requires from the Member States (BiH is among them) to include in their domestic laws both passive form (which BiH has fully satisfied) and active form of illegal interceding. An active form of this criminal offence, which is a mirrored reflection of its passive form and incriminates the giver of a reward or another benefit to a person with an intent that such person, by taking advantage of his or her official or social position or influence, intercedes that an official act is performed or omitted, is not recognised by any of the Criminal Codes in BiH, and at the same time, BiH has not made a reservation in respect of the above mentioned Article of the Convention. In given situation, thus, there are two options: 1) to amend all four Criminal Codes as to establish as a criminal offence an active form of this offence or 2) for BiH to make a reservation in respect of Article 12 of the Criminal Law Convention on Corruption. In that regard, this would mean that BiH does not fully satisfy the obligations undertaken by the ratification of this document of the Council of Europe.

3.1.5 Embezzlement

Article 221 BIHCC
Embezzlement in Office

(1) Whoever, with an aim of acquiring unlawful property gain for himself or another, appropriates money, securities or other movable entrusted to him by virtue of his office in the institutions of Bosnia and Herzegovina, or of generally his position within the institutions of Bosnia and Herzegovina, shall be punished by imprisonment for a term between six months and five years.

(2) If a property gain acquired by the perpetration of the criminal offence referred to in paragraph 1 of this Article exceeds the amount of 10.000 KM, the perpetrator shall be punished by imprisonment for a term between one and ten years.

(3) *If a property gain acquired by the perpetration of the criminal offence referred to in paragraph 1 of this Article exceeds the amount of 50.000 KM, the perpetrator shall be punished by imprisonment for a term not less than three years.*

Article 348 RSCC
Embezzlement in Office

(1) Whoever unlawfully appropriates money, securities or other movables entrusted to him by virtue of his office or, generally by his position within institutions or legal persons, shall be punished by imprisonment for a term between six months and five years.

(2) If the material gain acquired in the course of the commission of the offence referred to in Paragraph 1 of this Article does not exceed 200 KM, and the perpetrator 's aim was to acquire small value, he shall be punished by a fine or imprisonment for a term not exceeding one year.

(3) If the material gain acquired in the course of the commission of the offence referred to in Paragraph 1 of this Article exceeds 10,000 KM, the perpetrator shall be punished by imprisonment for a term between one and eight years and if the material gain exceeds 50,000 KM, the perpetrator shall be punished by imprisonment for a term between two and ten years.

Article 384 FBIHCC
Embezzlement in Office

Identical to Article 221 BIHCC.

Article 378 BDCC
Embezzlement in Office

Identical to Article 221 BIHCC.

Embezzlement is one of classic criminal offences against official duty. A perpetrator of this offence can be a person who holds an office or generally a position within a public authority or legal person.

The act of perpetration of this criminal offence consists in unlawful acquisition of money, securities or other movable property entrusted to him by virtue of his office or of generally his position within a public authority or legal person.

Following the above mentioned, this criminal offence requires that the perpetrator exercises possession over certain money, securities or other movable property entrusted to him by virtue of his office or of generally his position within a public authority or legal person.

Furthermore, the act of appropriation by the perpetrator can be committed through direct unlawful appropriation or through spending for his own account or for the account of another person, as well as through unlawful alienation to third persons for his own account or the account of another person.
Also, this criminal offence requires unlawfulness of appropriation, and such appropriation that does not have a character of unlawfulness cannot be treated vis-à-vis this criminal offence.

In accordance with this incrimination, appropriation of immovable property entrusted to a person by virtue of his office or of generally position in a public authority or legal person cannot be a subject of this criminal offence, but possibly of a criminal offence.

As for guilt of the perpetrator, it is differently incriminated by BIHCC, FBIHCC and BDCC which require a direct intent of the perpetrator intent to acquire for himself of for another person property gain), while RSCC does not contain such a provision, which means that a possible intent of the perpetration is also provided for.

The punishment prescribed ranges from the term between six months and five years (Paragraph 1 of all Criminal Codes), while all codes establish as a qualifying circumstance the amount of property gain, thus the first qualifying circumstance is the acquired property gain exceeding KM 10,000, which is punishable by the imprisonment for a term between one and ten year (in RSCC between one and eight), and the most severe qualifying circumstance is the acquired property gain exceeding KM 50,000, which is punishable by the imprisonment for a term not less than three years (in RSCC between two and ten years).

The RSCC provides in Paragraph 2 for a privileged circumstance, i.e. the acquired property gain must not exceed the amount of KM 200 but the perpetrator has aimed at acquiring a gain of a small value, and the punishment prescribed is a fine or the imprisonment for a term up to one year.

3.1.6 Money Laundering

Article 209 of BiHCC
Money Laundering

(1) Whoever accepts, exchanges, keeps, disposes of, uses in commercial or other activity, otherwise conceals or tries to conceal money or property he knows was acquired through perpetration of criminal offence, when such a money or property is of larger value or when such an act endangers the common economic space of Bosnia and Herzegovina or has detrimental consequences to the operations or financing of institutions of Bosnia and Herzegovina, shall be punished by imprisonment for a term between six months and five years.
(2) If the money or property gain referred to in paragraphs 1 of this Article exceeds the amount of 50.000 KM, the perpetrator shall be punished by imprisonment for a term between one and ten years.
(3) If the perpetrator, during the perpetration of the criminal offences referred to in paragraphs 1 and 2 of this Article, acted negligently with respect to the fact that the money or property gain has been acquired through perpetration of criminal offence, he shall be punished by a fine or imprisonment for a term not exceeding three years.
(4) The money and property gain referred to in paragraph 1 through 3 shall be forfeited.

Article 270 of RSCC
Money Laundering

(1) Whoever accepts, exchanges, keeps, disposes of, uses in commercial activity the money or property he knows was acquired through commission of criminal offence, or otherwise conceals or attempts to conceal it
shall be punished by imprisonment term ranging between six months and five years.
(2) If the perpetrator of the offence described under paragraph 1 of this article is at the same time the perpetrator or accomplice in commission of the criminal offence through which the money property gain mentioned under previous paragraph has been acquired
shall be punished by imprisonment term ranging between one and eight years.

a. *If the money or property from paragraphs 1 and 2 of this article are of large value, the perpetrator*
   shall be punished by imprisonment term ranging between one and ten years.
b. *If the offences from the previous paragraphs have been committed by several people organized for the purpose of commission of such offences, the perpetrator*
   shall be punished by imprisonment term ranging between two and twelve years.
c. *If during the commission of the offences from paragraphs 1, 2 and 3 of this paragraph the perpetrator had acted negligently with respect to the circumstance that the money or property gain have been acquired through commission of criminal offence,*
   he shall be punished by imprisonment term not exceeding three years.
d. *The money and property from paragraphs above shall be confiscated.*

Article 272 of FBIHCC
Money Laundering

Identical to Article 209 of BiHCC, apart from paragraph 1. where this article does not contain the wording "when such a money or property is of larger value or when such an act endangers the common economic space of Bosnia and Herzegovina or has detrimental consequences to the operations or financing of institutions of Bosnia and Herzegovina,", and also paragraph 2 which provides: "if the money or property referred to in paragraph 1 of this Article is of large value" instead of the amount of over 50000 KM, as is otherwise provided by paragraph 2 of Article 209 BiHCC.

Article 265 of BDCC
Money Laundering

Identical to Article 272 of FBIHCC

Having in mind this kind of incrimination, it is obvious that this criminal offence is specified in the criminal codes in BiH as one special form of criminal offence of concealing. Namely, this criminal offence implies the existence of a predicate criminal offence through which money or property were acquired, where the criminal offence of money laundering is with regard to that predicative offence of accessory character.

The act of perpetration of this criminal offence is identified alternatively as acceptance, exchange, keeping, disposal of, use in commercial or other activity, or otherwise concealment or attempt to conceal money or property the perpetrator knows was acquired through perpetration of criminal offence. From the contents of incrimination itself it is entirely clear that money and property as objects of a criminal offence of money laundering must be acquired through some criminal offence and the perpetrator of that criminal offence must be aware of that. The principal question in the incrimination set as above is whether or not the predicative criminal offence must be established by the appropriate court judgment. In that regard the case law has not provided yet any adequate results, particularly for the reason that manifestations of money laundering in BiH are generally related to the criminal offence of tax evasion and that the criminal offences of money laundering are generally prosecuted first. If we are to accept the viewpoint that it is not necessary for the court sentence to indicate that money and property have been acquired by a criminal offence * (*The Comments of Criminal Codes of Bosnia and Herzegovina, edition 2005, p. 689.) then in such cases we would have a situation where for instance one person has been declared guilty for the criminal offence of money laundering by which sentence it would be established that the perpetrator first laundered the money originating from the criminal offence of tax evasion of another person (even though in regard of that other person and the criminal offence of tax evasion perpetrated by that person no criminal proceedings would be initiated at all, or the court sentence against «the money launderers» would initiate the criminal proceedings against the person for whom the final and binding judgment in fact already established that the person had committed the tax evasion.

Thus the basic principles of criminal proceedings would be impaired, or the principle of presumption of innocence and the right to defence would be infringed, since the person for whom the final and binding judgment has established the evasion of tax payment would be *de facto* declared guilty for tax evasion although the person has never had the chance to either take part in such criminal proceedings, or present facts and propose evidence in his favour.

Accordingly, considering the method of how this criminal offence is established in the criminal codes of BIH which implies the knowledge of the perpetrator that the money or property were acquired by the criminal offence, it would be, to say the least, correct to take concurrent steps towards proving both the criminal offence of money laundering and the predicate criminal offence at least in its objective terms of meaning. Any act of the perpetrator performed after becoming aware that the money or property have been acquired by the criminal offence, no matter whether the perpetrator of the predicate offence is known to him not, and which act is directed at concealing or attempting to conceal such money or

property, and in particular the actions referred to in paragraph 1 of all criminal codes in Bosnia and Herzegovina, must be considered as criminal offence of money laundering.

Since this criminal offence is new in all criminal codes in BIH, it would be necessary to say a few things about the very nature of this criminal offence. Namely, the main objective of the perpetrator of criminal offence of money laundering (money launderer) is legalization of “dirty money” that originates from certain illegal practices, or in case of the criminal codes of Bosnia and Herzegovina, from a criminal offence. The objective of the perpetrator of the criminal offence of money laundering is to place ”the dirty money” into legal financial flows in order to get “clean money” through certain fictitious financial transactions by which such «dirty money» is sought to be injected into legal financial flows as a sort of financial input, which creates fiction of certain business developments that have actually never happened, and the consequences of such fictitious business developments reflect in the increase of money supply in legal financial flows while such an increase of money supply is equivalent to «the laundered money», or a false picture is created in terms of an actual business development, whereas in regard of the difference between what has realistically happened and what is featured to have happened generates the same effect as in the fictional portraying of the business development taken as a whole.

A generally acknowledged viewpoint is that the money laundering procedure may be divided into the following three stages:
a) *Placement* – at this stage direct proceeds (mainly trade) from crime are channelled into the financial system or various valuables are bought;
b) *Layering* – at this stage the aim is to conceal the genuine criminal origins of funds through a number of cover-up transactions, attempts are also made to separate the funds from their illegal source (the ways most frequently used are: exchange of currency, use of import-export companies and insurance companies, manipulation with guarantees, bonds and securities, business operations by way of off-shore companies, use of box office and resident mail, and the like); and
c) *Integration* – at this stage the launderers integrate their funds into economy and financial system, the funds are then mingled with legal funds and are then used either for legal investment into economic activities or for a new criminal activity or for luxury purposes or other similar needs.*(*Maros-Barac, p. 167.,168, - the Comments of the Criminal Codes of BiH)
In this criminal offence, the act of perpetration positioned alternatively meaning that the perpetrator of this crime may undertake any of the specifically enumerated activities or several of them or an activity other than those enumerated but directed at concealing or making an attempt to conceal the money or property known to have been acquired from a criminal offence.

Concerning the issue of guilt, it is typical that the fundamental form of guilt is intent (direct or potential/prospective) meaning that the perpetrator of this criminal offence must be aware that the money or property as objects of this criminal offence were acquired through perpetration of some crime (in view of this circumstance there is also a criminal responsibility foreseen for negligence paragraph 3 of BiHCC; FBIHCC and BDCC, paragraph 2, sub-paragraph c) of RSCC.) and must be conscious and have volition (willingness or consent to accept, exchange, dispose of, use such money or property in commercial or other activity, otherwise conceals or tries to conceal money or property; nevertheless the fact that the act of perpetration of this criminal offence by its perpetrator is undertaken with a view to concealing the source of laundered money constitutes a *condicio sine qua non* of this crime.

As for the prescribed punishment for the basic form of this crime, all criminal codes in Bosnia and Herzegovina provide the imprisonment sentence for a term between six months and five years, and also all criminal codes in Bosnia and Herzegovina identify as one of the qualifying circumstances of this crime a larger value of laundered money, while in the Criminal Code of Bosnia and Herzegovina there is reference to a face value, or the amount exceeding 50,000 KM. However, the RSCC provides another few qualifying circumstances of this crime of which the first is that the perpetrator of this crime is at the same time also a perpetrator or accomplice of the criminal offence by which money or property were

acquired as object of money laundering (paragraph 2) and the perpetration of these crimes by several persons who associated for the purpose of perpetrating these crimes, (paragraph 2).

A very interesting question arising in relation to the definition of basic forms of money laundering that are covered by paragraph 1 of the relevant provisions is whether they also include the perpetrator of the earlier criminal offence. This dilemma does not exist only in the RSCC, which addresses this issue in the positive terms in paragraph 2 of Article 280. But it is mainly because of this explicit provision stipulating stricter punishment for a money launderer, who is at the same time the perpetrator of an earlier criminal offence, that there remains the question of other codes where the provisions of such type do not exist. Even more ambiguity comes up with the wording *"Whoever (…) the money or property* ***he knows was acquired*** *through commission of criminal offence,..."* , which leads us to the conclusion that it is always the other person the one who has acquired the money or property in question.

If the legislator does not decide to amend the law in the sense of more precise defining of this matter, the reply shall have to be looked for in the relevant case-law. Both approaches are possible, the first that acknowledges the principle of realistic concurrence/merger and allows for punishment of the perpetrator of such an earlier crime even for laundering of money that was acquired by this crime (of course, with understanding the real nature or substance (elements) of this crime) and the second that upholds the principles of a seemingly realistic concurrence of both crimes, such as the case is with concealing the act committed by the perpetrator of the predicate offence (in this example we are going to refer to non-punishable succeeding acts).

With respect to the above dilemma, the answer is provided neither by the Convention of the European Council CTES 141, which addressed this matter quite openly, or pragmatically and in Article 6, in relation to Article 40, provided the member countries with the possibility of choice. The states may consequently choose or decide that the criminal offence of money laundering should not be of relevance for the perpetrators of an earlier crime. We shall not at this point give preferences, which after all are found in the domain of crime policy, but it would however be useful if this matter were clearly and explicitly addressed in a uniform and equal way in all four criminal codes in Bosnia and Herzegovina.

It should also be pointed out that there is an extremely illogical paragraph 2, sub-paragraph c) of Article 280 of the RSCC which provides that the perpetrator of this crime referred to in paragraphs 1 and 2 shall be punished, if, in relation to the circumstance confirming that the money and property were acquired by the criminal offence, he acted out of negligence, since it is completely illogical that the perpetrator of the criminal offence of money laundering referred to in paragraph 2, who is at the same time the perpetrator of a predicate offence too, could in that case act out of negligence.

Also, the incrimination of this crime in all criminal codes in Bosnia and Herzegovina foresees the confiscation of money or property which have been the objects of this crime.

From all incriminations in the criminal codes in Bosnia and Herzegovina it is evident that they all identify this crime substantively in the same way, although the RSCC provides also two additional qualifying circumstances of this criminal offence. The very method of determination this crime creates numerous dilemmas that were already mentioned before in this text, so one of the great dilemmas is how to prove the so-called predicate offence. When determining this criminal offence the legislator has failed to use a more generic term *«money or property known to be acquired in an illegal way»,* rather than by a criminal offence, as it was provided by some other countries, so the legislator has thus accepted a more restrictive approach to this criminal offence, meaning that the object of criminal offence perpetration is indeed only the money or property acquired through crime rather than any money or any property acquired in an illegal way.

It should be admitted that the BIHCC, FBIHCC and BDCC target the substance of the criminal offence of money laundering much better and more precisely in respect of the requirement that the money and

property are of larger value or that this act endangers the common economic space of Bosnia and Herzegovina or has detrimental consequences to the operations or financing of its institutions. The RSCC does not require such criteria, and so, apart from the lack of understanding of the type and nature of this crime, as a result some absurd situations or interpretations could also arise with regard to the existence of the criminal offence of money laundering.

Namely, in regard of incrimination within the RSCC, theoretically, everyone who is aware that certain money or property were acquired through criminal offences and even the perpetrator of that crime (this is even a qualifying circumstance) who, as it were, keeps such money or property, or for example disposes of the money or property, conceals or tries to conceal them, fulfils the elements of the criminal offence of money laundering. This way of understanding this criminal offence may create a great number of absurd situations that arise exactly from the method of incrimination of this criminal offence, so for example the perpetrator of the criminal offence of theft who steals money from a newsstand & tobacco shop, and buys a bicycle with that money fulfils the elements of the criminal offence of money laundering (and so the elements of its qualifying form in the RSCC) since he knew that the money he bought the bicycle with originated from the criminal offence of theft, or what is more, he himself was even the perpetrator of that criminal offence, and he disposed of that money. However, we are convinced that such application of the provisions of the RSCC relating to the criminal offence of money laundering has never been intended by the legislator, since the situation indeed leads to an absurd. For the proper application of these provisions due account should be taken of the fact that the following two requirements need be met even under the RSCC in order for this criminal offence to exist: 1) the perpetrator of the criminal offence must dispose of that money in order to conceal its real origin rather than to put it in regular use and 2) the targeted purpose/value is always the financial, monetary system of the community, which is endangered by the placement of dirty money, rather than the money itself or private property of the entity from which it was stolen in the previous criminal offence.

3.1.7 Tax Evasion

Article 210 of BiHCC

Tax Evasion

(1) Whoever evades payment of amounts required under the legislation of Bosnia and Herzegovina on taxes or social contributions by not submitting required information, or by submitting false information on acquired taxable income or on other facts which may effect the determination of the existence or the amount of such obligation, and the obligation that is evaded exceeds the amount of 10.000 KM, shall be punished by a fine or imprisonment for a term not exceeding three years.
(2) Whoever perpetrates the offence referred to in paragraph 1 of this Article and the evaded obligation exceeds the amount of 50.000 KM, shall be punished by imprisonment for a term between one and ten years.
(3) Whoever perpetrates the offence referred to in paragraph 1 of this Article and the evaded obligation exceeds the amount of 200.000 KM, shall be punished by a term of imprisonment for a term not less than three years.

Article 287 of RSCC
Evading Payment of Taxes and Contributions

(1) Whoever evades payment of taxes required under tax legislation of the Republika Srpska or contributions to pension scheme and health insurance prescribed in the Republika Srpska, by not submitting required data or by submitting false data on earned taxable income or on other facts which affect the determination of the amount of such obligations, and the amount of obligation

whose payment is evaded exceeds 10.000 KM, shall be punished by a fine or imprisonment for a term not exceeding three years.
(2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article, and the amount of obligation whose payment is evaded exceeds 50.000 KM, shall be punished by imprisonment for a term between one and ten years.
(3) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article, and the amount of obligation whose payment is evaded exceeds 150.000 KM, shall be punished by imprisonment for a term between three and fifteen years.

Article 273 of FBIHCC
Tax Evasion

Identical to Article 210 of BIHCC except that its first paragraph contains the wording ”for himself or for another.”

Article 267 of BDCC
Tax Evasion

Identical to Article 273 of FBIHCC.

With respect of the criminal offence of tax evasion, it should be emphasized that the perpetrator of this criminal offence may be any person who commits for himself or another act of perpetration of this criminal offence. Regardless of the fact that such an explicit provision is not contained in the BIHCC and RSCC, it flows from legal nature of this criminal offence.

The act of perpetration of this criminal offence may be accomplished through omission (failure to provide required information concerning the taxable income or other facts of relevance for calculation of taxes and contributions.) in which case the perpetrator of this crime entirely fails to provide required information concerning his generated income or business developments or other relevant facts inherent to such income, which is subject to calculation of taxes and contributions, and thus conceals them and makes impossible the calculation of due taxes and contributions or through commission (providing false information concerning the generated taxable income or other facts of relevance for calculation of taxes and contributions) in which case the perpetrator provides false information thereby concealing the actual generated income or business developments or facts inherent to such income, that is subject to calculation of taxes and contributions. In both cases the perpetrator of this crime fails to present the actual balance of his income, which is subject to calculation of taxes and contributions, or the facts that influence the establishment of these liabilities. It should be stressed that the objective requirement of incrimination is the fact that the liability being evaded exceeds the amount of 10,000 KM, meaning that this criminal offence exists only inasmuch as the amount of the liability evaded thereby exceeds the amount of 10,000 KM.

On the point of guilt, it is uniformly regulated under all criminal codes in Bosnia and Herzegovina and it implies the existence of intent (direct or potential) on the part of the perpetrator of this crime, which means that the perpetrator is aware of income being generated, which according to applicable legislation is subject to calculation of taxes and contributions or of other facts influencing the establishment of these liabilities, and he has awareness and volition (willingness or consent) not to provide the required information about that income or such facts or has awareness and volition (willingness or consent) to provide false information about that income or such facts,

The prescribed punishment for the basic form this of crime is ranging from a fine to an imprisonment sentence of up to three years. The qualifying circumstance of this crime is placed in

two paragraphs and is relating exclusively to the amount of evaded liability so that the first qualifying circumstance is outlined in paragraph 2 of all criminal codes in Bosnia and Herzegovina and constitutes the amount of tax liability evaded exceeding 50,000 KM, punishable by imprisonment for a term between one and ten years, while the other qualifying circumstance is outlined in paragraph 3 of all criminal codes in Bosnia and Herzegovina expressed as the evaded liability in the amount exceeding in BIHCC, FBIHCC and BDCC 200,000 KM, whereas in RSCC 150,000 KM, which is in BIHCC, FBIHCC and BDCC punishable by imprisonment for a minimum term of three years, implying that that in the most serious of the paragraphs this crime is punishable by the general maximum imprisonment sentence of 20 years, whereas in RSCC the most serious form of this criminal offence is punishable by imprisonment for a term between three and fifteen years.

The only distinction between BIHCC; FBIHCC and BDCC, on one hand, and RSCC, on the other hand, is outlined through a qualifying circumstance of paragraph 3 of all criminal codes in Bosnia and Herzegovina where BIHCC; FBIHCC and BDCC foresee as a qualifying circumstance the amount of over 200,000 KM, whereas in RSCC this qualifying circumstance is expressed as the amount of liability of over 150,000 KM, and the prescribed sentence in the same paragraph, where in BIHCC, FBIHCC and BDCC it is punishable by a general maximum sentence of 20 years imprisonment, whereas in RS as a maximum punishment the same paragraph prescribes imprisonment for a term of maximum 15 years. This distinction as well as those preceding it, that are highlighted in the same sense, bring into question the constitutionally guaranteed right to equal treatment of all citizens in Bosnia and Herzegovina.

3.1.8 Failure to Pay Taxes

Article 211 of BiHCC
Failure to Pay Taxes

A person who fails to pay tax obligations in accordance with a tax legislation of Bosnia and Herzegovina, shall be punished by a fine or imprisonment for a term not exceeding three years.

This criminal offence is provided for exclusively by the BiHCC, and is incorporated into this Manual for the simple reason of pointing at its legal untenability.

Namely, the perpetrator of this criminal offence may be any person failing to pay tax liabilities, no matter whether or not this person has featured and calculated such liabilities. Accordingly, the only incriminated act here is the failure to pay the outstanding tax or tax liability that inherently represents the incarceration for debt that is contrary to all relevant international conventions and declarations addressing this issue.

Thus the recommendation of the author of this Manual is to strike out this criminal offence from the BIHCC since there is no any single cause that would justify its existence. Namely, in any case, by applying the BiH Constitution, priority of application is given to relevant international documents listed in the Constitution, explicitly prohibiting the existence of the so-called *incarceration for debt*, which this incrimination essentially represents. Namely, the state authorities have the opportunity of enforced tax collection insofar as the tax payer reports and calculates his tax liability but evades its payment. If, on the other hand, the taxpayer does not have sufficient funds that could be subjected to enforced settlement of the tax liability, then this is involves a classical case of incarceration for debt, or in other words the only thing incriminated here is just the tax liability non-payment.

In the event that the acts committed by the perpetrator of this criminal offence do assume the characteristics of another criminal offence that made impossible the payment of the calculated and

reported tax liability, then the incrimination of the non-payment itself has no grounds whatsoever, nor may such incrimination be consistent with the relevant international conventions and declarations.

3.1.9 Illicit Trade

Article 212 of BiHCC
Illicit Trade

(1) Whoever, without authorisation, sells, buys or exchanges items or goods whose distribution is forbidden or limited pursuant to the regulations of the institutions of Bosnia and Herzegovina or international law, and if, by such an act, some other criminal offence for which a more severe punishment is prescribed has not been perpetrated,

shall be punished by imprisonment for a term between one and ten years.
(2) Items and goods referred to in paragraph 1 of this Article shall be forfeited.

Article 271
Illegal Trade

(1) Whoever without authorization to trade procures goods or other objects of general consumption in a larger amount or value for the purpose of selling them, or whoever without authorization carries out trade or mediation in the trade or representation of domestic organization in traffic of goods and services,
shall be fined or punished by imprisonment term not exceeding two years.
(2) Whoever sells the goods whose production he had organized without proper authorization, shall be punished by imprisonment term ranging between six months and five years.
(3) The punishment from paragraph 2 of this article shall also be imposed on whoever sells, keeps for the purpose of sale, buys or exchanges goods or objects whose sale or traffic is restricted or prohibited
(4) If the perpetrator of the offence referred to in paragraphs 1, 2 and 3 of this article has set up a ring of middlemen or retailers, or has made a profit that exceeds 10.000 KM,
he shall be punished by imprisonment term ranging between one and eight years.
(4) Goods and commodities of illegal trade shall be forfeited.

Article 267 of FBiHCC

Illicit Trade

(1) Whoever, without authorization for trade, supplies goods or other items of general consumption in a value exceeding 10.000 KM in order to sell them, or whoever, without authorization, engages on a large scale in trade or in acting as intermediary in trade or as representative in the exchange of goods and services,

shall be punished by imprisonment for a term between three months and three years.
(2) If the perpetrator of criminal offence referred to in paragraph 1 of this Article organized a network of re-sellers or middlemen, or if, by the criminal offence referred to in paragraph 1 of this Article, a material gain exceeding 30,000 KM has been acquired, or if the distribution of goods or items has been forbidden or restricted pursuant to regulations,

shall be punished by imprisonment for a term between six months and five years.
1) (3) Goods and items of the illicit trade shall be forfeited

Article 261 of BDCC
Illcit Trade

Identical to Article 267 of FBIHCC

As far as the criminal offence of illicit trade is concerned it is evident that the same criminal offence is regulated in different ways in the BIHCC, FBIHCC, BDCC and RSCC, although FBIHCC and BDCC put this incrimination in place in the identical way.

The perpetrator of this criminal offence may by any person procuring for trade certain goods or objects for the purpose of their sale or the person performing illegal trade or mediation in trade or agency in trade of goods and services.

BIHCC incriminates this offence in a different or substantially more restrictive way than RSCC; FBIHCC and BDCC, or restricts this criminal offence to trade prohibited or limited by regulations of Bosnia and Herzegovina.

3.1.10 Abuse of Authority in Economy

Article 252 of RSCC
(Article 247 of FBIHCC and Article 241 of BDCC)
Abuse of Authority in Economy

(1) The responsible person in a company or other person engaged in a commercial activity (A responsible person in a legal person – FBiHCC and BDCC), who with the intention of acquiring illegal profit for his own or other legal person (acquiring unlawful material gain for that legal person – FBiHCC and BDCC):

a) creates or keeps illicit funds in the country or abroad;

b) by drawing up documents of false contents, by false balance-sheets, setting of value, taking of inventory or other misrepresentation or concealment of facts (by false balance-sheets, appraisals or taking of inventory, or by other misrepresentation or concealment of facts – FBiHCC and BDCC), falsely displays the situation and flow of assets and business results (thus misleading managing bodies in the legal person while they are making decisions in management activities – added in FBiHCC and BDCC);

c) puts the legal person into better position at the occasion of getting money or other conveniences which would not, by provisions of current regulations, be recognized to that legal person (this sub-paragraph does not exist in FBiHCC and BDCC) ;

d) when executing his tax duties or other legal duties denies payment of the funds which constitute public revenue (payment of taxes and other fiscal obligations that are determined by law - FBiHCC and BDCC);

e) uses designated assets (no reference to "designated" in FBiHCC and BDCC) available to him contrary to their purpose;

f) in some other way grossly violates his powers relating to the disposal, use or management of property, shall be punished by imprisonment term ranging between six months and five years.

(2) In case that the act referred to in paragraph 1 of this article has significant material benefit to the perpetrator, or extensive damage has occurred, (the material gain exceeding 200,000.00 KM was acquired - FBiHCC and BDCC)
the perpetrator shall be punished by imprisonment term ranging between one and ten years ***(eight years - FBiHCC and BDCC)****.*

3.1.11 Busienss Fraud

Article 265 of RSCC
(Article 251 of FBiHCC and Article 245 of BDCC)
Business Fraud

(1) Whoever, while carrying out a business activity, in concluding or executing a contract or business, deceives another by presenting facts in a way which leads to thinking that the obligations will be met, or concealment that the obligations will not be met, or that it will be impossible to meet the obligations, and for the purpose of partial or full non-fulfilment of obligations for another side or somebody else a significant material damage occurs, shall be punished by imprisonment term ranging between six months and five years.
(2) If the commission of the offence described under paragraph 1 of this article causes damage exceeding 10.000 KM, the perpetrator shall be punished by imprisonment term ranging between one and eight years, and if this damage exceeds 50.000 KM, the perpetrator shall be punished by imprisonment term ranging between two and ten years.

Article 251 of FBIHCC and Article 245 BDCC

Fraud in Economic Operations

(1) Whoever, as an agent or representative of a legal person, with an aim of acquiring unlawful material gain for that or another legal person, by use of uncollectible payment orders, uncovered cheques or in some other way misleads another or keeps him in mistaken belief, thus inducing him to do or not to do something to the detriment of his own property or the property of another, shall be punished by imprisonment for a term between six months and five years.
(2) If, by the criminal offence referred to in paragraph 1 of this Article, a material gain is acquired or damage exceeding 10,000.00 KM is caused, the perpetrator shall be punished by imprisonment for a term between one and eight years.
(3) If, by the criminal offence referred to in paragraph 1 of this Article, a material gain is acquired or damage exceeding 50,000.00 KM is caused, the perpetrator shall be punished by imprisonment for a term between one and ten years.

3.1.12 Unauthorized Acceptance of Presents or Gifts

Article 267 of RSCC
Unauthorized Acceptance of Gifts or Presents

(1) Whoever, while carrying out business activity,, demands or accepts an award, gift or any other benefit in order to achieve an agreement be concluded or not concluded, or to have an action performed and not performed to the harm of the legal person, thereby causing significant damage to the legal person,
shall be punished by imprisonment term ranging between six months and eight years.
(2) The perpetrator from paragraph 1 of this article who after concluded or not concluded agreement, or any other action performed or not performed, demands or accepts an award, gift or any other benefit,
shall be punished by imprisonment term not ranging between six months and five years.
(3) The award, gift or any other benefit shall be confiscated.

3.1.13 Unauthorized Giving Presents or Gifts

Article 268 of RSCC
Unauthorized Giving Presents or Gifts

(1) Whoever gives or attempts to give to a person engaged in business activity a disproportional award, gift or other benefit, for the purpose of acquiring some unjustified convenience when contracting a business deal from paragraph 1 of article 256 of this Code,shall be punished by imprisonment term ranging between one and eight years.
(2) Whoever gives or attempts to give to the person engaged in business activity a disproportional award, gift or any other material or non-material benefit as a counter-service for contracting a deal or executing a deal,shall be punished by imprisonment term ranging between six months and five years.
(3) The perpetrator of the offence described under paragraph above, who had given the award or gift at request, but reported the offence before it had been disclosed, or before he had learned of its disclosure,may be absolved from punishment.
(4) The given award or benefit shall be confiscated, while in the case described under paragraph 3 of this article, it may be returned to the giver.

3.1.14 Criminal Liability of Legal Persons

The liability of legal persons for criminal offences is of special importance in the area of economic crime, abuse of authority of responsible persons in economic entities and even abuse of authority in public-national, regional and local sector particularly in those cases where interactions occur between the legal and private sector which in their deviating forms and modulations covers also the most important corruption offences. To persecute only individuals, physical persons would under these conditions mean to leave out an important part of legitimate and necessary criminal law reaction in relation to legal persons for which the required standard of liability may be established for committed criminal offences.

In the examples of criminal offences that are a subject matter of this material, it is necessary therefore from the very beginning of investigations or criminal prosecution to take into account and check whether there are grounds for criminal liability of a legal person for the committed criminal offences. This is not something to think about in the later stage of the proceedings, but should be determined simultaneously, i.e. concurrently with obtaining evidence and establishing guilt of physical persons. This approach is also suggested by relevant procedural provisions of all codes (Article 375 BIHCC and identical articles in other codes), which indicate the simultaneous proceedings against physical and liable legal persons. These provisions should be understood as necessitating that even the pre-investigation/pre-criminal proceedings, including also the collection of data and information, should prior to that apply also to potentially liable legal persons. The prosecutor must in this sense give guidance to the police and other institutions participating in data and information gathering in the first earliest state of investigation.

The substantive law grounds for the proceedings against legal persons are practically identical, apart from some minor differences in RSCC, and are even prescribed in the identical chapters of all four criminal codes.

The definition of legal person is contained in all four criminal codes in those articles specifying the meaning of terms for the purposes of these codes. Perhaps the definition of legal person in the criminal code may not happen to be entirely appropriate, and perhaps not necessarily required since the listing of different types and forms of legal persons in the beginning of relevant paragraphs suggests in some way a closed detailed enumerative list of legal persons created for the purposes of criminal code, whereas at

the end of paragraph this definition would open up completely by the following wording: "… in the same way as other institutions or bodies that acquire and use funds and that are legally recognised as legal persons " For example in BIHCC Article 1, paragraph 10. we may therefore ask ourselves the following question; What happens with all those organizations, entities, which meet only the last requirement, meaning that their legal personality is recognized by law but they do not acquire or use funds? All legal persons of this kind are ruled out from all criminal codes, and so, by analogy, they are excluded from potential liability for criminal offences. Such way of thinking may turn out to be of more theoretical rather than practical meaning, but the whole concept would nevertheless be much easier-to-refer-to if the criminal codes left the definitions of legal persons to other regulations, or determined specifically that legal persons are either of those entities whose legal personality is recognized by law.

The prosecutor should basically prove that the perpetrator – a physical person, committed a criminal offence. This needs to be completely clear and is relevant for all four codes. Another one important point is the understanding of subjective and objective concepts of criminal offences (BIHCC, Chapter V and identical provisions of other codes), meaning that a deed arising as a result of actions carried out by a legal person may objectively or on the basis of its consequence appear to be a criminal offence, but it may not cause the liability of the legal person based on the criminal code, unless at the same time there has been no identification and evidence also in regard to subjective elements of that deed; which in turn may well mean that in any case it is necessary to discover and identify the physical person – perpetrator of the criminal offence and prove the existence of legally required form and degree of guilt. We may provide here an example of corruption offence of giving bribe, where on the part of the perpetrator a "coloured" direct or potential intent – *Dolus Coloratus* is sought in respect to legal indications of criminal offence and even in respect to prohibited consequence – bribe given in exchange for official service. It is not therefore sufficient, in order to establish the liability of a legal person, to have an official person receiving a benefit from that legal person (money, gift, non-property gain), in exchange for performance of an official act, but it has to be proved that the physical person who "dragged" the legal person into the abyss of potential liability, has in the subjective terms of meaning fulfilled all legal characteristics of the particular criminal offence in question.

It is necessary to understand the wording "criminal liability of a legal person" in the sense that there may not exist a criminal offence unless all of its objective and subjective characteristics have been identified, so in that case there can neither exist the liability of legal person, although the prohibited consequence has occurred including the existence of the grounds for liability of the legal person. It follows clearly from everything described above that in any particular case where the prosecution of a legal person is intended, first step to be taken is to identify the physical perpetrator of the criminal offence.

Namely, at this particular point a wrong interpretation could turn out to be the case of those paragraphs in the relevant codes (paragraph 1, Article 124 BIHCC and identical provisions of the other codes), which refer to liability of legal persons for criminal offences even in case where the perpetrator is not criminally liable for the criminal offence. Theoretically, there are ambiguities here that are of relevance for the situations in which we refer to a criminal offence, in regard of which all subjective and objective indications have been established and the perpetrator is a criminally non-liable person, e.g. a child or mentally incapacitated persons. Our view is that one would go much too far into analysis of the matter if we were to start discussion as to whether a criminal offence in this case exists at all. What should be noted here is that according to all criminal codes in Bosnia and Herzegovina, without identifying a physical person perpetrator of the criminal offence there is no liability of the legal person for that offence either. In our view, the requirement of the provision addressing the liability of a legal person for a criminal offence, even where the perpetrator is not criminally responsible for the crime, is not accurately defined; it would be more concise and theoretically correct if the said provision stated the reasons of procedural nature precluding the prosecution or conviction of a physical person (e.g. immunity, situation referred to in Article 116, paragraph 5 of BiHCPC or situation referred to in Article 218/3 BIHCC).

Let us analyse in due course the grounds for liability of that legal person, assuming that the perpetrator has committed a criminal offence in the name of, for account of or for the benefit of the legal person. They are defined in the identical provisions of all four material regulations (all in Chapter XIV respectively) with but one apparently minor and maybe for someone only grammatical distinction, which still has to be mentioned since it suggests inadequate understanding of wording used in the Slovenian *Law on Liability of Legal Persons for Criminal Offences*, which obviously served as a platform, a matrix for Bosnian codes, and which reads as follows: »…*če pomeni kaznivo dejanje izvršitev protipravnega sklepa…*. In the translation to all official languages in Bosnia and Herzegovina, namely, these words have the following meaning: »if the (perpetrated) criminal offence means (therefore in its substance constitutes) the perpetration of illegal conclusion ….of the governing and supervisory bodies of a legal person «. The intent of the Slovenian legislator has never been to make an extraction of its sense from the overall criminal offence context (as it was done by BIHCC; FBIHCC and BDCC) or of its characteristic elements (RSCC). The word ”pomen” in the Slovenian should indeed translate as ”sense, meaning, purpose”, but this word is a noun, whereas the Slovenian Law is using the verb ”pomeni”, which may literally translate as “to mean, to constitute”, and by no means as “*sense, meaning*” or “characteristic (element)”.

The situation that at this moment exists in Bosnian laws requires interpretation of the term “the purpose of the criminal offence” or, on the other hand, of its “characteristics”. Our belief is that, while accepting the above explanation of the inadequate translation, a complete simplification is necessary; the purpose/sense/meaning (the same should apply to characteristics as well) is the criminal offence itself, along with its objective and subjective characteristics, in which one should not look for any more ”profound” meaning. Yet, for the sake of full clarity and in order to eliminate variable legal-philosophical interpretations of this provision, an amendment in the Code in terms of its simplification would be welcome.

All four codes go as far as possible in regard to the criminal offences for which legal persons may be held criminally liable. These codes do not provide however any specific catalogue of these offences, unlike Slovenian and many other regulations in Europe and elsewhere, but rather uphold the principle that a legal person may not be liable for all criminal offence referred to in the Special Part, provided of course that the particular criminal offence may by its very nature be perpetrated in the name of, for account of or for the benefit of the legal person. We should not perhaps refer to it at all, but still let us note that, having in mind the above criteria that are provided for alternatively, a legal person may be found liable for all criminal offences in the area of economic crime and corruption discussed here.

A perpetrator of the criminal offence referred to in the preceding paragraph of the relevant provisions (Article 124 BIHCC and identical provisions of other codes) may be any physical person, while there is no requirement either for said person to be employed with the legal person. Of course, in most examples the physical perpetrator of a criminal offence shall be employed in the legal person, which we could set as a rule for those situations referred to as the first in line of the grounds for liability, that is to say, when a criminal offence is arising from the conclusion, order or permission of its governing or supervisory bodies of a legal person, but also for the situation referred to as the last in line of grounds for liability, namely, when the governing or supervisory bodies of the legal person have failed to carry out due supervision over the legality of work of its employees. In the remaining two cases, in case of governing or supervisory bodies influencing the perpetrator or enabling him to perpetrate the criminal offence and in case of a legal person disposing of illegally obtained property gain (IOPG) or using objects acquired in the criminal offence, the perpetrator of the predicate offence may be an employee of the legal person but also any other person unrelated to the legal person by his or her formal employment status, but, for example, subject to influence of the governing bodies of the legal person and perpetrating the criminal offence for its benefit.

The governing and supervisory bodies of the legal person may be defined by a law, other general enactment, internal act of the legal person, but their status may equally be derived from also on the

basis of their terms of reference or post or position they occupy within the legal person. Liabilities for the perpetrated criminal offence are cumulative; they are established and proved for each legal, responsible and physical person separately, under the rules of the General Part of the Criminal Code and are not mutually exclusive (which is clearly suggested by the provisions of Article 125. paragraph 2 of BIHCC and identical provisions of other codes).

In conceptual terms, it seems completely logical that a legal person may be liable for a criminal offence committed out of negligence only in case where on the part of its governing or supervisory bodies there is no active commission, or action in the sense of influencing the perpetrator, which logically rules out the lack of awareness on his part and thus the very existence of the criminal offence committed out of negligence (immediately after the actions of governing bodies start affecting the perpetrator, its subjective attitude is raised at least to the level of possible intent).

When we talk about the grounds for liability of a legal person disposing of IOPG or using objects acquired in the criminal offence; it has to be noted that, with the accepted level of subjective treatment of liability of the legal person, the proper understanding of these provisions by assuming that the persons who, in the name of the legal person, dispose of IOPG or use objects acquired in the criminal offence should, at the moment of disposal or use, have awareness, therefore, they should know of the fact that IOPG or objects acquired in the criminal offence are at stake here. Without fulfilling this requirement we would arrive at the point of objective liability for the criminal offence, which can have no place in the modern criminal codes.

The matter of criminal proceedings against the legal persons is in our view well addressed and analysed in the comments of BiHCPC, so, there is no need to repeat these comments, but instead our only aspiration at this point would be to draw attention to just a few of details that can cause certain problems in practice. One of the issues is of relevance for the provision referring to purposefulness of initiating the criminal proceedings (Article 376 BiHCPC and identically in other criminal procedure codes). The question that requires an answer is the meaning of the phrase indicating that “the contribution of the legal person to the commission of a criminal offence was insignificant and that for this reason the prosecutor does not institute the proceedings against the legal person”. At this point the Code introduces a new discretionary right of the prosecutor, to which the proper meaning should be attributed in order to apply this principle in the right way. In which cases can we talk about insignificant contribution of the legal person to the commission of a criminal offence? It is most important to understand that the contribution of the legal person, which may constitute the grounds for its liability for the criminal offence, must always reach the level and intensity indicating that the requirements of Article 124 of BiHCC or of identical provisions of other codes have been met. If, for instance, the influence of the governing bodies on the perpetrator of a crime is insignificant to such an extent that it caused for the perpetrator none of the subjective changes in relation to his decision to perpetrate the criminal offence, then we shall have to note that there is no liability of the legal person for that criminal offence either. The influence must therefore be so significant to trigger the change in the subjective attitude of the perpetrator towards the potential perpetration of the criminal offence. It is only then that we may note that the grounds for liability of the legal person exist for that particular crime, and only further from this level (intensity) of contribution shall the prosecutor use his discretionary power to decide whether the contribution of the legal person was still insignificant.

By analogy with an offence of insignificant character perpetrated by a physical person, it is a must in this case also that we first establish whether at least one of the grounds have been fully met for liability of the legal person in terms of the perpetrated crime, and only then we should consider the possibility of applying the provision referring to purposefulness of initiating the criminal proceedings against that legal person. This of course applies to all reasons and examples from this provision, although the remaining ones are either made more objective or much more clearly defined (e.g. in case where a legal person has neither enough property to use it in order to cover the costs of the proceedings, where the bankruptcy proceedings have been initiated against the person, or the like.) The discretionary power of

the prosecutor in connection with the criterion of insignificant contribution requires special attention also because of the possible abuse.

4 PART THREE – PROPER AND EFFECTIVE USE OF MECHANISMS AND INSTITUTES OF CRIMINAL PROSECUTION

Any successful criminal prosecution of the criminal offences of corruption and economic crime implies the effective use of mechanisms of criminal prosecution that were discussed in the first two parts of the Manual.

In order to accomplish these objectives it is necessary to make proper steps in several key stages of investigation, and we could classify these stages, that are at the same time the stages of general character in relation to all criminal offences in the area of corruption and economic crime, as follows:

1. Taking a decision to conduct investigation (Order for conducting an investigation)
2. Planning an investigation
3. Guiding and supervision of an investigation
4. Conducting an investigation

4.1 Initiation of the investigation: Order for conducting an investigation)

The initial stage of each investigation, including the investigation of criminal offences in the area of corruption and economic crime is represented by the issuance of a decision to conduct investigation. That decision is issued by the prosecutor in the form of an order.

The main and only condition envisaged by the legislator for issuance of this order is represented by «grounds for suspicion » that a criminal offence has been committed, and accordingly the grounds for suspicion is an initial standard for conduct of investigation by the prosecutor.

4.1.1 Evaluation of Grounds for Suspicion

The evaluation of grounds for suspicion and status of the case in the criminal offences in the domain of corruption and economic crime has many specific features in comparison with the criminal offences in the domain of general criminality. The acts of perpetration of these criminal offences, and especially the consequences arising therefrom, are generally obvious. In cases of the criminal offences in the domain of corruption and economic crime actions, acts of perpetration and consequences of the criminal offences are not always obvious, but by contrast the perpetrators of these criminal offences try to conceal them as much as possible, or disguise them in such a way as not to cause any suspicion that the criminal offence has ever been perpetrated. Thus they are attempting to present them as regular, proper and orderly performance of their duties, regular business operations, normal contacts, ordinary risks, etc.

Why is this issue important?

After the Criminal Procedure Code is comprehensively analysed, it becomes clearly visible that the backbone of any activity of the prosecutor in the criminal proceedings is the existence of the *grounds for suspicion* that a criminal offence has been committed, which means that the prosecutor should not undertake any action in the criminal proceedings unless this initial standard of suspicion comes into existence.

Accordingly, the evaluation of grounds for suspicion constitutes the initial stage of issuing the decision to conduct investigation that in the criminal prosecution of these criminal offences should be taken very seriously, but still not restrictively. So, the main question at this stage is: When do

the grounds exist for suspicion that the criminal offence committed can be classified as one of those belonging to the group of criminal offences in the area of corruption and economic crime?

The grounds for suspicion that the criminal offence was committed is not the standard for suspicion that in terms of these criminal offences is inevitably based on direct evidence, because such evidence do not often exist at the initial stages of investigations in these cases. So the grounds for suspicion represent that degree of suspicion which indicates that there is existence of certain facts and circumstances, which, once they are brought into connection with certain logical hypotheses based on criminal experience, may indicate that the criminal offence was committed.

Order for conducting an investigation

Once the prosecutor has found that there are grounds for suspicion, he shall then pursuant to the criminal procedure code issue a decision to conduct an investigation. This decision is in the form of an Order for conducting an investigation.

The issuance of the Order for conducting an investigation in the criminal prosecution of criminal offences in the domain of corruption and economic crime is of an extremely great importance. On one hand, this Order represents a decision issued by the prosecutor concerning the existence of grounds for suspicion; while on the other hand, it represents a specific kind of investigation planning at its initial stage, and the elaboration of the investigative strategy and tactics that will ensure efficient criminal prosecution.

Under this Order the prosecutor covers the person(s) against whom the investigation is going to be conducted, if they are known (it may happen that the prosecutor is unable to identify the suspect at the initial stage of investigation not because he is hiding, but because from an objective consequence that constituted the grounds for investigation, the act of perpetration causing such consequence was not evident – e.g. a created shortage according to the inventory findings) in which cases the prosecutor may open the investigation against an unknown perpetrator who will be the object of investigation. Also, the prosecutor should include in this Order a description of acts from which the characteristics of the criminal offences arise. This provision should not be understood restrictively and it is completely clear that the factual description (which sometimes can be evident even at the initial stage of investigation) may not be of the same contents and quality as the factual description at the point when the indictment is issued. This factual description at the point of opening the investigation may in the investigations of these criminal offences be established as predominantly general, e.g. including only the consequence, object of the criminal offence and wider timeframe of perpetration, while the act of perpetration itself or its details will be the object of investigation.

By the order for conducting an investigation the prosecutor shall determine which circumstances should also be investigated and which investigative measures should be taken, and then with all of that we are approaching the stage called Investigation Planning.

4.1.2 Planning an investigation

Planning of the investigation sets off as early as the order for conducting an investigation is issued and continues throughout the entire investigation as a dynamic and dialectical process of devising the investigation and adjusting it to the new situations and developments that come up in the investigation. In addition to the fact that it is a methodologically necessary step for efficient and successful conduct of such a complex and multidisciplinary activity as the investigation, investigation planning as a key moment of investigation on which the success and efficiency of the investigation is based, is actually foreseen by the provisions of the criminal procedure code providing that to the effect of conducting an investigation the prosecutor shall indicate the circumstances to be examined and the kinds of investigative actions to be taken.

In the criminal prosecution of the criminal offences in the domain of corruption and economic crime the investigation planning shall include several stages:

- To determine the known facts and circumstances, and known direct and indirect evidence of relevance for the potential criminal offence and perpetrator;
- To establish hypotheses;
- To consider the need for taking some prospective measures in order to ensure the presence of the suspect in the criminal proceedings and successful conduct of the criminal proceedings;
- To identify the facts and circumstances that are necessary and those that are useful to be established during the investigation;
- To identify by which evidentiary means shall certain facts and circumstances or relevance for the criminal proceedings be established;
- To identify which investigative actions should be taken, and whether some of them would require an approval from the court;
- To identify the investigation participants who will be in charge of conducting the particular planned investigative actions;
- To determine the order by which the investigative actions shall be conducted;
- To specify the timeframe for each investigative action separately, and all investigative actions together; and
- To specify the periods of time and the methods of communication between the investigation participants taking part in the investigation.

a) Establishing the hypotheses

After considering the known facts and circumstances as well as direct and indirect evidence that lead to the opening of an investigation, one necessary methodological step would be to establish hypotheses. This step enables the focusing on the relevant facts and circumstances that need be explored and the type of evidence which could be instrumental in proving the perpetrated criminal offence, the locating of such evidence, etc.

When establishing the hypothesis one should not restrict himself to a single hypothesis, but rather it is desirable, provided that it makes sense, to establish the multiple alternative hypotheses which could all be explored at the same time.

b) Timely communicating of information and the dynamics of planning

The investigation planning should be done in cooperation with authorized officials who are intended to be in charge of carrying out the planned investigative actions, and after each investigative action is completed, the prosecutor as a coordinator and manager of investigation in his own right, must be informed by the authorized officials about the conduct, progress and results of investigative actions, for the purpose of coordination and possible additional planning or amendments to the current plan in some or all of its segments.

It is worth noting at this point that *investigation* is a dynamic and dialectical activity that may require the accommodation to new situations and developments occurring in the investigation, and so for that reason a timely communication of information to the prosecutor about all investigative actions taken and new facts and circumstances is of crucial importance for the success of the entire investigation.

c) Division of work

It also has to be mentioned that the investigations of criminal offences in the domain of corruption and economic crime should in general require the involvement of many investigation participants - authorized officials (police, tax administration inspectors, budget inspection experts and other authorised

officials, experts from the specific fields – expert court witnesses, etc) because only in this way will the investigation go in the right direction enabling a timely focusing on crucial elements of investigation.

With a view to above considerations, at the very moment of planning it is necessary to use expert knowledge and expertise of said persons in order to make an efficient plan of investigation by focusing on crucial facts to be explored, and for that purpose it is necessary to make the „division of work ", at the stage of planning itself, and set out the sequence of taking the individual investigative actions so that each following investigative action could use as its base the results already accomplished by the investigative action taken before it. Also it is immensely important to set the timeframes and methods of communication among the participants involved in the investigation so that all investigation participants could receive in a timely manner the available knowledge of information obtained in the investigation and be able to use that knowledge in order to accomplish their tasks successfully.

d) Risk evaluation and investigation confidentiality

When planning the investigation of criminal offences in the domain of corruption and economic crime, it would be necessary to make an evaluation of risk that evidence may be destroyed or concealed or investigation otherwise hindered, since these investigations are generally concerned with a kind of conspiring and for the investigation destructive behaviour of the perpetrators and their possible accomplices in these criminal offences that happen and are perpetrated in secrecy, by reason of which it is necessary to avoid as long as possible any premature taking of investigative actions and measures requiring the court approval (except in the case when there exists a serious risk that the failure to undertake these measures is going to result in destroying or concealing evidence). Therefore, the planning stage relating to specifying the sequence of taking the individual investigative actions and measures if of paramount importance.

Accordingly, when planning the investigations of criminal offences in the domain of corruption and economic crime it would be necessary to resort in general to secret investigations in which a suspect is questioned only at the end of investigation (except for the cases in which such questioning of a suspect at the beginning of investigation is indispensable), in which case all required measures need be taken in order to avert, minimise or reduce to the least possible extent the so-called information leaking. This approach is important for the simple reason that in this way the suspect continues to behave as if nothing has been happening, and his caution is far and away less than usual, which enables the investigators to obtain the required information and evidence easier and faster.

4.2 Guiding and supervision of investigation

The guiding and supervision of investigation shall be performed by the prosecutor. This guiding and supervision of investigation sets off from the very point of planning the investigation and lasts until its completion. It represents a peculiar kind of continuity of planning which is realized through the guiding and supervision by the prosecutor. These elicit an active role of the prosecutor in the investigation as early as since the time the grounds for suspicion existed that a criminal offence has been perpetrated.

Namely, the guiding in itself includes implicitly that a larger number of investigation participants take part in the investigation. Their activities are coordinated and they are directed and supervised by the prosecutor, who basically acts as a kind of investigation manager.

The guiding of the investigation as is said at the earlier point, starts with the investigation planning and lasts during the entire investigation through the development of the investigative strategy and tactics that adapt themselves to all new developments arising in the investigation.

The guiding of investigation in case of criminal offences in the domain of corruption and economic crime is primarily followed by devising and adapting of the investigative strategy and tactics, where the

prosecutor may decide to carry out the particular investigative actions personally while conferring some of them to the authorised officials.

In the investigation of these criminal offences, particularly those in the domain of corruption and economic crime, it is generally useful to provide at the very beginning the preliminary findings of an expert in the investigated field so that the investigation could be focused on the relevant facts and circumstances, and for the purpose of avoiding unnecessary waste of time and resources on collecting evidence of no relevance for proving the criminal offences in question.

The sequence of taking the investigative actions, as indicated at an earlier point above, should be specified at the very beginning of an investigation; however, during the investigation itself, subject to those new incoming developments and information, it is possible that it shall be necessary to change this sequence of investigative actions.

This guiding also includes the maintenance of regular and irregular contacts with all participants involved in the investigation, in which case it is useful to arrange the regular meetings with all participants of the investigation at which the results of the investigative actions as well as all problems encountered during the investigation shall be presented, whereas an evaluation of the current status of the investigation and decisions shall be made concerning the further courses of investigation and any new investigative actions and measures to be taken prospectively, which, although unplanned at the outset of investigation, would now help to overcome the problems arising in the investigation stage or contribute to the efficiency and dynamics of investigation.

The guidance also entails the care about the dynamics of investigation, or about timeframes required for taking the particular investigative actions and measures, since only in that way the investigation shall be efficient and successful, while its costs shall be reduced and material and human resources used to the most optimal extent.

The guiding and supervision of the investigation should not be seen as the way to curb creativity of the authorized officials who participate in the investigation, but rather to the contrary, the authorized officials participating in the investigation under the guidance and supervision of the prosecutor must demonstrate a maximum degree of creativity in performing the tasks assigned to them by the prosecutor. The guiding and supervision must stimulate creativity of the authorized officials participating in the investigation, so this is exactly the reason justifying the need to engage the authorized officials in devising the investigative strategy and tactics as early as from the investigation planning itself and keep them engaged all the way through until the investigation is completed.

The guiding and supervision of the investigation by the prosecutor must at every moment be directed towards making sure that the material and human resources of investigation are used optimally, and that care is taken of legality of all investigative actions and measures conducted.

4.3 Conducting an investigation

When conducting an investigation of the criminal offences in the domain of corruption and economic crime the prosecutor and authorized officials must act quickly and in a synchronized way. Generally, in investigating these criminal offences it is necessary to combine the obtaining of material evidence and gathering information from witnesses, in which case the obtaining of material evidence should possibly be done before hearing any potential witnesses, and so by timely providing a search or seizure warrant from a relevant court of law, assuming that the search and seizure operations are performed simultaneously and quickly at all locations where such evidence could be found, so that concealing and destroying of evidence would be avoided.

When investigating these criminal offences, and in particular the criminal offences in the domain of corruption and economic crime, where possible, prior to conducting any search, relevant business documentation that is otherwise held with national authorities and banks should be obtained since in this way information is acquired without the suspect knowing that the investigation is mounted against him. In order to prevent any „information leak“ while the inquiries are made to request information from the state authorities and banks, such information about the suspect should insofar as possible be requested in a „bundle “ together with other information required from the same party, so as to avoid as much as practicable anything that would „divert attention to the suspect “.

The hearing of witnesses in investigations of criminal offences from the domain of corruption and economic crime should, inasmuch as possible, be carried out once certain information have already been obtained, which shall in turn be presented bluntly to the witness in order to avoid his possible solidarity and taking sides with the suspect, because in this kind of situation the witness gains an impression that a great deal of information is available to the investigative authorities and that any kind of solidarity with the suspect could easy attribute the perpetration of the criminal offence to himself, which all enables a more reliable, detailed and useful testimony of the witness.

When it comes to the expert witness evaluation in investigations of the criminal offences in the domain of corruption and economic crime, and in particular those criminal offences in the domain of economic crime, such witnessing is in principle almost always conducted.. However, as it is noted already in referring to the investigation planning, it would be useful provide at the very beginning of the investigation some preliminary findings and opinions of expert witnesses so that the entire investigation would be focused in the right direction. However, since in these investigations there is normally a general participation of the authorized officials who themselves happen to be experts in the field of economy (tax administration inspectors, inspectors of the budget inspection etc.), their knowledge and experience should, insofar as practicable, be used to the maximum extent in the preliminary review of documentation, analytical records, etc. so that the costs of the criminal proceedings could be reduced to the minimum.

The use of special investigative actions, due to the nature and character of the criminal offences in the domain of corruption and economic crime which are generally perpetrated with the great deal of conspiracy and secrecy of their perpetrators, has an enormous significance for the investigation of these criminal offences. As a result, these special investigative actions shall be covered under a later separate chapter of this Manual.

4.4 FINANCIAL INVESTIGATIONS

Traditional repressive methods of crime prevention and control, based on the available knowledge of modern forms and methods of perpetration of criminal offences, do not represent most adequate instrument for combat against crime and have failed to provide any significant results in that regard. Since it has so far become apparent that the criminal organizations are most sensitive and vulnerable in the segment of gain obtained by a criminal offence, it was reasonable to draw the conclusion that in this regard it is necessary to make an additional effort in finding new solutions which could allow for identifying and tracking of such assets. Such gains must, at a certain point enter into legalization process (i.e., used for some legal purposes), and these entries itself are in fact the point where the perpetrators are exposed to the greatest risk as most vulnerable.

Equally, the disclosure of illegal assets in the attempt of their incorporation into legal flows, and their forfeiture shall have much more far-reaching effects on the operations of criminal organizations and individual criminals than many other conventional means used in the combat against crime. For this reason the main focus of the combat against money laundering, but also against crime overall, is transferred to the area of institutions and to the fields where the money is in fact found i.e. the domain of financial institutions and all other institutions that are in touch with the monetary assets in performing

their regular activities. Thus the field of combat against the organized crime and other related activities are in part also conveyed to this domain.

The conduct of financial investigations, which is substantially based on the so-called Principle of Finance and Cash Flow Tracking – showed as extremely useful in suppressing crime and disclosing numerous criminal offences, not only money laundering, which is often believed to be the only result of financial investigations.

In the very domain of suppressing and controlling the money laundering, the application of the principle of tracking the financial flows is realized through the area of implementation of regulations guiding the areas of monetary flows. In this relation, there is the need for mandatory regulation of the area of financial and banking business operations, as well as some other areas, by separate legislation which will regulate the procedures of controlling the financial monetary flows. The mandatory character of reporting the transactions above certain level to a relevant institution, keeping and maintenance of files, and identification of the order issuers and clients who request such transactions are some of the instruments for combat against money laundering contained in these regulations. At the same time, this represents also one of the substantive parts of financial investigations.

The importance of financial investigations undertaken by the law enforcement agencies would be impossible or otherwise extremely difficult if there were no data and records of the institutions obligated to implement the above-referenced corpus of regulations.

The most important question in this field is to make the proper distinction between the conduct of financial investigations and conduct of criminal investigations for criminal offences of financial and economic crime.

Although there are different views of the concept of financial investigations and different definitions of financial investigations, we will not for the purpose of this Manual go into more extensive or detailed contemplation of these differences, but instead attempt to provide an integral, summary review of financial investigations as an instrument of the law enforcement agencies in controlling crime.

First of all, the financial investigations should be seen as a systematic approach to the analyzing of economic and social relations as possible indicators of criminal behaviour among individuals. In other words, the financial investigations are nothing else than «collecting, controlling, comparing, processing and analyzing of financial and/or other related data to meet the demands of the law enforcement agencies » and all for the purpose of discovering criminal offences and their perpetrators, as well as evidence required for the conduct of the criminal proceedings. By way of illustration, the conduct of financial investigations for a certain number of persons who during a relatively short period of time show some signs of an abrupt accumulation of riches and enormous spending of funds (purchase of houses, apartments, cars, luxury public life, etc.) which in fact initiates a comprehensive financial investigation, may, by way of systematic analyses of the collected information, to detecting and disclosing of a criminal offence and its perpetrator. Namely, in the above example, there is a likely possibility that through the tracking and analysing of data about the persons concerned and by consolidating the data with other available data on a perpetrated criminal offence of a bank robbery, it shall be established that these are exactly the same persons who perpetrated that criminal offence, although the *prima facie* knowledge of information gathered on the crime scene were not suggesting that it was them who could be considered as possible perpetrators.

For the effective conduct of financial investigations it is of utmost importance for the staff involved in such investigations to have necessary knowledge and skills from this field. It on no account means that these concern exclusively the knowledge in the area of economy and finance. By contrast, these skills and knowledge must be a combination of fundamental knowledge of police operative-criminology practices and knowledge of commercial activities. Over the course of financial investigations, it is

indispensable to continuously create possible versions and hypotheses, and test the same continually until either positive or negative elimination is accomplished. As the scope of the knowledge obtained is increasing, it would be logical to expect also the increase in the level of skills and knowledge required for their interpretation and analysis, which all leads towards hiring certain professional and technical experts, such as specialists and expert witnesses from the particular areas (accounting, book-keeping, banking, etc.).

Based on the knowledge gained in the process of conducting the financial investigations, not only do we get hold of data about the perpetrated criminal offences and their perpetrators, but also some other useful information, such as the amount of illegal proceeds of crime and their origin itself. The disclosure of illegal transactions and proving the close relationship between the proceeds and their illegal origin may in turn lead to forfeiture of these proceeds, as well as of other forms of property gained as a result of perpetrating criminal offences.

As is indicated above, the special importance within the financial investigations belongs to the tracking and controlling of monetary flows. In that sense we should also view the importance of a consistent implementation of regulations guiding this particular area, controlling and keeping the records on each transaction in due form, and application of strict rules in performing businesses and operations with money and other monetary instruments. The character of these regulations is apparently of preventive form, since they seek to preclude any attempt of implementation of illegal (dirty) assets into legal financial institutions and normal monetary flows. Equally, by implementing the regulations on the recording of transactions we gather also the data of relevance for the conduct of financial investigations in the way of providing the base for making analyses and putting in place versions and hypotheses.

A relatively considerable shortcoming of this concept is a quantitative scope of application, since in the everyday practice of the financial operations there is an enormous number of transactions which meet the legal requirements concerning the undertaking of the measures required for verification and reporting of these transactions. This caused the additional efforts and burdens for those institutions subject to application of these regulations, which mirrors in the change of cost-effectiveness and success, because the equity in such institutions follows the path of least resistance seeking a more secure harbour with less complicated system of operation.
As for the use of financial investigations in the context of the applicable legislation in Bosnia and Herzegovina, there is no single obstacle standing in the way of using the same as a means (method or work) for disclosing the criminal offences, perpetrator of the criminal offences, the amount of illegal property gain, locating the illegally obtained gain, and all to the effect of finding and securing evidence for the criminal prosecution of perpetrators as well as for the conduct of the procedures aimed at forfeiting the property gain obtained by a criminal offence.

The authorized officials of the law enforcement agencies in Bosnia and Herzegovina should use the financial investigations wherever possible and to the greatest extent practicable. The financial investigations should be conducted also in those cases which do no count as those in the area of financial crime, but also in cases of other criminal offences through the perpetration of which it would be possible to obtain illegal property gain. Such criminal offences would be all those offences within the range of corruption criminal offences, criminal offences against property, all down the lane to those criminal offences of robbery and murder motivated by greed.

The conduct of financial investigations itself, which *ipso facto* constitutes nothing else than one special form of operative-analytical work of the police and other agencies with police authorities does not require the participation of the prosecutor, nor should we identify such financial investigations with the prosecutorial investigation. The financial investigations may constitute a part or method of conducting the prosecutorial investigations as need may arise, but equally their application is not conditioned upon any participation or authorization of the prosecutor.

5 THE INTENT OF CRIMINAL OFFENCE: CORRUPTION AND ECONOMIC CRIME

With regard to those criminal offences in the area of corruption and economic crime, although intent was treated separately as part of each of the criminal offences addressed in the Manual, a special reference should be made again to some general aspects of intent in case of the perpetrators of the criminal offences in the area of corruption and economic crime.

Namely, having in mind the nature and character of these criminal offences, it follows that that the perpetrators of these criminal offences are by rule mentally capable, or they possess the capacity in both the intellectual and volitional terms.

Since these corruption criminal offences (stricto sensu) cannot generally be perpetrated out of negligence, we can consequently ask a specific question about the presence of intent in these criminal offences, in view of the subjective element of these criminal offences, because there are numerous acquitting court verdicts which do not find that the accused persons acted with intent in the acts or perpetration of criminal offences particularly those in the area of corruption.

Before looking into those criminal offences in the area of corruption and making determination of whether they have been perpetrated with intent or not, we should first identify the values protected by law against this specific group of criminal offences. This is done in order to enable further discussion on the matter of existence or lack of intent as one of the forms of guilt.

Namely, official duty is the value protected in case of these criminal offences, which implies that these criminal offences are directed exactly against this value protected under the criminal code.

In order to discuss intent of the perpetrators in case of these criminal offences, it is sufficient that their intent should cover the actions directed against official duty, and it would be a mistake to give equal treatment to motifs and intent of the perpetrators in case of these criminal offences. However, such equalizing is a very frequent case in practice.

Then again we have to note that only persons with official capacity as official or responsible persons may appear as perpetrators of criminal offences against official or responsible duty. The existence of this capacity implies that during his nomination or appointment to such official or responsible office this person has to pass through a certain screening in the sense of having his intellectual capacities verified, which is done in accordance with the applicable laws or bylaws regulating the particular field in which this person seeks to perform certain official or responsible duty.

This requires from us to assume that the likelihood of these persons being mentally incapacitated is substantially reduced. What more, these persons have an increased responsibility given the character of the duty they perform, which again affects out determination as to the existence of their criminal liability or intent.

Namely, it is indeed this subjective element of the criminal offence that proved as most disputable in practice or most difficult to be proved in criminal offences in the domain of corruption and economic crime. In order to establish the existence of an intent in case of perpetrators of these criminal offences it is necessary that the perpetrator has a subjective attitude towards the offence as his goal, or it is necessary that he has awareness of prohibited consequences that may arise as a result of its perpetration or omission.

However, this awareness of prohibited consequences includes also the awareness of an infringement or jeopardy for official or responsible duty which constitutes a value protected by law against these criminal offences, and by no means of all consequences of such an infringement or danger for this protected value. Referring to the issue of volitional component of intent, this is an area in which most of the problems occur.

Namely, it is only in the event where the law requires «intent» that one may be referring to indispensability of existence of a direct intent, whereas in all other cases it may be also the question of a possible intent. However, even in the event where the existence of a criminal offence requires «intent », this intent should not be equalized with the motif, but instead this intent must rather be seen in the sense of existence of a volition to take a certain action or cause a certain prohibited consequence, no matter what motivational mechanism triggered such an action of perpetration, which may potentially be ascertained, while meting out the punishment, as extenuating or mitigating circumstances.

Accordingly, the motivation of the perpetrator in these criminal offences is not prevailing upon us to decide the question of existence of an intent, although intent may be brought into close connection with motif, but may also be seen as independent from it, and more so for the fact that the value protected against these corruption criminal offences is an official or responsible duty which through actions of the perpetrator is infringed or endangered.

Namely, when *intent* is correlated with *motif,* this is done in those cases when the criminal code identifies motif in the exact terms of incrimination as elements of crime, e.g. an aim to secure for himself or for another some gain (abuse of office or official authority in the Criminal Code of the Republika Srpska). Yet when the securing of property gain for himself or another is seen as an objective consequence of taking advantage of or exceeding the limits of office, official responsibility and authority, or failing to execute official or responsible duty, (abuse of office or official authority in BiHCC, FBiHCC and BDCC), the motif related to such consequences may constitute only a circumstance influencing the fashioning of punishment, whereas the existence of the criminal offence itself is by no means dependent upon the motivational mechanism of the perpetrator of that criminal offence, and thus for its existence it is sufficient that there is an intent to take advantage, exceed or fail to execute official duty.

Yet, even in case where the criminal code sets out in the very elements of crime a motivational mechanism e.g. intent to acquire property gain for himself or another (e.g. Abuse of Office or Official Authority in the RS Criminal Code), the intent of the perpetrator must be seen in the light of whether the perpetrator had awareness and volition that such consequence of abuse, exceeding or failure to execute an official or responsible duty may or should become materialized, no matter whether the acquiring of property gain for himself or another was a motivational mechanism triggering the action of perpetration, or the motivational mechanism was something completely different, while the process of material gain was an incidental consequence of such active commission.
In any case, it would be sufficient for the existence of intent in this case that there was awareness and volition in the perpetrator to abuse, overstep or fail to execute office, official or responsible duty, and awareness and volition that a consequence of such an action will be property gain for the perpetrator or another person, where the perpetrator of the criminal offence accepts it as his own deed, meaning that the perpetration attributed to such consequence is covered with his volition.

Referring to the criminal offences of corruption which are manifested by taking advantage of one's office, responsible position or official authority, the assessment of incrimination level of such abuse is made on the basis of exact interest of office which is decisive in evaluating the existence of intent on the part of the perpetrator taking advantage of his office, responsible position or official authority. This means that the perpetrator of such deed of perpetration, acts within the limits of his authority granted to him by law, but fails to execute it in the interest of his office. By contrast, he does it rather in the interest of acquiring the property or non-property gain for himself or another person. When it comes to those criminal offences of corruption which are manifested by exceeding the limits of one's official authority, any such exceeding can by no means be convalidated by the interests of his office, since no official interest may convalidate any illegal conduct, or acting beyond one's legal authority.
In such cases it may possibly be the point of application of the institute of extreme necessity, provided that all required conditions exist substantiating that criminal law institute.

6 INCITMENT AS FORM OF COMPLICITY AND USE OF SIMS

Incitement to perpetrate a criminal offence as an institute of procedural law, inextricably bound with some special investigative actions, represents a novelty in the legal tradition in this part of the world. So its proper application requires some more elaborate explanation. The explanation of the provision referred to in paragraph 6 of Article 116 BIHCPC means at the same time that we also provide the explanation for the provisions of other identical provisions found in other criminal procedure codes .

For the purpose of this Manual we are going to confine ourselves to criminal offences in the domain of corruption or incitement to perpetrate these criminal offences, which could happen through use of a measure of simulated purchase of certain objects and simulated bribery. Of course, there may exist some other ways towards inciting someone to perpetration of criminal offences by using a whole series of other, classical and undercover police operations, among which there is a distinctive role in BIHCPC for yet another kind of action – the action of the police undercover investigator or informant. Here we can immediately ask the question about whether we may refer in the criminal legislation of Bosnia and Herzegovina to incitement even beyond the requirements set out under the provision above, for example in case that the defence claims the police actually caused perpetration of a criminal offence by using other forms and methods of provoking, facilitating, offering an opportunity. Such way of thinking is not out of question and it is suggested also by jurisprudence of the European Court of Human Rights. There is a general rule specifying that the police or other agents of the state are in no case whatsoever entitled to overstep the prescribed limits of their authorized influence on perpetration of criminal offences.

In BIHCPC this rule is prescribed only in paragraph 6 of Article 116 and so only by referring to a general rule, without any essential definition of what the prohibited activities actually are and what in fact the incitement to perpetration of a criminal offence means, or which are the cases where the court may hold that there has been a case of incitement the consequence of

which is that the criminal prosecution is ruled out.

It is obvious that within the special investigative actions the code allows for the use of methods which in their essence, provided that the case refers to a simulated purchase of objects or simulated bribery, include the proactive operations of the police with the elements of realizing and creating a convenient situation, placing a noose, or fishnet in which a perpetrator of a criminal offence may eventually be caught. Such actions are legitimate, legal and generally indispensable in disclosing and investigating those criminal offences in the domain of corruption. An essential and decisive question is where we should set the boundary between permitted and prohibited or excessive actions. BIHCPC provides no answer to this question, so it will have to be answered through the judicial practice and case-law (unless the legislator decides to amend the law).

Most of the contemporary criminal law systems support (either in laws or in practice) the so-called subjective-objective approach to considering whether in a particular case incitement has happed, and this kind of approach was pursuant to the provisions of ECHR recognized either by the European Court of Human Rights in the case of *Teixeira de Castro* vs. *Portugal* (9/6/1998). In this case, by referring to the simulated purchase of narcotic drugs, the Court found disputable the following matters: 1) the fact that before the commencement of the police actions there was no evidence that the person was involved (involved?) in the criminal activity (subjective test), and 2) the fact that the police agents were a way too active in influencing the suspect (objective test).

The Court shall issue an order (authorization) for simulated purchase of the object or simulated bribery in case of the person against whom there are grounds for suspicion that he alone or in concert with other persons took or is taking part in perpetrating a criminal offence referred to in Article 117 of BIHCC. Although this criterion could in some way also constitute a subjective test for application of this measure, we encounter here an obvious contradiction. Namely, while other measures from this article are intended to collect evidence about an already perpetrated crime, this specific measure means something substantively different: the commission or omission of the criminal offence in concert with the agents of the state or before their very eyes. If the person has indeed taken part in the commission of a criminal offence, this in the light of potential use of this measure may mean one thing; that this person has predisposition towards committing criminal offences, meaning that the subjective criterion for ordering this measure has been met. For proving an already committed criminal offence this measure is of no relevance whatsoever, since by its application a new independent criminal offence is perpetrated, so there is the question of whether the special investigative action, whose intent is not to facilitate collection of evidence (such as is explicitly provided by paragraph 1 of Article 116) is permitted in the criminal legislation of Bosnia and Herzegovina at all.

It is our belief that in practice this measure can be taken only in the cases in which there are grounds for suspicion that at the moment when these measures are ordered the person is actually taking part in the perpetration of the criminal offences in the domain of corruption or other criminal offences referred to in Article 117 of BiHCPC where simulated purchase of objects is possible. This kind of measure taken in this way would mean, on one hand, the genesis of a triggered offence, while on the other hand, such taking is the only one action which at the same time can also serve the purpose of collecting evidence of that criminal offence.

In each example, in order to bring this measure in line with the basic guarantees that need be provided by any modern criminal procedure, prior to its ordering, the relevant court will have to become convinced that the person against whom the measure is to be ordered has predisposition towards committing criminal offences, meaning his will, intent, willingness, volition, predilection, tendency to perpetrate a criminal offence, before the police agents or state authorities influence and interfere with his subjective sphere. In terms of his predisposition it will not be sufficient if, for instance, before this measure is ordered, the person takes part in perpetration of various criminal offences, but it will also be necessary to prove that the person is indeed predisposed towards perpetration of this type of criminal offences for which the measure is proposed (for example in the domain of corruption). Like in other examples, there are no formal evidentiary rules for proving this specific predisposition or tendency, but the court shall deliberate freely at its own discretion all evidence obtained for this particular purpose.

The precepts described in the above text should be taken into account before ordering this measure – we are referring therefore to the preliminary test which the court has to take once it decides the prosecutor's proposals.

Yet, whether incitement has really happened or not shall be established only later after this measure is taken, or in general at the main trial (but possibly even earlier, during investigation or in the procedure after the charges are brought), in the so-called ensuing test which shall generally follow after the motion is made by the defence claiming that the defendant would not have perpetrated the criminal offence had he not been induced to that by the agents of the state. In this case the court shall have the task to consider in detail all circumstances in connection with the method by which the measure was taken and then, observing

all subjective elements of the defendant, establish whether in the particular example the incitement was the case or whether by acting exceedingly the state made a criminal out of a decent man.

In the USA they have the most extensive experiences relating to the „entrapment“ issue, which is how they call the institute in question. Their case-law sets out in multiple examples the following criteria which could also be well used in Bosnia and Herzegovina, for example (United States v. Perez-Leon,1985): a) what is the character or reputation of the defendant, including also his record of prospective criminal past; b) has the first original inducement to commit a criminal offences come from the state; c) has the defendant in the beginning reacted negatively and accepted the offer from the state only after continued insistence of the state or after multiple attempts; d) what was the nature or the substance of the incitement itself.

In certain examples, incitement shall have to be assumed, by reason of excessive efforts of the state actions or actions of its agents. Here we are dealing with a mere objective criterion linked with entirely inappropriate or illicit actions of the police, such as for instance use of force, or threats, excessively tempting lure which is not directed towards some particular perpetrators, but practically incriminates everyone passing by the entrapment scene incidentally, and so forth.

The consequence of incitement shall be preclusion of the criminal prosecution against the incited person for a criminal offence committed in relation with the actions which lead to perpetration of the criminal offence – this is one of the circumstances referred to in CPC which rules out the criminal prosecution and results in an appropriate decision of the court, depending on the stage of the proceedings .

7 FORFEITURE OF PROPERTY OBTAINED BY CRIMINAL OFFENCE

Implementation of the provisions dealing with forfeiture of property gain obtained by a criminal offence (hereinafter:PGOCO) means making alive one of the fundamental purposes of the criminal prosecution and trial. In many countries this aspect is underestimated and forgotten, if not in the laws, then surely many times in practice that is not accustomed to its role in dealing with property law matters within the framework of criminal procedure, and prefers leaving these issues to civil courts for their adjudication. However we should know that the civil courts do not have available many of the instruments that are otherwise available to institutions in the criminal procedure in particular those used for tracking and disclosure of property origins and its temporary securing by a security mechanism for the purpose of later forfeiture.

The criminal prosecution and trial institutions in Bosnia and Herzegovina should have in mind that the property law related issues to be adjudicated over the entire course of criminal proceedings are of at least the same if not higher importance than apprehending, prosecution, ad conviction of the perpetrators of criminal offences, which is of particular relevance for corruption and economic crime. Since the first contact with a case in this area, the police and prosecutor need to pay equal attention to both the investigation concerning guilt of the suspect and obtaining evidence to that effect, and the so-called financial investigation, which has to be conducted in a synchronized way and in parallel with the former. If the PGOCO is not identified at the very beginning and if its forfeiture is not provided to the greatest extent possible, it will generally no longer be possible to be done at any later stage. The perpetrators of these criminal offences are generally not in custody but at large, and are capable people, even experts in the fields of economy, finances, accounting. They could very easily, once they feel the threat of criminal prosecution, in many ways prevent the forfeiture of PGOCO. The man intent of the relevant provisions of CC and CPC is that this should be precluded and the fundamental principle of substantive criminal law fulfilled, so that no one could keep the property gain obtained by criminal offence.

There is an essential difference between BIHCC; FBIHCC; BDCC and RSCC regarding the material grounds for forfeiture of property gain obtained by a criminal offence, Namely, the first three mentioned codes bring a far-reaching provision, which through the main gate introduces a novelty into substantive criminal legislation of this region – a reversed *onus probandi*, which is found in the special procedure as separate from the predicate offence (BIHCC: Article 110 paragraph 3, FBIHCC and BDCC: Article 114, paragraph 3). Below we shall present how one such provision may be implemented effectively, which could contribute specifically to solving situations in which the procedure is not completed with a convicting verdict for a criminal offence in the area of corruption or money laundering.

Namely, we believe that in such cases one cannot apply the provision we can find in all procedural codes of Bosnia and Herzegovina guiding the forfeiture of objects that must be forfeited under the criminal codes and are forfeited for reasons of overall security or morality in the cases, in the event of criminal proceedings that are not completed with a verdict in which the defendant is found guilty. Money is a generic term and in that sense it is *dirty money* generated from the criminal offence of money laundering, or money used for bribing. It is by its characteristics not distinguished in any point from any other money, so for that reason it is not possible to note that it endangers the general security or causes damage to morality. Let us assume the case of a perpetrator of the money laundering criminal offence against whom a final indictment was issued but who dies during the proceedings. In such an example, without the possibilities provided by the above provisions about the new and special procedure for forfeiture of property gain obtained by a criminal offence, the money should be returned to the ”believed widow”. In order to use new possibilities provided in all criminal codes except in the RSCC, the only thing left to be done is to follow the assumption or approach, which according to our general public is not problematic. This assumption specifies that the received gift, bribery or dirty money generated from the criminal offence, is both the object of the criminal offence and the property gain obtained by a criminal offence. Therefore, in these examples one may effectively apply the provisions relating to forfeiture of objects and (or) forfeiture of property gain obtained by a criminal offence. The case-law in Bosnia and Herzegovina shall have to reconcile the differences between possible approaches to this subject matter, with recognition that, except in RSCC, the required material basis already exists in the criminal codes.

With the exception of RSCC, the other criminal codes in Bosnia and Herzegovina have reached very solid internationally comparable legal grounds for forfeiture of property gain obtained by a criminal offence. The RSCC, however, requires amendments to be made towards expanding the possibility of forfeiture of property gain obtained by a criminal offence to include also those cases when the gain has been transformed into another form, when it is merged with other property or when the perpetrator of a criminal offence is in possession of other seemingly legally obtained property, whereas the forfeiture of any direct property gain obtained by a criminal offence is no longer possible. Although the international documents in this area do not set any requirement of incorporation into national legislation the reversed *onus probandi,* which nevertheless was done considerably in the new criminal legislation of Bosnia and Herzegovina, in order for Bosnia and Herzegovina to harmonize this

area internally it would be most useful to incorporate into the RSCC an identical provision on special procedure separate from the general procedure as soon as possible. Note that this provision already exists in the remaining three criminal codes. At the same time, for the purpose of all four codes, at least the main rules of this procedure should be defined identically, knowing that the procedure is at this moment obviously left to imagination of the courts.

Immediately after learning that the reasons exist (grounds for suspicion) indicating that a criminal offence has been committed in the areas of corruption and economic crime, the prosecutor must, pursuant to the provision which makes that obligation also clearly binding for him, collect evidence and establish the circumstances of necessity and relevance for determination of property gain obtained by a criminal offence (BIHCPC Article 392 paragraph 2 and identical provisions in other codes).

Concerning the collection of evidence intended for the establishment of property gain obtained by a criminal offence, the prosecutor shall have the extremely broad powers available, assuming of course that the court ordering the investigative actions accepts the motions made by the prosecutor. Looking into the provisions of Article 72 of BiHCPC or identical provisions of other codes, we shall find in paragraph 1 of this article a standard provision covering an order issued to a bank or another legal person, requesting from them to turn over to the court the data on business operations, transactions, deposits of the suspect and other persons who are reasonably believed to have been involved into these dealing or transactions. The standard level of evidence sufficient for mounting of this measure may perhaps happen to be laid too low at the level of existence of grounds for suspicion that the person has committed the criminal offence generating property gain. If nothing else, in any court order of this kind the court should provide a well substantiated explanation by which the grounds for suspicion must be clearly articulated, so that at some later stage in the proceedings it can be verified or made sure that this institute, against which there is no special legal remedy, was not abused, or that the reasons for termination of the bank's confidentiality already existed at the point of its determination.

It is not completely clear what range and scope are covered by paragraph 2 of the analysed provision (72 ZKP BIH), and this ambiguity is associated with two reasons. First reason is of concern to the question whether the authorization referred to in paragraph 2 (at this point we are no longer going to make reference to articles of other codes since they are identical to the articles of BIHCPC) –which is allowing the use of special investigative actions referred to in Article 116 BIHCPC – is limited with the provision of Article 117 of the same law. Alternatively, 72/2 BIHCPC may still represent a special provision that is fully independent from Article 117 and applicable to all examples of identification and finding of illegally obtained property. The following interpretation is also possible, which, on one hand, means that the prosecutor or the court has in hand some extremely strong powers required for the conduct of a comparative financial investigations, while on the other hand, this would impair the principle of proportionality between the measures and the gravity of the criminal offences in questions. Namely, the consequences of this interpretation would be that the provision of Article 116 BIHCPC could possibly apply to each criminal offence generating property gain. The wording of paragraph 2 of Article 72 leads into such an interpretation ever more so than it would lead into a more restrictive interpretation in which a catalogue of criminal offences would be restricted by the provisions of Article 117, because it makes a clearly sufficient substantive relation with paragraph 1 which covers all criminal offences referring to obtaining property gain. Namely, paragraph 2 is also referring to some other activities that are taken, in addition to the one referred to in paragraph 1, indicating thus to the measures referred to in Article 116.

Yet we are almost positive that the intent of the legislator was not to extend in this way the application of special investigative actions referred to in Article 116, since it is quite clear that such extension would be in striking contradiction with Article 6 and 8 of the European Convention on Human Rights. We must not forget that evidence collected in this way may be used in the special, separate procedure (except in RSCC), where the reversed *onus probandi* applies, which would place the owner or the beneficiary of the gain, who is supposed to prove its legal origin, into a rather inequitable position.

Even if we accept the restrictive application of paragraph 2 of Article 72 and bring it in connection with all requirements of Articles 116 and 117, there remains an outstanding question of what criminal offences may require action under Article 116 or identical provisions of other codes. The question that is of special interest for us is whether the special investigative actions can possibly be used in order to prove criminal offences in the domain of corruption and economic crime.

Article 73 BIHCPC (and identical Article of other codes) allows for the security measures of seizure or arrest in property as a security mechanism. This provision covers the property that is to be forfeited under BIHCC. It is important to pay attention to two things. First, in paragraph 1 it is emphasized that the court may order this measure at any point of time (meaning at any stage) in the proceedings, whereat the procedure is not defined or limited to the criminal proceedings, so there may stand a logical conclusion that this measure may be issued even at the earliest stage of the proceedings, the stage of operative work of the authorized officials, and prior to any formal mounting of an investigation, which actually is the purpose of this measure so as to

make it efficient. It is not realistically practicable to anticipate that the security measure would be efficient in the later course of the proceedings, once the perpetrator has already been informed of the proceedings against him and of sanctions which may be directed towards forfeiting the illegally obtained property. The perpetrators of the criminal offences in the domain of corruption and economic crime will never stand idle waiting for their property to be forfeited, but will rather make sure (in a very expertly way) that such thing never happens. That is why the use of this measure is of special even decisive relevance at the moment when the perpetrator of the criminal offence is still unaware of this investigation and does not have his mind set to prevent the forfeiture. Secondly, what has to be noted is the fact that the procedure under paragraph 1 is not bound with any additional requirements or requests, unlike the example of paragraph 2 of the same Article which refers to a "risk of delay"; therefore, it is our view that in case of criminal offences in the domain of corruption and economic crime the court must generally always be requested to issue this measure. Prior to that the prosecutor shall collect the data and evidence under Article 72 BIHCC or the relevant provisions in other codes. We therefore point out the conclusion that the temporary seizure of property in case of criminal offences in the domain of economic crime and corruption is not an exception but a rule by which the prosecutor should act in any case of this kind, unless he is positive that on the basis of evidence the motion to issue this measure is unnecessary. The situation in the area of economic crime and corruption is therefore different and diametrically opposite to the concept of using security measures of temporary seizure and arrest in property as an exception applicable to the classical crime.

The forfeiture of property gain from a legal person or use of the mechanism for securing any later forfeiture is conducted through appropriate application of all relevant provisions (Article 387 BIHCPC and identical articles of other codes), where the same principles should be followed as those referred to or analysed in the text above. It has to be noted that for the sake of securing the forfeiture of property gain from a legal person there is yet another additional reasonable cause in Article 386 BIHCPC, paragraph 1, or in the identical provisions of other codes. It may not happen to be the best possible solution to refer in the same provision to the security measure guaranteeing the enforcement of punishment, forfeiture of property and forfeiture of property gain, and accordingly invoke at the same time the relevant application the article which on the other hand refers to the third institute – a temporary security of the property claim and invoke at the same point the provisions that apply to the enforcement procedure. The situation would be much clearer if just a single, identical and clearly defined pathway were to be followed in respect of forfeiture of property gain from the physical and legal persons. We believe that the appropriate application of the relevant provisions of CPC to the legal persons is indeed making this entirely possible.

We once more advise a due caution at this point about the dual nature of the "dirty" money, bribery and gifts and gain given or received as bribery, and whose nature is such that it cannot be forfeited either physically or legally. On one hand, we may (and even must) refer to the objects whose forfeiture is made mandatory under all criminal procedure codes (for relevant criminal offences see those provisions in the special parts of the codes), so that it is possible in regard to them to request the issue of an order for forfeiture of these objects and by that analogy secure their safe-keeping. On the other hand, once these objects have ultimately been confiscated in the end of the proceedings by a final court decision, this will in general terms mean at the same time that the property gain was forfeited at a certain counter value equivalent to the value of these objects. Therefore, through the institute of forfeiture of objects we arrive at a certain dual outcome, since in principle the said objects generate certain illegal property gain, the forfeiture of which may thus be secured at the first stage and only to have it subjected to confiscation in the end.

7.1 Separate Procedure of Confiscation of the Property obtained by a Criminal Offence

The provision of paragraph 3 of Article 110 of BiHCC foresees the conduct of a separate procedure of forfeiting the property gain obtained by a criminal offence, there is a probable cause to believe that the gain derives from a criminal offence and the owner or possessor is not able to give evidence that the gain was acquired legally. Such as it stands, this provision opens a number of questions and controversies concerning the laws applicable in Bosnia and Herzegovina.

First and basic point is that this provision sets the legal grounds for the conduct of the non-criminal proceedings in which no criminal liability of the perpetrator is to established but rather (il)legality of the obtained property. The direct conclusion is that this is by no means of concern to inversion of *the presumption of innocence* principle since this does not involve the procedure of establishing one's criminal liability, but rather the procedure of identifying the property origin. Interestingly enough, the Code is using the term "separate" procedure, rather than any other term, e.g. "special ". From this wording it is possible to draw an indirect conclusion that this case is of concern to the procedure that should in some way be derived and "separated" from some already existing criminal proceedings. In this case the question could be asked why at all we should "separate " the proceedings when we know that the criminal proceedings within themselves stipulate ways of acting (procedures) for forfeiture of property

gain obtained by a criminal offence. The reasons for conduct of the separate procedure may have multiple meanings, but we are going to refer here only to some. One of the reasons may be the death of the suspect /accused, or a mental disorder that could lead to termination of the criminal proceedings. Also, one of possible reasons for the conduct of the separate procedure could appear in case where evidence required for the conduct of the criminal proceedings is unavailable to the prosecutor or when the prosecutor is not in the position to obtain the required evidence due to the existence of objective obstacles that stand in the way of their collection. In this case, by mounting the separate procedure aimed at forfeiting the property gain obtained by a criminal offence an attempt could at least be made to provide for the fulfilment of the legislative provision of paragraph 1, Article 110 of BiHCC: *Nobody is allowed to retain material gain acquired by the perpetration of a criminal offence*, since there is no possibility of conducting the real criminal proceedings for the purpose of establishing criminal liability, and by analogy, the imposition of the measure of forfeiting the property gain obtained by a criminal offence.

However, with the current situation in mind in terms of the provisions of procedural nature, it may not be noted that it is possible to implement the said separate proceedings either. Namely, there is no procedural provision in the criminal procedure codes, which may be said to be applicable to this particular procedure. The procedural provisions relating to the forfeiture of property gain and the forfeiture of property gain are of exclusive relevance for the situation where the criminal proceedings are already being conducted, i.e. when the main trial stage has already been reached. Equally, if we consider the type of the judicial decision whereby the property gain obtained by a criminal offence is forfeited, we shall see that the criminal procedure code provides two types of decisions – a verdict and a ruling. The possibility of forfeiting the property gain by the decision taken by the court in the form of a ruling is restricted to the following two procedural situations:

a) in application of correctional measures; and
b) in the proceedings in case of mental incapacity, which again implies that, *de facto* and *de iure*, the court would not have the opportunity of completing the separate procedure for forfeiture of property gain due to the lack of the appropriate form of the decision that would represent the viewpoint of the court, since the use of rulings as a form of judicial decision is restricted to the two aforesaid situations.

On the other hand, the verdict is exclusively of concern to the criminal proceedings ending up with its reaching.

Having in mind the above concerns, there can be an obvious conclusion that the introducing into the criminal legislation of Bosnia and Herzegovina of a possibility of conducting the separate criminal procedure about the forfeiture of property gain is nothing else than the vague and insufficient wording of the legislator. Namely, the ruling contained in the provisions of Article 110, paragraph 3 of BiHCC is apparently in line with the efforts made by certain European countries to confront the criminality through the use of procedures where no criminal liability but rather legality of the property obtained shall be established in the future. However, in such cases this involves the conduct of the civil procedure rather than the criminal procedure.

Therefore, if the intent is to enable the conduct of the separate procedure for forfeiture of property gain obtained by a criminal offence, the implementation of one of the following two alternative possibilities shall be necessary:

a) Amend the criminal procedure code by adding those provisions whereby the procedure (proceedings) of application of substantive provisions referred to in Article 110, paragraph 3 of BiHCC would be regulated; or
b) Adopt a *lex specialis* law on the forfeiture of property gain obtained by a criminal offence, regulating the requirements and area of application, procedural jurisdictions, course of the proceedings, types of the decisions and sanctions, and the like.

Until then, regardless of the fact that the said provision concerning the forfeiture of property within the a separate procedure already exists in the material part of the criminal legislation of Bosnia and Herzegovina, the same provision shall be unusable until the adequate process-related procedural law regulation of those proceedings is accomplished.

8 SPECIFIC FEATURES OF PROCEEDINGS AGAINST TAX EVASION AND MONEY LAUNDERING

8.1 Specific Features of Perpetration

The criminal offences of money laundering in Bosnia and Herzegovina are most frequently arising in relation or concurrence with the criminal offence of tax evasion.

On the point of criminal offences of tax evasion, it is typical that in Bosnia and Herzegovina this criminal offence occurs most frequently in two basic forms. First of them is the maintenance of the so-called dual book-keeping system. In one segment of this the book-keeping system, entries are made based containing genuine data affecting the tax and contribution calculations and levies, and this system is concealed from the competent authorities rather then presented to them.

Yet in the other segment of the book-keeping system, entries are made based containing data which in general significantly reduce the actual taxable income and other facts of influence for tax and contribution calculations and levies, which is presented to the competent authorities when such obligations are identified. This implies, as a matter of fact, the action of perpetration by way of an act or disclosure of false information about the personal taxable revenues earned or about other facts of influence for the levy of taxes and contributions foreseen under the current legislation.

Other form of perpetration of this criminal offence present over the last few years is the most frequent form of perpetration of this criminal offence and is of concern to the so-called phantom (bogus) companies or non-existing companies established with a sole aim of enabling such tax evasions and in general the most typical among them are the companies incorporated through the use of falsified documents, their real owners and responsible persons are unknown, they are not located in their registered seat, they have no infrastructure required for performance of their business activity (they do not have any whole-sale warehouses, retail-sale facilities, or even office space) or for their purposes they use the facilities of already existing companies which disassembled and ceased their actual business operations. Namely, in the latter case the virtual cash turnover, whose placement is eventually within the retail sale, is featured as fictitious operations with the so-called phantom or non-existing corporate entity, while all corresponding business documentation is compiled supporting the false notion that such business event has actually happened in reality. Purchase orders are issued supported with statements made by the purchaser-phantom or non-existing company that the goods are going to be used for further sale, delivery orders and bills and in turn the cash earned as income arising from the actual business event is turned over to the person – phantom or non-existing company that deposits these funds to the account of the phantom or non-existing company (generally as earnings deposit) and then makes their immediate transfer to the account of the company that generated the genuine cash income in reality, or makes return of these funds now by way of giro-account bank transfers to the business entity which made genuine turnover of revenues in cash, and thus features the bogus business event that purportedly happened between that company and phantom or non-existing company, followed by a financial transfer through a transfer account between these two companies.

The main point of this tax evasion scheme is in converting the cash revenues, on which the seller was supposed to calculate the taxes and contributions, into giro-account bank transfers money and redirecting the tax liability to the so-called phantom or non-existing company. In this case it is of no relevance whether the money which represents the tax liability was calculated and levied from the real buyer and not featured or appropriated by the perpetrator or other person. Instead, the key fact is the tax liability crated through the earned income or business event from which the revenues derive and are hidden or concealed for the purpose of evasion.
As is evident and flows from the practice so far, in this case there is the question of concurrent criminal offences of tax evasion and money laundering.

The most frequent form of perpetration of the criminal offence of money laundering over the last few years on the territory of Bosnia and Herzegovina have been the cases of legalizing the funds acquired through perpetration of the criminal offence of tax evasion. This method implied the specific purpose establishment of “bogus” companies, whose intended purpose was not to perform legal commercial operations, but rather to be used as the so-called *shell* companies, with the only aim of enabling the issue of forged business documentation in order to disguise (legalize) the illegally acquired funds of other legal persons. Businesswise, these are the companies which exist just “on-paper”, and in reality they mainly do not perform their own legal business activity which they registered and indicated in their incorporation act, although it is neither completely ruled out that they may perform certain legal operations. Their tasks is to be a broker or to mediate in transfers of the dirty money, thus

making complicated the cash flows to such an extent that at no point in time may we track the origin of that money. They purchase, sell, and transfer money for the said purpose. Anyone may be the formal owner of such kind of company, whereas their real owners are most frequently some criminal organizations or individuals for whose benefit the money laundering is performed, although the cases are not unknown where such companies are established to be used exclusively as a service providers, i.e. sell their services to those in need.

One of the methods of legalization of illegally acquired funds obtained by a criminal offence of tax evasion, typical for Bosnia and Herzegovina, is presented in the following scheme.

Ilustration:

- Company A (a company performing a legal trade business activity) as an undertaking with authority to perform wholesale trade operations, buys some commercial goods from the supplier or manufacturer.

- Company A sells the commercial goods procured in this way trough its retail facilities or sells them wholesale to another company, without making records of the sales and without calculating the appropriate tax rate, after which it takes possession of a certain amount of cash. Since thus the goods are not written down from commodity-material book-keeping records, while on the other hand there is cash acquired through sale of these goods, which is at that point impossible to be featured as a legally acquired revenue, there happens a situation when it is necessary to de-register the entries of the goods in a convenient way from the commodity book-keeping records and the revenue acquired in this way should be featured as a legally acquired revenue.

- Company B (so-called phantom or *shell* company), following the prior agreement with the responsible persons of Company A, prepares and issues the orders for purchase of commercial goods to Company A, in the amount and quantity of commercial goods which Company A already sold for cash, whereas Company B indicates that the ordered goods would go to further sale, thereby enabling Company A to redirect the tax liability from itself to Company B.

- Company A makes a bill of quantifies for Company B according to the purchase order above,

- Company B takes over from Company A the bill of quantities for the allegedly delivered goods and cash Company A acquired through the sale of goods.

- Company B deposits that cash on its bank account, featuring it as revenue derived from its own business operations (so-called earnings deposit).

- Company B pays out through giro-transfer from its own bank account to Company A the amount indicated in the submitted bill of quantities.

- Upon receiving the payment, Company A compiles a bill of goods sold and dispatch order on the delivered goods, which is signed and certified by responsible person of Company B, although such delivery could not have been carried out since the goods were sold by Company A for cash.

- Company B keeps certain percentage of the total amount of cash transferred by it to the account of Company A, in return for the business done (most often 1%)

In the above described way there happens the concurrence between the elements of two criminal offences: a criminal offence of tax evasion and a criminal offence of money laundering. However, there arise numerous questions about each person's respective responsibility for each particular criminal offence and about the acts that stand as part of each particular crime respectively.

Therefore it is possible to distinguish a few situations (scenarios of the event) having in mind the points of view from which the whole matter is looked at, and so as follows:

Situation 1 – Company A commits no crime because it has «orderly » documents based on which the tax liability has been transferred to Company B, i.e. Company A has made a due delivery of the ordered goods to Company B, which Company B has

properly paid by transferring the funds from the purchaser's account to the bank account of the seller.

Situation 2 – Company B commits the criminal offence of tax evasion since it fails to settle the tax liability established by law for the goods it purchased from Company A.

Situation 3 – Companies A and B together take part in perpetration of the criminal offences of tax evasion and money laundering, since by their concerted action they enable Company A to evade tax payment on turnover of goods, and in turn carry out legalization of the proceeds obtained through perpetration of tax evasion crime.

Situation 4 – Company A commits the criminal offence of tax evasion and Company B the criminal offence of money laundering.

There are certain grounds in all above situations in the very factual description of actions of Company A and Company B. however, if due interpretation is rendered of the legislative-legal provisions regulating the criminal offences of tax evasion and money laundering, Situation 4 shall in fact be the most realistic one, and so for the following reasons.

Company A, acts with direct intent to perpetrate the criminal offence of tax evasion and by its acting it has taken certain actions, as is eeralier described, in order to perpetrate this criminal offence. The allegation that the criminal offences of tax evasion is incomplete and that, by this analogy, we may still not refer to the criminal offence of money laundering since allegedly there is no predicate offence here, is ill-founded. Namely, Company B was established merely to "provide services" of money laundering to some regular companies such as Company A, companies that are in demand of disguising their illegally acquired assets that are generated through the performance of its core business activities by non-compliance with the applicable legislation. In order to be liable for the criminal offence of money laundering, Company B, or its responsible persons, should know that the money and property acquired through perpetration of the criminal offence, but not be aware of "*each and every criminal offence perpetrated in the course of acquiring the money. Otherwise, the persons could be entirely protected from criminal prosecution by finding an easy way out through the denial of knowledge about certain criminal offences committed by the participants, knowledge that is completely unnecessary for the successful money laundering scheming*".

On the other hand, it is incorrect to interpret that the criminal offence of tax evasion, as a predicate offence, is made complete only after the bank transfer of funds is done from the account of Company B to the account of Company A. This offence is completed at the moment when Company A compiles the necessary documents concerning the non-existent sale of goods to Company B, and do so on the basis of a purchase order containing the statement of assuming tax liabilities from Company B. Here we should possibly look for the elements of aiding and abetting in perpetration of the criminal offences of tax evasion for Company B, since the issue of the purchase order with the statement constitutes a *condition sine qua non* for perpetration of the criminal offence of tax evasion, as is described earlier in the particular case.

By the same token, the criminal offence of money laundering shall exist only at the moment when Company B deposits the cash taken over from Company A to its bank account, as this corresponds to the first stage of money laundering – *placement*. Second stage – *layering*, starts when this money is transferred (returned) to the account of Company B, or when this money becomes a legal revenue of Company A acquired on the basis of *«paper»* business relation with Company B. further use of these funds of Company A and in the future business operations constitutes the third, final stage of money laundering process - integration of funds.

It is important to note that at this stage insufficient importance was attached to criminal prosecution and processing of criminal offences of tax evasion and money laundering. Namely it would be proper to render that the search for the laundered money should not stop with nor the prosecutor should be satisfied with finding of a certain part of funds with"money launderers" and their processing (in this case Company B), but the investigation should rather go further until reaching the real owners of the "laundered money" (in this case Company A), and finding and seizure of these funds, as well as their processing. Namely, the basis for this viewpoint originates from the very legislative definition of the criminal offence of money laundering, which provides inter alia the following wording: *"... Whoever accepts, exchanges, keeps, disposes of, uses in commercial or other activity, otherwise conceals or tries to conceal money or property he knows was acquired through perpetration of criminal offence ...."*. In the particular case we have Company A which is well aware of the fact that the money is acquired by perpetration of a criminal offences, as it is itself the perpetrator of the criminal offence and which company is still, after the illegally obtained funds are formally «laundered» through Company B, continuing to use the them in the commercial activity of Company A, and in fact such funds are used as the generator for increase of scope in business activities and revenues of Company A.

The second point lies in the very legal provision (Article 110 of BiHCC) so that nobody is able to keep the acquired gain obtained by a criminal offence. In this case such a gain has only assumed a form of formal legal assets but by no means could it

ever change its origin.

The third point for liability of Company A lies in the fact that the criminal offence of money laundering perpetrated by Company B is done by the request (order) of Company A, wherefrom volition (intent) of Company A is arising to perpetrate the very criminal offence of money laundering.

Case-law (example):

Verdict of the Special Panel of the Appellate Division of the State Court of Bosnia and Herzegovina No. KPŽ-22/04

The defendants R.P. ad T.L. accused to have established a company "U" for the purpose of providing services of money laundering of illegally obtained funds, or for the purpose of perpetrating the criminal offences of money laundering referred to in Article 209 of BiHBCC, ad criminal offences of tax evasion and forging of official document (Article 271 paragraph 1 of FBiHCC and Article 373 paragraph 1 in connection with Article 31 of BiHCC).

The defendants R.P. and T.L. have, in the period of less then two months, established contacts and "bogus" business operations with more than 115 companies from the territory of Bosnia and Herzegovina and abroad and, by way of depositing to the account of their Company «U» larger sums of cash (about 14 million KM), issued false purchase orders to their purported suppliers, signed dispatch orders covering some goods that were never delivered, and made giro-account transfer payments to the bank accounts of suppliers taking 1% commission amount in return.

The defendants R.P. and T.L. were found guilty for the criminal offence of money laundering whereas the charges made for other criminal offences were rejected.

The criminal offence of forging official documents was rejected with an explanation that the forged documents were an executive instrument or means of perpetration of the criminal offences of money laundering, or that the forging of official documents was the perpetration action. The allegations in the indictment for tax evasion were dismissed with an explanation that the bill of indictment does not contain legal and factual description of the criminal offences of tax evasion.

Further explanation of the panel, by which the concealing of the evaded taxes constitutes an element of the criminal offences of money laundering, and therefore *may not exist as an independent offence of aiding and abetting the perpetration of the criminal offence of tax evasion that was perpetrated by another person*.

This interpretation is causing most fervent and heated discussions, the more so that in this case the accusations in indictment claimed that the accused persons were also those who aided and abetted the perpetration of the criminal offences of tax evasion. In order to understand the whole case much better, it would be necessary to take into account all allegations in the factual description of all actions taken by the defendants.

Namely, there is a direct intent on the part of the defendants to perpetrate the criminal offence of money laundering, and in this sense the company in their ownership was established for the purpose of accomplishing that objective. After the registration the company does not perform any business activity within the period of about 4 months. In that period the defendants R.P. and T.L. maintain the contacts with a large number of companies throughout Bosnia and Herzegovina, to which they offer their "services", or the mechanism for legalization of illegally acquired funds. Upon reaching an agreement about all sorts of cooperation with other companies the defendants make purchase orders and deliver them to these companies. It is exactly this act – issue of purchase orders, which is in fact the disputed action in the sense that it concerns the action of aiding and abetting in the criminal offence of tax evasion or commencing the actions of perpetration of the criminal offence of money laundering. The truth is that this action represents a segment within the entirety of the criminal offences of tax evasion on the part of about 115 companies identified in the quoted verdict. However, from the point of view of the defendants R.P. and T.L. their intent is within the limits of money laundering of illegally obtained funds, and such an action of issuance of false purchase orders is in fact a preparatory action within the whose range of action that constitute a criminal offences of money laundering. In other words, by this action the defendants «introduce» the owners of the illegally obtained assets into a certain type of business relation with intent to acquire gain for themselves, and not with the aim of enabling the perpetration of the criminal offences of tax evasion of others. The truth is that through their actions the defendants have contributed also to perpetration of that criminal offence but their primary intent and criminal liability exist in relation with the criminal offences of money laundering.

After these companies would forward the cash to the defendants, along with the corresponding documentation (bill and

purchase order), the defendants would deposit these cash funds to the bank accounts of their company. Depositing such funds to the bank account of their company may already be seen as a perpetrated criminal offences of money laundering, or *"...even without the repeated transfer of cash...it is possible to conclude that the money was laundered at the very moment when it was deposited to the bank account ... by way of which the genuine origin of money was concealed*".

At the next stage, the defendants carried out transfers of funds according to the orders that were already filled well in advance and received by the defendants together with the cash from the companies that are also the owners of that money.

However, unlike this view presented in the said verdict in regard of existence of concurrent offences involving these two criminal offences (tax evasion and money laundering) there are certain dilemmas and other views that we are going to point at this time.

Namely, this view starts from an assumption that in this case the money laundering is essentially a *modus operandi* for perpetration of the criminal offence of tax evasion, since without such money laundering this method of perpetration of the criminal offence of tax evasion would not be possible at all. The money laundering is an independent and separate criminal offence which in relation to the predicate offence is in fact an offence of accessory character.

Accordingly, as the presumption of its existence, the criminal offence of money laundering has a completed predicate criminal offence. In these cases there is the question of whether the criminal offence of tax evasion was, at the moment of commencement of acts of the criminal offences of money laundering, completed or not, or is the money laundering in fact an integral part of perpetration of the criminal offences of tax evasion, or its *modus operandi*. If one can prove that the criminal offence of tax evasion was completed before any act commenced (which were taken in order to conceal the real origin of laundered money), the act pointing out the legal elements which make it a crime of money laundering, then we could say that this is about the concurrence of these two criminal offences. However, if one cannot prove that the criminal offence of tax evasion had been completed before the actions of perpetration of money laundering started, or in cases in which the criminal offence of tax evasion is essentially proved through the criminal offence of money laundering as its integral part, then we could not say that this is about the concurrence of criminal offences of tax evasion and money laundering, but rather about a single criminal offence of tax evasion in which the actions qualified as money laundering should be treated as complicity or aiding and abetting in the criminal offence of tax evasion. This is because the criminal offence of money laundering is a separate criminal offence which cannot be an integral part of any other criminal offence. Although the past and current case-law has taken position that in this case there are both criminal offences: tax evasion and money laundering.

8.2 Criminal Prosecution

In the first form of perpetration of the criminal offence of tax evasion in BiH (dual book-keeping) when planning and conducting investigation, it is most important to establish the method in which one can identify the real scope of manufacture and trade turnover of the suspect, without looking into his "legal book-keeping system". Addressing this issue is a key step on which the overall success of criminal prosecution is depending.
In manufacture and trade companies, which imply the existence of an entire system of manufacture or trade process in the sense of existence of multiple business units that together make an entirety of a single company, it is simply impossible to manage such an enterprise without maintaining at some place the records of realistically and genuinely generated revenues and expenditures (various notebooks, business diaries, shift journals, computer programs, etc.), whether the records are made on input of raw materials or semi-finished products, manufacture or exit of final products, sales of final products, performance of employees, from which the production output of the suspect would be evident, etc.

As a result, whenever the grounds for suspicion exist that the criminal offence of tax evasion has been committed by maintaining the dual book-keeping, it would be necessary to :

- locate business unit of the enterprise;
- pay attention to the number of employees and engaged material resources (machinery, trucks, etc.);
- apply special investigative actions (*optional*);
- identify an everyday work routine of the company (work scheme) and method of communicating and "circulating" the documentation in the company;
- identify the location of unofficial (black) documentation;
- conduct the search and seizure of objects-documentation (off-the-record documentation) at the very origins of their making (business units) and official book-keeping at the same time; and
- apply other investigative measures and actions, which were already a subject of discussions in this document and that

are common for criminal prosecution of these sanctions.

Undertaking of these measures will enable the obtainment of unofficial documentation, and on the basis of comparison with "legal documentation", by way of the appropriate court witness expertise it will be possible to identify the real scope of business operations, and the balance of revenues and expenditures, so that on the basis of comparison with what the suspect is featuring as valid, one could establish the existence of the criminal offence of tax evasion. Here we have to say that it is often the case that after the prior investigative actions are undertaken as specified above, it will not be sufficient to conduct the financial-economic expert evaluation only, but prior to that some other mandatory expertise will have to be performed (in manufacture companies, it would be mechanical-engineering technology expertise, forestry and wood processing expertise, etc., whereas in trade companies it would be graphology expertise, etc.) so that the scope of production and turnover could be established on the basis of parameters such as input of raw materials, level of engagement of employees and raw materials etc, or in order to identify the forged business documentation, so as to find out thus what the real scope of production and turnover is and create the preconditions for financial-economic expertise.

In case that there are grounds for suspicion that the criminal offences of tax evasion and money laundering have been committed in this way, it would be necessary to do the following without delay:

- take some special investigative actions as may be required (*optional*);
- locate the business documentation of both companies (if the documentation of the so-called phantom company cannot be obtained, locate the documentiaon of the company with regard to which there is suspicion of tax evasion);
- perform search operations and seize temporarily the business documentation of the company with regard to which there is suspicion of tax evasion (in particular, special attention to be paid to the so-called accessory documentation, which was already discussed before, notebooks, business diaries, computer database, etc.);
- obtain the relevant bank data on financial transactions of the suspects, and make their analysis
- identify person(s) who operate in the company in the name or for account of the so-called phantom company, locate the person(s), and as it may be required undertake the measures for securing the suspects in the criminal proceedings;
- perform identification of persons who are potential intermediaries between the company perpetrating the tax evasion and the phantom company;
- establish the formal accuracy or correctness of business documentation, where special attention has to be focused on the following;
- means of transport indicated in the dispatch orders as a means by which goods are transported between the tax evasion suspect company and the so-called phantom company, and the names of drivers;
- if necessary perform full graphology expertise of the business documentation;
- perform financial-economical expertise (here it is especially important to mention that graphology expertise and potential search of computers should precede the financial expertise so that the conditions could be created for the finance expert witness to perform the expertise of the genuine turnover and output achieved in reality; and
- carry out other investigative actions and measures, with a special note that the investigative actions that are to be taken must go in the direction of proving a bogus business event and that the genuine trade or turnover of goods between the tax evasion suspect company and the phantom company has actually never happened.

In the second form of perpetration of the criminal offence of tax evasion and money laundering, it has to be noted that this form of perpetration has mandatory occurrence along with the mandatory presence of forged documentation, by reason of which in these forms of perpetration of the criminal offence in general we require graphology expertise in addition to financial-economic expertise.

It has to noted that the disclosure and criminal prosecution of this criminal offences is made difficult because they generally involve an organized group of people who on a daily basis and under the false identification data open the new so-called phantom companies through which they perform the money laundering or aiding and abetting of the tax evasion and so in the form of a craft. This is why it is difficult to track these persons. For that reason the key role in criminal prosecution of this particular kind of this criminal offence is played by the Law on Prevention of Money Laundering and institutions authorized hereunder, because only a timely detecting and spotting of illegal activities and communicating information about the same may lead to shedding clear light on these criminal offence, and to eventual criminal prosecution of their perpetrators.

At this point, due to the similarity of regulations and possible comparison, we still have to mention some examples of money laundering which were processed in the Republic of Slovenia and which were not completed with reaching the convicting verdict. The reasons are different, but there is probability that, due to the similarity of criminal codes of Slovenia and BIH, such

phenomena may emerge in the case-law of Bosnia and Herzegovina.

The first series of examples with which we wish to shed some light on the problem (non)sentencing of the perpetrators of the preceding criminal offence and money laundering, which was in concurrence with this offence, emerged in Slovenia after the amendments were made in the Criminal Code, in which an explicit provision similar to the one referred to in paragraph 2 of Article 280 of RSCC was introduced in 1999, five years after the first incrimination of money laundering in the Criminal Act of Slovenia. Until then, the provisions of Slovenian Criminal Code were in that regard conceptually closer to the provisions of other laws in Bosnia and Herzegovina. Like them, Slovenian code did not either explicitly rule out the possibility of sentencing the perpetrator of the preceding criminal offence for money laundering, so on multiple occasions criminal prosecution went in both directions. However, in none of these examples, for the various (other) reasons, before the amendments were made in the code in 1999, had a convicting verdict ever been reached.

In what respects these two systems are now similar? After the amendments were made, for those perpetrators of criminal offence who perpetrated the criminal offence between 1995 and 1999 two codes have become applicable; the first one by reason of the general rule on scope of application of the criminal code which was applicable at the moment of perpetration of the criminal offence, whereas the second one because the amendments were followed by an interpretation that only from that point on (from the point when amendments were made) it is further possible to have the ”dual” sentencing of perpetrators and that the amendments to the code were made for the simple reason that under the then applicable code such thing was not possible (this is a situation which could also be repeated in Bosnia and Herzegovina, if similar amendments are to be made like those in Slovenia, or if comparisons are now made between RSCC and the remaining three codes).

In Slovenia the proceedings were conducted on the basis of bills of indictment filed by the State Prosecutor’s Office before various courts of law that were all until 2004 in the lack of proper orientation, and as a result were issuing diametrically opposed decisions in terms of the possibility of and admissibility of ”dual” punishment; namely, all decisions were attacked through appeals and extraordinary legal remedies from one or the other side, all until the Verdict of the Supreme Court of the Republic of Slovenia I Ips 297/2003 of 28 March 2004, that was later confirmed also by the Verdict I Ips 83/2004. By way of these examples the Court has quite clearly held that the ”*provisions of Article 252 of Slovenian Criminal Code from 1994 do not prescribe the possibility of ‘dual’ punishment, so the defendant, who is at the same time the perpetrator of the predicate offence, may not be held liable also for the criminal offence of money laundering”.* The Court was of conviction that an opposing view would mean violation of the rule of law principle and the level of determination of criminal offences in the Code. The so-called ”dual” punishment, the Court holds, is fully determined only with the amendments made to the criminal code *“as published in ‘the Official Gazette of the Slovenian Republic’, No. 63/99 of 8 March 1999 and entered into force 15 days following the day of publication in the Official Gazette.”*

After this decision had been made, all first instance courts, and most prosecutors as well, started to comply with it and reach acquitting verdicts or reject charges and withdraw indictments. Not all have agreed with the said decisions, which in Slovenia yet does not have the meaning of a binding precedent. As an example we quote one of appeals filed against an acquitting verdict by the State Prosecutor:

“*After many years of perpetrating the criminal offences of prohibited crossing of the state border, the defendant J.L. cannot only be accused just for that act of guaranteeing for himself enjoyment of illegally acquired property gain. By his actions after obtaining that property gain, the defendant has beyond doubt exceeded this intent. If his intent were to reside only on that point, the money obtained could simply be spent on purchase of real property, other objects and for improvement of living standards. Insofar as the defendant has procured for himself several expensive cars or spent the obtained money on daily sustenance, the State Prosecutor’s Office is not charging him with the criminal offence of money laundering. The Prosecutor’s Office is bringing charges against defendant J.L. for money laundering to the extent that he attempted on multiple occasions to conceal the genuine origin or source of funds by abusing the banking and financial system of the Republike of Slovenia. In this part, recognizing also the fact that the criminal offence of money laundering falls under completely different chapter of the criminal code (criminal offences against economy) then the criminal offence of concealing and that under criminal legislation the protected object is entirely different – banking and financial system of the Republic of Slovenia), there is a realistic concurrence of the preceding criminal offence and the criminal offence of money laundering, regardless of the fact that both criminal offences were perpetrated by the same person. Although the Criminal Act from 1994 did not explicitly provide that the perpetrator of the preceding criminal offence shall be liable also for the criminal offence of money laundering, equally, it has not precluded such possibilities either. The truth is that the State Assembly in the 1999 Amendments to Criminal Code provided explicitly that for the criminal offence of money laundering the perpetrator of the preceding offence shall also be liable, but in the opinion of the Prosecutor’s Office it does not necessarily have to mean that, having in mind the totality of the matter hereinbefore, this liability*

did not exist even before the Amendments"

The other problem, which, unlike the first, does not depend on the like or different response to the legal issue, is how to prove (sometime even the very existence of) the predicate (preceding) criminal offences. Namely, it usually happens in practice that enough evidence is gathered about dubious transactions which suggest the concealing of genuine source or origin of money or property, but there is the lack of evidence concerning the predicate (preceding) criminal offence, which generates the money of property gain in question. This problem escalates in the examples when the preceding criminal offence is committed abroad, in other countries, or when a longer period of time has elapsed (very often several years) from the moment of the predicate offence until the time when suspicious transactions are discovered.

The case-law in Slovenia, and even in some other countries that have more experience and longer tradition of processing the criminal offence of money laundering, clearly points at the fact that the investigation of this criminal offence requires a synchronised and parallel approach to evidentiary procedure with the predicate offence and the criminal offence of money laundering, where the money is acquired by this criminal offence. Neither this is an optimal approach, but the reality is such that in criminal offences of organized economic crime and corruption, their perpetration generally becomes exposed or subject to suspicion only when suspicious transactions start to be performed, which transactions are reported by the banks and other financial institutions to a specialized institution in charge of preventing the money laundering. The situation is thus different by comparison with the normal procedure of disclosure and proving of criminal offences – we do not start at the outset at the origin of funds or the predicate criminal offence, but at the end of line with disclosing and proving accessory acts of disguising the source of money, which, in order to have the meaning in the criminal law terms (in order to incriminate them) fully depend on the quality of evidence for the predicate offence.

Due to the clandestine nature and complexity of the said criminal offences, this situation is more or less a reality and can be altered only if the capacities are improved of those institutions that are responsible for the unveiling of these criminal offences. However, what can be done immediately is to trigger an obligation upon the institutions that note such transactions or other appropriation of money or property, which have the character of money laundering (referring of course to the degree of suspicion that this criminal offence has been committed), to inform in an instant the prosecutor who should commence the simultaneous investigation towards revealing the original criminal offence. If no suspicion may be established within the reasonable timeframe in respect of the predicate offence, or if its main characteristics can hardly be defined either, this cannot usually be done even later on. Thus it is seen in practice that these examples of the financial investigation, exclusively used to prove concealing of the sources of funds, make no sense, unless at least in parallel enough evidence can be obtained in view of the predicate criminal offence.

9 THE LAW ON PREVENTION OF MONEY LAUNDERING

Until mid 2004, there were two laws in force in Bosnia and Herzegovina regulating the prevention of money laundering, in the Federation BiH and Republika Srpska. Since the new Law on Prevention of Money Laundering at the state level came into force, this particular area has been regulated uniformly throughout the State.

This Law regulates the measures and responsibilities for detecting, preventing and investigating money laundering and the funding of terrorist activities. The Law also contains the definitions of individual terms from this field, of which the most important is the one on the money laundering. So, for the purpose of this Law the money laundering has the following meaning (Article 2 paragraph 1 of the Law):

a) The conversion or transfer of property, when such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such activity to evade the legal consequences of his or her action;
b) The concealment or disguise of the true nature, source location, disposition, movement, rights with respect to, or ownership of property, when such property is derived from criminal activity or from an act of participation in such activity;
c) The acquisition, possession or use of property derived from criminal activity or from an act of participation in such activity;
d) Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned above.

As one may notice, this definition is not congruent to the criminal law definition of the criminal offence of money laundering, which creates a certain dosage of misunderstanding. Namely, first of all it would be necessary to distinguish what kind of definitions we are dealing with here. In the criminal procedure codes there is prescription of actions and elements which make the criminal offence of money laundering (enforcement measures, intent, negligence, volition, criminal law sanctions, etc.), whereas in the Law on Prevention of Money Laundering we are offered a generic definition of money laundering, in the sense of description of basic forms of behaviour that constitute the money laundering as a phenomenon: conversion or transfer of property – concealment or disguise – acquisition, possession or use of property derived from criminal activity – participation in, association to commit the listed actions. Such defining of the money laundering as a phenomenon should always be bound with criminal law precepts of the money laundering as a criminal offence. The Law on Prevention of Money Laundering, the more so this is a *lex specialis* legislation, simply supplements the legal qualification and contributes to a more appropriate and comprehensive interpretation and understanding of the criminal offence of money laundering in the criminal proceedings. The legal understanding of the phenomenon of money laundering is of particular importance for work of those in charge of preventing, detecting and criminal prosecution of criminal offences of money laundering – authorized officials and prosecutors, since only by proper understanding of money laundering we shall be able to plan investigation, or identification of the required evidence and the method and sequence of their gathering.

The provisions of this Law also establish a new body in charge of preventing, investigating and detecting the operations of money laundering and funding of terrorist activities. This is the Financial Intelligence Department (FID) which operates within the State Investigation and Protection Agency of Bosnia and Herzegovina (SIPA) and in accordance with the provisions of the Law on the latter Agency under supervision of the Agency's director. This organizational solution represents the most frequent cause of dilemmas about the role and responsibilities of FID. Unlike the solution adopted in the legislation of Bosnia and Herzegovina (a financial intelligence department within a police agency) certain number of countries has adopted the FID model of an administrative government body without political authority and outside the police structure.

The FID staff as employees of SIPA and police officials according to the Law on Police Officials of Bosnia and Herzegovina, obviously have the powers to act in the criminal proceedings and use all legal authorizations, before the investigation is opened and during the investigation itself.

However, given the nature of core activities by reason of which FID is established, and within tasks and duties prescribed under the Law on Prevention of Money Laundering, it would be more proper if the authorized officials – FID employees, were not used for conduct of comprehensive investigations, nor in order to carry out the evidentiary procedures pursuant to the provisions of the criminal procedure codes. This concerns in particular the application of evidentiary procedures such search of apartment and other premises, search of persons or even application of special investigative actions. Those in charge of said activities should be criminal police investigators responsible for the conduct of criminal (crime) investigations, and by acting according to knowledge, findings and information they receive from FID through all of its primary activities (Article 16 of the Law: The FID

shall receive, collect, record, analyse and when prescribed by this Law or other Laws forward to a prosecutor and upon authorization investigate and forward to another authorized official information, data and documentation received in accordance with the provisions of this Law).

The provision according to which the FID forwards the data to the prosecutor „when this is regulated by this or other another law“ must be seen in the light of the provisions referred to in Article 22 of the Law on Prevention of Money Laundering, or the provisions of Article 219, paragraph 5 of the Criminal Procedure Code of BiH. In both cases it is about the obligation of submitting an official report about the perpetrated criminal offence, based on the information and evidence gathered about the existence of grounds to suspect that a criminal offence has been perpetrated. In other words, when the available information collected by FID confirm the grounds for suspicion which do not require the taking of additional investigative actions in terms of their substantiation, the FID shall file an official report to the prosecutor as is described above. In cases where it is required to carry out the investigative actions and verifications aimed at obtaining additional information and evidence, the FID should forward already available information to the criminal investigators for further procedure. This in no case means that the involvement of the FID is drawn to an end. The FID remains involved also in further activities with an only difference that the FID employees do not undertake the direct actions in the field aimed at collecting any additional information and evidence.

10 CRIMINAL PROSECUTION OF ABUSE OF OFFICE AND OF OFFICIAL AUTHORITY

The criminal offence of abuse of office or official authority constitutes a criminal offence with the largest number of manifested forms in Bosnia and Herzegovina. Given the great variability of its manifested forms, it is almost impossible to generalise this criminal offence by method of its perpetrator, therefore in this Manual we are going to point at one of its most common modalities or patterns according to which this criminal offence is perpetrated in Bosnia and Herzegovina.

10.1 Specific Features of Perpetration

The first form of perpetration of this criminal offence is the taking of direct advantage or exceeding of one's office or official authority, by reaching various decisions thereby acquiring a benefit to oneself or to another person. Such forms of perpetration of this criminal offence dose not create in principle any great difficulties about criminal prosecution of such persons, since both the action and consequence of one's deed are clearly evident, and there is a problem of relevance for "evidence of intent" of the perpetrator only in RS, where the prosecutors encounter problems on a regular basis, due to a restrictive understanding on he part of the courts concerning this intent.

However, the intent of the perpetrator is by its nature a psychological attitude towards the deed, and there is no exact mechanisms by which this psychological attitude of the perpetrator could be proved, except the objective circumstances of perpetrator of a criminal offence.

Accordingly, and having in mind that "intent" represents a direct premeditation indicating that the perpetrator was aware that as a result of his act or omission he will obtain to himself or another some property gain or non-property gain, and volition to acquire such gain. Accordingly, in these cases it is not necessary to contemplate the motifs of the perpetrator of this criminal offence, but rather find evidence proving awareness and volition of the perpetrator of this criminal offence.

The second form of perpetration of this criminal offence implies the existence of a private company owned by or in some other way related or close to the suspect under suspicion of abusing office or official authority, while this company shows up as a legal person at tenders or otherwise, and in seemingly standard procedures of taking advantage of office or official authority of the suspect receives various privileges on a regular basis. In these cases, the person who in general represents and acts as an agent of such private company is closely related to the suspect and shares with him the gain obtained as a result of these privileges.

10.2 Criminal Prosecution

When there are grounds for suspicion that that this criminal offence is perpetrated it is necessary to undertake the following actions:

- Identify the authority of the suspect (obtain the relevant laws and bylaws);
- Establish the regularity of formal procedures that were followed (and as may be required hire the competent inspection authorities);
- Identify the informal unofficial connections of the suspect with other persons involved in the event resulting in the criminal offence;
- Establish the financial and property status of the suspect before and after the event that is subject to investigation (whether it there has been an abrupt accumulation of wealth and riches);
- Identify the objects and documentation that may be used as evidence;
- Perform temporary seizure of objects – documentation;
- Take separate investigative actions as may be required, except in RS (optional); and
- Conduct other investigative actions as may be required.

11 INTERNATIONAL CASE LAW WITH RELEVANCE TO THE APPLICATION OF CRIMINAL LEGISLATION IN BIH

11.1 Case 1: State Secretary of the Ministry of Economy

Decision of the Higher Court in Ljubljana No. I.Kp 544/2004 of 2 November 2004.

In the proceedings finalized with a final and binding verdict in the Republic of Slovenia for a criminal offence of receiving bribe, which is by its legal characteristics identical to incriminations of in the laws of Bosnia and Herzegovina, a small group of people was convicted, among whom there was also the former State Secretary (deputy minister) for economy department. For the purpose of this Manual we are going to analyze just one part of the verdict of relevance for him; where it worth mentioning that there were several counts of the indictment specified for other criminal offence as well, of which some were convicting while some acquitting. We have chosen the part that is most interesting and important from the point of view of criminal prosecution of corruption, since in this segment the Slovenian courts have attempted to respond to some significant legal and factual issues.

The defendant B.Š. was found guilty for a criminal offence of receiving bribe under Article 267 paragraph 2 of the Criminal Code of the Republic of Slovenia, which by its legal characteristic is identical to the provisions of privileged forms of receiving gifts or bribe referred to in Article 217 of BIHCC, Article 351 of RSCC, Article 380 of FBIHCC and 374 BDCC (paragraph 2 in all CCs). He was sentenced to imprisonment for a term of two years, an accessory fine in the amount of five million Slovenian Tollars and the security measure of temporary ban on carrying out his activity, as a result of perpetration of a criminal offence, for a term of two years. We shall present the relevant facts through an analysis of individual issues.

All problems to which the defence counsels of the defendant referred in the appeal against the first instance verdict were of concern to the issue of whether the authorized official who accepts a promise of a gift or bribe, as was the case in this example, ought to request this promise so that only in this way he would completely fulfil this way of perpetration of that criminal offence. The defence has therefore claimed that only the acceptance of a promise of a gift by an authorized official, mo matter whether this was actually requested, does not fulfil all legal characteristics of this criminal offence.

The Court did not uphold the point made by the defence, and instead it held that in paragraph 2 of Article 267 of Slovenian Criminal Code there are alternative definitions of multiple way of perpetration and that the standpoint of the defence was wrong, since for the perpetration of this criminal offence it is sufficient that the authorized officials accepts the promise of a gift, without even requesting such promise before that. In the particular case, in terms of the factual status which constituted the bottom premise of the situation, meaning that "*the defendant B.Š. on the date not precisely defined in the month of March or April 2000 through the co-defendant S.D. informed the injured D.S. of the possibility of receiving some non-refundable grants for his private company, on condition that D.S. would be after receiving these funds be willing to give one part of them to B.Š. in return; when D.S. accepted it through the co-defendant S.D., the defendant B.Š. in his capacity as authorized official interceded that these funds were really granted to the company D.S.*"

The Court does not allow for any dilemma that in this example the perpetration of the criminal offence took place entirely within one of its characteristic elements (beforehand acceptance of a promise of a gift in order to perform an official act), meaning that all legal descriptions of this criminal offence were met.

The other important issue that required final determination in this case was whether the defendant B.Š. enjoyed the status as official authority when he performed this act. In that relation it was established that in the critical period the defendant held the position as state secretary in the domain of industry within the Ministry of Economy and that this area of responsibility included also appropriation and disposal of the budget funds intended for subsidising of commercial organizations or enterprises. More particularly, B.Š. was the president of a commission that conducted the substantive and formal selection of the candidates for subsidies, prepared proposals and forwarded them to the Minister for his signature.

In its appeal the defence indicated among other things that the commission as an entirety was "official authority", and that it was taking its decisions in its capacity as collegial body, rather than its individual member. The Court overturned this argument. The first argument supporting its viewpoint was derived from an analysis of the term "official authority" from the Criminal Code and

determined that the official authority is not just a person authorized to take final decisions, but also a person authorized to perform individual official acts. The second, in our view the most interesting reason for overturning the appeal in this segment was referring to the structure of the commission itself or the role that B.Š. played in the commission's decision-making. It seems that in this case the determination by the Court in addition to its first reasoning, namely, that the defendant B.Š. had an overwhelming and decisive influence on the commission itself as its president concerning the decision-making process and that this is proved by his capacity as „official authority", was unnecessary and even contradictory to the first argument as to why in this case B.Š. had the capacity of an official authority.

In relation to this matter, the matter at stake was expanded by the defence counsel of one of the other defendants who were convicted for the various forms of complicity to the predicate offence of accepting bribe. Made problematic is namely the term "act" or "authorities" of the defendant B.Š. which in the opinion of the defence may not have the character of "official act". According to this standpoint, the official act was performed by the Minister, who issued or formally confirmed (and signed) the final decision about the subsidy recipient. B.Š. was only the president of an *ad hoc* commission, at whose proposal for granting of funds the Minister was by no means obligated to respond; nevertheless he was taking independent and sovereign decisions concerning the grant of subsidies. The defence has made an additional testimony by stating that the Criminal Code fails to define in its relevant part the meaning of the term „official act ", so the term should be judged based on and within the framework of the Law regulating the administrative procedure. The Court however disagreed with such arguments. It confirmed the views of the defence that the criminal code had failed to define the term of official act, but at the same time found that this term was not defined under the Administrative Procedure Law; yet, from both regulations in the parts defining the terms official authority or its characteristics, the meaning of the term official act flows accordingly. Namely the Criminal Code in its Article 126 determines the official authority as a person performing officials' acts and holding official office within a state authority, as well as other persons authorized by laws and other regulations to perform official acts. Out of this argumentation, which in our view was tautology and fails to respond to the allegations made by the defence, the Court has reached the conclusion that in the particular example the defendant B.Š. as an official authority was also performing official acts.

As for the allegations of the defence that the Commission presided over by the defendant B.Š. was only an *ad hoc* institution, whose positions and proposals were not binding for the Minister either, the court has held that the Commission was not only an advisory body without much relevance for the final decision-making concerning the grant of subsidies, but the Minister would generally accept any proposal of the Commission in case he did not have any technical or professional objections regarding its proposals; however, in this last example he did not alter the decisions himself, but the remanded this case to the Commission for reconsideration or new opinion. In the above procedures of the Commission the defendant B.Š. as its president had a decisive role. Therefore, it is beyond any doubt the truth, sums up the Court that, if all above matters are considered: the defendant was in fact performing an official act in his capacity as official authority.

11.2 Case 2: Urban Planner Official at the Department for Urban Planning of Local Community

Decision of the District Court in Ljubljana No. Ks 87/2002 of 4 March 2002

This example, that ended up with a final and binding ruling rejecting the motion of the State Prosecutor to mount an investigation (in Slovenia ruling on conduct of an investigation unlike in Bosnia and Herzegovina is still issued by an investigative judge) by the Higher Court in Ljubljana, we start considering it by referring to the relevant facts.

The defendant S.D. with the professional background as an architect was a public servant in the Department of Urban and Environmental Planning in the Local Community of Ljubljana, where as part of his terms of reference he prepared information and consents (permits) for construction of new buildings in the area of Ljubljana City. The criminal prosecution against him was mounted on the grounds of suspicion that by aiding the co-defendant J.Z. he committed the criminal offence of accepting gifts (bribe) provided under Article 267, paragraph 1 of the Criminal Code of the Republic of Slovenia (an offence, which is by all of its legal characteristics identical to the provisions of Article 217 of BIHCC, Article 351 of RSCC, Article 380 of FBIHCC and Article 374 of BDCC (paragraph 1 in all codes).

The person that reported the criminal offence to the police stated in the criminal report in February 2000 to have requested in writing from the Department for Urban and Environmental Planning of Ljubljana Local Community the issue of site information based on the site documentation. This person intended to construct at the specific site a high-raised ground-floor business

commercial building. The response of the defendant S.D., provided as the site information folio to the said person (let us call that person Person A), was that this kind of construction at this site is not possible. Within the same period, at a given point of time, independently and with no connection with the first act (which was also later the case) the defendant S.D. issued the site information to the co-defendant J.Z. where he specified that construction of a six-storey building is possible at the given site, which was not in accordance with the plan-design of the possible constructions in this environment (this act was prosecuted as a separate criminal offence of abuse of official authority).

The co-defendant J.Z. therefore possessed the site information on the basis of which a construction permit could be issued for construction of a six-storey building, whereas Person A received a different information indicating that it was not possible to increase substantially the factor of usable space in comparison with the then existing status (a ground-floor building).

The co-defendant J.Z., who in the meanwhile learned that Person A was willing to perform construction at the site in question, in regard of which the co-defendant already had the site information for a six-storey building, contacted Person A personally and offered him support in terms of obtaining him the adequate site information, in return of which she requested from Person A 500,000 DEM (German Marks). In that instant Person A contacted the police.

Following that contact, special investigative actions were mounted immediately: surveillance and technical recording of phones, undercover investigators and in the end a simulated giving of bribe. The undercover investigator introduced himself to the co-defendant J.Z. as a potential investor interested in constructing a multi-storey building at the concerned site. The co-defendant J.Z. offered to intercede in obtaining the required documents and asked in return for this service again the same amount of 500,000 DEM, which would in her words be enough for obtaining all required documentation, out of which sum, again according to her words, for his role in the whole procedure the defendant S.D. requested 100,000 DEM; namely, his role in this was to confirm or certify to the undercover investigator the availability and affordability of the site information, which was in co-defendant's (J.Z.) possession, and based on which construction of a six-storey building would eventually be possible. The undercover investigator accepted the offer and at the stage to follow he brought and delivered to the co-defendant J.Z. the amount of 500,000 DEM . Of that amount, they together split 100,000 DEM, after which the co-defendant J.Z. took the undercover investigator to the office of the defendant S.D. and introduced him as a potential investor. The defendant S.D. certified at that point that such construction should be possible at the given site, and thereafter the co-defendant J.Z. turned over to him in the presence of the undercover investigator the envelope containing the amount of 100,000 DEM, which the defendant S.D. did not open, but put it in the drawer of his desk. After that both the defendant and co-defendant were apprehended.

What could eventually go wrong, so that the proceedings in this example, which was *prima facie* crystal-pure, did not end up with a convicting verdict? After the investigative judge disagreed with the motion of the State Prosecutor to mount an investigation, the case was decided by a panel of the District Court, and after that following an appeal lodged by the prosecutor, the final and binding decision was reached by the Higher Court. We are going to refer to some of the reasons, which were indicated by the appeal panel as those guiding the court to reject this motion.

Based on the motion to mount an investigation it is not possible, holds the judicial panel, to establish which official act was performed by the defendant S.D. and why he would be barred from performing them. Formally, the document in question (site information) was issued by the Department for Urban and Environmental Planning of Ljubljana Local Community, and was signed by the Head of the Department and the defendant S.D. The document was issued prior to the incriminated action to the co-defendant J.Z., and the very verbal explanation of the meaning of this document (oral confirmation or certification of affordability of the site documentation) does not necessarily mean the performance of any official act. It would be interesting to compare this position with the opposite position of the same court in the example of the state secretary B.Š., who was found in fact as someone who actually performed an official act, although he was just the president of a collegial body called Commission and even though he did not made any final decisions himself and they were the responsibility of the Minister. In the example of the urban planning official S.D. there is no single dilemma that at the time of the incriminated action he enjoyed the status of official authority (public official in the local community department), so the court did not even have any objections concerning the determination of his status.

There is no even problem about decision-making or performance of acts within a collegial body, so there remains only the standpoint of the court specifying that at the moment of accepting the money, which followed after an oral statement given to the undercover investigator concerning the possibility of construction based on the proposed site information, having made that statement the defendant S.D. was not considered as someone who performed an official act and due to that this official act lacks one of the constituting legal definitions or characteristics.

The court went on by presenting an argument diametrically opposite to the one in the example above. It invokes again the Law on Administrative Procedure and says, that the term *confirmation/certification* or the verb “confirm/certify“ must take into account this Law which defines the confirmation/certification as a written document issued by administrative authorities at the request of clients, in the areas where official records are kept. If we are to claim that the defendant S.D. as an official authority has confirmed/certified something, the issue of such written confirmation/certification may be considered as an official act.

11.3 Case 3: Tax Inspector (I)

Decision of the District Court in Maribor No. Ks 584/2005 of 23 August 2005.

Even in this example the prosecutor failed with his motion for mounting an investigation against an inspector of the Tax Administration Office of Maribor and a larger number of other perpetrators of several different criminal offences in the domain of economic crime and corruption. For the purpose of this Manual we are going to point at several segments of this interesting example, in referring to official acts of a tax inspector and claims made by the prosecutor's office that as part of this acts he committed the criminal offence of accepting bribe; in the opinion of the Court, the office of the prosecutor failed to prove the existence of grounds for suspicion in respect of all elements of this criminal offence, and as a result the motion to mount an investigation was overturned.

The first segment of this case concerns an act of inspection practice by the inspector G.L. in the company K.d.o.o. from Maribor. The general manager of that company, S.K. reported to the police that the inspector G.L. attempted to commit an act of extortion during the process by requesting from him bribe, which the injured party was supposed to pay in order to reduce the outstanding tax liability established under an official statement (records) made by the inspector. In addition to his continued eliciting the inspector constantly raised or gradually increased the projected final amount of the tax liability, which originally was 150 million SIT, and then 500 million SIT, so in the end, after the injured party refused to pay bribe, the inspector established in his official statement the outstanding tax liability of ore than one billion SIT (as a result of which the company became illiquid at the same time and got in the position where bankruptcy proceedings were introduced against it (by way of which, in the opinion of the prosecutor's office, some new criminal offences were committed in the area of economic crime).

Based on the crime report filed by the general manager S.K., together with the police the Prosecutor's Office started to collect evidence in the pre-trial proceedings. Among other things, based on information gathered through the use of special investigative actions, a connection could be identified (in terms of phone communications about situation concerning the tax liability) between the inspector and other suspects, who showed up later in the Company K.d.o.o. just after the company got into condition of illiquidity. When interrogated on the issue of this criminal offence, the inspector denied any soliciting of bribe or extortion from the general manager by way of requesting bribe and claimed that he set out the amount of tax liability in accordance with the rules of profession and within his official authority.

The Court did not issue an investigation order for this criminal offence. The main reason for rejection of the Prosecutor's motion was that in this example the preliminary question was not addressed about realistic (substantive) volume (amount) of the outstanding tax liability levied and charged on the company K.d.o.o. and therefore this fact is of key relevance for determination of grounds for suspicion about perpetration of the criminal offence in question.

The Court thus asked itself whether a billion SIT amount of tax liability is a realistic assessment or not. The Tax Administration Office accepted the assessment of the inspector about one billion of tollars of outstanding tax liability and issued an order to the Company requiring the payment of this amount. The company brought a court action against this decision, but this action was not yet decided by the second instance authority. The Court holds that they should either wait with the mounting of an investigation until the final decision is taken by the competent institution about the amount of outstanding tax liability or obtain evidence about this fact independently with support of experts and before filing the motion to mount this investigation.

We believe that this standpoint of the Court is unjustified. In addition to the described state of the facts, there is in our view a sufficient degree of grounds for suspicion that the criminal offence of soliciting bribe was perpetrated on the part of the inspector, and that an order to mount the investigation should be issued. The injured party was cautioned that about the fact that the false reporting of a crime is itself a criminal offence. It is proved nevertheless that even the existence of extensive communication between the inspector and the persons that were claimed to have committed multiple criminal offences in the domain of economic crime when the Company K.d.o.o. got into position of complete lack of liquidity, which was the consequence of the newly established outstanding tax liability. The discretionary rights enabled the tax inspector to manipulate, at his own discretion, and adjust the depth and detailed treatment of his inspection reviews and engineer the findings related to those reviews. The realistic volume of the outstanding tax liability is not even a necessarily existing, required nor constituent element of this criminal offence, while the accurate assessment could be accomplished through investigation by way of financial court witness expertise.

11.4 Case 4: Tax Inspector (II)

Against the same inspector mentioned above in the Manual, an investigative judge of the District Court in Maribor issued an investigation warrant on reasonable ground for suspicion (probable cause) that he perpetrated two criminal offence of accepting bribe in its privileged form, which under the definition of the Law corresponds to the criminal offence referred to in Article 217, paragraph 2 of BIHCC, meaning that he accepted a gift or benefit, in order to perform within the scope of his official powers an act, which otherwise ought to be performed by him.

Both examples concerned the tax inspections – inspection practices within certain companies in which no regularity or shortcoming was noted, which was determined in the inspector's official record in relation to which at least according to the claims of the Prosecutor's Office, the inspector accepted a gift or benefit. Following an appeal filed by the suspect's defence counsel, the judicial panel reversed the decision of the investigative judge and overturned the motion for investigation in both of the cases above. The same decision was issued for the adversary party – for both donors of gifts or benefits, the general managers of these private companies.

During the pre-trial proceedings against the same inspector and other persons, the Prosecutor's Office got across these two criminal offences incidentally through special investigative actions of covert following, surveillance and technical recording of telecommunications, which were carried out in relation to other criminal offence. In the stage that followed certain information was obtained from the relevant bank account and financial transactions, documentation of the Tax Administration Office in relation to these inspections and hearings were also conducted of the suspects, the inspector and both general managers.

The fact hat both tax inspection supervisions were conducted and that the inspector did not find within them any oversights and deficiencies, which he also officially noted and concluded, was not challenged. The Prosecutor's Office could not prove at this stage that the gifts or benefits received could influence in any respect the findings of the inspector, so the criminal offence was qualified not under paragraph 1 but paragraph 2 of the relevant provision (meaning that because of the gift or benefit received, the inspector did not perform an official act of inspection supervision in the scope and way he ought to perform it). Through the investigation by way of financial experts the Prosecutor's Office intended to establish whether this case involved also this form of the said criminal offence and as necessary make a subsequent prequalification of the initial legal determination. However, this has proved later to be a tactical mistake of the Prosecutor's Office, which, in the opinion of the Court, together with the police, failed to collect sufficient evidence required to mount the court investigation either. It seems, that in the event the expertise is done before the motion for investigation is filed, in which case the expertise could also indicate all possible oversights in the inspection findings, we could have success at least in regard to the serious form of this criminal offence, while the situation in relation to the less serious qualification used would in any case be identical.

In both examples the findings of surveillance and technical recordings of telecommunications – telephone surveillance of the suspect inspector suggested his close, friendly relations with the general managers, although there was no direct evidence connected with bribing the inspector. In the first example, there was evidence of two financial transactions in relatively small amounts (each about EUR 500) within one months following the completion of the tax inspection, from the transaction account of the company, under the order of the general manager; one carried out on the account of a fans' club whose member was the tax inspector, and the other on the account of a music band in which his son played. These transactions were denied neither by the suspect inspector (who said that the are perhaps a bit "unhygienic "), nor by the manger, although they both claimed that these have nothing to do with the official act and are exclusively of friendly character.

In an example of the same type to which criminal legislation of Bosnia and Herzegovina would apply, a most likely question to be asked would be whether it incriminated the acceptance of gift or bribe by the third party (meaning to those who perform the official act). This problem which due to its explicit definition that covers both possibilities does not exist in the Slovenian legislation, is mentioned in the second part of this manual where it points at a possible lack of conformance between the criminal codes of Bosnia and Herzegovina with the international documents.

On the other hand, we are almost entirely sure that the prosecutor in Bosnia and Herzegovina would, with these facts in mind, order an investigation (which was indeed initially done also by the investigative judge in Slovenia, but his decision was later changed). One of the authors who was at the same time a prosecutor in the case described above, found it very hard to accept the conclusion of the judicial panel that evidence collected do not suggest any cause-effect connection between the tax inspection and the said donations. The Court holds that no evidence was produced in the degree of reasonable grounds to believe that the donations were granted with a sole intent of bribing, which is a constituent element (characteristic) of this

criminal offence. Instead, (in our view) it accepts at their face value the arguments made by the suspects who said that the donations were a result of friendly motifs and are in no connection with the official acts of the inspector. The court asked itself a question which –in the example of processing a criminal offence of bribery of concern to the acts in regard of which the authorized official within the scope of his official powers performs an act which ought to be performed by him, or makes the omission of an act, which ought not to be performed by him – is of no relevance for the existence of the criminal offence, and this question is relating to motif as follows: „ Why would the general manager K.G. in the first place make a promise of a gift or benefit to the inspector and so only because the latter could do something which he in terms of his official duty had to do anyway, and why would he at all bribe him, knowing that the latter did not find any deficiencies through the tax inspection supervision". In our view the Court has in this case a very weak understanding of the quintessence of this criminal offence, where the arguments of the Court for rejecting the motion for investigation are irrelevant.

In the second example, in addition to the facts presented in this case (tax inspection, findings and official record in which no oversights were noted, very close relations between the owners – manager and inspector suggested in the recordings of phone conversations) a short time after the inspection was over a considerable amount of money was deposited by the inspector on his personal account he held with a commercial bank (amount roughly corresponding to his three monthly wages). The situation became more incriminating for the inspector, who among other things was also an expert court witness, when at the hearing about the source of this money he testified that the money originates from fees paid to him by the court for this expert witnessing. This could of course be checked and it turned that in the critical period of time the Court did not pay any fees for expert witnessing to the suspect inspector. One additional point to be made is that the function of the tax inspector is incompatible with the other remunerative activity and that in the critical period in addition to this money he was quite normally receiving his regular salary.

However, neither these shreds of evidence were sufficient for the Court to mount a judicial investigation (this kind of attitude would perhaps be understandable and acceptable by the author in case an acquitting verdict is pronounced due to the lack of evidence, but by means in the earliest stage of criminal proceedings). The Court even found unacceptable the testimonies given by the inspector in connection with the sources of funds, and concluded that the relevant facts in relation to this money remain completely vague and unsubstantiated, to use this conclusion for the following argumentation: "It was exactly for the reason of vagueness of the source of funding (money) that this could not possibly placed in relation with any payment by the Company I.A. d.o.o. and even less so with the tax inspection by conducted in this company inspector G.L. " Our opinion is that in this way, with such an attitude in the very early stage in the investigation, one can never count on success in prosecution of the criminal offences of corruption.

12 ORGANISED CRIME

Through its expansion in terms of spreading over in the global plane, using new sophisticated techniques, tactics, and methods, and making ever increasing and hardly measurable profits, organized crime imposes itself as a phenomenon that has to be treated at all levels, from local to worldwide, and this has to be done by experts from a wide range of expertise.

Organized crime can be defined in different ways but we still cannot talk about s single, universal definition, while the question remains whether such thing will virtually ever be done. However, organized crime has certain constant values, common denominators, features that are more or less present in almost all of definitions. These are, among others: size and numbers, existence of organizational and hierarchical structure, division of labour, real-time dimension, territory of spreading (usually ever more extensive), personal system of values (moral norms e.g.), tendency to establish legal forms of existence and activity, perpetration of criminal offence as a core activity, high revenues and action planning.

A common denominator of organized crime is the excessive demand present in professional criminals to organize themselves into various groups, gangs and similar forms of association, aimed at perpetrating criminal offences as their permanent method of acquiring gain and generating revenues. Such forms of association frequently entail certain qualities such as continuity of operation in their actions, personal norms, standards of behaviour and understanding of values, outstanding level of organization, dynamism and resourcefulness, ingenuity, operability, specialization in carrying out activities, ethic, cultural and historical relations, connections with individuals in power, legalization of illegally acquired gain through various forms of money laundering.

However, from the point of view of this Manual, it is very important to have a criminal law definite of organized crime, and render its legal interpenetration and find its application in criminal proceedings. The Criminal Code of Bosnia and Herzegovina (Article

250) provides for incrimination of the criminal offence of organized crime.

(1) Whoever perpetrates a criminal offence prescribed by the law of Bosnia and Herzegovina as a member of an organised criminal group, unless a heavier punishment is foreseen for a particular criminal offence, shall be punished by imprisonment for a term not less than three years.

(2) Whoever as a member of an organised criminal group perpetrates a criminal offence prescribed by the law of Bosnia and Herzegovina, for which a punishment of imprisonment of three years or a more severe punishment may be imposed, unless a heavier punishment is foreseen for a particular criminal offence, shall be punished by imprisonment for a term not less than five years.

(3) Whoever organises or directs at any level an organised criminal group which by joint action perpetrates or attempts to perpetrate criminal offence prescribed by the law of Bosnia and Herzegovina, shall be punished by imprisonment for a term not less than ten years or a long-term imprisonment.

(4) Whoever becomes a member of an organised criminal group which by joint action perpetrates or attempts to perpetrate criminal offence prescribed by the law of Bosnia and Herzegovina, unless a heavier punishment is foreseen for a particular criminal offence, shall be punished by imprisonment for a term not less than one year.

(5) A member of an organised criminal group referred to in paragraph 1 through 4 of this Article, who exposes the organised criminal group, may be released from punishment.

Equally, the Criminal Code there provides for a definition of o*rganised criminal group* (Article 1, sub-paragraph 17. BiHCC), by specifying that *an organized criminal group* is a structured group of at least three or more persons, existing for a period of time and acting in concert with the aim of perpetrating one or more criminal offences for which a punishment of imprisonment of three years or a more severe punishment may be imposed under the laws of Bosnia and Herzegovina.

It is evident from this definition that an organized criminal group is first of all determined by its organizational structure, size, lifetime, perpetration of criminal offences as its core activity. For criminal processing of organized crime, or for classification of certain criminal activities of a certain group of people under criminal law qualification of organized crime, it is not of critical importance to know the type of criminal offences perpetrated by an organisation, although there is constraint and so by gravity of the sentence imposed, the same way as it is irrelevant what kind of clear organizational hierarchical forms of structure of an organized criminal group exist. For proving a criminal offence or organized crime it is necessary to collect evidence into two directions: evidence for predicate criminal offence which someone perpetrated and evidence which may lead us to believe that this offence was perpetrated by someone involved in it as member of an organized criminal group. This second group of evidence include evidence implying a time continuity of existence of an organization, intent to perpetrate criminal offences as a form of professional engagement, and potentially, internal forms of organization of an organized criminal group. On the proper understanding of relations that prevail in an organization, as well as subject to evidence collected, it will depend which legal provision shall apply to an each individual member of such an organization. Therefore a member of an organization who committed a criminal offence within the operations of his organization shall be subject to application of provisions of paragraph 1 or 2 of this article, subject to the gravity of predicate offence. The person with the role of an organizer within the organization (creator) and/or managerial role shall be prosecuted under paragraph 3 of said article, no matter whether this person him/herself was directly involved in perpetration of a predicate offence. Equally, those persons who become members of an organized criminal group but do not take part in perpetration or in attempt of perpetration of a criminal offence, shall be criminally liable as provided under paragraph 4 of that article.

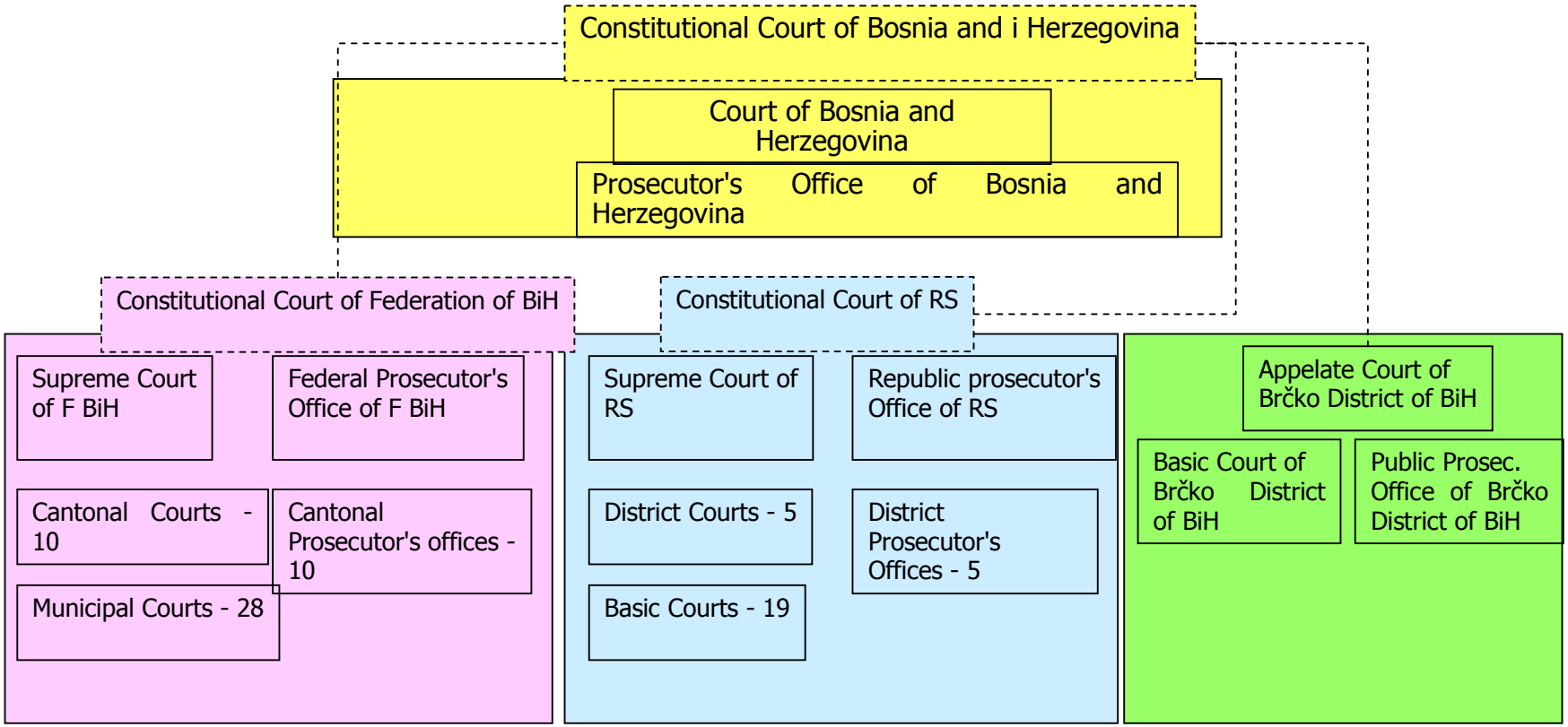
The provision of paragraph 5 of that article represents a novelty in criminal legislation of Bosnia and Herzegovina, since this provision introduces in some way into the criminal code an institute of «crown witness/repentant witness». While in some legislative systems this institute is treated as procedural institute, our legislative system recognizes it as part of material regulations, since in fact it does not concern the real institute of crown witness. So it is enabled that those members of an organized criminal group who reveal the organized criminal group have the opportunity to be released from serving their sentence. This therefore means that such person shall not be free from criminal liability for criminal offences he or she perpetrated, but they are provide with legal possibility to be released from serving the sentence. Since introduction of this legal possibility until now, there has been already one case of application of this institute noted in the case-law of Bosnia and Herzegovina, when the Court of Bosnia and Herzegovina acknowledged a plea bargain agreement between the Prosecutor's Office of Bosnia and Herzegovina and members of an organized criminal group who by cooperating with the Prosecutor's Office contributed to revealing of an entire organized criminal group he himself belonged to as member, against which the prosecutor

mounted and conducted an investigation. In the particular case the person concerned was found guilty but also was released from serving the sentence, or in its verdict the Court did not pronounced the criminal law sanction to the accused.

Finally it is important to note in the end that the very form and type of the criminal offences do not play any role in qualifying certain criminal activities as activities an organized criminal group, which is frequently encountered as a problem in everyday judicial and prosecutorial practice. Namely, there is the traditional and media-driven dominant identification of organized crime with the organizations of historical type known as «Italian mafia, *cosa nostra*» and in criminal offence of trade in drugs, arms trade, prostitution and the like, it constitutes the main reason of problems found with interpretation of organized crime in judicial and prosecutorial practice. According to applicable legal regulations in Bosnia and Herzegovina, it is important that these concern only the criminal offences punishable by the sentence of imprisonment for the term of three years or more and not exclusively in those cases where three years of imprisonment sentence is a legal minimum, but rather for all criminal offences for which the three-year imprisonment sentence is foreseen – for example, for the criminal offences punishable by the sentence of imprisonment for a term between one and five years, between one and ten years, of at least one year, minimum two, minimum three years, etc. Through the consistent application of the legislative provisions it is completely possible to have an organized criminal group that is established and operational only in the sense of perpetrating criminal offences, for example, money laundering, smuggling, tax evasions, customs fraud and the like.

13 MAPPING OF THE CRIMINAL LEGAL SYSTEM AND PROCEDURES

13.1 Criminal Legal System in BiH



13.2 Criminal Proceedings under the Criminal Legislation