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## **CONFERENCE OF THE PARTIES**

**Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS no°198)**

**Assessment Report of the  
Conference of the Parties to CETS no°198**

**BOSNIA AND HERZEGOVINA<sup>1</sup>**

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<sup>1</sup> Adopted at the 7<sup>th</sup> meeting of the Conference of the Parties to the CETS no°198 (Strasbourg, 5 – 6 November 2015)

*Bosnia and Herzegovina is a State Party to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS no°198) since 1 May 2008. This assessment of the implementation of the Convention in Bosnia and Herzegovina followed the decision of the 6<sup>th</sup> meeting of the Conference of the Parties (C198-COP) in 2014. This Assessment Report was adopted at its 7<sup>th</sup> meeting (Strasbourg, 5 – 6 November 2015).*

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## ACRONYMS

AML/CFT	Anti-money laundering/combating the financing of terrorism
BD	Brčko District
BiH	Bosnia and Herzegovina
CARA	Criminal Assets Recovery Act
CC	Criminal Code
CEPs	Compliance Enhancing Procedures
CETS	Council of Europe Treaty Series
CFT	Combating the financing of terrorism
CPC	Criminal Procedural Code
ESW	Egmont Secure Web
ETS	European Treaty Series [since 1.1.2004: CETS = Council of Europe Treaty Series]
EU	European Union
FATF	Financial Action Task Force
FBiH	Federation of Bosnia and Herzegovina
FID	Financial Intelligence Department
FIU	Financial Intelligence Unit
FT/TF	Financing of terrorism
ML	Money laundering
MLA	Mutual Legal Assistance
MoU	Memorandum of Understanding
RS	Republic of Srpska
SIPA	State Investigation and Protection Agency of BiH
STR	Suspicious transaction report

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## **A. BACKGROUND INFORMATION AND GENERAL INFORMATION ON THE IMPLEMENTATION OF THE CONVENTION.**

1. The Council of Europe **Convention on Laundering, Search, Seizure, Confiscation of the Proceeds from Crime and Financing of Terrorism**, which is the treaty number 198 in the Council of Europe Treaty Series (it is therefore referred to as “CETS 198” or “the Convention”) establishes under Article 48 a monitoring mechanism which is responsible for following the implementation of the Convention: the Conference of the Parties (COP).
2. The Convention came into force on 1 May 2008, when six instruments of ratification were deposited with the Secretary General of the Council of Europe, all of which originating from Member States of the Council of Europe.
3. The monitoring procedure under this Convention deals with areas covered by CETS 198 that are not covered by other relevant international standards on which mutual evaluations are carried out by MONEYVAL and the Financial Action Task Force (FATF). At its second meeting in 2010, the COP adopted an evaluation questionnaire based on areas where the Convention “adds value” to the current international Anti-money laundering/combating the financing of terrorism (AML/CFT) standards and agreed that the Conference would normally assess the countries in the order that they ratified the Convention<sup>2</sup>. At its sixth meeting in 2014, the COP confirmed that Bosnia and Herzegovina (hereinafter also referred as “BiH”) would be among the next countries to be assessed under this mechanism.
4. The monitoring questionnaire was sent to the BiH authorities in November 2014, who sent their replies in November 2014. The updated replies were received in April 2015. The responses to the questionnaire were coordinated by the Financial Intelligence Department and the Ministry of Justice.
5. Two trained reviewers were identified to assess the implementation of the Convention by Bosnia and Herzegovina.
6. A draft report was prepared by the reviewers, namely, by Ms Iskra Mitrevska-Damcevska (“the former Yugoslav Republic of Macedonia”) on the issues of the functioning of FIU, and Mr Sorin Tanase (Romania) on new legal aspects under the CETS 198. The section on international co-operation was prepared by the Secretariat. This monitoring report by the COP is based primarily on a desk review of the replies by BiH to the monitoring questionnaire. Public information available in MONEYVAL’s adopted evaluation and progress reports, as well as information reported under the compliance enhancing procedures (CEPs) have been considered and taken into account<sup>3</sup>. This report is not intended to duplicate but complement the work of other assessment bodies.

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<sup>2</sup> It was also decided that, if there were a number of countries that ratified on the same day, they would be assessed in alphabetical order.

<sup>3</sup> In particular the 3<sup>rd</sup> round mutual evaluation report (MONEYVAL(2009)42), subsequent progress report (MONEYVAL(2010)28) and eleven compliance enhancing reports. Information available under the compliance enhancing procedures has also been taken into account, as BiH has been monitored under this process on a regular basis since 2011. Given the lack of adequate progress, MONEYVAL issued a public statement on 1 June 2014, which was revised in September and December 2014, as well as in April 2015. The public statement was lifted in September 2015 since a number of key amendments to the Criminal Code were adopted in May 2015 to address outstanding shortcomings in relation to the money laundering offence, and the confiscation regime and monitoring under CEPs has been terminated. All reports are available on MONEYVAL’s website: [www.coe.int/MONEYVAL](http://www.coe.int/MONEYVAL).

7. BiH signed the Convention on 19 January 2006 and ratified it on 11 January 2008. It entered into force in respect of BiH on 1 May 2008. At the time of ratification BiH had not deposited any declarations or reservations.<sup>4</sup>
8. The draft report was discussed at a pre-meeting on 21-22 September 2015 and submitted for discussion and adoption by the COP at its 7<sup>th</sup> meeting in November 2015.
9. In September 2015, MONEYVAL adopted its 4<sup>th</sup> round evaluation report on BiH.<sup>5</sup> The evaluation report contains information on the developments which have occurred in Bosnia and Herzegovina after the last evaluation report, some of which are relevant in the context of this report, namely:
  - The mental and physical elements of the money laundering offence in the countries' four criminal codes are largely in line with the Vienna and Palermo Conventions. While there are some technical aspects which still need clarifying, it appears that progress has been made in terms of both the number and quality of money laundering cases.
  - BiH has improved its ability to freeze, seize and confiscate property, and the introduction of provisions on reversed burden confiscation and their application in practice have undoubtedly reinforced the confiscation regime. The system has begun to produce better outcomes. However, effective implementation needs to be enhanced, in particular with regard to the routine application of provisional measures and effective enforcement of confiscation orders.
  - A number of technical deficiencies remain in place with regard to the TF offence. These are of a particular concern given the terrorist risks faced by BiH. Initiatives were however reported which address the threat of terrorism and TF. In particular, a new offence of joining foreign paramilitary organisations was introduced, and a number of investigations are underway in this respect.
  - The Financial Intelligence Department (FID), the financial intelligence unit (FIU) of BiH, is vested with a broad range of powers. Its institutional arrangements ensure its functioning to a satisfactory level. Nevertheless, there were concerns with regard to the effectiveness of its analytical process and the quantity and quality of its output.
  - The range of Mutual Legal Assistance (MLA) that the authorities may provide in criminal matters is broad and covers all the requirements of the international standards. In addition, the authorities were vested with additional powers by the amendments to the MLA Law adopted in 2013. Provision of MLA is not subject to any unreasonable, disproportionate or unduly restrictive conditions. It cannot be denied due to possible involvement of fiscal matters. There are no secrecy or confidentiality laws which would negatively impact in this respect. In practice, the authorities met on-site demonstrated high commitment and dedication to international cooperation and informed the evaluation team about the quality of such cooperation.

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<sup>4</sup> A list of declarations and reservations to CETS 198 is kept up-to date on the website of the Treaty Office of the Council of Europe at <http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=198&CM=8&DF=27/03/2012&CL=ENG&VL=1>.

<sup>5</sup> See [www.coe.int/moneyval](http://www.coe.int/moneyval)

## B. MEASURES TO BE TAKEN AT NATIONAL LEVEL

### I. GENERAL PROVISIONS

#### 1. Criminalisation of money laundering – Article 9 paragraphs 3, 4, 5, 6

The areas where it is considered that the Convention adds value on money laundering criminalisation are as follows:

- The predicate offences to money laundering have to, as a minimum, include the categories of offence in the Appendix to the Convention (which puts the FATF requirements on this issue into an international legal treaty [article 9(4)]).
- As to proof of predicate offence, paragraphs 5 and 6 establish new legally binding standards to better facilitate the prevention of money laundering: clarification that a prior or simultaneous conviction for the predicate offence is not required [article 9(5)], and to clarify that a prosecutor does not have to establish a particularised predicate offence on a particular date [article 9(6)].
- To allow for lesser mental elements for money laundering of suspicion (and negligence, the latter of which was to be found also in ETS141) [article 9(3)].

10. The relevant Convention provisions are set out in Annex I.

#### ***Description and analysis***

11. Bosnia and Herzegovina has several levels of political structuring under the state government level. BiH is divided into two entities, RS and FBiH. The Brčko District in the north of the country was created in 2000 out of land from both entities. It officially belongs to both, but is governed by neither, and functions under a decentralised system of local government. Both of the entities and Brčko District (BD) have established their own legislative frameworks including Criminal Codes.
12. Money laundering is criminalised both under the state level (Criminal Code of BiH -“CC BiH”) and under the Criminal Codes of: the Federation of Bosnia and Herzegovina; the Republic of Srpska and Brčko District (respectively “CC FBiH”, “CC RS” and “CC BD”). The relevant provisions are: Article 209 of the CC BiH (as amended on 27 May 2015), Article 272 of the CC FBiH, Article 280 of the CC RS and Article 265 of the CC BD:

#### ***Article 209 of the CC of BiH***

*(1) Whoever accepts, exchanges, keeps, disposes of, uses in commercial or other activity, converts or transfers, otherwise conceals or tries to conceal money or proceeds, their nature, source, location, use of, movement, ownership or any other right, when such money or proceeds is gained by the perpetration of a criminal offence:*

*a) abroad or on the territory of the entire Bosnia and Herzegovina or on the territory of the two entities or on the territory of one entity and Brčko District of Bosnia and Herzegovina; or*

*b) prescribed by the Criminal Code of Bosnia and Herzegovina or by other law at the state level,*

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

*(2) If the perpetrator of the act referred to in paragraph (1) is also a perpetrator of or an accomplice to the criminal offence whose perpetration resulted in the money or proceeds referred to in the previous paragraph, the perpetrator shall be punished by*

*imprisonment for a term between one and ten years.*

*(3) If the money or property gain referred to in paragraph (1) of this Article exceeds the amount of 200,000 KM, the perpetrator shall be punished by imprisonment for a term between one and ten years not less than three years.*

*(4) 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.*

*(5) Money proceeds and income or other benefits derived from the proceeds acquired through a criminal offence referred to in the paragraphs (1) to (4) of this Article shall be confiscated.*

*(6) Knowledge, intent or purpose as an element of a criminal offence set forth in the paragraph (1) of this Article may be inferred from objective, factual circumstances.*

#### **Article 272 CC FBiH**

*(1) Whoever receives, exchanges, holds, disposes of, uses in economic or other business activity, or otherwise conceals or tries to conceal money or property for which he knows to be acquired by perpetration of criminal offence, shall be punished by imprisonment for a term between six months and five years.*

*(2) If the money or property referred to in paragraph 1 of this Article is of large value, the perpetrator shall be punished by imprisonment for a term between one and ten years.*

*(3) If, perpetrating the criminal offence referred to in paragraphs 1 and 2 of this Article, the perpetrator acted out of negligence regarding the circumstance that the money or property were acquired by perpetration of criminal offence, shall be punished by a fine or imprisonment for a term not exceeding three years.*

*(4) Money and property referred to in paragraphs 1 through 3 of this Article shall be forfeited.*

#### **Article 280 CC RS**

*(1) Whoever receives, exchanges, keeps, disposes of or uses in corporate or other business or conceals or tries to conceal money or property he knows was obtained by commission of criminal offense, shall be punished by imprisonment for a term between six months and five years.*

*(2) If the perpetrator referred to in Paragraph 1 of this Article is at the same time an accessory or accomplice in the criminal offence that resulted in obtaining money or property gain referred to in the preceding Paragraph, he shall be punished by imprisonment for a term between one and eight years.*

*(3) If the money or property referred to in Paragraphs 1 and 2 of this Article is of high value,*

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

*(4) If the criminal offences referred to in preceding Paragraphs are committed by a group of people who joined with the intention of committing such criminal offences, the perpetrator shall be punished by imprisonment for a term between two and twelve years.*

*(5) If, while committing the criminal offences referred to in Paragraphs 1, 2 and 3 of this Article, the perpetrator acted negligently concerning the fact that the money or*



*property were obtained by commission of a criminal offence, he shall be punished by imprisonment for a term not exceeding three years.*

*(6) The money and property referred to in preceding Paragraphs shall be forfeited.*

#### **Article 265 of the CC BD**

*(1) A person who accepts, exchanges, keeps, disposes of, uses in commercial or other business, or in other way conceals the money or property that person knows to have been obtained through a criminal offence, or conceals or attempts to conceal it shall be sentenced to prison from six months to five years.*

*(2) If the money or property gain referred to in Paragraph 1 of this Article is of large value, the perpetrator shall be sentenced to prison from one to ten years.*

*(3) If in the commission of the criminal offences from Paragraphs 1 and 2 of this Article, the perpetrator was negligent to whether the money or property gain have been obtained through a criminal offence, the perpetrator shall be fined or sentenced to prison of up to three years.*

*(4) The money or property gain from Paragraphs 1 to 3 of this Article shall be forfeited.*

13. Article 209 of the Criminal Code of BiH, which provides for the offence of ML, was amended on 27 May 2015. As a result of recent legal amendment, the ML offence is not subject anymore to additional conditions, such as the “larger value” of laundered property or the endangering brought to the common economic space of BiH, which is a significant step forward. Also the recent provision regarding the express possibility to prove the knowledge, intent or purpose with factual circumstances should facilitate the work of the judiciary in ML cases.
14. The evaluation team also welcomes the introduction of rules regarding the competence in ML cases at the state level. The state level authorities are now competent to investigate ML in the cases when the predicate offence/offences was/were committed:
  - a) abroad or on the territory of the entire Bosnia and Herzegovina or on the territory of the two entities or on the territory of one entity and Brčko District of Bosnia and Herzegovina; or*
  - b) prescribed by the Criminal Code of Bosnia and Herzegovina or by other law at the state level.*
15. As a consequence, the authorities at the entity level shall be competent to investigate ML cases only when the predicate offences were committed in the respective entity. As a logical step forward, the authorities should amend the definitions of ML offences from the entities level to criminalise self-laundering in FBiH and BD.
16. Besides the abovementioned conditions, the material elements of the money laundering offences under the different Criminal Codes are commonly addressed. Therefore, for the purposes of this report they will be considered collectively and references to the money laundering offences should be read as including the money laundering offence under each Criminal Code unless otherwise stated.

#### **Article 9(3)**

17. Article 9 paragraph 3 enables parties to introduce legislative or other measures to establish as a money laundering offence cases where the person suspected or ought to have assumed that the property was proceeds – (it is recalled that the Convention provides that countries may take either measure or both). In BiH, BD and FBiH the definitions of ML offence specify that in cases where the perpetrator acted negligently with regard to the criminal origin of the relevant money or proceeds, a fine or sentence

of imprisonment not exceeding three years will be applied.<sup>6</sup> In the RS CC (Article 280 Money Laundering) it is provided that in cases where the perpetrator acted negligently a punishment by imprisonment for a term not exceeding three years shall be applied. Thus it can be concluded that both measures stipulated under Article 9 paragraph 3 are provided in the BiH legislation. However, no practical cases to demonstrate the application of such provisions were indicated.

18. The RS authorities should consider harmonizing the sanctioning regime with the state level, FBiH and Brčko District, where the perpetrator in such cases may be fined or sentenced to imprisonment not exceeding three years.

#### **Article 9(4)**

19. The four Criminal Codes take an “*all crimes*” approach, as there is no definition or other restriction on the meaning of criminal offence for the purpose of the money laundering offences. The authorities confirmed that in the absence of any limitation on what may constitute a criminal offence for these purposes, all offences are covered, irrespective of their nature or severity.
20. At the time of the previous Moneyval evaluation, it was noted that subject to one exception, all of the designated categories of offence under the Glossary to the FATF Methodology were covered, either at state level or at the level of the Entities or Brčko District. The exception was market manipulation, which was not criminalised under the CC BD or at state level and which therefore would not constitute a criminal offence if carried out in Brčko District. Since then, Brčko District has introduced legislation to address this deficiency, by way of an amendment to the Law on Securities. Under new Article 78a, the existing prohibition on market manipulation at Article 76 is now subject to criminal sanction and comprises a criminal offence for the purpose of the money laundering offences.

#### **Article 9(5)**

21. Article 9 paragraph 5 specifically requires Parties to the Convention to ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering. The definitions of ML in all four Criminal Codes do not require a prior or simultaneous conviction for the predicate offence.
22. During the 4<sup>th</sup> round Moneyval on-site visit, representatives from both the prosecuting authorities and the judiciary from all entities and Brčko District confirmed that there was no evidential or other bar to taking forward cases of autonomous money laundering, either as a matter of law or practice. They confirmed that circumstantial evidence could be relied upon for this purpose. No conviction for autonomous money laundering was reported by the authorities of the FBiH or BD, while several cases were identified by the authorities in the Republic of Srpska and at state level.

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<sup>6</sup> Under BiH CC negligence is defined as follows:

*Article 36*

(1) *A criminal offence may be perpetrated by advertent or inadvertent negligence.*

(2) *The perpetrator acts with advertent negligence when he was aware that a prohibited consequence might have occurred as a result of his action or omission to act, but carelessly assumed that it would not occur or that he would be able to avert it.*

(3) *The perpetrator acts with inadvertent negligence when he was unaware of the possibility that a prohibited consequence might have occurred, although, under the circumstances and according to his personal characteristics, he should and could have been aware of such possibility.*

CC FBiH, CC RS and CC BDiH contain identical provisions.

## **Article 9(6)**

23. The information provided indicates that in all cases the judicial authorities proved the exact nature of the predicate offence; hence the provision has not yet been tested.

## ***Effective implementation***

24. The jurisprudence related to ML cases developed significantly in the last few years in BiH. Perhaps the most relevant examples were the Republic of Srpska cases of *Copic*, and also *Darko Saric*. The state-level prosecutor indicated a number of cases involving autonomous money laundering including the *Majorka* case, which involved the construction of a luxury hotel for the purposes of laundering the proceeds of drug trafficking and tax evasion by an organised criminal group in BiH and in other jurisdictions. The authorities in the Republic of Srpska also confirmed that in some cases the Warsaw Convention had been relied upon for the purpose of establishing autonomous money laundering.
25. A large number of cases were provided to the evaluation team which demonstrate that the authorities attach importance to ML cases. It seems that the most common predicate offences are tax fraud and organized crime offences, such as human trafficking, migrants smuggling and robbery. A suggestion would be to make available relevant jurisprudence from all the levels of BiH to the judiciary and also to the competent police forces.
26. However, during the onsite visit, a difference of understanding and interpretation of the pieces of legislation appeared in discussions with the prosecutorial authorities. At state level and RS level, the prosecution and courts are familiar with the Warsaw Convention and are making reference to it, including in court decisions, in F BiH and Brčko District should be further improved.
27. There have been a number of cases involving autonomous money laundering and foreign predicate offending, which is another very encouraging development. The understanding and commitment of the prosecutors and the judiciary in this respect is to be commended.
28. Also during interviews carried out in Moneyval on-site visit, a representative from the prosecutor's office in BD indicated that there had been no money laundering prosecutions in the last four years. However, there had been three cases which were eventually transferred to the state-level courts for prosecution and there are some on-going investigations.
29. As already mentioned, there have been no cases to date of ML involving persons who "could have known or should have known that the money or property was derived from criminal activity".

## ***Recommendations and comments***

30. Although all the definitions of the ML offence extend to the cases where the perpetrator acted negligently with regard to the criminal origin of the relevant money or property, no practical application of this provision was demonstrated. Even though "negligent" ML is criminalised as provided under Article 9 paragraph 3 of the Convention at all levels, it has not yet been tested in practice. The RS authorities should consider harmonizing the sanctioning regime of the "negligent" ML with the state level, F BiH and Brčko District.

31. The authorities are advised to criminalise self-laundering in FBiH and BD.
32. Given the discrepancy between the approach and case law among the state level authorities, FBiH, RS and BD, it is recommended to take further actions regarding the application of Article 9 paragraph 5 and 6 of the Convention, and to further develop prosecutorial and court practice based on these provisions of the Convention. Especially the implementation of Article 9 paragraph 6 of the Convention should be explored by the judiciary from BiH, considering that many ML cases are connected to predicate offences committed abroad.

## 2. Corporate liability – Article 10 paragraphs 1 and 2

The areas where it is considered that the Convention adds value are as follows:

- Some form of liability by legal persons has become a mandatory legal requirement (criminal, administrative or civil liability possible) where a natural person commits a criminal offence of money laundering committed for the benefit of the legal person, acting individually who has a leading position within the legal person (to limit the potential scope of the liability). The leading position can be assumed to exist in the three situations described in the provisions (see Annex II).
- According to Article 10 paragraph 1:
 

*“Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:*

  - a. a power of representation of the legal person; or*
  - b. an authority to take decisions on behalf of the legal person; or*
  - c. an authority to exercise control within the legal person,*

*as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.”*
- The Convention expressly covers lack of supervision (article 10 paragraph 2 makes it a separate, additional requirement).

### **Description and analysis**

33. The criminal liability of legal persons is regulated by all criminal codes, at all levels, and the provisions are harmonised.
34. The basic text provides that the chapter called “liability of legal persons for criminal offences” regulates criminal liability of a legal person, with the exclusion of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Republic of Srpska, the Brčko District of Bosnia and Herzegovina, canton, city, municipality and local community, for a criminal offence perpetrated by the perpetrator in the name of, for account of or in favour of the legal person.
35. According to Article 124 from CC BiH, for a criminal offence perpetrated in the name of, for account of or for the benefit of the legal person, the legal person shall be liable:
 

*(a) when the purpose of the criminal offence is arising from the conclusion, order or permission of its managerial or supervisory bodies; or*

- (b) when its managerial or supervisory bodies have influenced the perpetrator or enabled him to perpetrate the criminal offence; or*
- (c) when a legal person disposes of illegally obtained property gain or uses objects acquired in the criminal offence; or*
- (d) when its managerial or supervisory bodies failed to carry out due supervision over the legality of work of the employees.*
36. Article 125 of the CC BiH sets the limits of the liability of the legal person:
- (1) With the conditions referred to in Article 124 (Basis of Liability of a Legal Person) of this Code, a legal person shall also be liable for a criminal offence when the perpetrator is not guilty for the perpetrated criminal offence.*
- (2) Liability of the legal person shall not exclude culpability of physical or responsible persons for the perpetrated criminal offence.*
- (3) For criminal offences perpetrated out of negligence, a legal person may be liable under the conditions referred to in Article 124, item d) of this Code, and in that case the legal person may be punished less severely.*
- (4) When in the legal person except from the perpetrator there is no other person or body that could direct or supervise the perpetrator, the legal person shall be liable for the criminal offence within the limits of the perpetrator's liability.*
37. Equivalent articles are included in all the Criminal Codes.
38. Regarding the principle of territoriality, the CC BiH covers the offences committed by legal persons in the following circumstances:
- a. domestic and foreign legal persons are liable for offences perpetrated within the territory of Bosnia and Herzegovina,*
- b. domestic and foreign legal persons are also be liable for a criminal offence perpetrated outside the territory of Bosnia and Herzegovina if the legal person has its seat in the territory of Bosnia and Herzegovina or if it carries out its activities in the territory of Bosnia and Herzegovina, if the offence was perpetrated against the State of Bosnia and Herzegovina, its citizens or domestic legal persons,*
- c. a domestic legal person is also liable for a criminal offence perpetrated outside the territory of Bosnia and Herzegovina against a foreign state, foreign citizens or foreign legal persons, subject to the conditions referred in the Criminal Codes.*
39. Liability of legal persons does not exclude criminal liability of physical persons responsible for the criminal offence. Legal persons may be held liable for all criminal offences under the CC BiH (and respectively in the other Criminal Codes) and other criminal offences defined by law, unless the criminal offence specifically excludes or limits punishments for legal persons and therefore money laundering is an offence which applies to legal persons.
40. According to Article 131 from CC BiH, legal entities may be punished with a fine, seizure of property and dissolution of the legal person. Fines shall not be less than 5,000 KM nor exceed 5 million KM but if by perpetrating the criminal offence, the legal person has caused material damage to another party or the legal person has come into possession of an unlawful material gain a fine can be imposed up to the doubled amount of the maximum. The seizure of property of a legal person – that is, seizing either the half of its property, or its major part, or the entire property – may be imposed for criminal offences threatened with imprisonment for a term of five years or more (Article 133). The court may pronounce the dissolution of the legal person in case its activities were entirely or partly being used for the purpose of perpetrating criminal offences (Article 134).

41. In addition to the security measure of forfeiture referred to in Article 74 of CC BiH (Forfeiture), there are further security measures available for sanctioning legal persons under CC BiH (Article 137) such as the publication of the judgement as well as the ban on performing certain economic activities.
42. As a conclusion, Article 10 paragraph 1 of the Convention is adequately covered in BiH.
43. On the other hand, provisions dealing with situations where legal persons can be held liable as a result of lack of supervision are limited to the case when the managerial or supervisory bodies of the legal person failed to carry out due supervision over the legality of work of the employees.
44. It should be noted that Article 10 paragraph 2 of the Convention extends the liability in the cases when the offence was committed by a natural person under its authority, and not only to employees. Moreover, the explanatory report of the Convention indicates that Article 10 paragraph 2 aims at holding legal persons liable for the omission by persons in a leading position to exercise supervision over the acts committed by subordinate persons acting on behalf of the legal person.

### ***Effective implementation***

45. Several judgments have been issued in which legal persons were held liable for ML offences. In these cases the owner and director of the legal entities based on own approval have performed illegal activities on behalf and for the benefit of the aforementioned legal entities.

### ***Recommendations and comments***

46. It is recommended to cover accordingly Article 10 paragraph 2 of the Convention and not to limit the criminal liability of the legal persons in the case of lack of supervision only in connection to the employees.
47. Authorities should take further necessary steps to apply to a larger extent the corporate liability mechanisms by law enforcement agencies and judicial authorities (guidance documents, instructions etc.) in money laundering and other predicate offences, and terrorist financing cases in the various circumstances envisaged by Article 10 of the Convention.

### **3. Previous decisions – Article 11**

Article 11 is a new standard dealing with international recidivism. It recognises that money laundering and financing of terrorism are often carried out transnationally by criminal organisations whose members may have been tried and convicted in more than one country. Article 11 provides for a mandatory requirement for the State to take certain measures but does not place any positive obligation on courts or prosecution services to take steps to find out about the existence of final convictions pronounced in another State-Party; its wording is as follows:

“Each Party shall adopt such legislative and other measures as may be necessary to provide for the possibility of taking into account, when determining the penalty, final decisions against a natural or legal person taken in another Party in relation to offences established in accordance with this Convention.”

### **Description and analysis**

48. Article 48 of CC BiH provides that the court shall impose the punishment on the perpetrator of the criminal offence within the limits provided by law for that particular offence, having in mind the purpose of punishment and taking into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances), and, in particular: the degree of guilt, the motives for perpetrating the offence, the degree of danger or injury to the protected object, the circumstances in which the offence was perpetrated, *the past conduct of the perpetrator*, his personal situation and his conduct after the perpetration of the criminal offence, as well as other circumstances related to the personality of the perpetrator.
49. Furthermore, paragraph 2 of the same Article specifies that in ruling on the punishment for the criminal offence in recidivism, the court shall take into special consideration whether the most recent offence is of the same type as the previous one, whether both acts were perpetrated from the same motive, and it will also consider the period of time which has elapsed since the pronouncement of the previous conviction, or since the punishment has been served or pardoned.
50. The evaluation team was advised that the provisions of Article 48 CC BiH are applied by the courts in practice and international recidivism is considered when deciding a penalty.
51. Similar provisions are included in all three non-state level Criminal Codes.

### **Recommendations and comments**

52. Article 11 from the Convention is properly implemented.

### **4. Confiscation – Article 3 paragraphs 1, 2, 3, 4**

The confiscation and provisional measures set out in the Convention which are considered to add value to the international standards are in the following areas:

- Article 3, paragraph 1 introduces a new notion to avoid any legal gaps between the definitions of proceeds and instrumentalities as, according to it, *“Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds **and laundered property.**”*
- Confiscation has to be available for ML **and to the categories of offences in the Appendix** (and no reservation is possible) (Article 3 paragraph 2).
- Mandatory confiscation for some major proceeds-generating offences is contemplated under this Convention (Article 3 paragraph 3 [Annex III]). Though not a mandatory provision, the drafters sent a signal that, given the essential discretionary character of criminal confiscation in some countries, it may be advisable for confiscation to be mandatory in particularly serious offences, and for offences where there is no victim claiming to be compensated.
- Reverse burdens are possible (after conviction for the criminal offence) to establish the lawful or other origin of alleged proceeds liable to confiscation – Article 3 paragraph 4 [subject to a declaration procedure in whole or in part].

## **Description and analysis**

### **General**

53. The legal framework for confiscation is set out in the four Criminal Codes and under the Criminal Procedure Codes of each legal system.
54. Confiscation of instrumentalities is dealt with under Article 74 of the CC BiH, Article 78 of the CC FBiH, Article 62 of the CC RS and Article 78 of the CC BD. Although these provisions are broadly harmonised, there are some differences between them.
55. "Proceeds" and "property" were defined in May 2015 under Article 1 of CC BiH:  
*"proceeds" means any economic advantage, derived from or obtained, directly or indirectly, from criminal offences. It may consist of any property;*  
*"property" includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.*

### **Article 3 paragraph 1**

#### **Forfeiture of Instrumentalities**

56. Article 74 of CC BiH was also amended in May 2015:  
*(1) Instrumentalities which are in any manner, wholly or in part used or intended to be used for perpetration of criminal offence, or which are acquired through perpetration of criminal offence, shall be forfeited if they are in the ownership of the perpetrator.*  
*(2) Instrumentalities from paragraph 1 of this article shall be forfeited even if they are not ownership of the perpetrator, but this does not affect the rights of third parties to claim compensation of damages from the perpetrator.*
57. In the previous version of Article 74 paragraph 2 of CC BiH, objects that were not owned by the perpetrator used or destined for use in the perpetration of a criminal offence, or objects that resulted from the perpetration of a criminal offence, were supposed to be confiscated when consideration of public safety or moral reasons so require. The rapporteurs welcome the removal of the conditions imposed for the confiscation of instrumentalities belonging to third parties.
58. After the recent amendments, the confiscation of instrumentalities is mandatory in both situations provided under Article 74 CC BiH, if they belong to the perpetrator and also in the case they belong to a third party.
59. However, the provisions at the level of the entities are unchanged. Article 78(1) of the CC FBiH and Article 78(1) of the CC BD are further conditioning the confiscation of instrumentalities. As a consequence, the provisions are subject to more limitations in FBiH and BD than at state level. The power to order confiscation of instrumentalities under Article 62 of the CC RS, while broadly similar, is discretionary rather than mandatory in respect of both perpetrators and third parties, and confiscation from the perpetrator is not subject to any conditions. The authorities are advised to harmonize the provisions from the level of the entities with the one provided under CC BiH.

#### **Proceeds or property the value of which corresponds to such proceeds**

60. Article 110 of the CC BiH was also amended:



*(1) Nobody is allowed to retain proceeds acquired by the perpetration of a criminal offence.*

*(2) The proceeds referred to in paragraph 1 of this Article shall be confiscated by the court decision, which established the perpetration of a criminal offence, under the terms set forth under this Code.*

61. Article 114 of the CC FBiH, Article 94 of the CC RS and Article 114 of the CC BD provide that no one shall be allowed to retain material gain acquired by the perpetration of a criminal offence, and material gain shall be confiscated by the court decision that established the perpetration of a criminal offence.
62. There is nothing to limit the reference to a criminal offence in any way, so the general rules outlined above apply to money laundering, terrorist financing and all predicate offences. There is also nothing in the legislation to define or otherwise restrict the type of property or material gain that may be confiscated.
63. Under Article 111 of the CC BiH, Article 115 of the CC FBiH and Article 115 of the CC BD, income or other benefits derived from the proceeds of a criminal offence, from property into which proceeds of crime have been converted, or from property with which the proceeds of crime have been intermingled is subject to the same confiscation regime as applies to the proceeds of the criminal offence.
64. In RS, in the case of assets related to offences that come within the categories listed in Article 2 of the Criminal Assets Recovery Act (CARA), confiscation of direct or indirect proceeds of crime and converted or intermingled assets is specifically provided for by Article 3(a). There is no equivalent provision in the CC RS for the purposes of offences that are not covered by CARA. However, the authorities in the Republic of Srpska indicated that confiscation of indirect or intermingled assets was possible under the CC RS and the CPC RS and that this had been confirmed in practice by verdicts in a number of cases. This approach is consistent with the fact that the courts are bound by the provisions of the Palermo and the Warsaw Conventions, when applying the legal framework, as confirmed above in relation to the criminalisation of money laundering.
65. The confiscation of property of corresponding value is expressly provided for under all four Criminal Codes. Article 111 of the CC BiH, Article 115 of the CC FBiH, Article 95 of the CC RS and Article 115 of the CC BD provide that all money, valuable objects and every other material gain acquired by the perpetration of a criminal offence shall be confiscated from the perpetrator, and if the confiscation is not feasible the perpetrator shall be obliged to pay an amount that corresponds to the acquired material gain.
66. The four Criminal Codes also provide for the confiscation of property in third party hands. Article 111 of the CC BiH, Article 115 of the CC FBiH, Article 95 of the CC RS and Article 115 of the CC BD provide that material gain acquired by the perpetration of a criminal offence may be confiscated from parties to whom it has been transferred. This is subject to two conditions, first that the transfer was made without compensation or at an undervalue, and secondly that the person to whom the material gain was transferred knew or ought to have known that the material gain was acquired by the perpetration of criminal offence.

## **Laundered property**

67. In addition to these generally applicable provisions, there is specific provision for confiscation in relation to the money laundering offence under each Criminal Code. Under Article 209 (5) of the CC BiH, Article 272 (4) of the CC FBiH, Article 280 (6) of

the CC RS and Article 265 (4) of the CC BD, the money and property gain that is the subject of the offence i.e. the laundered property, shall be confiscated.

### **Article 3(2)**

68. There is nothing that limits application of the relevant provisions to any criminal offence, and BiH has made no declaration pursuant to paragraph 2a) or 2b) of Article 3 of the Convention.

### **Article 3(3)**

69. Article 78(3) of the CC FBiH and Article 62 of the CC RS state that the law may provide for mandatory forfeiture. Article 78(3) of the CC BD provides that the law may provide for mandatory forfeiture from third parties consideration of public safety or moral reasons so require, again without prejudice to the right to claim damages from the perpetrator.

### **Article 3(4)**

70. The CC BiH and the CC FBiH have been amended to introduce the concept of extended confiscation which provides for a splitting burden of proof between the judiciary and the perpetrator in relation to some offences. In such cases, if the prosecutor provided sufficient evidence to reasonably believe that such property gain was acquired by the perpetration of the criminal offences, while the perpetrator failed to prove that the gain was acquired in a lawful manner, the court may issue a confiscation order.

71. Another major legal development is the possibility to continue the confiscation procedures in civil proceedings under amended Article 110a paragraph 2 of the CC BiH:

*“In case the conditions laid down by law, for the forfeiture of proceeds, income, profit or other benefits from proceeds, in criminal proceedings, are not fulfilled, the request for forfeiture, of the same, may be filed in a civil procedure”.*

72. The concept of extended confiscation has also been introduced in the Republic of Srpska in the new dedicated asset recovery legislation, namely the Criminal Assets Recovery Act (“CARA”). This Act, which covers a range of matters including the establishment of an Asset Recovery Agency, came into force in September 2010 and is a *lex specialis* applicable to certain categories of offences that are listed in Article 2. These are as follows:

- Crimes against sexual integrity;
- Crimes against public health (including the production and trafficking of drugs);
- Crimes against the economy and payment system;
- Crimes against authority (including offences of corruption, embezzlement and fraud);
- Organised crime;
- Crimes against public order;
- Crimes against humanity and against values protected by international law;
- Other crimes under the CC RS where the value of items that have been used, aimed at or result from the offence exceed 50,000 KM.

73. Article 110a of the CC BiH provides for extended confiscation, *i.e.* confiscation where the owner of property is required to demonstrate its lawful origin, in relation to certain named categories of offence under the CC BiH. These are crimes against humanity and values protected by international law, crimes against the economy, market integrity and in the area of customs, offences of corruption and other offences against official duty or other responsible duty, offences of copyright violation, crimes against the armed forces of BiH, and offences of conspiracy, preparation, associating and organised crime. Article 110a provides that where criminal proceedings involve an offence in these categories, the court may confiscate the property gain for which the prosecutor provided sufficient evidence to reasonably believe that such property gain was acquired by the perpetration of the relevant offence, while the perpetrator failed to prove that the gain was acquired in a lawful manner.
74. Article 114a of the CC FBiH is in identical terms, save that the categories of offences to which it applies are confined to crimes against economy, trade or security of payment systems, crimes against the judiciary and bribery or offences against official or other responsible duty. However, although the categories are different many of the offences that they cover are the same.
75. Articles 28 to 32 of the CARA provide for an extended confiscation regime which is applicable to all offences within the scope of the CARA as outlined above. Under Article 31, in support of a confiscation request the prosecutor shall provide evidence of assets in the possession of the defendant that were acquired before the initiation of criminal proceedings, together with evidence of circumstances pointing out an obvious discrepancy between the defendants' assets and income. The defendant or his legal representative shall then provide evidence indicating that the prosecutor's request is unfounded or that the assets have been acquired legally. As indicated above, provision is also made under Article 31 for the confiscation of assets held by a third party or a defendant's legal successor, whereby the prosecutor shall provide evidence that property has been transferred without compensation or at an undervalue in order to hinder the execution of the confiscation process. The legal successor or third party or a legal representative may then produce evidence either to prove that the prosecutor's request is unfounded or to demonstrate that the assets have been acquired legally. These provisions should be read in the context of the definition of criminal assets in Article 3, namely assets of an offender or property owner that are in obvious discrepancy with his reported income. Reported income is all the available financial resources of the property owner that may provide its legal background.
76. The extended confiscation in all three regimes appears to be similar. That aside, the effect of all three regimes appears to be that if the prosecutor raises a *prima facie* case that the assets are criminal in origin, it is for the defendant to disprove this. As mentioned in the MONEYVAL report this interpretation was confirmed by the authorities during the MONEYVAL onsite visit. The authorities indicated that in one case the extended confiscation was applied in relation to assets belonging to a third party.
77. Article 114a of the CC BD is in identical terms, save that the categories of offences to which it applies are confined to criminal offences involving terrorism, against economy, business operations and safety of payment transactions, involving tax offences, against judiciary, criminal offences of bribery and offences against official and other responsibility.

## **Effective implementation**

78. The judiciary from BiH seem to attach great importance also to applying seizure and confiscation measures. However, there are no comprehensive statistics in this field. Some statistical data of confiscated assets from RS and managed by the specialized agency is available:

*Table 1*

2014.	Type of property	Amount in BAM
	Money	101,040.40
	Passenger motor vehicles	18,842.00
	Cargo motor vehicles and working machines	1,610,881.72
	Real estate	1,157,451.74
	Aircraft	375,501.02
Total		<b>3,263,716.88</b>

2013.	Type of property	Amount in BAM
	Money	119,578.75
	Passenger motor vehicles	153,000.00
	Real estate	145,453.17
	Computer devices and other equipment	3,540.00
Total		<b>421,571.92</b>

2012.	Money	277,364.19
	Shares in the company	18,379,913.00
	Passenger motor vehicles	171,460.00
	Cargo motor vehicles	9,640.00
	Real estate	352,778.00
	Computer devices and equipment	90,000.00
Total		<b>19,281,155.19</b>

Court of Bosnia and Herzegovina provided information on confiscated proceeds during the period from 2004-2015 for all final verdicts

*Table 2*

Type of property	Amount in BAM
Money	40,722,641.67
Real estate	2 houses, 1 apartments
Movables	1 motor vehicle, shares in the company

Court of Bosnia and Herzegovina provided information on imposed security measures as referred to in Article 74 of the Criminal Code of BiH

Table 3

Upon binding verdicts of the Court of BiH, the following security measures have been imposed

Under 77 verdicts, motor vehicles have been seized (passenger and freight motor vehicles)
Under 366 verdicts, weapons and ammunition have been seized
Under 125 verdicts, narcotic drugs have been seized
Under 81 verdicts, cigarettes have been seized
Under 383 verdicts, counterfeited bills
Under 77 verdicts, valid bills have been seized
In 905 cases, various items have been seized (computers, mobile phones, textbooks, CDs, DVDs, livestock and similar)

### **Recommendations and comments**

79. The authorities are recommended to review the discretionary nature of confiscation of instrumentalities in the CC RS.
80. The authorities are recommended to review the conditions imposed for the confiscation of instrumentalities belonging to third parties in F BiH, RS and BD.
81. The authorities are also recommended to review the confiscation of instrumentalities under F BiH, BD and RS legislation so that the confiscation of such objects owned by third parties can be mandatory.
82. It is highly recommended to improve the quality and scope of statistics in order to allow the examination of the overall effectiveness of the system. The authorities are recommended to ensure that the provisions on confiscation and provisional measures are properly and effectively applied.

### **5. Management of frozen and seized property – Article 6**

The Convention introduces a new standard which relates to the requirement of proper management of the frozen and seized property enshrined in Article 6 which reads as follows:

*“Each Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention.”*

### **Description and analysis**

83. In BiH and BD, the situation of management of frozen and seized property is similar. The CPC includes a specific provision dedicated to the safekeeping of the seized objects and documentation:

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

84. However there is no further procedure in place for the courts to establish how to deposit and manage the seized objects, and it seems that they do not have the personnel or resources to deal with this task.
85. Apart from this provision, there are no other legislative or institutional measures in place.
86. In FBiH under the Law on Forfeiture of Criminal Proceeds provisions regarding a specialised agency were included; however the agency is not operational.
87. The situation is different in RS, where a special law dedicated to asset recovery was adopted. Inter alia, the law provides for the setting up of an asset management agency, as an administrative unit within the Ministry of Justice.
88. The main tasks of the agency are the following:
- a) Manages the criminal assets, proceeds of crime defined by the Article 62 of the RS Penal Code), proceeds of criminal offence defined by Articles 94 throughout of the RS Penal Code and property provided as a guarantee in criminal proceedings;*
  - b) Provides a professional assessment of proceeds of crime;*
  - c) Stores, preserves and sells the seized criminal assets and manages funds obtained in such a manner;*
  - e) Keeps records of property that it manages in terms of item a. of this paragraph and of court proceedings deciding upon such assets;*
  - f) Assists in providing legal aid;*
  - g) Assists in training civil servants in relation to forfeiting of criminal assets and;*
  - h) Performs other tasks in accordance with this Act.*
- The agency is bound by the law to keep specific evidence on all seized assets during the seizure period.
89. Further, there are special provisions and procedures in place. Special categories of seized assets are also envisaged: assets that have the historical, artistic or scientific value shall be handed over by the Agency to institutions authorized to preserve and keep such items; foreign banknotes and effective foreign money, precious metals, gems and semi-precious stones and pearls shall be handed over by the agency to the Treasury to be kept etc.
90. The law also provides the possibility to sell seized movable assets prior to a final court decision. The agency deals with the selling of seized movable assets, which in principle is done through a public auction, with the exception of perishable assets and animals, which have to be sold immediately.

### ***Effective implementation***

91. According to the information provided, the Agency for Management of Confiscated Assets currently manages temporarily or permanently confiscated assets around 23,000,000 BAM.

## **Recommendations and comments**

92. The authorities from BiH and BD should take immediate actions to adequately implement Article 6 of the Convention, by adopting such legislative or other measures as may be necessary to ensure proper management of seized property. The courts should not be burdened with the task of managing seized assets. It is therefore recommended to establish similar specialized agency, as in RS. Furthermore FBIH is encouraged to take further steps for making the specialised agency fully operational.

### **6. Investigative powers and techniques required at the national level – Article 7 paragraphs 1, 2a, 2b, 2c, 2d**

The areas where the Convention is considered to add value are as follows:

- The provisions of article 7 introduce powers to make available or seize bank, financial or commercial records for assistance in actions for freezing, seizure or confiscation. In particular: Article 7 paragraph 1 provides that *“Each Party shall adopt such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in articles 3, 4 and 5. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy.”*
- Article 7 paragraph (2a) provides for power to determine who are account holders: *“To determine whether a natural or legal person is a holder or beneficial owner of one or more accounts, of whatever nature, in any bank located in its territory and, if so obtain all of the details of the identified accounts;”*
- Article 7 paragraph (2b) provides for the power to obtain “historic” banking information *“To obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts, including the particulars of any sending or recipient account;”*
- Article 7 paragraph (2c) [subject to declaration under article 53] provides for the power to conduct “prospective” monitoring of accounts as it provides for *“To monitor, during a specified period, the banking operations that are being carried out through one or more identified accounts;”*
- Article 7 paragraph (2d) provides for the power to ensure non-disclosure *“To ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been sought or obtained in accordance with sub-paragraphs a, b, or c, or that an investigation is being carried out.”*
- States should also consider extending these powers to non-banking financial institutions (article 7 paragraph (2d))

## ***Description and analysis***

### **Article 7 paragraph 1**

93. The legal frameworks at all levels (Article 72 CPC BiH, Article 136 CPC RS, Article 86 CPC FBiH, Article 72 CPC BD) allow the authorities (the courts at the prosecutors' request) to 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.
94. In case of an emergency, the prosecutor may take the previous measures on the basis of an order. The prosecutor shall seal the obtained information until the issuance of the court warrant. The prosecutor shall immediately inform the preliminary proceedings judge on the measures undertaken, who may issue a court warrant within 72 hours. In case the preliminary proceedings judge does not issue the warrant, the Prosecutor shall return such information without accessing it.
95. 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 offense or intended for the commission of the criminal offense, or suspected to serve as a disguise for a criminal offense or disguise of a gain obtained by a criminal offense.
96. In addition to the general provisions from the CPC, according to Article 20 of the RS Criminal Assets Recovery Act ("CARA"), the special unit organised within the Ministry of Interior dealing with financial investigations, may receive, following a court decision, the information regarding the business and private accounts and safety deposit boxes of the property owners. The special unit may be allowed to inspect the safe deposit boxes and also the permission to perform automatic processing of the balance sheets of business and personal accounts and safe deposit boxes of the property owner.
97. FBiH has also special provisions in the Law on Forfeiture of Criminal Proceeds (Official Gazette of Federation of Bosnia and Herzegovina 71/14 from September 3, 2014, entered into force on 12 March, 2015): in the course of proceedings on forfeiture of criminal proceeds in accordance with the Law, the court may order state bodies, banks, financial institutions and other natural and legal persons to forward information and data required to render decisions based on this Law. In the order for submission of data and information, the court shall specify the deadline for executing the order, which shall not exceed one month, term which seems to be quite long.
98. The sanction for not executing the court order within the prescribed deadline or in case of incomplete execution of the order, the court may in its decision sanction the legal person with the fine up to BAM 200,000.00, and the natural person and the responsible person in the legal entity or state body with the fine ranging from BAM 2,000.00 to BAM 50,000.00. If the natural person and the responsible person in the legal entity after being imposed such fine fail to proceed in accordance with the court order, such person may be punished by term in prison until the execution of the order, but no longer than three months.



## Article 7(2)

a)

99. It seems there are no centralized databases to determine bank accounts of a natural or legal person or beneficial owner. If the authorities have information regarding a bank or a bank account, they have the powers to ask for documents or additional information.
100. As provided in the answers submitted by Brčko District data on bank accounts of legal person are maintained by the Central Bank.
101. In the answers submitted by the Republic of Srpska it is indicated that RS Banking Agency provides data on all bank accounts opened on the territory of RS.
102. As indicated by the authorities these data are available to other competent authorities through the criminal procedure mechanisms.
103. However, Article 7 paragraph 2a goes beyond and tracing of the accounts is not covered at all.

b)

104. The authorities have indicated in the response to the questionnaire that information on the specified accounts and of banking operations which have been carried out during a specified period through one or more specified accounts including the particular of any sending or recipient account can be obtained through the order issued under the abovementioned provisions of the CPCs (Article 72 CPC BiH, Article 136 CPC RS, Article 86 CPC FBiH, Article 72 CPC BD).
105. The FID is also authorised to request data from the reporting entities under the AML/CFT on certain transactions or persons, including based on the request of the competent authorities in BiH.

c)

106. The FID is the only competent authority which can request monitoring of financial operations when there are suspicions of ML or TF. As indicated by the authorities suspicions can arise when transactions involve funds acquired from predicate offences.
107. Article 60 of the AML/CFT Law provides that:

*(1) FID may order the liable person in writing to continually monitor the financial operations of a client with regard to which there are grounds to suspect money laundering or financing terrorist activities, or other persons where it could be reasonably concluded that such persons aided or took part in transactions or affairs of the suspicious persons, and order regular reporting to the FID on transactions or affairs that these persons perform or intend to perform with the liable person. The FID shall set deadlines for liable persons to deliver the information sought.*

*(2) If the FID does not set the deadline, the liable person shall forward to the FID the data referred to in paragraph 1 hereof before the transaction or before establishing a business relationship; should it not be possible, due to the nature of transaction and business relationship or due to other justified grounds, the liable person shall submit to the FID a report stating reasons for such actions.*

*(3) Implementation of measures referred to in paragraph 1 hereof shall last no longer than three months; in justified cases the duration may be extended for another month each time, having in mind that the total duration of measures may not exceed six months in total.*

108. As mentioned by the authorities the FID can order monitoring of operations based on the requests of other competent authorities and in practice the FID has issued a monitoring order based on a request from the Prosecutor's Office.

d)

109. As concerns the measures in place to ensure that banks do not disclose to the customer concerned or to other third persons that information has been sought or obtained in accordance with Article 7(2)(a, b, c) of the Convention or that an investigation is being carried out, tipping off provisions are provided only under Article 74 of the AML/CFT law, which provides that:

*(1) Liable persons and their employees, including the management, supervisors, other executives and other personnel who have access to protected data shall not reveal to the client or third persons the fact that the information, data or documentation about the client or transaction were forwarded to FID nor that the FID, in accordance with Article 58 hereof, has temporarily suspended transaction or instructed the liable person to take an action.*

*(2) Information about FID requests, information, data or documentation forwarded to FID, temporary suspension of a transaction or instruction given in accordance to paragraph (1) hereof shall be treated as protected data.*

*(3) The FID, other authorised person or prosecutor may not give information, data and documentation collected in accordance with this Law to the person it is related to.*

*(4) The FID shall decide on lifting the protection from the data.*

110. As indicated by the BiH authorities when Prosecutors Office is seeking information from the Bank, through the Court, the Prosecutors' Office classifies such a motion as confidential. That means that person who receives this information at the Bank, has to handle the information in accordance with the Law on secret data protection. If the person at the bank makes available such information to the client in matter or to the third party then such a person is subject to criminal prosecution for breach of secrecy of proceedings.

111. As concerns the application of provisions under Article 7 to accounts held in non-bank financial institutions, relevant provision are extended to reporting entities as provided under AML/CFT law and other legal person engaged in financial transactions

### ***Effective implementation***

112. No statistics or practical case examples have been made available.

### ***Recommendations and comments***

113. The authorities are encouraged to take additional measures to expedite the processes through which law enforcement authorities may determine whether a natural or legal person is a holder or beneficial owner of bank accounts.

114. The authorities should introduce legal mechanisms in order to ensure that the provisions of Article 7 paragraph 2 are properly implemented, including the possibility to use monitoring of accounts in respect of all the relevant criminal offences in accordance with the Convention's provisions and not only in ML/TF cases.

115. The authorities are recommended to maintain statistics regarding the use of special investigative techniques.

## **7. International co-operation**

### **7.1 Confiscation – Article 23 paragraph 5; Article 25 paragraphs 2, 3**

The Convention is considered to add value in the following areas:

The Convention introduces a new obligation to confiscate that extends to “*in rem*” procedures. Hence, Article 23 paragraph 5 reads as follows:

*“The Parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures **equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions**, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention.”* (i.e. transformed or converted etc.)

Asset sharing (though Article 25(1) retains the basic concept that assets remain in the country where found, the new provisions in Article 25(2) and (3) require priority consideration to returning assets, where requested, and concluding agreements).

#### ***Description and analysis***

116. As indicated by the authorities in their replies to the questionnaire the legal framework of BiH does not provide for measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions.
117. International cooperation for confiscation purposes is covered by Article 20 of the Law on Mutual Assistance in Criminal Matters (MLA Law) dealing with confiscation in the framework of MLA. The scope of the property that can be returned to the requesting party is defined in the MLA Law. As defined in the mentioned article the hand-over may be accomplished at any stage of the criminal proceedings, but only on the grounds of a final and binding decision. The MLA Law also defines cases when the proceeds may be retained in Bosnia and Herzegovina.
118. There are no agreements or arrangements in place giving special consideration to sharing confiscated property with other countries on a regular or case-by-case basis.

#### ***Effective implementation***

119. As indicated in the additional information provided by the authorities during 2014 and 2015, the Ministry of Justice of Bosnia and Herzegovina received from another party to CETS 198 five Letters Rogatory for the confiscation of proceeds, though no proceeds were confiscated.

#### ***Recommendations and comments***

120. Bosnia and Herzegovina has not adopted specific measures to implement Articles 23 paragraph 5 of the Convention; the same goes for Article 25 paragraphs 2 and 3.
121. Therefore, it is recommended to establish a mechanism for execution of measures equivalent to confiscation of property, which are not criminal sanctions, in relation to a criminal offence as part of international cooperation.

122. Bosnia and Herzegovina should consider entering into agreement or arrangements to cooperate with other parties for the purpose of implementation of Article 25 of the Convention.

**7.2 Investigative assistance - Article 17 paragraphs 1, 4, 6; Article 18 paragraphs 1, 5; Article 19 paragraphs 1, 5**

The areas where the Convention is considered to add value here are the following:

- The Convention introduces the power to provide international assistance in respect of requests for information on whether subjects of criminal investigations abroad hold or control accounts in the requested State Party. Indeed, Article 17 paragraph 1 reads as follows: *“Each Party shall, under the conditions set out in this article, take the measures necessary to determine, in answer to a request sent by another Party, whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in its territory and, if so, provide the particulars of the identified accounts.”* This provision may be extended to accounts held in non-bank financial institutions and such an extension may be subject to the principle of reciprocity.
- The Convention also introduces power to provide international assistance in respect of requests for historic information on banking transactions in the requested Party (which may also be extended to non-bank financial institutions and such extension may also be subject to the principle of reciprocity). Article 18 paragraph 1 provides that *“On request by another Party, the requested Party shall provide the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account.”*
- The Convention is considered to add also value as it establishes the power to provide international assistance on requests for prospective monitoring of banking transactions in the requested Party (and may be extended to non bank financial institutions). Article 19 paragraph 1 reads as follows:

*“Each Party shall ensure that, at the request of another Party, it is able to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Party.”*

***Description and analysis***

123. Pursuant to Article 1 of the MLA Law, apart from domestic legislation, MLA is also provided on the basis of multilateral international treaties to which BiH is a party and bilateral agreements concluded in this respect. According to paragraph 1 of the same Article, the provisions of an international agreement prevail over domestic legislation. Therefore, as indicated by the authorities Article 17 of the Convention shall be directly applicable. With regard to jurisdictions with which BiH has not concluded an agreement on MLA, the provision of MLA would be subject to the principle of reciprocity in accordance with Article 12 of the Law on MLA.
124. Articles 8 and 13 of the MLA Law set out the range of MLA in criminal matters that the authorities of BiH are able to provide. These include extradition of suspects, accused and sentenced persons, transfer of criminal proceedings, recognition and enforcement of foreign judicial decisions, as well as general types of legal assistance.

125. Pursuant to Article 13, general types of legal assistance include *inter alia* the execution of individual procedural actions such as service of summons, service of documents and other objects relevant to the proceedings, seizure of objects, handing over of seized objects to the requesting state, search of sites and persons, and controlled delivery, information and intelligence exchange. In addition assistance may also be provided for other actions that may arise in criminal proceedings and are not contrary to the MLA law and the criminal legislation of BiH.
126. The authorities have informed that national legislation, namely Criminal Procedures Codes, described earlier under analysis of Article 7; also apply in the context of foreign requests for information on bank accounts, on banking transactions and on the monitoring of banking transactions. As provided under Article 97 of the MLA Law, relevant provisions of the Criminal Procedure Codes, Criminal Codes, the Laws on Minor Offences and the Laws on Courts shall be applied to the matters that concern mutual assistance in criminal matters and are not specifically regulated in the MLA Law.
127. Under Articles 67 of the AML/CFT Law the FID is authorized to share with foreign counterparts' information and documentation obtained in Bosnia. The FID submits information upon explained request to the foreign law enforcement agencies only when an explanation for suspicion and concrete links with money laundering and financing terrorist activities are stated, provided that similar protection of confidentiality is ensured. Actions undertaken under the AML/CFT Law could be executed for the purposes of that law.
128. Powers of the FID obtain information on bank accounts, on banking transactions and on the monitoring of banking transactions are described under analysis of Article 7.

**Articles 17(4) and (6), 18(5) and 19(5)**

129. As for the extension of the applicability of Articles 17(6), 18(5) and 19(5) of the Convention to accounts held in non-bank financial institutions, Article 72 of the BiH CPC contain reference to bank or other legal person performing financial operations. Identical provisions are included also in the other Criminal Procedure Codes as indicated under the analysis of compliance with Article 7 of the Convention.
130. Article 60 of the AML/CFT law applies to all reporting entities<sup>7</sup>.

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<sup>7</sup> According to Article 4 of the AML/CFT law money laundering and financing terrorist activities under the Law shall be carried out by the following reporting entities:

- a) Banks;
- b) Insurance companies, insurance brokers, licensed to deal with life insurance affairs;
- c) Leasing companies;
- d) Microcredit organisations;
- e) Authorised agents trading in financial instruments, foreign currencies, exchange, interest rates and index instruments, transferable securities and commodity futures;
- f) Companies engaged in electronic funds transfer;
- g) Investment and pension companies and funds, regardless of their legal form;
- h) Post offices;
- i) Casinos, gambling houses and other organizers of games of chance and special lottery games, particularly betting, slot machines, internet games of chance and games on other telecommunication means;
- j) Currency exchange offices;
- k) Pawnshops;
- l) Persons engaged in professional services:
  - 1) Public notaries,
  - 2) Lawyers,

## **Effective implementation**

131. The authorities have provided a case example on a foreign request received by a Ministry of Justice of BiH for search and seizure of assets from the safe deposit boxes held in a bank in BiH. The BiH authorities have informed the foreign counterpart that according to national legislation a court order for search and seizure of assets from the safe deposit boxes is required. Based on a Letter Rogatory from the court of the requesting state sent via Ministry of Justice with a request to seize the contents of the safe deposit boxes the request was executed by the competent authorities of BiH.

## **Recommendations and comments**

132. In general, it is considered that legislative provisions authorize the authorities to execute request from foreign authorities through the Ministry of Justice or the FID (in case of ML/TF).

133. Nevertheless the Rapporteurs deem that it would be beneficial if, in addition to the other types of the legal assistance provided under the legislation regulating MLA, the possibility was clearly for the authorities to execute the following requests:

- determine whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in Bosnia and Herzegovina;
- obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period;
- and monitor, during a specified period, the banking operations that are being carried out through one or more accounts.

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3) Accountants,

4) Auditors,

5) Legal or natural persons performing accounting services and tax counselling services.

m) Real estate agencies;

n) Legal and natural persons performing the following activities:

1) Receiving and/or distributing money or property for humanitarian, charitable, religious, educational or social purposes,

2) Transfer of money or values,

3) Factoring,

4) Forfeiting,

5) Safekeeping, investing, administering, managing or advising in the management of property of third persons,

6) Issuing, managing and performing operations with debit and credit cards and other means of payment,

7) Issuing financial guarantees and other warranties and liabilities,

8) Giving loans, crediting, offering and brokering in the negotiation of loans,

9) Organizing and performing auctions,

10) Trade in precious metals and stones and products made of these materials,

11) Trade in works of art, vessels, vehicles and aircrafts,

12) Persons referred to in Article 3 Item m) hereof.

o) Privatisation agencies.

### 7.3 Procedural and other rules (Direct communication) – Article 34 paragraphs 2 and 6

The Convention is considered to add value in that it introduces the possibility for direct communication prior to formal requests. According to article 34 paragraph 6:

*“Draft requests or communications under this chapter may be sent directly by the judicial authorities of the requesting Party to such authorities of the requested Party prior to a formal request to ensure that it can be dealt with efficiently upon receipt and contains sufficient information and supporting documentation for it to meet the requirements of the legislation of the requested Party.”*

#### **Description and analysis**

134. Under Article 4 of the MLA law, Letters Rogatory by foreign judicial authorities shall be sent to national judicial authorities through the Ministry of Justice of Bosnia and Herzegovina.
135. As concerns the ability to send draft requests or communications directly by the judicial authorities of the requesting Party to such authorities of the requested Party prior to a formal request to ensure that it can be dealt with efficiently upon receipt and contains sufficient information and supporting documentation for it to meet the requirements of the legislation of the requested Party, this is not provided in the national legislation. However, the authorities have confirmed that this is common practice.

#### **Effectiveness**

136. The authorities have advised that the Ministry of Justice does not receive feedback information on the direct communication between judicial authorities of Bosnia and Herzegovina and other state parties to the Convention, therefore, no information on the number of requests sent directly can be provided.

#### **Recommendations and comments**

137. BiH has not made use of the option set out in Article 34 enabling to send request or communications directly in event of urgency. The authorities should consider the use of this option to facilitate co-operation under the Convention.
138. The authorities should ensure that they are in a position to provide comprehensive statistical information on the practice of international co-operation and direct communication between judicial authorities of the Parties.

### **8. International co-operation – Financial Intelligence Units - Article 46 paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12**

It is considered that the added value of the Convention in A.46 is that it sets out a *“detailed machinery for FIU to FIU cooperation, which is not subject to the same formalities as judicial legal cooperation.”* The relevant provisions are set out in full.

**Paragraph 1** Parties shall ensure that FIUs, as defined in this Convention, shall cooperate for the purpose of combating money laundering, to assemble and analyse, or, if appropriate, investigate within the FIU relevant information on any fact which might be an indication of money laundering in accordance with their national powers.

**Paragraph 2** For the purposes of paragraph 1, each Party shall ensure that FIUs exchange, spontaneously or on request and either in accordance with this Convention or in accordance with existing or future memoranda of understanding compatible with this Convention, any accessible information that may be relevant to the processing or analysis of information or, if appropriate, to investigation by the FIU regarding financial transactions related to money laundering and the natural or legal persons involved.

**Paragraph 3** Each Party shall ensure that the performance of the functions of the FIUs under this article shall not be affected by their internal status, regardless of whether they are administrative, law enforcement or judicial authorities.

**Paragraph 4** Each request made under this article shall be accompanied by a brief statement of the relevant facts known to the requesting FIU. The FIU shall specify in the request how the information sought will be used.

**Paragraph 5** When a request is made in accordance with this article, the requested FIU shall provide all relevant information, including accessible financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between the Parties.

**Paragraph 6** An FIU may refuse to divulge information which could lead to impairment of a criminal investigation being conducted in the requested Party or, in exceptional circumstances, where divulging the information would be clearly disproportionate to the legitimate interests of a natural or legal person or the Party concerned or would otherwise not be in accordance with fundamental principles of national law of the requested Party. Any such refusal shall be appropriately explained to the FIU requesting the information.

**Paragraph 7** Information or documents obtained under this article shall only be used for the purposes laid down in paragraph 1. Information supplied by a counterpart FIU shall not be disseminated to a third party, nor be used by the receiving FIU for purposes other than analysis, without prior consent of the supplying FIU.

**Paragraph 8** When transmitting information or documents pursuant to this article, the transmitting FIU may impose restrictions and conditions on the use of information for purposes other than those stipulated in paragraph 7. The receiving FIU shall comply with any such restrictions and conditions.

**Paragraph 9** Where a Party wishes to use transmitted information or documents for criminal investigations or prosecutions for the purposes laid down in paragraph 7, the transmitting FIU may not refuse its consent to such use unless it does so on the basis of restrictions under its national law or conditions referred to in paragraph 6. Any refusal to grant consent shall be appropriately explained.

**Paragraph 10** FIUs shall undertake all necessary measures, including security measures, to ensure that information submitted under this article is not accessible by any other authorities, agencies or departments.

**Paragraph 11** The information submitted shall be protected, in conformity with the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and taking account of Recommendation No R(87)15 of 15 September 1987 of the Committee of Ministers of the Council of Europe Regulating the Use of Personal Data in the Police Sector, by at least the same rules of confidentiality and protection of personal data as those that



apply under the national legislation applicable to the requesting FIU.

**Paragraph 12** The transmitting FIU may make reasonable enquiries as to the use made of information provided and the receiving FIU shall, whenever practicable, provide such feedback.

### **Article 46 paragraphs 1, 2 and 3**

139. The Financial-Intelligence Department (FID) is the Financial Intelligence Unit of BiH. As a police type of FIU the FID acts within the State Investigation and Protection Agency (SIPA) and operates under its supervision. The SIPA is an administrative unit within the Ministry of Security of BiH with operational autonomy, established for the purpose of performing police tasks, headed by a director and financed from the “Budget of the Institutions of Bosnia and Herzegovina and International Obligations of Bosnia and Herzegovina”.
140. According to Article 55 of the AML/CFT Law the FID receives, collects, records and analyses data, information and documentation, as well as, investigates and forwards results of analyses and/or investigations to competent prosecutor’s offices, authorities investigating ML and/or FT and/or other competent authorities.
141. The FID performs tasks related to prevention, investigation, detection of ML and FT, promotes cooperation between competent authorities of BiH, the FBiH, RS and the BD in the area of the prevention of ML and the FT activities. One of the core functions of the FID is cooperation and exchange of information with competent bodies of other states and international organizations in charge for the ML/ FT prevention.
142. The FID is a member of the EGMONT Group since 2005.
143. Articles 65, 66 and 67 of the AML/ CFT Law regulate the competences of the FID in the field of international cooperation. Article 65 provides that the FID has powers to request data, information and documentation (hereinafter: “information”) from various institutions involved in ML/ FT prevention, including the foreign FIUs.
144. According to Article 66 of the AML/ CFT Law the FID is entitled to submit information upon requests or in own initiative to foreign FIUs. Sharing of information is subject to the following conditions: the FID requests a written warranty stating that information will be used only for purposes defined by provisions of the AML/CFT Law and that equivalent level of confidentiality is guaranteed. In order to forward data, information and documentation to police and judiciary bodies abroad, a prior written approval of the FID shall be necessary.
145. Under Article 67 of the AML/CFT Law, upon explained request the FID submits information to the foreign law enforcement agencies only when an explanation for suspicion and concrete links with ML and FT activities are stated, provided that similar protection of confidentiality is ensured.
146. International cooperation of the FID is not conditioned by the type of the FIU.
147. The FID is not restricted in cooperating with foreign counterparts which are not members of the Egmont Group. The authorities have confirmed that the AML/CFT Law does not impose any restriction with regard to cooperation between the FID and non-

Egmont Group members FIUs and as an example information exchange with Kosovo\*\*s FIU is emphasised.

148. Neither the wording of legislation nor the practice restricts exchange of information to any particular type of FIU. In this respect the authorities have provided the following statistical data:

*Table 4 Statistical data- Received requests and requests sent to foreign FIUs breakdown by the type of the FIU*

TYPE OF FIU	2012		2013		2014	
	Received	Sent	Received	Sent	Received	Sent
Administrative FIU	32	38	51	34	37	29
Judicial/ Prosecutorial FIU	6	/	2	1	2	2
Police FIU	8	14	10	12	9	10
<b>Total</b>	<b>46</b>	<b>52</b>	<b>63</b>	<b>47</b>	<b>48</b>	<b>41</b>

149. Even though the existence of a Memorandum of Understanding (MoU) is not a prerequisite to exchange information, the FID has signed 11 MoUs with foreign FIUs.

#### **Article 46(4)**

150. Under Article 65 of the AML/ CFT Law it is not explicitly prescribed that the request shall be accompanied by a brief statement of the relevant facts known to the FIU or that it shall be specified how the information sought will be used.
151. As indicated by the authorities the requests made by the FID are accompanied by a brief statement of the relevant facts and it is specified in the request how the information sought will be used.
152. The rapporteurs note that under Article 65 it is specified that the FID may not submit or show data, information and documentation obtained to third natural or legal persons, or other bodies, nor use them for other purposes in contravention of the conditions and restrictions set by the requested party.
153. Alongside the legal requirements, as a member of Egmont Group the FID exchanges information using the Egmont Secure Web (ESW) and applies its principles and rules. Authorities confirmed that templates used for requesting information from foreign FIUs are adapted to the Egmont templates and contain: statement (ensuring confidentiality of individuals or information, for not forwarding to other institution without prior written approval of the FIU and using information only for stated purposes), information about requesting agency, information about requested FIU, persons or subject of request and content of request.
154. According to the provided information the FID has not received refusal notification from a foreign FIU on the bases of insufficient background information. However, authorities indicated that in several cases further clarification or additional information for determining specific links with the requesting country and requests for stating specific grounds for ML/ FT suspicion were required by the requested FIU.

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\* All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

## **Article 46(5)**

155. In a case of received request from a foreign FIU that meets legal requirements the FID has competences to request and provide information to foreign FIUs.
156. Articles 66 and 67 of the AML/CFT Law authorize FID to share with foreign counterparts' information and documentation obtained in BIH.
157. Furthermore, according to Article 56 of the AML/CFT Law the FID requests necessary information from reporting entities. Upon written request the FID requires information on identification of a client, reason for establishing business relationship, transactions and other information stipulated under Article 54 of the AML/ CFT Law, information on ownership and bank transactions of the person, as well as other information, data and documentation necessary for carrying out the tasks of the FID according to the AML/CFT Law. Reporting entities provide requested information to the FID within 8 working days.
158. According to Article 61 of the AML/CFT Law the FID may request information from competent authorities to provide information, data and documentation for undertaking its duties under the AML/CFT Law. It seems that based on Articles 66 and 67 of the AML/CFT Law, the FID will be able to share requested law enforcement data with the foreign counterparts (FIUs and law enforcement agencies).
159. No specific timeframes are provided for requested authorities to submit to the FID relevant information, however as stated under Article 61 it shall be done urgently.
160. The FID has powers to inspect the documentation in the premises of reporting entities or competent authorities.
161. The authorities have confirmed that the FID is conducting all necessary checks and provides the relevant results based on the request of a foreign FIU without reference to other kinds of cooperation if the request contains description of ML/FT suspicion acceptable for the FID.
162. According to the statistical data provided to the rapporteurs in 2009-2014 responses to the requests from foreign FIUs were provided on average in 7-60 days. Authorities explained that time required to provide reply to foreign FIUs depends on the data requested and translation. In cases when researches last longer the FID provides initial partial reply and amended response is provided when all requested or verified data is available.

## **Article 46(6)**

163. Although it is not explicitly prescribed in Article 66 of the AML/CFT Law, the FID has powers to refuse to divulge information to a foreign FIU when similar confidentiality protection is not ensured and written warranty is not granted.
164. It should be noted that in the period from 2009-2014 (until September) the FID has refused to divulge information in one case in 2013. According to the explanations provided the request was rejected as it related to an infraction<sup>8</sup>.

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<sup>8</sup> Authorities additionally explained that FID did not refuse to submit information, the refusal related to approval for dissemination of previously provided information to the magistrate court to be used in minor offence proceedings.

165. The authorities confirmed that any refusals are appropriately explained to the FIU requesting the information; however there is no legislative requirement to notify the requesting party about the refusal.

#### **Article 46(7)**

166. The use of information obtained and provided by the FID is determined by the AML/CFT Law. Article 76 of the AML/CFT Law prescribes that the FID, reporting entities, government authorities, legal persons with public authority and other subjects and their employees shall use information obtained in accordance with the Law only as an intelligence data for ML/FT prevention and detection and other cases as stipulated by the AML/CFT Law.
167. According to Articles 65 and 66 of the AML/CFT Law the FID requests information for achieving its competences prescribed by the law, as well as, it provides information to foreign FIUs if legal conditions are met.
168. In cases when the FID submits information to a foreign FIU, a foreign FIU needs a prior written approval of the FID for dissemination of information to police and judiciary bodies. Although the AML/CFT Law doesn't explicitly prescribe obligation to request prior consent in a case when the FID needs to forward information obtained from a foreign FIU to BiH competent authorities, Article 65 paragraph 2 imposes prohibition on disclosure to third persons in contravention of the conditions and restrictions set by a foreign FIU that provides information.

#### **Article 46(8)**

169. Article 66 of the AML/CFT Law provides that prior to submission of data to FIUs of other countries; the FID shall request a written warranty stating that data, information and documentation will be used only for purposes defined by provisions of this Law. In order to forward data, information and documentation to police and judiciary bodies abroad, a prior written approval of the FID shall be necessary. Concerning conditions on exchange of information as indicated in the 4<sup>th</sup> round MER adopted by MONEYVAL<sup>9</sup> no unreasonable or unduly restrictive conditions are imposed in this respect.

#### **Article 46(9)**

170. The FID is in line with paragraph 9 of the convention and doesn't impose any restriction in relation of providing approval for the disseminations. According to Article 66, data, information and documentation will be used only for purposes defined by provisions of the AML/CFT Law. In order to forward data, information and documentation to police and judiciary bodies abroad, a prior written approval of the FID shall be necessary.
171. The Authorities also noted that Article 76 of the AML/CFT Law which prescribes "Use of collected data" is applicable to use of such data by the foreign FIUs.
172. Article 76 stipulates that the FID, reporting entities, government authorities, legal persons with public authority and other subjects and their employees shall use the data, information and documentation obtained in accordance with this Law only as intelligence data for the purpose of prevention and detection of money laundering and financing terrorist activities and other cases as stipulated by the Law.

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<sup>9</sup> See 4<sup>th</sup> Round Detailed Assessment Report on BiH adopted by Moneyval in September 2015.

173. Thus it can be concluded that transmitted information or documents cannot be used for criminal investigations or prosecutions.

#### **Article 46(10)**

174. The FID has undertaken measures to secure information obtained by implementation of the AML/CFT Law.

175. According to Article 65 paragraph 2, the FID is not authorized to submit or show information obtained in a frame of international cooperation to third parties nor use them for other purposes in contravention of the conditions and restrictions set by a requested FIU.

176. Article 73 of the AML/CFT Law prescribes that the FID shall use data, information and documentation obtained in accordance with the law, only for the purposes defined by the law.

177. Article 74 of the AML/CFT Law regulates protection of data confidentiality. Tipping of requirements adequately reflected impose prohibition of client notification for reporting entities and management, supervisors, other executives, as well as, for employees of FID, competent authorities and public prosecutor. As it is stated by the Authorities, police officers employed in the FID are bound to keep official secret of all confidential materials under Article 37 of the Law on Police Officials ("Official Gazette of BiH" No. 27/04, 63/04, 05/06, 33/06, 58/06, 15/08, 63/08, 35/09, 07/12). In addition, all positions occupied in the FID are subject to security clearance and issuance of permits for access to classified data.

178. Furthermore in line with paragraph 10 of Convention all information and documentation that FID possess are treated as protected data. More precisely in line with Article 74 paragraph 2 of the AML/CFT Law protected data by the FID are: information about FID requests, information, data or documentation forwarded to FID, orders and other instructions for temporary suspension of a transaction. The FID as a part of the SIPA implements the Law on protection of secret data ("Official Gazette of BiH" No. 54/05 and 12/09) which regulates the common bases of a single system of designation, access to use, keeping and protection from unauthorized disclosure, destruction and abuse of secret data. Manner and form of designating secret data, security areas for issuance and renewal of security authorization to access secret data, IT security and other important aspects are regulated by the new Book of Rules on protection of secret data in the SIPA<sup>10</sup> from May, 2015. In accordance with legal requirements the FID adequately developed security of its premises and servers.

179. The FID uses the ESW for communication and exchange of information with foreign FIUs.

#### **Article 46(11)**

180. The Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) was signed in 2004 and ratified in 2006.

181. The AML/ CFT Law don't deal specifically with data protection issues, and general rules for data protection are applicable. The Law on the Protection of Personal Data

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<sup>10</sup> No. 16-11-02-4721-1/15

(“Official Gazette of BiH” No. 49/06 and 76/11) regulates and secures the right to privacy with regard to the processing of personal data. Authorities stated they implement the Book of Rules on implementation of the Law on protection of personal data in the State Investigation and Protection Agency<sup>11</sup> which stipulates the rules and procedures in the SIPA with regard to the implementation of the basic principles of lawful processing of personal data at the SIPA, the procedure for giving out personal data to a user and transfer of data abroad, rules governing the realization of rights of data subject, manner and other issues.

#### Article 46(12)

182. As indicated by the authorities the AML/CFT Law doesn't address the issues related to requesting or providing feedback on the use made of information and in practice feedback is provided upon request of a foreign FIU.
183. The authorities indicated that feedback is provided based on the request.
184. No statistical data on the feedback provided has been made available to the Rapporteurs.
185. It seems that the FID does not request any feedback on the use of information it has provided by the requesting FIUs.

#### Effective implementation

186. The FID appears to have good cooperation with foreign FIUs and implements the requirements of Article 46 to a large extent. Request for information was refused only in one case<sup>12</sup>, average timeframe to provide response to the foreign FIUs is approximately from 7 up to 60 days.

Table 5 - Table of received requests from foreign FIUs.

International co-operation	2009	2010	2011	2012	2013	2014 I-IX
<b>RECEIVED REQUESTS</b>						
<b>Foreign requests received by the FIU</b>	83	55	75	46	63	31
<b>Spontaneous sharing of information received by the FIU</b>			1	1	1	7
<b>TOTAL (incoming requests and information)</b>	83	55	76	47	64	38

<sup>11</sup> No. 16-09-02-1832-1/11, adopted on 24 March 2011

<sup>12</sup> See footnote N 8

<b>Foreign requests executed by the FIU</b>	52	65	75	49	79	37
<b>Foreign requests refused by the FIU</b>					1	
<b>Average number of days to respond to requests from foreign FIUs</b>	20-60	2-14 without translation 7-60 with translation	2-14 without translation 7-60 with translation	2-14 without translation 7-60 with translation	2-14 without translation 7-60 with translation	2-14 without translation 7-60 with translation
<b>Refusal grounds applied</b>					Refused (use for misdemeanour offence)	

Table 6 - Table of submitted requests from the FID

<b>International co-operation</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014 I-IX</b>
<b>SUBMITTED REQUESTS</b>						
<b>Requests sent by the FIU</b>	<b>57</b>	<b>46</b>	<b>48</b>	<b>52</b>	<b>47</b>	<b>31</b>
<b>Spontaneous sharing of information sent by the FIU</b>		<b>1</b>		<b>3</b>		<b>2</b>
<b>TOTAL (outgoing requests and information)</b>	<b>57</b>	<b>47</b>	<b>48</b>	<b>55</b>	<b>47</b>	<b>33</b>

### **Recommendations and comments**

187. The BIH's authorities are encouraged to consider further implementing steps to reflect requirements of paragraphs 6 and 12 of Article 46 in the AML/ CFT Law.

188. There is no provision indicating that refusal should be appropriately explained to the requesting FIU.

189. The authorities are encouraged to request information on the use of information provided by the FIU from requesting counterparts.

### **9. Postponement of domestic suspicious transactions – Article 14**

The Convention is considered to provide added value by requiring State Parties to take measures to permit urgent action in appropriate cases to suspend or withhold consent to a transaction going ahead in order to analyse the transaction and confirm the suspicion.

### ***Description and analysis***

190. Articles 58 and 59 of the AML/CFT Law prescribe the administrative procedures for temporary suspension of transactions by the FID when the latter suspects ML or FT in reference to a certain transaction, account or person.

191. Performing its duties related to ML/FT analysis and investigations upon Suspicious transaction report (STR), request or order from prosecutor's office, requests from BIH's or foreign authorities and when ML or FT suspicion exists, the FID has powers to issue a written order to a reporting entities for the temporary suspension of a transaction. In urgent cases, the FID issues a verbal order to the reporting entity, later confirmed with a written order. ML or FT suspicion the FID refers to transaction, accounts and persons. The temporary suspension lasts 5 working days and this period is counted from the moment when the FID issued the order for suspension or from the moment the FID received the STR from the reporting entities.

192. After expiration of this period, a transaction may be temporarily suspended only by a decision of a competent court pursuant to provisions of the code of criminal procedures of BiH, the FBiH, RS and the BD.

193. As specified under Article 58, in urgent cases the FID may issue a verbal order for temporary suspension of a transaction/s, thus suspension can be applied in a timely manner.

### ***Effective implementation***

194. According to the information provided by the FID in the period from 01.01.2009 - 30.09.2014, the FID issued 70 orders for temporary suspension of transactions for a total amount of 23,819.861,72 KM (around 12 million Euros). In most of the cases, the FID issued orders for temporary suspension of transactions, when appropriate also based on STRs received or its own analysis upon request of the Public Prosecutor's Office. In 2014 the FID increased the number of measures applied for temporary suspension of transactions, based on STRs received or its own analysis.

195. Although the FID keeps statistic on the number of issued temporary suspension of transaction, no comprehensive statistics was made available in regard to the number of cases where the FIU order was followed by a preliminary investigation, a seizure order, prosecution, conviction, confiscation.

### ***Recommendations and comments***

196. Overall, measures are in place to implement the requirements under Article 14. The FID has powers to issue a written order to postpone transaction. Use of this instrument is not restricted or conditioned by the need of having an STR submitted. Legal provisions allow the FID also to take urgent action in cases when ML and FT suspicions exist to suspend a transaction in order to analyse it and confirm the suspicion. Moreover the power to suspend transactions was applied in a number of cases.

197. The FID is encouraged to continue applying measures of temporary suspension of transactions, based on STRs received or its own analysis.

198. FID is encouraged to develop more comprehensive statistics in this regard in order to assess the effective implementation of this measure.



## **10. Postponement of transactions on behalf of foreign FIUs – Article 47**

Article 47 establishes a new international standard, namely:

“1. Each Party shall adopt such legislative or other measures as may be necessary to permit urgent action to be initiated by a FIU, at the request of a foreign FIU, to suspend or withhold consent to a transaction going ahead for such periods and depending on the same conditions as apply in its domestic law in respect of the postponement of transaction.

2. The action referred to in paragraph 1 shall be taken where the requested FIU is satisfied, upon justification by the requesting FIU, that:

*a. the transaction is related to money laundering; and*

*b. the transaction would have been suspended, or consent to the transaction going ahead would have been withheld, if transaction had been the subject of a domestic suspicious transaction report.”*

### ***Description and analysis***

199. The FID is authorized to suspend or withhold consent to a transaction going ahead at the request of a foreign FIU as required under Article 47 of the Convention.
200. As specified under Article 69 of the AML/CFT Law the FID has the power to temporarily postpone suspicious transaction(s) upon a motivated written proposal from a foreign FIU. As specified under Article 69 of the AML/CFT Law domestic procedures in respect of the postponement of transactions are applicable also when a transaction is postponed at the request of a foreign FIU.
201. Under Article 58, the FID may issue a written order for a temporary suspension of the transaction(s) (including at the request of a foreign FIU) if it suspects ML or TF activities in reference to a certain transaction, account or person.
202. The FID shall immediately inform the competent prosecutor's office in BiH about the issued order on postponement.
203. According to Article 58 paragraph 5 of the AML/CFT Law the FID provides information to the requesting FIU on issued written orders or on reasons for rejecting requests for temporary suspension of a transaction/s.

### ***Effective implementation***

204. The FID has not received any request from a foreign FIU for temporary suspension of a transaction in the period from 2009 to 2014 and did not have the opportunity to apply its power under Article 69 of the AML/CFT Law. However, before 2009, the FID has issued orders on postponement at the requests of foreign FIUs, followed by freezing orders issued by the court of Bosnia and Herzegovina. It should be noted that the FID has sent a request to postpone a transaction in amount of 500,000 Euros to a foreign FIU. Subsequently a freezing order was issued by the court.

## ***Recommendations and comments***

205. As indicated above, the BiH has measures in place which enable it to suspend or withhold consent to a transaction when ML and FT suspicions exist, upon a request from a foreign FIU, in line with Article 47 of CETS 198.

### **11. Refusal of co-operation – Article 28 paragraphs 1d, 1e, 8c**

The Convention is considered to add value here as, according to article 28 (i.e.) and article 28(1)(d), the political offence ground for refusal of judicial international cooperation can never be applied to financing of terrorism (it is the same in respect of the fiscal excuse)

Provision is made in article 28(8c) to prevent refusal of international cooperation by States (which do not recognise self laundering domestically) on the grounds that, in the internal law of the requesting Party, the subject is the author of both the predicate offence and the ML offence.

## ***Description and analysis***

206. Paragraph 2 Article 10 of the Law on Mutual Legal Assistance on Criminal Matters prescribes that no request for mutual legal assistance shall be denied solely because it concerns an offence which is considered to be a fiscal offence pursuant to national law.
207. Paragraph 1 of Article 10 of the Law on Mutual Legal Assistance on Criminal Matters prescribes that crimes against humanity or other values protected by international law may not serve as a basis to deny the request for mutual legal assistance in terms of Article 9, subparagraphs b) and c) of the Law.
208. Subparagraphs b) and c) of Article 9 prescribe that a relevant national judicial authority shall deny a request for legal assistance if the request concerns an offence which is considered to be a political criminal offence or an offence connected with a political criminal offence; or if the request concerns a military criminal offence.
209. As for the international cooperation in the cases when the subject is the author of both the predicate offence and the ML offence, the authorities mentioned that cooperation in this case will be granted. It is important to note that self-laundering is criminalised at state level and in the RS, but not in the FBiH and BD.

## ***Effective implementation***

210. No data has been provided as to whether any cooperation has been granted in the instances described above.

***Recommendations and comments***

211. The authorities should consider introducing amendments in the CC FBIH and the CC BD to include explicit reference to self-launderers.
212. It is recommended to ensure that statistical data on the practice of international cooperation in these two areas are available.

## II. OVERALL CONCLUSIONS ON IMPLEMENTATION OF THE CONVENTION

213. Bosnia and Herzegovina has undertaken important steps to ensure compliance of the national legislation with the provisions of the Convention.
214. In respect of Article 9: Although all the definitions of the ML offence extend to the cases where the perpetrator acted negligently with regard to the criminal origin of the relevant money or property, no practical application of this provision was demonstrated. Even though “negligent” ML is criminalised as provided under Article 9 paragraph 3 of the Convention at all levels, it has not yet been tested in practice. The RS authorities should consider harmonizing the sanctioning regime of the “negligent” ML with the state level, FBiH and Brčko District. The authorities are advised to criminalise self-laundering in FBiH and BD. Given the discrepancy between the approach and case law among the state level authorities, FBiH, RS and BD, it is recommended to take further actions regarding the application of Article 9 paragraph 5 and 6 of the Convention, and to further develop prosecutorial and court practice based on these provisions of the Convention. Especially the implementation of Article 9 paragraph 6 of the Convention should be explored by the judiciary from BiH, considering that many ML cases are connected to predicate offences committed abroad.
215. In respect of Article 10 of the Convention, it is recommended to cover accordingly Article 10 paragraph 2 of the Convention and not to limit the criminal liability of the legal persons in the case of lack of supervision only in connection to the employees. Authorities should take further necessary steps to apply to a larger extent the corporate liability mechanisms by law enforcement agencies and judicial authorities (guidance documents, instructions etc.) in money laundering and other predicate offences, and terrorist financing cases in the various circumstances envisaged by Article 10 of the Convention.
216. As regards Article 11 of the Convention, Bosnia and Herzegovina has adopted measures to implement the provisions of Article 11.
217. As regards Article 3 of the Convention, the following actions are recommended:
- To review the discretionary nature of confiscation of instrumentalities in the CC RS.
  - To review the conditions imposed for the confiscation of instrumentalities belonging to third parties in FBiH, RS and BD.
  - To review the confiscation of instrumentalities under FBiH, BD and RS legislation so that the confiscation of such objects owned by third parties can be mandatory.
  - To improve the quality and scope of statistics in order to allow the examination of the overall effectiveness of the system. The authorities are recommended to ensure that the provisions on confiscation and provisional measures are properly and effectively applied.
218. As regards the management of frozen and seized property, the authorities from BiH and BD should take immediate actions to adequately implement Article 6 of the Convention, by adopting such legislative or other measures as may be necessary to ensure proper management of seized property. The courts should not be burdened with the task of managing seized assets. It is therefore recommended to establish similar specialized agency, as in RS. Furthermore FBiH is encouraged to take further steps for making the specialised agency fully operational.
219. Bosnia and Herzegovina is encouraged to take additional measures to expedite the processes through which law enforcement authorities may determine whether a natural or legal person is a holder or beneficial owner of bank accounts. The authorities should introduce legal mechanisms in order to ensure that the provisions of Article 7

paragraph 2 are properly implemented, including the possibility to use monitoring of accounts in respect of all the relevant criminal offences in accordance with the Convention's provisions and not only in ML/TF cases. The authorities are recommended to maintain statistics regarding the use of special investigative techniques.

220. Bosnia and Herzegovina is recommended to establish a mechanism for execution of measures equivalent to confiscation of property, which are not criminal sanctions, in relation to a criminal offence as part of international cooperation. Bosnia and Herzegovina should consider entering into agreement or arrangements to cooperate with other parties for the purpose of implementation of Article 25 of the Convention.
221. Rapporteurs deem that it would be beneficial if, in addition to the other types of the legal assistance provided under the legislation regulating MLA, the possibility was clearly for the authorities to execute the following requests:
  - determine whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in Bosnia and Herzegovina;
  - obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period;
  - and monitor, during a specified period, the banking operations that are being carried out through one or more accounts.
222. BiH has not made use of the option set out in Article 34 enabling to send request or communications directly in event of urgency. The authorities should consider the use of this option to facilitate co-operation under the Convention.
223. The authorities should ensure that they are in a position to provide comprehensive statistical information on the practice of international co-operation and direct communication between judicial authorities of the Parties.
224. As regards the implementation of Article 46, the BIH's authorities are encouraged to consider further implementing steps to reflect requirements of paragraphs 6 and 12 of Article 46 in the AML/ CFT Law. There is no provision indicating that refusal should be appropriately explained to the requesting FIU. The authorities are encouraged to request information on the use of information provided by the FIU from requesting counterparts.
225. Overall measures are in place to implement the requirements under Article 14. FID is encouraged to keep more comprehensive statistics in this regard in order to assess the effective implementation of this measure. The FID is encouraged to continue applying measures of temporary suspension of transactions, based on STRs received or its own analysis. FID is encouraged to develop more comprehensive statistics in this regard in order to assess the effective implementation of this measure.
226. The FID has not received any request from a foreign FIU for temporary suspension of a transaction in the period from 2009 to 2014 and did not have the opportunity to apply its power under Article 69 of the AML/CFT Law. However, before 2009, the FID has issued orders on postponement at the requests of foreign FIUs, followed by freezing orders issued by the court of Bosnia and Herzegovina.
227. In respect of Article 28 the authorities should consider introducing amendments in the CC F BiH and the CC BD to include explicit reference to self-launders. It is also recommended to ensure that statistical data on the practice of international cooperation in these two areas are available.

### III. ANNEXES

#### ANNEX I

##### Article 9 of the Convention – Laundering offences

3. Each Party may adopt such legislative and other measures as may be necessary to establish as an offence under its domestic law all or some of the acts referred to in paragraph 1 of this Article, in either or both of the following cases where the offender
  - a) suspected that the property was proceeds,
  - b) ought to have assumed that the property was proceeds.
  
4. Provided that paragraph 1 of this article applies to the categories of predicate offences in the appendix to the Convention, each State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies:
  - a) only in so far as the predicate offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year, or for those Parties that have a minimum threshold for offences in their legal system, in so far as the offence is punishable by deprivation of liberty or a detention order for a minimum of more than six months; and/or
  - b) only to a list of specified predicate offences; and/or
  - c) to a category of serious offences in the national law of the Party.
  
5. Each Party shall ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering.
  
6. Each Party shall ensure that a conviction for money laundering under this Article is possible where it is proved that the property, the object of paragraph 1.a or b of this article, originated from a predicate offence, without it being necessary to establish precisely which offence.

## **ANNEX II**

### **Article 10 of the Convention – Corporate liability**

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
  - a) a power of representation of the legal person; or
  - b) an authority to take decisions on behalf of the legal person; or
  - c) an authority to exercise control within the legal person,as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.
2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.

## **ANNEX III**

### **Article 3 of the Convention – Confiscation measures**

3. Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime. Parties may in particular include in this provision the offences of money laundering, drug trafficking, trafficking in human beings and any other serious offence.
4. Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law.