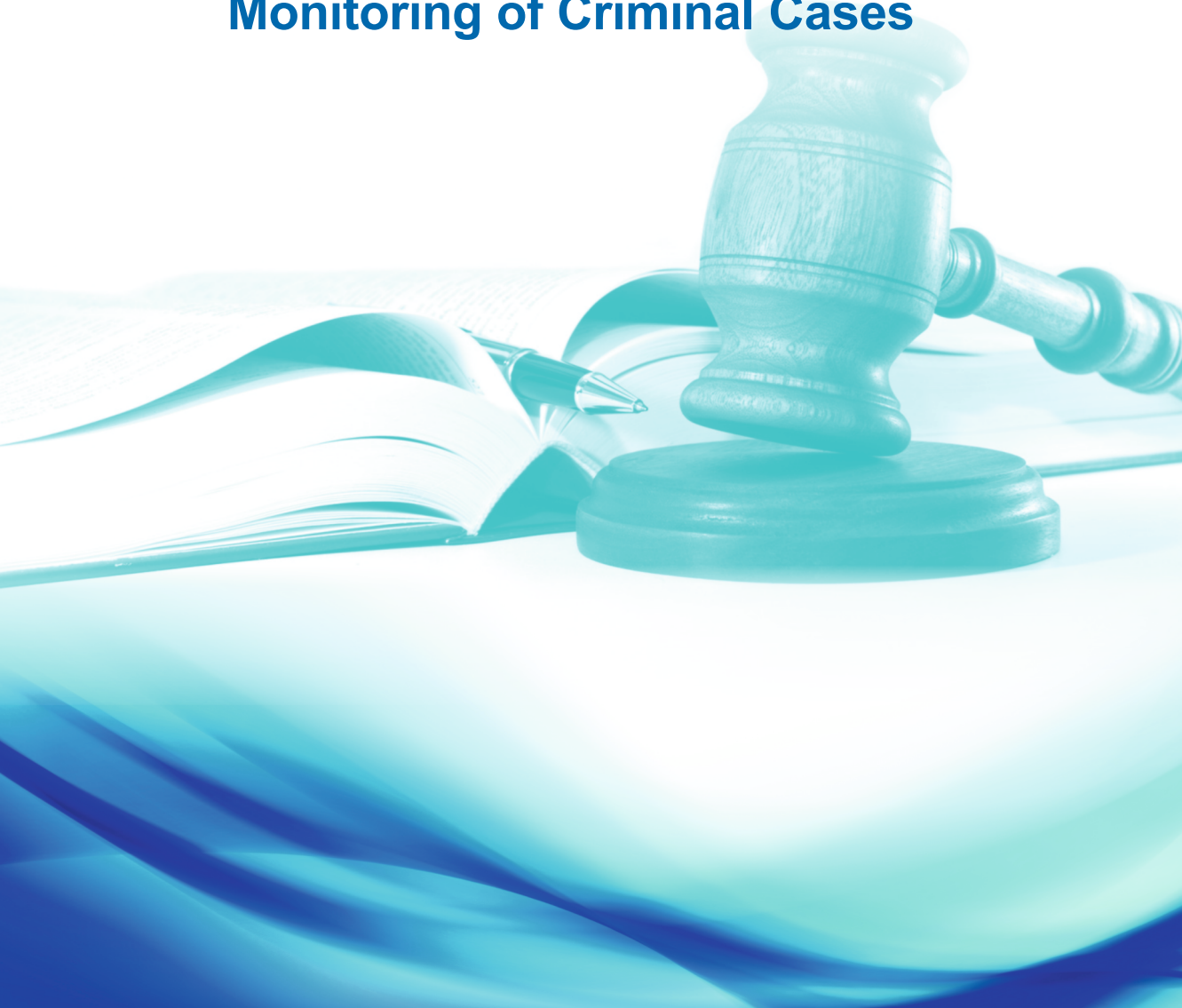




Assessing Needs of Judicial Response to Corruption through Monitoring of Criminal Cases



Assessing Needs of Judicial Response to
Corruption through Monitoring of Criminal
Cases (ARC)

PROJECT REPORT

**TRIAL MONITORING OF
CORRUPTION CASES IN BIH:
A FIRST ASSESSMENT**

FEBRUARY 2018

EXECUTIVE SUMMARY

This is the first public report by the OSCE Mission to Bosnia and Herzegovina (hereinafter: “the Mission”) based on the monitoring of corruption cases in BiH. To the Mission’s best knowledge, it is also the first analysis of this kind carried out in BiH. This report constitutes one of the main outputs of the Mission’s Project on *Assessing Needs of Judicial Response to Corruption through Monitoring of Criminal Cases* (hereinafter: “the ARC”) which was initiated in October 2016 with the support of the US Department of State’s Bureau of International Narcotics and Law Enforcement Affairs (hereinafter: “INL”).

The main objective of the Project is to identify and analyse problems in the quality and effectiveness of judicial response to corruption at the legislative, institutional and individual capacity level, as well as to propose adequate and feasible measures to address these problems.

The core findings of this report are based on the monitoring of 67 corruption cases which have been completed by the domestic judicial system in the period between January 2010 and September 2017. Although they do not profess to represent a comprehensive overview of all relevant features characterizing the processing of corruption cases in BiH, based on its extensive experience in monitoring and analysis of complex categories of cases, the Mission asserts that these findings represent a solid baseline for the assessment of the quality and effectiveness of corruption case processing.

The report is composed of four Chapters and concludes with a set of recommendations.

Chapter I explains the trial monitoring principles and methodology employed in the ARC Project, with specific regard to the criteria for the categorization and selection of cases according to their degree of seriousness and to the monitoring techniques.

Chapter II presents an overview and some critical observations on legal and institutional aspects of the current criminal justice system in BiH with specific regard to the processing of corruption cases. Concerning the legal framework, the Mission notes that the material and procedural criminal legislation (including provisions which are key for the processing of corruption cases) at the different levels of authority in BiH are not sufficiently harmonized. It also underscores the systemic challenges, and danger of increasing divergence, posed by the amendment process of key provisions of the criminal procedure in order to implement the Decision of the BiH Constitutional Court of June 2017. The failure of the authorities at the state and entity level to pass

adequate and harmonized amendments would seriously hamper the capacity of the BiH judiciary to deal with serious and complex crimes, including corruption. With regard to the institutional framework, chapter II describes the current fragmentation of the judicial system when it comes to the processing of corruption cases. The establishment of specialized judicial bodies at the state and entity level has resulted in a three-layer jurisdictional system where conflicts of jurisdiction and lack of co-ordination between these levels have negatively affected the processing of high profile corruption cases.

Chapter III provides a short overview (“mapping”) of ongoing corruption cases which are currently under observation by the Mission. Foremost, the Chapter focuses on an in-depth analysis of key issues which were identified as common or recurring problems during the monitoring of a significant number of completed cases. These issues were selected as they proved to be the most influential in determining the final outcome of the proceedings, which, in the high level cases, was most often an acquittal. These matters can be grouped into three broad areas: (1) conflicts of jurisdiction, lack of co-ordination and fragmentation in the processing of corruption cases among different levels of jurisdiction in BiH; (2) inadequate capacity of prosecutors in the drafting of indictments and in the gathering of evidence supporting the charges; and (3) inadequate capacity of judges in applying and interpreting the law in a reasoned and predictable manner.

The first area has already been mentioned above. Observed concerns are specifically related to:

- a. flaws in the application of existing provisions to solve conflicts of jurisdictions between the state and entity courts;
- b. the absence of a mechanism to resolve conflicts of jurisdiction and avoid parallel investigations between the BiH Prosecutor’s Office (hereinafter: “the BiH PO”) and the entity Prosecutor Offices (hereinafter: “the POs”).

In relation to the second area – addressing the performance of prosecutors – the Mission’s findings show that:

- a. With regard to the drafting of indictments, in a number of cases the description of the criminal behaviour in the indictment was seriously flawed due to the lack of, or unclear identification of, one or more of the elements of the crime. To be specific, in some high profile cases for the crime of abuse of office, the Mission observed that the indictment did not clearly illustrate the modality in which the criminal offence was committed. Another frequent concern is related to the inadequate identification and description of the regulations, norms or general principles of public administration which were allegedly violated by the defendant’s abuse of office.
- b. With regard to the evidence gathering process, in some cases indictments are filed on the basis of incomplete evidence, thus requiring the submission of additional evidence by the prosecution during the trial. In a sizeable number of cases, the evidence submitted for the purpose of quantifying the economic damage or gain constituting the alleged consequence of the criminal conduct was poor. Finally, in a

significant number of cases, the prosecution submitted little or no evidence on the criminal intent of the defendant.

In relation to the third area, addressing the performance of judges, the Mission's trial monitoring findings reveal four main shortcomings:

- a. Insufficient oversight by judges during the review of indictments, resulting in the confirmation of indictments which should be dismissed or sent back for corrections.
- b. Judicial decisions are often based upon unclear or insufficient reasoning. In some cases, flaws in the reasoning were related to the manner of presentation and evaluation of the evidence as it was not assessed in light of the elements of the crime. In other cases, the reasoning was not structured in a way that the elements of the crime were identified and addressed separately.
- c. The jurisprudence on corruption-related offenses is not harmonized, and judicial panels adjudicating these cases fail to refer to precedents in their reasoning. In particular, trial monitoring coverage showed concerning examples of unclear or inconsistent interpretation of substantive and procedural law as well as a systematic failure to refer to jurisprudence by both trial and appellate level courts in BiH. This last feature, together with the absence of a supreme court at the state level having the role to ensure consistency in the case law, represent major obstacles to legal certainty and equality before the law in BiH. To be more specific, the absence of reference to precedents in judicial decisions on corruption cases often gives the impression that each case is decided in isolation, with no effort being made to demonstrate that similar cases are treated alike. Under these circumstances, the risk of individuals receiving different judgments in similar cases is acute.
- d. There is no adequate sentencing practice for corruption cases. In many of the monitored cases which ended with conviction, the Mission noticed a marked leniency in sentencing, with prescribed punishments frequently falling below the mandatory statutory minimum. Closely connected to this problem is the failure of the system to ensure consistency and proportionality in the sentencing policy applied in corruption cases throughout BiH.

The report concludes at Chapter IV with a set of recommendations that propose feasible measures that, if implemented, would adequately strengthen the role and capacity of the judiciary in the fight against corruption. Considering that the issues identified in the report concern the capacities of legislation, institutions and individual judges and prosecutors, the recommendations are addressed to the legislative, executive and judicial authorities at all levels in BiH.

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INTRODUCTION

This is the first public report by the OSCE Mission to Bosnia and Herzegovina (hereinafter “the Mission”) based on the qualitative monitoring of corruption cases in the country. To the Mission’s best knowledge, it is also the first analysis of this kind carried out in Bosnia and Herzegovina (BiH).

Corruption in BiH represents a very significant threat to the country’s long-term stability and rule of law as it hampers social, economic and political progress. Although preventative measures remain important, the criminal justice system of BiH serves as the main instrument for countering this widespread phenomenon. However, national and international observers generally perceive that the judicial response to corruption in BiH is far from satisfactory. On the other hand, identification and analysis of the specific causes of a weak judicial response to corruption remain limited.

To address this gap, in October 2016 the Mission launched the Project on *Assessing Needs of Judicial Response to Corruption through Monitoring of Criminal Cases* (hereinafter “the ARC Project”).¹ Owing to its extensive trial monitoring (hereinafter: “TM”) programme, in place since 2002, the Mission possesses extensive experience in assessing the judicial system’s processing of complex and sensitive cases, including war crimes, hate crimes, and trafficking in human beings. Accordingly, through the ARC Project, the Mission extended its TM activities to cover criminal proceedings for corruption offences.

The ARC Project is financially supported by the US Department of State’s Bureau of International Narcotics and Law Enforcement Affairs (hereinafter: “INL”). In May 2016, the INL expressed an interest in funding monitoring and analysis efforts aimed at addressing the specific problems faced by the BiH judiciary in the fight against corruption. This coincided with the Mission’s planning of a number of activities in the field of anti-corruption, including an examination of the judiciary’s role.

The main objectives of the ARC Project are: (a) to identify and analyse problems and trends in the quality and effectiveness of judicial response to corruption at the legislative, institutional and individual² level; (b) to propose adequate and feasible measures with a view to strengthening the role and capacity of the judiciary in the fight against corruption; and (c) to design a set of indicators with a view to measuring progress in the processing of corruption cases and the impact of implemented measures.

¹ On the OSCE commitments on fighting corruption, see OSCE Ministerial Council, Decision no. 5/14 of 5 December 2014, available at <https://www.osce.org/cio/130411?download=true>

² Namely the experience, skills, specific technical knowledge, and motivation of officials involved in the judicial process.

The present report represents one of the main outputs of the ARC Project, undertaking a first preliminary assessment of the effectiveness and quality³ of judicial response to corruption through the systematic analysis of trial monitoring data. Chapters I and II serve to introduce the reader to the trial monitoring data and the systemic analysis in Chapter III. Specifically, Chapter I explains the main TM principles and methodology employed in the ARC Project, with specific regard to the criteria for the selection of cases and the TM modalities. Chapter II presents an overview of the current legal and institutional framework of the criminal justice system with a focus on the processing of corruption cases. The analysis contained in Chapter III is divided in two parts. The first part offers a short overview (“mapping”) of ongoing corruption cases which continue to be under observation by the Mission. The second part covers 67 corruption cases completed between January 2010 and September 2017. This data presents the core findings of this report. The report concludes with a set of recommendations, based on the Mission’s trial monitoring and analysis, addressed to the domestic institutions.

The ARC project, in its final report scheduled for the end of 2018, will follow-up on these recommendations and further explore issues affecting the judicial response to corruption.

³ For a definition of these two terms, see Chapter 3.1 below.

CHAPTER I –

TRIAL MONITORING METHODOLOGY

1.1 General principles of OSCE trial monitoring

The OSCE Office for Democratic Institutions and Human Rights (OSCE-ODIHR) publication *Trial Monitoring - a Reference Manual for Practitioners*, specifies that “OSCE trial-monitoring programmes have proven to be valuable, multi-faceted tools for supporting the process of judicial reform and assisting OSCE participating States in developing functioning justice systems that adjudicate cases consistent with the rule of law and international human rights standards”.⁴

In implementing trial monitoring programmes, the OSCE follows a number of fundamental principles. Specifically, “the principle of non-intervention, also referred to as non-interference, underlies the trial monitoring conducted by all OSCE programmes”.⁵ In all OSCE programmes non-intervention as a minimum means “no engagement or interaction with the court regarding the merits of an individual case and no attempts to influence indirectly outcomes in cases through informal channels”,⁶ as this behaviour would inevitably compromise the independence of the judiciary.

A further important principle is objectivity, requiring that “trial-monitoring programmes accurately report on legal proceedings using clearly defined and accepted standards and that they apply these standards impartially”.⁷ Finally, the principle of agreement requires that national authorities agree to permit trial monitoring as part of their commitment to the set of principles established by the OSCE in the field of the administration of justice.⁸ Trial monitoring under the ARC Project fully adheres to these general principles and guidelines. As explained in the next two sections, it also adopts tailor-made features in accordance with the specific focus and goals of the Project.

⁴ ODIHR, *Trial Monitoring – a Reference Manual for Practitioners*, 2012, p. 11, available at <http://www.osce.org/odihhr/94216?download=true#page=15>.

⁵ *Ibidem*, p. 18.

⁶ *Ibidem*, p. 19.

⁷ *Ibidem*, p. 19.

⁸ *Ibidem*, p. 20.

1.2 Criteria for the categorization and selection of corruption cases to be monitored

Identifying corruption cases is not a straightforward exercise. Since corruption can be broadly defined as the abuse of public power for private gain, corruption criminal cases cover a wide range of offences. As explained in the OSCE Handbook on Combating Corruption, “bribery is one of a number of offences that fall under a broader notion of corruption; corruption can also involve other criminal offences such as embezzlement, misappropriation of property, trading in influence, abuse of function, illicit enrichment, laundering of proceeds of crime, concealment, obstruction of justice and participatory acts”.⁹ These offences are defined in international conventions such as the United Nations Convention against Corruption (UNCAC) and the Council of Europe Criminal Law Convention on Corruption, both ratified by BiH.

BiH criminal legislation to a large extent mirrors the criminalization of corruption as envisaged in the two conventions. In addition, in May 2015 the High Judicial and Prosecutorial Council (hereinafter: “the HJPC”) of BiH adopted a comprehensive list of corruption offences which forms the basis for the categorization of cases as corruption cases (under the acronym of “KTK”) in the BiH judicial system. The Mission’s methodology refers to both international and national standards for the identification of corruption cases without taking an overly formalistic approach. Namely, when selecting cases for monitoring, the very nature of the alleged offences (being symptomatic of corruption practices) rather than the official categorization of the case under the domestic system is considered. The application of strict and formal criteria would not be consistent with the goals of the Project, which requires that all relevant criminal proceedings are monitored regardless of the categorization of cases according to the domestic criteria. It is important to underline, for example, that cases involving corruption charges are sometimes not officially categorized as corruption cases but as economic crime or organized crime cases, as these categories can overlap and are inter-related.

While the Mission monitors cases at all levels of jurisdiction in BiH, the monitoring of all corruption cases carried out in BiH would not be feasible resource-wise nor advisable from a methodological point of view, as the amount of data gathered would be too vast to be properly analysed in sufficient detail. To address this problem, categorization criteria have been adopted to select the cases to be monitored in a clear and transparent manner.

Accordingly, the ARC Project categorizes corruption cases as high, medium or low level in terms of their overall seriousness. This is achieved by assessing two main criteria: status of the accused and gravity of the (alleged) conduct.

⁹ OSCE, Handbook on Combating Corruption, 2016, p. 189, available at <http://www.osce.org/secretariat/232761?download=true> and in Bosnian language at <http://www.osce.org/bs/secretariat/361076?download=true>.

With regard to the first criterion, the status of the accused is defined according to their status as public figures and to the degree of power they are in the position to effectively exercise. Accordingly, a case is ranked “high” when the defendants are high profile elected and appointed officials at the state or entity level, heads of public companies at the entity level, or the highest ranking civil servants/members of the judiciary. A “medium” ranking is given when the defendants are low profile elected officials, senior civil servants from public institutions, and members of the judiciary not evaluated as highest ranking. A “low” ranking is given when the defendants are civil servants at various level of government with no or minimal supervisory authority, for example, employees of health, law enforcement, education, or employment public institutions.

The second criterion aims at assessing the gravity of the consequences of the offence on the victims and the society in general. In this sense, cases are ranked as “high” when the economic gain or damage resulting from the criminal conduct is quantified as more than 200,000 BAM (approximately 100,000 Euro); or when non-quantifiable harm to victims or the society in general is of such gravity that citizen’s trust in public institutions is radically undermined (for example, cases of corruption linked to sexual exploitation). Cases are ranked as “medium” when the economic gain or damage is quantified between 200,000 BAM and 10,000 BAM; or, when non-quantifiable, harm to victims or society is of significant gravity or related to sensitive areas of the administration (for example, corruption linked to the health or education system). Cases are ranked as “low” when economic gain or damage is quantified as less than 10,000 BAM; or when non-quantifiable harm, harm to victims or to society is of low gravity.

On the basis of a combination of the rankings given in each case under these two criteria, cases are categorized according to their overall level of seriousness. When the marks given in the two main criteria are not the same, additional criteria are utilized to achieve a ranking. For example, cases that were ranked as “high” in one category and “medium” in the other can be categorized as “overall high level” only when this can be justified considering other factors such as: multiple (namely at least three) defendants, the systematic nature of the criminal behaviour, exceptional prominence of the accused, or exceptional gravity of the offence. Similarly, cases that were ranked as “medium” in one category and “low” in the other can be categorized as “overall medium level” only when this can be justified considering other factors such as: at least three defendants, the systematic nature of the criminal behaviour, prominence of the accused, or sensitive area of corruption (health, education).

As mentioned, cases are selected for monitoring in accordance with their categorization. Specifically, the Mission has undertaken to monitor all high level corruption cases initiated in BiH since the start of the ARC Project, namely January 2017. The categorization criteria have been deliberately construed so that only a limited number of cases falls into this category, namely the most serious and sensitive cases processed in the country.¹⁰ As a consequence of this approach, medium level cases can cover a range of criminal conducts that can be very serious and deeply affect society. Due to their relevance and

¹⁰ See Chapter 3.1 below.

larger number, the monitoring of these cases is essential for a comprehensive assessment of judicial response to corruption. Accordingly, the Mission has undertaken to monitor this category of cases to the extent that its resources allow. The current estimation is that the Mission will be able to monitor the majority of medium-level corruption cases. Low level corruption cases will be monitored only in jurisdictions where no high or medium level corruption cases are identified by the Mission.

The purpose of the categorization criteria is not only to ensure consistency in the selection of cases. Their main objective is to provide the Mission with a yardstick to measure progress or regress of the judiciary in addressing high and medium level corruption. More specifically, the categorization of cases will allow the Mission over time to measure the productivity of prosecutors' offices and courts (and the degree to which high level corruption is tackled by the judiciary) by looking at the ratio between high level cases and the total number of corruption cases initiated and finalized every year according to the official data gathered by the HJPC. Another important issue that will be explored through this tool in future reports is how the performance of the judiciary varies in terms of quality and effectiveness depending on the seriousness of the case.

1.3 Trial monitoring modalities

As stated in the Introduction, the foremost objective of this Project is to assess the different factors determining the effectiveness and quality of the judicial response to corruption and to identify and analyse specific problems and shortcomings in the processing of corruption cases. Due to the broad nature of the concepts, the reference to quality and effectiveness requires further clarification and framing. Quality of judicial performance is generally used to refer to a variety of qualitative elements of the judicial process such as clarity, lawfulness and consistency of decisions taken by the judicial actors, or the treatment of parties and the public during the process. This concept is usually used in contradistinction to features such as efficiency and productivity which are captured through quantitative indicators such as the number of processed cases, the clearance rate, and the length of proceedings. On the other hand, there is no universal definition of what effectiveness is in the context of criminal justice. In very general terms it can be said that effectiveness measures whether or not the institutions in question are achieving the goals society has set for them.¹¹ In this relation, one can distinguish between the general goal of the criminal justice system, which is to deliver justice by convicting and punishing the guilty while protecting the innocent, and the specific goals of the different institutions that constitute the system. In this sense, the role of the prosecution is to use means appropriate to both the discovery and suppression of crimes through the pursuing of criminal charges; whereas the role of the judges is to administer justice fairly and correctly, and primarily to adjudicate on those criminal charges by reaching a correct result on the basis of the law and the facts presented before them.

¹¹ See Open Society Institute, *Promoting Prosecutorial Accountability, Independence and Effectiveness*, 2008, p. 22, available at https://www.opensocietyfoundations.org/sites/default/files/promoting_20090217.pdf.

Monitoring trials is arguably the most suitable tool for assessing effectiveness and quality of the judicial response to corruption. The ARC Project has adopted specific trial monitoring modalities in terms of data collection.

Selected corruption cases are monitored from the moment when proceedings are open to the public, namely from the filing of the indictment or, when applicable, from the moment when a request for custody of suspects is filed by the prosecution. While in principle monitoring of the investigation phase is not excluded under OSCE trial monitoring programmes, this is not included in the ARC Project considering the sensitivity, complexity and confidentiality of investigations in these cases. A possible future expansion of the monitoring of corruption cases to the investigation phase would depend on necessity and a specific agreement with domestic authorities.

As a rule, Mission trial monitoring staff are required to attend all hearings during the main trial, the appeal, and possible retrial phases, and to take notes on court proceedings. Exceptionally, if a trial monitor cannot attend a hearing, the Mission will acquire an audio record of the session in question with a view to ensuring a complete review of the proceedings.

Data collection techniques are not limited to attending hearings but also include review of the courts' case-files to obtain copies of all legal acts (particularly indictments, verdicts, procedural decisions and motions) deemed relevant for the assessment of effectiveness and quality of proceedings and their compliance with applicable law. In this regard, it is important to recall the OSCE monitoring mandate under the Dayton Peace Agreement that provides the Mission with unrestricted access to case-files.¹² All information and documents obtained from the case-file are kept confidential and used solely for the purpose of monitoring and reporting.

Structured or semi-structured interviews also represent a further valuable source of information. As explained in the ODIHR Trial Monitoring Manual, "meeting with actors directly or indirectly involved in the justice system can yield a wealth of information to supplement or verify findings from monitoring hearings or reviewing documents" as "interviews may reveal aspects of the system's workings that are not easily perceived by trial monitoring alone".¹³

¹² Article II/8 of Annex 4 (Constitution of Bosnia and Herzegovina) and Article XIII of Annex 6 (Agreement on Human Rights) of the Dayton Peace Agreement. The nature of this mandate as extending to unrestricted access to case files was confirmed in the opinion of the High Judicial and Prosecutorial Council of 14 November 2006, and re-affirmed by the same body in its opinion of 3 September 2015.

¹³ ODIHR, *Trial Monitoring*, cit., p. 78.

CHAPTER II –

LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE PROCESSING OF CORRUPTION CASES

This Chapter offers a concise overview and some critical observations on legal and institutional aspects of the current criminal justice system in BiH related to the processing of corruption cases. As such, it covers substantial and procedural criminal law, as well as the organizational setting and division of jurisdictions within the BiH judicial system. In accordance with its constitutional structure, BiH has four different legal and judicial systems: one at the state level, one in each of the two entities – the Federation of BiH (FBiH) and Republika Srpska (RS) – and one in the Brčko District BiH (BD). These systems work in parallel and, as stated by the Venice Commission, “have developed on largely autonomous lines over the past two decades”,¹⁴ thus resulting in a fragmented structure on several levels of authority.

2.1 Criminal Law framework

Corruption offences are independently defined in each of the four criminal codes corresponding to each of the above-mentioned levels of authority. To a large extent, the relevant provisions in the codes reflect the incriminations prescribed in the UN Convention against Corruption and in the Council of Europe Criminal Law Convention on Corruption, both of which have been ratified by BiH. Specifically, the four codes penalise corruption offences *strictu sensu* (i.e. active and passive bribery in the public sector) but also penalise other offences often linked to acts of bribery as falling under a broader notion of corruption, namely: abuse of office, fraud in office, embezzlement, trading in influence, money laundering and obstruction of justice.

Although sizable progress in this realm has been achieved in the last few years (notably with regard to the criminalization of money laundering), the criminal law framework is still not fully harmonized with international standards. In 2011, the Group of States against Corruption (GRECO) issued thirteen recommendations related to the criminalization of corruption.¹⁵ As of August 2017, BiH has satisfactorily implemented

¹⁴ Venice Commission, *Opinion on Legal Certainty and Independence of the Judiciary in Bosnia and Herzegovina*, 18 June 2012, p. 8, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)014-e)

¹⁵ See GRECO, Third Evaluation Round - Evaluation Report on BiH – Incriminations, 27 May 2011, available at <https://rm.coe.int/16806c4691>.

nine of these recommendations. Two recommendations have been partly implemented¹⁶ and two remain outstanding.¹⁷

The two GRECO recommendations that have not been implemented are rather important; one requires the harmonization of existing sanctions for bribery and trading in influence offences across BiH's different jurisdictions and the other asks for the full and consistent criminalization of bribery in the private sector across the different jurisdictions. In addition to the GRECO assessment, it should be added that sanctions are not harmonized also with regard to the crime of abuse of office, as the minimum and maximum terms of imprisonment foreseen for the basic and aggravated forms of this offence in the RS Criminal Code are markedly different from those foreseen in the other three criminal codes. Moreover, the definition of this offence in the RS Criminal Code differs from the ones in the other codes.¹⁸

Although the framework does require improvements, especially with regard to the issues identified by GRECO, it can still be concluded that the criminal law framework is generally adequate when it comes to the definition and scope of corruption offences.

2.2 Criminal Procedure Law framework

In 2003, new criminal procedure codes (hereinafter: "the CPCs") were enacted at the state, FBiH, RS, and BD levels, marking a radical shift from an inquisitorial system to a hybrid system with prominent features of the adversarial system. Although a general description of this system is not necessary for the purposes of this report, it is worth noting several of its features due to their importance in the processing of corruption and other serious and complex crimes.

In the investigation of corruption, the prosecution in BiH often relies on special investigative measures such as the interception of communications and computers, the use of undercover agents, covert surveillance and simulated bribery.¹⁹ These measures may be ordered by the court upon a motion by the prosecutor in connection with investigations of offences punishable by three years of imprisonment or more. This threshold covers virtually all corruption offences. Similarly, uncovering corruption often

¹⁶ Namely: "(v) to ensure that the bribery offences are construed in such a way as to cover, unambiguously, instances of bribery committed through intermediaries, as well as instances where the advantage is not intended for the official himself/herself but for a third party" and "(xii) to abolish the possibility provided by the special defence of effective regret to return the bribe to the bribe-giver who has reported the offence before it is uncovered". Although required amendments were made to the BiH and BD Criminal Codes, amendments to the FBiH and RS CCs still fall short of fully meeting the recommendations. See GRECO, *Third Evaluation Round - Fourth Interim Compliance Report on BiH*, 2 August 2017, pp. 5 and 7-8, available at <https://rm.coe.int/third-evaluation-round-fourth-interim-compliance-report-on-bosnia-and-/1680735d5b>.

¹⁷ See GRECO, *ibid*, p. 14.

¹⁸ See Article 220 of the CC of BiH, Article 383 of the CC of FBiH, Article 315 of the CC of RS and Article 377 of the CC of BD BiH.

¹⁹ See arts. 116-122 CPC BiH, arts. 130-136 CPC FBiH, arts. 234-240 CPC RS, arts. 116-122 CPC BD.

requires “insider witnesses”. In this regard, the CPCs foresee the use of plea bargaining²⁰ (which can be used to obtain the testimony of a co-defendant in exchange for leniency) as well as granting a witness immunity from prosecution in connection with his/her testimony.²¹

In this regard, it must be acknowledged that special investigative measures and witness immunity, when properly used, are crucial for the effective prosecution of those crimes. As high level corruption cases often involve complex schemes and the co-ordinated interaction of a number of participants, special investigative measures (electronic surveillance particularly) can provide information that would otherwise be unattainable.²² Witness immunity is also fundamental, as in many investigations the only source of evidence is the testimony of individuals who have participated in the crime. Recognizing this, the UN Convention against Corruption invites the State Parties to grant “immunity from prosecution to a person who provides substantial co-operation in the investigation or prosecution of an offence established in accordance with this Convention”.²³

On 1 June 2017, however, the Constitutional Court of BiH (hereinafter: “the BiH CC”) established that key aspects of the laws regulating these instruments are incompatible with constitutional and human rights because of undue vagueness in their formulation or the excessive scope of their application.²⁴ Specifically, in its decision the BiH CC declared unconstitutional a number of provisions of the Criminal Procedure Code of BiH (hereinafter: “the CPC BiH”), namely:

- Article 84(2)-(5), “Right of the Witness to Refuse to Respond”, concerning the granting of witness immunity. In relation to this issue, the Court found that the provisions regulating this matter are not sufficiently precise and clear, thus resulting in an overly-broad discretion by the prosecution in the application of this measure. The Court, for example, criticised the fact that the current regime allows the granting of immunity even to persons who have committed very serious offences and the fact that the decision of the prosecution to grant immunity is not subjected to judicial review.²⁵
- Article 117(1)(d), “Criminal Offenses as to Which Undercover Investigative Measures May Be Ordered,” concerning the list of offences for which special investigative measures can be ordered. With regard to this article, the Court found that the provisions in force allow the application of special investigative measures in

²⁰ See art. 231 CPC BiH; art. 246 CPC FBiH; art. 246, CPC RS; art. 231, CPC BD.

²¹ See art. 84 CPC BiH; art. 98 CPC FBiH; art. 189 CPC RS; art. 84, CPC BD.

²² See for example, UNODC, *Current practices in electronic surveillance in the investigation of serious and organized crime*, 2009, available at https://www.unodc.org/documents/organized-crime/LawEnforcement/Electronic_surveillance.pdf

²³ United Nations Convention against Corruption, art. 37.

²⁴ See Ustavni Sud BiH, *Djelomicnu Odluku o Dopustivosti i Meritu*, U 5/16, 1. juna 2017, available at http://www.ustavnisud.ba/dokumenti/_bs/U-5-16-1076865.pdf

²⁵ Case no. U 5/16, Constitutional Court of Bosnia and Herzegovina Decision of 1 June 2017, paras. 40-42.

an overly-wide range of offences, and as such the Law does not strike a fair balance between the protection of the right to privacy and the goal of crime repression.²⁶

- Article 118(3), “Competence to Order the Measures and the Duration of the Measures”, concerning conditions under which an extension of time in the application of these measures may be granted. Concerning this article, the Court found that prescribing the existence of “particularly important reasons” as a sufficient condition for the temporal extension of these measures did not represent an adequate guarantee against abuses due to the vagueness of this wording, which lacks any indication as to the nature of these reasons.²⁷

Other provisions which were declared unconstitutional concerned the timeframe for completion of the investigation and the timeframe for the filing of the indictment to the preliminary hearing judge.²⁸ The Court ordered the authorities to harmonize the provisions in question with the Constitution within six months of the date of communication of the Decision.

Considering the problems unveiled by this decision of the BiH CC, it is manifest that the current criminal procedure framework is not satisfactory for the processing of serious and complex cases, including high level corruption. In this regard, it is important to underscore that the provisions of the BiH CPC that were declared unconstitutional mirror, to a large extent, the provisions contained in the CPCs of FBiH, RS, and BD. It is logical to conclude that, while not yet declared formally unconstitutional, these provisions must also be amended to comply with this BiH CC decision, since they suffer from the same weaknesses identified in its decision. Accordingly, it is now the duty of the legislature at the state and entity levels to adequately amend the provisions in a way that would clarify their content and better define their reach. In this respect, the Mission asserts that the legislative changes should reflect a fair balance between the rights of individuals and the goals of criminal justice. A scenario in which the national authorities would fail to pass the necessary amendments, or would adopt provisions which fail to strike the above-mentioned fair balance, would seriously undermine the capacity of the BiH judiciary to deal with serious and complex crimes.

In order to draft a proposal for amendment of the CPC BiH to be considered by the Parliamentary Assembly of BiH, the state level Ministry of Justice established a working group composed of representatives of the judiciary and of the ministries of justice at the state, entity and BD level. The working group held its first meeting in September 2017 with the Mission and the US Embassy participating as observers. At the time of drafting this report, concrete proposals for changes were under discussion and anticipated to be finalized before the end of 2017. While the Mission welcomes the efforts undertaken by the Ministry of Justice and by the members of the working group, it also underlines that the proposal currently under preparation concerns exclusively the provisions of the BiH

²⁶ Ibidem, paras. 50-51.

²⁷ Ibidem, paras. 59-60.

²⁸ Ibidem, paras. 77-79, 82-83.

CPC; the need and procedure for harmonization of the entity and BD CPCs with the Decision of the BiH CC and potentially with the amended state CPC is not yet defined. In the meantime, the entity and BD courts will continue to apply provisions that, if not seen as formally unconstitutional, are vulnerable to legal challenge both in the cases they are relied upon and before the respective constitutional courts.

Against this backdrop, there is a very concrete risk this will further decrease the harmonization among the different legal systems of BiH in the regulation of fundamental aspects of the criminal procedure. The stress here is on the word “further” since the CPCs are already affected by unharmonized norms in several important aspects. This for example includes the regulation of legal assistance among courts and prosecutors’ offices at different levels of jurisdiction in BiH; the regulation of investigative actions; and the procedures concerning legal remedies.²⁹ In February 2016, upon request of the BiH Minister of Justice, and with the support of the Mission, a group of national experts identified the above and other issues in need of harmonization in CPCs in BiH. The group developed concrete proposals for, at least a partial, harmonization of the CPC’s but to the best knowledge of the Mission no steps have been taken by the BiH authorities to implement these proposals.

Against this background, the Mission holds that the current mechanisms for ensuring the harmonization of relevant legislation in the sphere of criminal justice, including with regard to the fight against corruption, are ineffective.³⁰ Since there is no insurmountable technical or legal obstacle to the harmonization of criminal legislation, this is primarily an issue of lack of political will. As such it raises the question of whether sufficient harmonization is sustainable at all and, if not, whether the unification of the criminal and criminal procedure codes would represent a viable solution, as experienced in other federal and decentralized states in Europe, such as Germany, Austria and Switzerland.

From a technical and more pragmatic point of view, based on its monitoring of the harmonization process of the criminal codes and criminal procedure codes over many years, the Mission observes that the process of developing and proposing appropriate amendments would enjoy greater efficacy under the work of a standing body of experts, as opposed to the current situation where working groups are established on an *ad hoc* basis. It is argued that this would better ensure that the participants in the drafting process have the necessary level of expertise; it would also help to increase the overall coherence of the different efforts aimed at amending one or more aspects of

²⁹ See Dr Miloš Babić, Dr Ljiljana Filipović, Dr Veljko Ikanović, Slavo Lakić, Branko Mitrović, *Komparativna analiza zakona o krivičnom postupku u Bosni i Hercegovini sa prijedlogom za harmonizaciju*, and *Spisak procesnih pitanja koja nisu obuhvaćena komparativnom analizom*, January 2016, on file with the Mission.

³⁰ In this regard, see also Venice Commission, *Opinion on Legal Certainty*, cit., p. 9. The problem of the lack of harmonization of material criminal law across the Country was also underlined by the Panel on Harmonization of Jurisprudence in BiH, which gathers judges from the higher courts in BiH. In particular, this Panel in 2016 sent a report to the MoJs at state and entity level underlining the need to undertake a comprehensive review of substantive criminal legislation in BiH with a view to draft changes that would put in place a solid criminal legislation. The panel justified this request by referring to the “disrupted internal coherence of the criminal-legal system in BiH, which is a result of frequent and partial amendments and the taking over of some problematic, even wrong solutions” (see *Pravna hronika*, Year 4, page 33, at <https://csd.pravosudje.ba>)

the criminal legislation over time. Such a body of national experts existed previously, known under the name of CCIAT (Criminal Codes Implementation Assessment Team). Established by the BiH Ministry of Justice in 2003, it was tasked with analysing all aspects of the application of the Criminal Code and Criminal Procedure Code and recommending measures for improvement and effectiveness of this process. During its existence, the CCIAT prepared numerous amendments to the Criminal Code and to the Criminal Procedure Code of BiH which were subsequently adopted by the legislature. Importantly, several members of the team were also involved in working groups tasked with preparing amendments to the entity and BD codes, and ensured to a large extent that these provisions were harmonized with the state level ones. Notwithstanding the positive role played by the CCIAT, in 2013 the political support for this body ceased and it was officially abolished. The Mission recommends that national authorities should seriously consider reviving a standing body of experts to ensure the full harmonization of the criminal legal framework.

2.3 Institutional framework

As stated by the Venice Commission, the four judicial systems of BiH “differ considerably in their internal structure and the institutions they cover” and “the relationship between the systems is also not clearly defined, which gives rise to different interpretations of laws and inter-judicial disputes”.³¹ As discussed in this section and more specifically in Section 3.2.1, the fragmentation of the judicial and prosecutorial systems is particularly pronounced and problematic in connection with the processing of high profile corruption cases. These cases, as well as less serious corruption cases, can be tried at the state, entity and BD levels.

2.3.1 *Jurisdiction at the BiH Level*

Criminal Division of the Court of BiH has three Sections, with corruption cases handled by Section II, responsible for organized crime, economic crime and corruption. The Prosecutor’s Office of BiH mirrors the Court’s jurisdiction and internal division of work. Accordingly, corruption cases are dealt with by the Special Department for Organized Crime, Economic Crime and Corruption.

The Court of BiH includes both first instance and appellate divisions, and has jurisdiction over criminal offences defined in the Criminal Code of BiH and other laws enacted at the state level. This includes corruption offences when committed by officials of state institutions, regardless of their gravity. The Court has further jurisdiction (commonly referred as “extended jurisdiction”) over criminal offences provided in the laws of the FBiH, the RS and BD when the alleged criminal behaviours are particularly serious, namely: “(a) endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina, or (b) may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina

³¹ Ibidem, p. 11.

or cause serious economic damage or other detrimental consequences beyond the territory of an entity or the Brčko District of Bosnia and Herzegovina”³² Under the second part of this provision, a number of high profile corruption cases for charges provided under the RS, FBiH, and BD codes have been processed at the state level. Reference to some of these cases is made in Chapter 3.

2.3.2 *Jurisdictions at the Entity (FBiH, RS) and BD levels*

The criminal court system in FBiH comprises the Supreme Court of FBiH, 10 cantonal courts, and 31 municipal courts. The municipal courts have jurisdiction over offences under the FBiH Criminal Code for which a punishment of imprisonment of up to 10 years is prescribed by the law.³³ The cantonal courts, on the other hand, adjudicate cases punishable with more than 10 years of imprisonment, as well as appeals against decisions of municipal courts falling under their territorial jurisdiction.³⁴

As a result, corruption cases can be tried in the first instance either at the cantonal level or at the municipal level depending on the severity of the sentence prescribed for the specific offence under trial. The prosecution service comprises 10 cantonal prosecutors’ offices (competent to plead before the respective municipal and cantonal courts) and the Federal Prosecutor’s Office, which pleads before the Supreme Court of FBiH and has powers of supervision and co-ordination over the cantonal prosecutors. A degree of internal specialization in the prosecution of corruption is currently in place as specific departments for dealing with economic crimes, including corruption, were established in the organizational structure of the cantonal prosecutors’ offices in Sarajevo, Bihać, Mostar, Travnik, Tuzla and Zenica.

However, the FBiH institutional framework will shift dramatically towards centralization if the Law on Fighting Corruption and Organized Crime in FBiH is implemented.³⁵ This Law, which entered into force in February 2015, foresees the creation of a Special Department within the Supreme Court of FBiH and a Special Department within the Federal Prosecutor’s Office with exclusive jurisdiction in the territory of the Federation over a number of serious crimes under the FBiH Criminal Code.³⁶ The list includes organized crime, terrorism and corruption offences when committed by an elected or appointed official or when involving amounts exceeding 100,000 BAM (approximately EUR 50,000). As of December 2017, however, this Law has not been implemented as the special departments have not been established. The failure to establish these authorities could have resulted in institutionalized impunity for the above-mentioned crimes since, with the entry into force of the Law, cantonal prosecutors and courts are no longer competent for their prosecution and adjudication. This threat to the rule of law was averted owing to the pragmatic stance of the Supreme Court of FBiH, which ruled in

³² Article 7(2) of the Law on the Court of BiH.

³³ Law on Courts of the Federation of BiH, Art. 27.

³⁴ Ibidem, Art. 28.

³⁵ Law on Fighting Corruption and Organized Crime in FBiH, Official Gazette of FBiH, no. 59/14, 23 July 2014.

³⁶ Ibidem, articles 7 and 25(1).

2015 that those crimes shall remain under the jurisdiction of cantonal authorities until the Law on Fighting Corruption and Organized Crime in FBiH is fully implemented.³⁷

Similarly to the FBiH, the highest level of the RS criminal judicial system is defined by the Supreme Court of the RS, while six district courts and the 20 basic courts under them have criminal jurisdiction mirroring that of the cantonal and municipal courts of the FBiH, respectively. The prosecution service is composed of the Prosecutor's Office of RS and five district prosecutors' offices with territorial competence over their respective districts. Similarly to the FBiH, specific departments for organized and economic crimes (including corruption) have been established within the organizational structure of the district prosecutors' offices in Banja Luka, Bijeljina, Dobojo and Istočno Sarajevo.

A marked step towards centralization in the processing of corruption cases in RS was taken with the adoption of the RS Law on Fighting Corruption, Organized and Most Severe Forms of Economic Crime, which entered into force in July 2016.³⁸ Pursuant to this law, Special Departments within the District Court of Banja Luka and the Supreme Court of RS have been established with exclusive jurisdiction over first-instance trials and appeals in cases concerning a broad list of crimes committed on the territory of RS.³⁹ Among those are terrorism, incitement to hatred and trafficking in human beings; the jurisdiction on corruption offences is very wide as all instances of bribery and trading in influence are included regardless of their gravity, while abuse of office is covered only when committed by an official appointed by the government or the parliament. Under the same Law, the Special Department within the RS Prosecutor's Office was created with the responsibility to prosecute these crimes.⁴⁰ Although based on a similar concept, the Special Departments established under this Law have a broader jurisdiction than their (yet to be established) counterparts in the FBiH, as the latter, for example, do not have jurisdiction on all offences of bribery but only on those committed by an elected or appointed official or when involving amounts exceeding 100,000 BAM.

Finally, in the Brčko District, the BD Basic Court and the BD Appellate Court have jurisdiction over all offences provided under the BD Criminal Code, while the Prosecutor's Office of BD is competent to plead before these courts.

In conclusion, this complex judicial institutional framework is marked by a pronounced drive at the state and entity level toward the establishment of specialized judicial bodies with exclusive jurisdiction over the most serious forms of corruption and other serious crimes. At first sight, this seems consistent with an emerging global trend toward the establishment of specialized courts and prosecutors' offices for corruption and

³⁷ See press release by the FBiH Supreme Court at <https://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=54616>. Later on, the FBiH authorities passed amendments postponing the entry into force of the Law in question to 1st July 2017. As this deadline passed, funds have not been allocated yet and the FBiH Parliament on 27 July rejected a proposal by the government to further extend the deadline.

³⁸ RS Law on Fighting Corruption, Organized and Most Severe Forms of Economic Crime, Official Gazette of RS, no. 39/16, 11 February 2016.

³⁹ *Ibidem*, articles 13 and 14.

⁴⁰ *Ibidem*, Art. 6.

economic crimes.⁴¹ In countries with similar policies, this resulted in a high degree of centralization in the processing of high level corruption cases.⁴² It should be pointed out that this is not the case in BiH where the specialization drive resulted in a three-layer jurisdictional system where corruption cases can fall under the jurisdiction of (a) ordinary courts at the entity level (FBiH, RS, BD), (b) specialized courts at the level of RS or FBiH,⁴³ or (c) the state-level Court of BiH. The criteria for attributing jurisdiction in these cases frequently depend on the gravity and geographical scope of the offences, elements which are often not easily interpreted. As pointed out in in Section 3.2.1 below, unclear jurisdictional criteria result in frequent clashes of jurisdiction and parallel investigations, which negatively affect the capacity of judicial institutions to process corruption and other serious crimes.⁴⁴

⁴¹ See U4 Anti-Corruption Resource Center, *Specialized Anti-Corruption Courts: a Comparative Mapping*, December 2016, available at <http://www.u4.no/publications/specialised-anti-corruption-courts-a-comparative-mapping/>

⁴² Ibidem. Examples of countries where a specialized court with jurisdiction over corruption offences committed throughout the country was created are: Kenya, Bangladesh, Burundi, Croatia, Bulgaria, Slovakia, Afghanistan, Cameroon, Malaysia, Uganda, Senegal, Thailand, and Tanzania.

⁴³ As already mentioned, in FBiH these special bodies have not been established yet.

⁴⁴ On this issue see also USAID Projekat Pravosuđa u Bosnii i Hercegovini, *Dijagnostička analiza integriteta pravosudnog sektora u BiH i mogućih rizika od nastanka korupcije ili neetičnog ponašanja u pravosuđu*, p. 88-91, available at <http://usaidjp.ba/assets/files/publication/1453979174-dijagnosticka-analiza-integriteta-pravosudnog-sektora-u-bih-i-mogucih-rizika-od-nastanka-korupcije-ili-neeticnog-ponasanja-u-pravosuđu.pdf>.

CHAPTER III –

TRIAL MONITORING OF CORRUPTION CASES: A FIRST ASSESSMENT

This Chapter presents a first assessment on quality and effectiveness in the processing of corruption cases based on the trial monitoring findings and observations. The first section offers a short overview (“mapping”) of ongoing corruption cases which are currently⁴⁵ under observation by the Mission in accordance with the project’s criteria for the categorization and selection of cases to be monitored.⁴⁶ As these cases are not finalized, the core findings of this report, presented in the second section, are based on the monitoring of 67 corruption cases which have been completed in the period between January 2010 and September 2017. The reason for distinguishing these two groups of cases (ongoing and finalized) is that formulating an assessment of judicial performance in corruption proceedings based on the former would be premature and constrained by respect for the trial monitoring principle of non-intervention.

3.1 Mapping of cases currently monitored

This section will provide an overview of the cases currently being monitored by the Mission. Specifically, contextual information on the number, types, and seriousness of these proceedings is presented.

As of 30 November 2017, the Mission is monitoring 153 corruption cases⁴⁷, of which 94 are ongoing at the trial/retrial or appeal stage, while 59 are at the pre-trial stage (namely: pending confirmation of indictment, pending plea hearing or pending scheduling of the main trial).

As illustrated in Figures 1 and 2 below, the Mission is monitoring corruption cases before 32 different courts at all levels of jurisdiction in BiH. The majority of these cases are ongoing before 12 courts, namely: the Municipal Court (MC) Bihać (16), Municipal Court Tuzla (13), Municipal Court Livno (12), Municipal Court Mostar (12), Cantonal Court Sarajevo (11), Municipal Court Zenica (10), Court of BiH (7), Basic Court (BC) Doboј (7), Basic Court of Brčko District BiH (6), Cantonal Court Tuzla (6), Basic Court Banja Luka (5) and Cantonal Court Bihać (5).

⁴⁵ Namely at the time of drafting this report, in November 2017.

⁴⁶ See Chapter 1.2.

⁴⁷ The definition of corruption cases adopted by the Mission is broader than the definition adopted by the domestic institutions. For more details see Chapter 1.2.

Figure 1: Ongoing corruption cases monitored by the Mission, by court

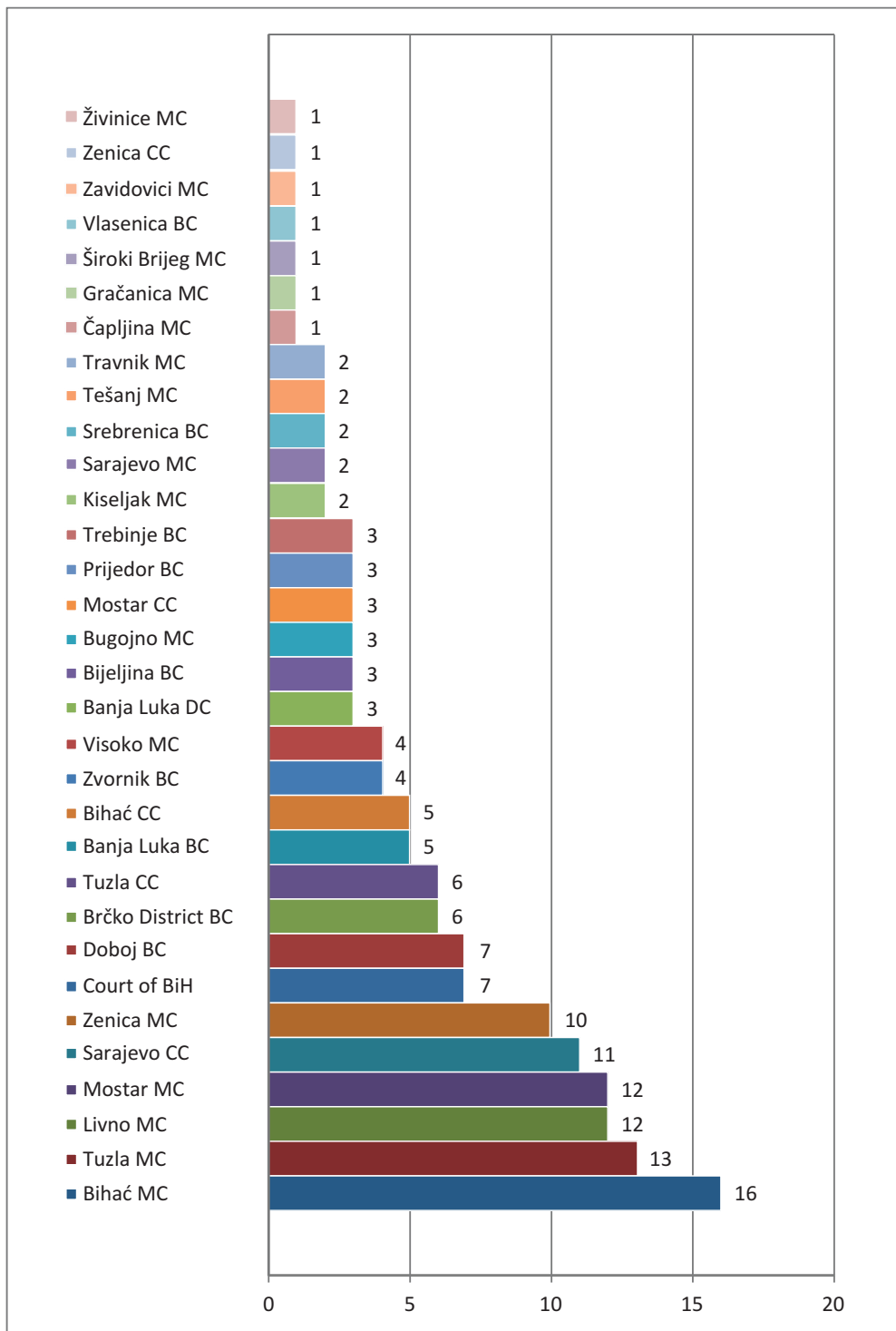


Figure 2: Ongoing corruption cases monitored by the Mission, by level of jurisdiction

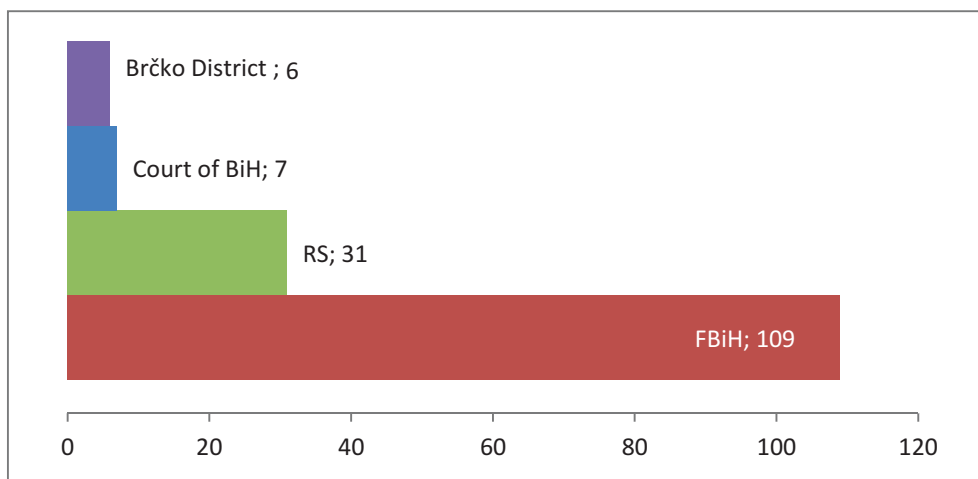


Figure 3 presents the specific type of corruption offences for which defendants have been charged in the cases monitored by the Mission. The majority of charges are for the offence of abuse of office (42.9 per cent), while charges related to giving or receiving bribes amount to 13.7 per cent. This is consistent with the general picture in BiH in 2016, where abuse of office was the most frequent charge present in corruption cases.⁴⁸

Figure 3: Specific forms of corruption charges in cases monitored by the Mission, by jurisdiction

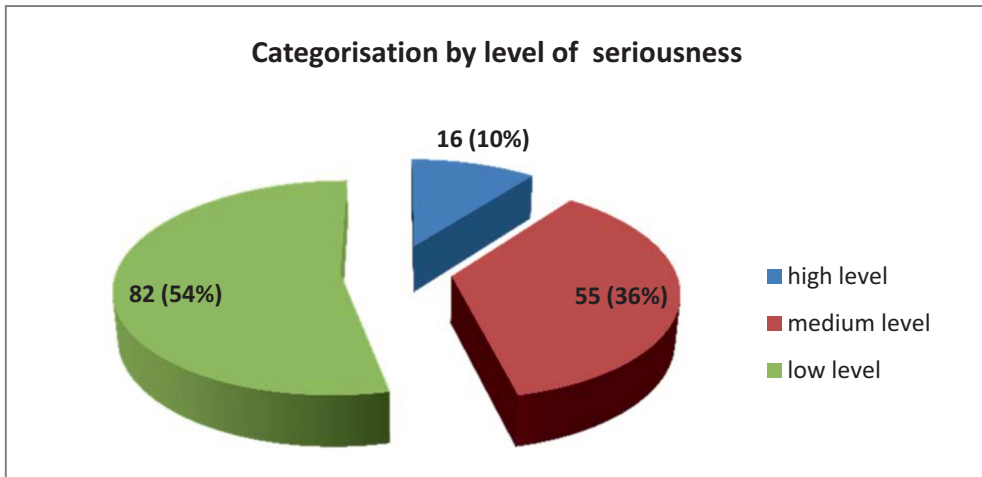
Criminal Charge	Court of BiH	FBiH	RS	Brčko	Total	Proportion relative to all corruption charges
Abuse of Office or Official Authority	6	79	10	2	97	42.9%
Accepting Gifts and other Forms of Benefits	1	13	6	2	22	9.7%
Forging an Official Document		10	4		14	6%
Lack of Commitment in Office		10	1	2	13	5.8%
Giving Gifts and other Forms of Benefits	2	3	4		9	4%
Illegal Interceding		2	3	3	8	4%
Abusing Power in Business		4	3		7	3.1%
Embezzlement in Office		3	4		7	3.1%
Fraud in Office		7			7	3.1%
Organised Crime	1	4			5	2.2%
Forging Document		1	3		4	1.8%
Money Laundering		4			4	1.8%
Other Charges		22	6		28	12.4%

⁴⁸ European Commission, *Bosnia and Herzegovina 2016 Report*, cit. footnote n.8, p. 17.

As explained in detail in Chapter I on the methodology for the monitoring of corruption cases, the ARC project has developed specific criteria for categorizing cases according to their degree of seriousness. In short, the categorization is based on the weighting of two criteria, namely the status of the accused and the gravity of the conduct. Accordingly, of the 153 ongoing monitored cases, 16 have been categorized as high level, 55 as medium level and 82 as low level corruption cases (see Figure 4). Out of the 16 high level cases, six were initiated (namely indictments were filed) in 2015, one in 2016 and six in 2017, while the remaining three were initiated earlier.

In this regard, the Mission and other independent observers have noted in the last three years an increase in the number of high profile corruption cases initiated in BiH. This positive development is mainly the result of indictments filed by the Sarajevo Cantonal PO, the BiH PO and the Bihać Cantonal PO.⁴⁹

Figure 4: Ongoing corruption cases monitored by the Mission by level of seriousness (high level, medium level, low level).



On a general note, it is important to underline that the ARC categorization criteria have been developed by the Mission for the purposes of its trial monitoring activities and in the absence of domestic procedures for the “weighting” of corruption cases according to their complexity and/or seriousness. In this regard, the Mission notes that the criteria adopted by the HJPC for the evaluation of the performance of judges and prosecutors do not adequately differentiate between high and low level corruption cases when it comes to the calculation of the “orientation quota”, namely the number of cases that should be solved by each individual judge or prosecutor.⁵⁰ Some judges and prosecutors working on corruption cases or holding managerial positions, when interviewed by the

⁴⁹ Namely, between 1 January 2015 and 30 November 2017, Sarajevo Cantonal PO filed four indictments in high level cases, the BiH PO filed three and the Bihać Cantonal PO filed two.

⁵⁰ See VSTV, Pravilnik o orijentacionim mjerilima za rad sudija i stručnih saradnika u sudovima u BiH, 17 December 2013; VSTV, Pravilnik o orijentacionim mjerilima za rad tužilaca u tužilaštvima u BiH, 20 December 2013 at <https://vsts.pravosudje.ba/vstv/faces/kategorije.jsp?ins=141&modul=1172&kat=1180&kolona=12032>

Mission for the purposes of this project, expressed the view that the current evaluation system does not adequately encourage prosecutors to carry out investigations in high level corruption cases or judges to draft high quality decisions in complex cases. Similar views were expressed by independent observers supporting rule of law efforts in BiH.⁵¹

3.2 Trial monitoring findings from completed cases

The analysis presented in this section does not profess to represent an all-inclusive overview of the features and problems characterizing the processing of corruption related cases in BiH. This objective would require a broader and lengthier assessment of cases over a longer period of trial monitoring activities. It focuses instead on an in-depth analysis of some key problematic issues which were identified as common or recurring in a significant number of the monitored cases. These issues were selected as they proved to be the most influential in determining the final outcome of the cases.

As mentioned already, the findings are based on the monitoring of a sample of 67 corruption cases that have been completed in the period between January 2010 and September 2017. It must be noted that, with few exceptions, these cases have been monitored by the Mission before the initiation of the systematic monitoring of the ARC project and on an *ad hoc* basis, namely in the absence of specific guidelines for the selection and monitoring of corruption cases. This means, for example, that some of these cases have not been monitored from the beginning to the end, but only for a certain period of time. Nevertheless, to ensure the accuracy of its findings, the Mission obtained and reviewed the relevant court documentation (indictments, verdicts, decisions on appeal) in all these cases. A summary of each of the 67 cases included in the sample is provided in Annex A to this report, but a brief overview of the typology of cases constituting this sample is as follows:

- According to the above-mentioned ARC criteria, 14 cases have been classified as high level, 22 as medium level and 31 as low level corruption cases.
- With regard to the year of completion, the vast majority of the cases were finalized in 2015 (7), 2016 (19) and 2017 (30).
- With regard to jurisdiction, the majority of cases were tried before the Banja Luka DC (10), Court of BiH (8), Sarajevo MC and CC (6), Bihać MC (7), Zenica MC (7), Brčko BC (5), Doboj BC (4).
- With regard to the type of corruption offence charged, the most common charge was abuse of office (67), followed by unconscientious behaviour in office (28), accepting bribes (15) and giving bribes (4).

⁵¹ See USAID's Justice Project in Bosnia and Herzegovina, Diagnostic Analysis of the Integrity of the Justice Sector in BiH and the Potential Risks of Corruption or Unethical Conduct in the Judiciary, pages 35-39, available at <http://usaidjp.ba/assets/files/publication/1453979174-dijagnosticka-analiza-integriteta-pravosudnog-sektora-u-bih-i-mogucih-rizika-od-nastanka-korupcije-ili-neeticnog-ponasanja-u-pravosudu.pdf>; in April 2017 EU experts carried out a peer review of the performance appraisal system for judges and prosecutors in BiH and recommended that a better balance between quantitative (caseload's quota) and qualitative criteria is ensured with a view to improve the quality of decisions.

- With regard to the outcome of the case: 55 cases ended with convictions; of these convictions, 33 were obtained through plea bargaining agreements (PBAs); 17 cases ended with acquittals, and five with partial acquittals.
- While the ratio between convictions and acquittals sees a marked prevalence of the former, this ratio is reversed if we consider only high level corruption cases; namely, out of the 14 cases falling into this category, eight ended with acquittals, two with partial acquittals and only four with convictions, three of which as a result of PBAs.
- With regard to the imposed sentences, imprisonment was ordered in 32 cases; in 24 cases the execution of the sentence was suspended and in 14 cases the payment of a fine was ordered. Seizure of proceeds of crime was imposed in 19 cases, while in five cases the convicted person was banned from performing official duties.

The in-depth review and analysis of these 67 cases revealed a number of concerning issues with regards to the quality of their investigation, prosecution, and adjudication. Based on the observation of hearings and review of the main legal acts in these cases, the most critical issues identified can be grouped into three broad areas: (1) conflicts of jurisdiction, lack of co-ordination and fragmentation in the processing of corruption cases among different levels of jurisdiction in BiH; (2) inadequate capacity of prosecutors in the drafting of indictments and in the gathering of evidence supporting the charges; (3) inadequate capacity of judges in applying and interpreting the law in a reasoned and predictable manner. As this is the first report under the ARC project, other fundamental issues, like the fairness of process and efficiency in the conduct of the proceedings, are touched upon only peripherally and will be addressed more systematically in the following ARC report.

3.2.1 Conflicts of jurisdiction, lack of co-ordination and fragmentation in the processing of corruption cases.

As seen in Section 2.3, the institutional framework for the prosecution and adjudication of corruption cases is complex and multi-layered. While this is not a problem in itself, trial monitoring findings underscore that, in some high profile cases, these features have negatively influenced the effectiveness of the judicial response to corruption. These specifically relate to 1) flaws in the application of existing provisions to solve conflicts of jurisdictions between the state and entity courts; and 2) the absence of a mechanism to solve conflicts of jurisdiction and avoid parallel investigations between the BiH PO and the entity POs.

With regard to the first issue – inadequate application of conflict of jurisdiction provisions – Article 7 of the Law on Court of BiH establishes that the Court is competent to “decide any conflict of jurisdiction between the courts of the Entities, between the courts of the Entities and the courts of Brčko District of Bosnia and Herzegovina and between the Court of BiH and any other court”.

In spite of this provision, the first instance panel in the case against **Bičakčić and Branković** before the Sarajevo CC inexplicably failed to address a defence motion raising the issue of double jeopardy against the first accused on grounds that proceedings for the same facts were ongoing at the same time before the Court of BiH.⁵² The failure of the panel to acknowledge the conflict of jurisdiction was duly noted and criticized by the Supreme Court of FBiH. This court in the end ordered the dismissal of charges against the accused since, in the meantime, the Court of BiH had issued a verdict in its own proceedings acquitting Mr. Bičakčić.⁵³ As this defendant had also been acquitted by the Sarajevo CC, this decision did not change the substantive outcome of the proceedings. However, the failure by the first instance panel at the Sarajevo CC to refer the case to the Court of BiH resulted in the conducting of parallel trials against the same person and for the same facts before two different courts. It must be noted that the Court of BiH also failed to address the issue of conflict of jurisdiction in its own related proceedings against Bičakčić. This situation not only jeopardized the rights of the accused, but also resulted in a serious waste of resources.

More generally, the Mission observes that the provisions addressing this matter in the Law on Court of BiH and the CPC BiH would benefit from further clarification as, in contrast to the entity level CPCs, they do not regulate the procedure for raising and deciding upon conflicts of jurisdiction.

The second issue, namely conflicts of jurisdiction between state and entity POs emerging at the investigation stage, is even more concerning from the point of view of legal uncertainty and the potential for abuse by the prosecution. This is because the law currently does not regulate this issue. The entity CPCs prescribe that the chief prosecutors of the FBiH and the RS have the authority to decide on conflicts between prosecutors' offices in the respective entities.⁵⁴ On the other hand, no similar provision (addressing conflicts between POs belonging to different entities or at the state and entity level) can be found in the CPC BiH. As a result of this deficiency, high level corruption cases may end up in a legal vacuum during the investigation stage.

This state of uncertainty as to the responsible prosecutor's office seems to have happened in the case against Čović et al. before the Mostar CC. The Mostar Cantonal PO opened an investigation in this case after receiving a criminal report filed by the FBiH financial police in 2003. However, in June 2005 the cantonal prosecutor sent the case to the BiH PO for review and for potential take-over. According to information available to the Mission, the BiH PO, after holding the case file for one year and three months, ultimately returned it to the Mostar PO. In January 2010, the Mostar PO raised an indictment in the case before the Mostar CC. While the investigation took seven years, it should be observed that investigative actions were taken by the cantonal prosecutor only in the years 2003–2004 and 2008–2009; the inactivity between the two periods can be attributed, at least in part, to the transfer of the case to the State PO and its

⁵² *Bičakčić and Branković*, Sarajevo Cantonal Court Verdict of 13 October 2010.

⁵³ *Bičakčić and Branković*, FBiH Supreme Court Verdict of 21 March 2012, pages 4-5.

⁵⁴ RS CPC art. 45, FBiH CPC art. 51

ambiguous status during that period. As will be discussed in the following section, this situation of legal uncertainty and delay probably affected the quality of the investigation in the case. Ultimately the case ended in an acquittal on grounds of lack of evidence.⁵⁵

Aside from clear-cut situations of conflict of jurisdiction, lack of co-ordination between state and entity POs may result in parallel investigations in cases that, being interlinked, could be more efficiently prosecuted by one office instead of being split between two or more. This seems to have happened recently in two high profile cases stemming from the financial collapse of Bobar Bank in RS. In August 2016, the Bijeljina District PO filed an indictment against **Veroljub Janjičić**, in the capacity of director of the Bobar Insurance Company, and **Darko Jeremić**, in the capacity of president of the Board of Directors of Bobar Insurance Company, charging them with the criminal offence of Business Mismanagement under the RS Criminal Code, whereby they allegedly caused damage amounting to approximately 8 million BAM.⁵⁶ The prosecutor subsequently reached plea agreements with both defendants, which were accepted by the court in November 2016 (for Mr. Jeremić) and in March 2017 (for Mr. Janjičić).⁵⁷

Aside from concerns related to the leniency of the sentences imposed (the accused were sentenced to six months of imprisonment each),⁵⁸ it must be noted that these cases are closely interlinked with the Bobar Bank case currently ongoing at the Court of BiH. The cases are intertwined at different levels. Mr. Jeremić is currently on trial before the Court of BiH for acts committed during the same period although in a different capacity, namely as director of another legal entity belonging to the Bobar group.⁵⁹ Mr. Janjičić, on the other hand, is not indicted in the state level case, but has been proposed as a witness for the prosecution.⁶⁰ Furthermore, the Bijeljina BC case and the Court of BiH case share some common evidence.⁶¹ To further complicate the matter, it is worth noting that Mr. Janjičić filed a motion in the Bijeljina proceedings for the dismissal of the case against him on grounds that, allegedly, in June 2016 he had been granted immunity from prosecution by the BiH PO. As the defendant failed, for unknown reasons, to produce the decision on immunity, the court rejected this motion.⁶²

These examples demonstrate the extent to which parallel investigations may result in a waste of resources and create general inefficiency of the justice system. As the investigation on the collapse of Bobar Bank case was started by the BiH PO in February

⁵⁵ *Dragan Čović et al.*, Mostar Cantonal Court Verdict of 27 June 2011.

⁵⁶ *Veroljub Janjičić and Darko Jeremić*, Bijeljina District Prosecutor's Office Indictment of 30 August 2016.

⁵⁷ *Darko Jeremić*, Bijeljina Basic Court Verdict of 25 November 2016; *Veroljub Janjičić*, Bijeljina Basic Court Verdict of 16 March 2017.

⁵⁸ See Chapter 3.2.3(c) for further details.

⁵⁹ *Darko Jeremić et al.* (Bobar Bank), Prosecutor's Office of BiH Indictment of 28 February 2017.

⁶⁰ *Ibidem*, page 66.

⁶¹ Namely three witnesses and some pieces of material evidence.

⁶² *Darko Jeremić and Veroljub Janjičić*, Bijeljina Basic Court Decision of 10 November 2016, pages 1-2. While the Mission at the moment of drafting this report is not informed about whether the accused was actually granted immunity, it will follow up on this issue as part of its monitoring of the Bobar Bank case before the Court of BiH.

2016 – before the indictment was filed in the Bijeljina cases – with stronger co-ordination and co-operation, this situation could have been avoided. Furthermore, as pointed out in the recent USAID BiH Report, failure to solve conflict of jurisdictions among prosecutors potentially creates the opportunity for abuse of the criminal process by the prosecution as this legal vacuum can be used to shield suspects from criminal proceedings.⁶³

Considering the inadequacy of the relevant provisions as well as the above-mentioned examples of judicial practice, it can be concluded that the allocation and exercise of jurisdiction between state and entity courts and prosecutors has been marred by serious problems which have undermined legal certainty, and effectiveness of the judicial response to corruption.

3.2.2 *Inadequate capacity of prosecutors in the drafting of indictments and in the gathering of evidence supporting the charges.*

Although the Mission has frequently observed concerns related to both the quality of indictments and the quality of the evidence gathering process in the same cases, this section addresses these two issues separately as they point to different needs and shortcomings of the prosecution service which require different corrective measures. Namely, the first issue requires targeted training for prosecutors on drafting techniques and analytical skills with specific regard to charging corruption related offences; the second issue, on the other hand, relates to shortcomings in the investigation process and suggests a need to boost the capacity of the different agencies which should support the prosecution in that crucial phase.

(a) Formulation of charges in the indictments

Indictments are the foundation on which the prosecution's case is based. Their quality can be assessed from different angles. In this section they will be assessed by making reference to the notion of "charging accuracy".⁶⁴ In short, a prosecutor has been accurate in the filing of charges when the charges clearly and comprehensively illustrate "the cause of the accusation - that is to say, the acts one is alleged to have committed and on which the accusation is based, but also of the nature of the accusation - that is, the legal characterization given to those acts".⁶⁵

In particular, the description of the acts or criminal behaviour found in the indictment should be consistent with the selected legal characterization and should cover all the factual and mental elements of an alleged crime. This requirement is consistent with the

⁶³ USAID's Justice Project in Bosnia and Herzegovina, Diagnostic Analysis of the Integrity of the Justice Sector in BiH and the Potential Risks of Corruption or Unethical Conduct in the Judiciary, pages 88-91, available at <http://usaidjp.ba/assets/files/publication/1453979174-dijagnosticka-analiza-integriteta-pravosudnog-sektora-u-bih-i-mogucih-rizika-od-nastanka-korupcije-ili-neeticnog-ponasanja-u-pravosudu.pdf>.

⁶⁴ RAND, Indicators of Justice: Measuring the Performance of Prosecution, Defence, and Court Agencies Involved in Felony Proceedings – A Guide to Practitioners, June 1976, p. 11, <https://www.rand.org/content/dam/rand/pubs/reports/2006/R1917.pdf>.

⁶⁵ See ECtHR, *Pélissier and Sassi v. France*, 25 March 1999, § 51.

standards prescribed under domestic law in BiH. Among other features, the criminal procedure codes require that indictments include “a description of the act pointing out the legal elements which make it a criminal offense, the time and place the criminal offense was committed, the object on which and the means with which the criminal offense was committed, and other circumstances necessary for the criminal offense to be defined as precisely as possible” as well as “the legal name of the criminal offense accompanied by the relevant provisions of the Criminal Code”.⁶⁶

In a number of cases analysed for the present report, the description of the criminal behaviour in supporting the charges in the indictment was seriously flawed due to the lack of, or unclear identification of, one or more of the elements of the offence. To be specific, in some high profile cases for the crime of abuse of office, the Mission observed that the indictment did not clearly illustrate the modality in which the criminal offence was committed. Under the criminal provisions in force in BiH, this offence can be committed by an official or a responsible person acting in one of the following three distinct modalities: (a) by taking advantage of his/her office or official authority; (b) by exceeding the limits of his/her official authority; (c) by failing to execute his/her official duty.⁶⁷

For example, the indictment filed in the case against **Edhem Bičakčić and Dragan Čović** before the Court of BiH was inconsistent with regard to the identification of the modality of commission of the abuse of office. In this case the two defendants were accused, as Prime Minister and Minister of Finance of the FBiH respectively, of illegally allocating funds amounting to several million BAM from the federal budget for the purchase, reconstruction and renovation of apartments of individual beneficiaries. In the factual description of the charges in the indictment it was stated that the defendants committed the offence by taking advantage of their office or official authority, while the legal qualification of the acts concluded that they exceeded the limits of their official authority.⁶⁸ As the factual description included a number of actions which the defendants undertook as part of their criminal conduct, a correct formulation should have specified the modality (i.e. “taking advantage” or “exceeding the limits”) in which each action had been committed.

⁶⁶ Criminal Procedure Code of BiH, Art. 227, Criminal Procedure Code of FBiH, Art. 242, Criminal Procedure Code of RS, Art. 242, and Criminal Procedure Code of BD BiH, Art. 227.

⁶⁷ See Article 220 of the CC of BiH, Article 383 of the CC of FBiH, Article 315 of the CC of RS, Article 377 of the CC of BD BiH. According to the Commentary on the relevant provision of the BiH CC, the first modality “exists when an official takes actions that are formally within the limits of his or her authority, but they are criminal in the substantive sense because they are contrary to interests and duties of the service”; accordingly, a “typical example of such abuses of office are abuses related to the so called discretionary powers when in the process of issuing an act or resolving a case, an official is authorized to choose between several solutions the one that is most purposeful”. The second modality, on the other hand, “exists when an official acts outside of his responsibilities, or outside of his subject matter jurisdiction ... because he undertakes an official act that falls under the responsibility of another official (of higher or lower instance), or in fact falls within the remit of an entirely different service (the so called usurpations)”; see Commentary on the CC of BiH, Group of authors, 2005 at page 721.

⁶⁸ *Bičakčić and Čović*, Prosecutor’s Office of BiH Indictment of 17 April 2009, pages 2, 21. This flaw was pointed out in the second instance verdict in this case. *Bičakčić and Čović*, Court of BiH Verdict of January 31, 2011, para. 17.

In the case against **Uroš Makić** before Livno MC, the indictment suffered from serious deficiencies. The accused was charged for abuse of office in his capacity as Mayor of Bosansko Grahovo, for the illegal allocation of funds from the municipal budget amounting to 16,000 BAM. The description of charges, however, does not specify whether the accused committed the abuse by exceeding the limits of official authority or by taking advantage of his office.⁶⁹ This shortcoming, coupled with the failure to identify the administrative norms which were allegedly violated by the accused, result in an overall vagueness of the charged conduct which seems incompatible with principles of legal certainty. It is worth noting that, despite this, the accused was initially convicted in first instance and was eventually acquitted only after the second instance court had ordered a retrial.⁷⁰

In the case against **Abdulkadir Tutnjević** before Novi Travnik CC, the accused was charged with abuse of office in the capacity of director of two different companies whereby he caused damages – and enjoyed a corresponding gain of – more than 2 million BAM. The factual description found in the indictment is incorrect or at least very ambiguous as it alleges that the accused, “by taking advantage of his official position, exceeded the limit of his authority”.⁷¹ With this formulation the prosecutor seems to be unduly merging the prescribed modalities of commission of the offence or, in the best case, to propose an alternative or cumulative definition of the conduct.⁷² Moreover, as the defendant is charged for actions committed in two different capacities at the same time, the factual description is all the more confusing as it lists eight different actions as part of the criminal conduct without specifying in which function he carried out each action.

Improper identification of the capacity in which the accused committed the crime of abuse of office was also noticed in the indictment against **Dragan Čović et al.** filed before the Mostar CC. The indictment alleged an undue gain amounting to approximately 4.5 million BAM in connection with the selling of shares of a public company providing mobile communications services. The first accused, Čović, was charged with committing the offence in multiple capacities, namely as Minister of Finance and Deputy Prime Minister of the FBiH Government, as well as in his capacity as President of the supervisory board of the postal service company based in Mostar.⁷³ The rest of the factual description of the charge, however, shows that defendant Čović was accused only for acts that he committed in the latter capacity and not for acts committed as a Minister or Deputy Prime Minister.⁷⁴ Moreover, the indictment is flawed with regard

⁶⁹ See Livno Canton Prosecutor’s Office Indictment of 20 November 2014, pages 1-2.

⁷⁰ *Uroš Makić*, Livno Municipal Court Verdict of 28 May 2015; Livno Cantonal Court Verdict of 20 February 2017.

⁷¹ See *Abdulkadir Tutnjević*, Central Bosnia Canton Prosecutor’s Office Indictment of 23 December 2011, p. 1.

⁷² A similar concern has been spotted in another indictment filed by the Cantonal PO in Travnik in the case against Bogomir Barbić before Travnik MC (*Bogomir Barbić*, Central Bosnia Canton Prosecutor’s Office Indictment of 11 December 2015, page 1).

⁷³ *Dragan Čović et al.*, Herzegovina-Neretva Canton Prosecutor’s Office Indictment of 29 January 2010, p. 2.

⁷⁴ The first instance verdict identified this issue. *Dragan Čović et al.*, Mostar Cantonal Court Verdict of 27 June 2011, p. 16.

to the formulation of the mental element of the crime. It alleges that the accused knew or had reason to know that the decision to sell the shares of the public company was illegal.⁷⁵ This wording is problematic because it seems to imply that negligence in ignoring the illegality of the procedure could be sufficient to fulfil the mental element of the crime. This is not correct since the crime of abuse of office requires direct intent.⁷⁶

In the case against **Obren Petrović** before Doboj BC, the identification of the manner of commission was clearly inconsistent with the actions allegedly undertaken by the accused as part of the criminal conduct. The defendant was charged with abuse of office, in the form of taking advantage of his position as Mayor of Doboj, for illegally allocating subsidies intended for socially vulnerable categories to other ineligible recipients (like radio and TV stations).⁷⁷ The description of the incriminating acts, however, clearly indicates that they were beyond the competence of Mayor's office, which, in turn, indicates that the defendant's alleged conduct was carried out by exceeding the limits of his authority and not by taking advantage of it. In spite of the fact that the commission of the incriminating acts was proved during the trial, this legal characterization flaw resulted in the acquittal of the defendant on the grounds that, since the acts were beyond his official competence, he did not have the capacity to commit them.⁷⁸

Aside from deficiencies in the identification of the proper modality of commission of the offence, another frequent concern relates to the inadequate identification and description of the regulations, norms or general principles of public administration which were allegedly violated by the defendant's abuse of office. Without this element (usually referred to as the "blanket provision"), it is impossible to qualify the conduct as illegal.

For example, in the above-mentioned case against **Dragan Čović et al.** before Mostar CC, the indictment alleges the illegal sale of shares of a public company.⁷⁹ However, it does not refer to the law that regulates this matter, namely the Law on Privatization of Companies in FBiH. It instead alleges that the incriminating acts were carried out in violation of a decision on the modalities of privatization issued by the FBiH Government,⁸⁰ which, however, could not constitute the legal basis for the selling of shares.

In the case against **Ivo Križanac** before Novi Travnik CC, the prosecutor identified the wrong blanket norm as the basis for charging the accused with illegal appropriation of funds. Namely, the prosecutor identified a provision that was adopted after the

⁷⁵ See *Dragan Čović et al.*, Herzegovina-Neretva Canton Prosecutor's Office Indictment of 29 January 2010, p. 2.

⁷⁶ See Commentary on the CC of BiH, Group of authors, 2005, p. 722.

⁷⁷ See *Obren Petrović*, Doboj District Prosecutor's Office Indictment of 5 October 2006, pp. 2-4.

⁷⁸ *Obren Petrović*, Doboj District Court Verdict of 31 July 2017, page 4. The flawed legal interpretation of the elements of crime adopted in the reasoning of the verdict in this case is examined in detail in the following section on judges' capacity.

⁷⁹ *Dragan Čović et al.*, Herzegovina-Neretva Canton Prosecutor's Office Indictment of 29 January 2010, pages 2-3.

⁸⁰ See Herzegovina-Neretva Canton Prosecutor's Office Indictment of 29 January 2010, p. 2. This issue was addressed in the first instance verdict in this case. *Čović et al.*, Mostar Cantonal Court Verdict of 27 June 2011, page 13.

commission of the alleged criminal conduct. The accused was charged with the illegal appropriation of funds in the amount of approximately 1.8 million BAM from the company of which he was the director. The indictment alleges that the accused violated a certain provision from the Statute of the company regulating the duties of the director.⁸¹ The relevant Statute, however, had been in force only since 2000, while a different statute had been in force at the time of the alleged crime. The prosecutor failed, however, to refer to the appropriate statute in force at the time of the alleged criminal conduct or to submit it as material evidence. As the first instance court acquitted the defendant, the FBiH Supreme Court, upon appeal, on this point observed that it was possible the accused violated some other blanket provisions through his conduct, but that there was no evidence he violated those referred to by the prosecutor in the indictment.⁸²

The Mission observed a similar failure to correctly identify the blanket provision in the above-mentioned case against **Abdulkadir Tutnjević**, which was also tried before the Novi Travnik CC. It is disconcerting to see that the indictment in this case does not include any reference at all to the blanket provision allegedly violated by the accused.⁸³ For this reason and others, the proceedings ended in an acquittal.

In the case against **Nikola Šego et al.** before the Court of BiH, the indictment charged seven officials of the BiH Ministry of Transport and Communications with abuse of office for taking decisions on the allocation of international road transport permits to companies in BiH in violation of a number of regulations.⁸⁴ The court, after seven years of proceedings and two convictions quashed by the Constitutional Court of BiH on grounds that they were not sufficiently well reasoned,⁸⁵ eventually acquitted the defendants.⁸⁶ Among other reasons for acquitting, the Court found that the prosecution had not proved that the accused had violated the blanket provisions included in the indictment. Interestingly, the Court added that the actions carried out by the defendants could have been deemed in violation of their official duty as they were aimed at unduly privileging certain companies; this possibility, however, could not be used as a basis for a conviction due to the different formulation of the blanket provision in the indictment.⁸⁷

This remark by the Court of BiH is particularly significant if it is linked to a more general issue that has been observed in virtually all abuse of office cases monitored by the Mission. Namely, the prosecution seems to be disregarding situations where the blanket provision element could be identified in the violation of the general principle of impartiality of the administration, rather than through the violation of specific legal provisions or regulations. This shaping of the offence is clearly admissible under the

⁸¹ Central Bosnia Canton Herzegovina-Neretva Canton Prosecutor's Office Indictment of 17 May 2013, page 2.

⁸² *Ivo Križanac*, FBiH Supreme Court Verdict of 7 May 2015, page 5.

⁸³ See Central Bosnia Canton Herzegovina-Neretva Canton Prosecutor's Office Indictment of 23 December 2011, page 1.

⁸⁴ *Nikola Šego et al.*, Prosecutor's Office of BiH Indictment of 4 January 2010.

⁸⁵ *Nikola Šego et al.*, Court of BiH second-instance verdicts of 3 June 2013 and 22 December 2014.

⁸⁶ *Nikola Šego et al.*, Court of BiH Third-Instance Verdict of 14 February 2017.

⁸⁷ See *Nikola Šego et al.*, Court of BiH Verdict of 8 November 2016, para. 75.

definition of abuse of office in BiH.⁸⁸ The narrow approach adopted by the prosecution, on the other hand, risks creating an impunity gap where conduct which is formally in compliance with the law, but is in fact aimed at abusing the public function to the benefit of personal interests, is not prosecuted.

A final general remark with regard to charging accuracy in the indictments concerns the style of presentation of the factual and legal description of the charges. Prosecutors in BiH generally adopt fairly long and elaborated descriptions, which is not a problem as such. However, in the most complex cases the description is usually presented in one or just a few sentences, spanning up to thirty or forty lines. This often makes it very difficult to identify and distinguish the elements of the crime, without adding any particular value. Moreover, in few cases it has been noted that the description includes facts, which are not a constitutive part of the alleged criminal conduct.⁸⁹ In this regard, the Mission recommends that prosecutors in BiH consider changing the technique of formulating charges in a way that would clearly underscore the different factual and mental elements of the crime for example through the use of subheadings.

(b) Gathering of evidence

A trial monitoring-based assessment of the process of gathering evidence proves more difficult and sensitive than analysing the quality of indictments. This is due to different factors: first, the Mission's trial monitoring programme, in its current format, does not monitor the investigation phase of corruption cases; second, gathering of evidence is a complex process involving not only the prosecution but a variety of actors and agencies;⁹⁰ and third, and most importantly, the effectiveness of this process cannot be assessed solely on the basis of whether or not the prosecutor obtained a convicting verdict.

It can indeed happen that difficult and complex cases end in acquittals because the evidence presented, although sound and professionally collected, does not satisfy the "beyond reasonable doubt" standard of proof. Such cases should not be taken as proof of dysfunctionalities in the system. The examples in this section, by contrast, are illustrative of situations in which the prosecution failed to provide *any* credible evidence with regard to one or more elements of the crime. Based on its analysis, the Mission concludes that these cases demonstrate structural flaws in the investigation of corruption cases.

Specifically, the Mission has identified three distinct concerns: 1) in some cases indictments are filed on the basis of incomplete evidence, thus requiring the submission of additional evidence by the prosecution during the trial; 2) in a great number of cases, the evidence submitted for the purpose of quantifying the economic damage or gain

⁸⁸ See footnote no. 15.

⁸⁹ *Edhem Bičakčić and Nedžad Branković*, Sarajevo Canton Prosecutor's Office Indictment of April 16, 2009; *Abdulkadir Tutnjević*, Central Bosnia Canton Prosecutor's Office Indictment of December 23, 2011.

⁹⁰ Such as, for example, law enforcement agencies, auditing authorities, anti-corruption agencies, public registry holders and banks.

constituting the alleged consequence of the criminal conduct was poor; and 3) in a significant number of cases, the prosecution submitted little or no evidence with regard to the mental element of the crime, i.e. the criminal intent of the defendant.

The first issue vividly emerged in the above-mentioned interlinked cases against **Bičakčić and Branković** before Sarajevo CC⁹¹ and **Bičakčić and Čović** before the Court of BiH,⁹² which both ended with acquittals. In the first case, the list of evidence proposed in the indictment shows that the prosecution did not conduct a financial investigation or propose an expert witness to determine the damage to the public budget as well as the undue gain allegedly obtained by the accused.⁹³

As the first instance panel noted this deficiency,⁹⁴ it allowed the testimony and submission of a report by a prosecution financial expert during the trial as additional evidence. It should be noted that the order for financial expertise included questions that were not directly related to the indictment.⁹⁵ On the other hand, the expert did not provide any finding with regard to a key element of the crime, namely the existence and amount of undue gain.⁹⁶

In the second case, **Bičakčić and Čović**, a number of important pieces of material evidence (originals of government decisions, auditing reports, public budgets) were proposed and submitted by the prosecution as additional evidence during the trial.⁹⁷ As these documents were available at the time of the investigation, it is not clear why they were not listed as evidence in the indictment. As additional evidence presented during the trial, these documents did not support the prosecution case. On the contrary, they showed the absence of a link between the alleged criminal acts of the defendants and the alleged consequence, namely the damage to the budget and the private undue gain.⁹⁸

The court, in fact, concluded that official decisions taken by the defendants did not constitute the basis for the allocation of funds to solve the housing problems of the individual beneficiaries.⁹⁹ Further proof that the evidence gathered during the investigation was incomplete is that in 12 out of 64 counts of the indictment, the beneficiaries of the funds are not identified. The first instance panel held that there was no justification for this shortcoming.¹⁰⁰

⁹¹ *Bičakčić and Branković*, Sarajevo Cantonal Court Verdict of 13 October 2010; FBiH Supreme Court Verdict of 21 March 2012.

⁹² *Bičakčić and Čović*, Court of BiH First-Instance Verdict of 8 April 2010; Court of BiH Second-Instance Verdict of 31 January 2011.

⁹³ *Bičakčić and Branković*, Sarajevo Canton Prosecutor's Office Indictment of 16 April 2009, pages 4-6.

⁹⁴ *Bičakčić and Branković*, Sarajevo Cantonal Court Verdict of 13 October 2010, page 14.

⁹⁵ *Ibidem*, page 14.

⁹⁶ *Ibidem*, page 14.

⁹⁷ *Bičakčić and Čović*, Court of BiH Verdict of 8 April 2010, pages 33-34.

⁹⁸ *Ibidem*, pages 56-59.

⁹⁹ *Ibidem*, pages 56-58, 59; Court of BiH second instance verdict of 31 January 2011, para. 17.

¹⁰⁰ *Ibidem*, pages 54-55.

In relation to the second issue, namely proving the existence and the amount of the economic damage or gain, concerns were observed in a number of cases. In the above-mentioned case against **Ivo Križanac** before Novi Travnik CC, the prosecutor's evidence for the appropriation of the company funds by the director for his personal gain was very weak and inconsistent. The material evidence presented by the prosecution did nothing to demonstrate that the accused executed any financial transactions to transfer the money from the company to his personal account. The prosecution financial expert prepared a report that was twice corrected during the investigation.¹⁰¹ The expert was examined at the main trial and her testimony was rejected as inconsistent and unreliable.¹⁰² Furthermore, the expert report findings were inconsistent with those contained in the report of the financial police, which was also submitted by the prosecutor, as the amounts they claimed were diverted from the company were different.¹⁰³ It should be noted that, aside from ordering the financial expertise, the prosecution did not undertake any other form of financial investigation.

In the case against **Dragan Čović et al.** before Mostar CC, the prosecutor failed to correctly ascertain the amount of private gain and economic damage caused by the accused. This is because the amounts indicated in the factual description of the indictment are substantially different from the sums indicated by the prosecution financial expert in her report.¹⁰⁴ In other words, the prosecution ordered the financial expertise in the investigation, but failed to harmonize the results of the expert report with the factual description of the charge.

In one of the two cases against **Zdravko Krsmanović** before Foča BC, the accused, as Mayor of Foča, was charged with abuse of office as he employed 19 persons to work for the Municipality in violation of regulations on the systematization of public positions and without issuing public vacancies.¹⁰⁵ The indictment identified the undue gain element in the salaries that had been paid to these persons on the basis of the employment contracts. The first instance panel, however, pointed out that, while the hiring procedure might not have been in compliance with the regulations, the contracts were nevertheless legally valid. The court explained that the undue nature of the gain could not be simply the consequence of the violation of the recruitment provisions, but needed to be established as a separate element.¹⁰⁶ The prosecutor, on the other hand, did not submit any evidence to prove that the contracts were illegal or that the salaries were illegitimately earned (for instance on the grounds that the jobs were fictitious).¹⁰⁷

¹⁰¹ *Ivo Križanac*, Novi Travnik Cantonal Court Verdict of 20 May 2014, page 40.

¹⁰² *Ibidem*, page 59.

¹⁰³ *Ibidem*, pages 59-60.

¹⁰⁴ *Dragan Čović et al.*, Mostar Cantonal Court Verdict of 17 June 2011, page 11.

¹⁰⁵ *Zdravko Krsmanović*, Trebinje District Prosecutor's Office Indictment of 20 June 2013.

¹⁰⁶ *Zdravko Krsmanović*, Foča Basic Court Verdict of 26 May 2015, page 34.

¹⁰⁷ *Ibidem*, page 29.

The case against **Stipe Prlić et al.** before the Court of BiH illustrates very well the problems affecting the financial aspects of investigations in high level corruption cases. The initial indictment charged two defendants (respectively the president and one member of the managerial board of the public company *Hrvatske Telekomunikacije*) for abuse of office and accepting bribes in connection with the illegal awarding of a tender for the development of a planning strategy to a private company.¹⁰⁸ The third accused, the owner of this company, was charged with bribing the first two defendants. As these offences were charged under the FBiH Criminal Code, the prosecution needed to show that the economic interests of BiH suffered significant damage as a result of the criminal acts in order for the case to be tried before the Court of BiH.¹⁰⁹

In this regard, the initial indictment alleged that, as a consequence of the criminal conduct, the company which won the tender acquired an undue gain of more than six million BAM.¹¹⁰ However, in examining the part of the indictment presenting the results of the investigation, it is unclear how the prosecution came to this figure. Based on the list of evidence it is apparent that the prosecution did not undertake any financial investigation apart from requesting the financial expertise. During the trial, the prosecutor, on the basis of the financial expert's report, changed the amount and the manner of calculating the gain by decreasing the amount of the company's alleged undue income from the initial six million figure to 216,124 BAM and increasing the alleged financial solvency of the same company to over four million BAM. The first instance panel, however, extensively criticized the report of the prosecution expert as contradictory, unreliable and contrary to the principles of financial expertise.¹¹¹

The third issue identified by the Mission as a major hurdle in the investigation of corruption cases is related to the gathering of evidence as to the mental element of the crime, that is, the intent of the defendant to carry out the illegal conduct and to produce its illegal consequences.

In the case against **Goran Škrbić et al.** before Banja Luka DC, the first defendant was charged with abuse of office in his capacity as director of the RS Privatization Agency by enabling, through illegal means, private companies to buy shares of previously state-owned companies at low prices. The charge alleged that as a result of this conduct, a damage of approximately 49 million BAM was caused to the RS Budget.¹¹² The key mental element to be proved was that the accused had acted in violation of the regulations on privatization and auctioning with the intent to secure an undue gain for the buyers and that he had not acted for other, legitimate, reasons.

¹⁰⁸ *Stipe Prlić et al.* (Gibraltar), Prosecutor's Office of BiH Indictment of 7 May 2015.

¹⁰⁹ For more details on the issue of the extended jurisdiction of the Court of BiH, see Chapter II above.

¹¹⁰ *Stipe Prlić et al.*, Prosecutor's Office of BiH Indictment of 7 May 2015, page 3.

¹¹¹ *Stipe Prlić et al.*, Court of BiH Verdict of 4 November 2016, page 58.

¹¹² *Goran Škrbić et al.*, RS Special Prosecutor's Office Indictment of 8 July 2008, pages 5-48.

The first instance court, in acquitting the defendants, found that the prosecution had failed to prove that the accused had this intention since it did not manage to establish the existence of a prior agreement between them and the buyers in the auction procedures.¹¹³ It can be argued that the prosecutor should have tried to establish some link between the accused and the individual buyers. It is evident, however, from the results of the investigation presented in the indictment, that the personal and business contacts of the accused were not properly investigated.¹¹⁴ Moreover, none of the witnesses who attended the auction as buyers or potential buyers testified in court that they knew the accused.

In the second case against **Zdravko Krsmanović** before Foča BC, the accused, as Mayor of Foča, was charged with abuse of office for the illegal transfer of 59,400 BAM from the budget of the municipality to a private association (of which he was president) and from the association to a construction company for the purpose of refurbishing the façade of a building in the proximity of the Sveti Sava Temple.¹¹⁵ The relevant mental element was that he had acted with the intent to obtain a gain for the individual owners of the refurbished building. However, the prosecutor did not offer any evidence to prove this intent. A link between the accused and the individual owners was not established. The prosecution, moreover, did not collect any evidence pointing to the acquisition of gain by the individual owners in terms of increase of values of their property, transfer of funds to their accounts, or anything else.¹¹⁶

In the closing arguments, as summarized in the first instance verdict, the prosecutor actually suggested that the criminal intent of the accused had its origin in a dispute between the accused and the orthodox religious authorities.¹¹⁷ If the verdict correctly represented this argument, it would demonstrate a serious misunderstanding by the prosecution of what constitutes criminal intent and what, instead, qualifies as a mere additional motive for the crime, not constituting an element of the crime. The first instance verdict underscored this failure and ascertained that there was no evidence that would prove that the accused had acted with the required intent.¹¹⁸

In the above-mentioned case against **Stipe Prlić et al.** before the Court of BiH, the factual description of the charge alleged that the exchange between the legal acts of the bribe takers and the transfer of money by the bribe giver was based on a mutual agreement.¹¹⁹ Indeed the offence of bribery requires a causal link between the exercise of the public function and the corruptive conduct of the private. To be more specific, the public official must (implicitly or explicitly) agree to use his function to serve a

¹¹³ Goran Škrbić et al., Banja Luka District Court Verdict of June 26, 2009, page 82

¹¹⁴ Goran Škrbić et al., RS Special Prosecutor's Office Indictment of 8 July 2008, pages 54-68.

¹¹⁵ Zdravko Krsmanović, Trebinje District Prosecutor's Office Indictment of 25 June 2014.

¹¹⁶ Trebinje District Prosecutor's Office Indictment of 25 June 2014, pages 2-3.

¹¹⁷ Zdravko Krsmanović, Foča Basic Court Verdict of 3 September 2015, page 23.

¹¹⁸ Ibidem, page 24.

¹¹⁹ Stipe Prlić et al., Prosecutor's Office of BiH Indictment of 7 May 2015, page 2.

private interest in exchange of a bribe.¹²⁰ As grounds for acquitting the defendants, the first instance panel found, among other things, that the prosecutor had failed to offer any evidence of a previous agreement or causal link between the outcome of the tender procedure and the transfer of money to the accounts of the accused.¹²¹ The only proved fact offered by the prosecution was that the accused had received payments to their bank accounts opened in Austria within two months after the signing of the disputed contract. This fact, although suspicious, was not sufficient to prove the link since the defense offered evidence that the transfer of money was in fact a loan which had actually been repaid by the accused.¹²²

It can be argued that in this case, the prosecution, in the absence of direct evidence proving the agreement between the parties, should have explored other areas, related for example to the possible existence of personal and business relations between the co-defendants. This case is particularly troubling not only because of clear flaws in the process of gathering of evidence, but also for the failure of the prosecutor to submit in due time the appeal against the first instance verdict. As a result, the acquittal became final with no challenge before the appeal panel.

As a general remark on the issue of intent, it is necessary to underline that direct evidence proving the mental element in cases of bribery or abuse of office will rarely be available. Typically, in the absence of interceptions of communications between the different actors pointing to their intention and agreement in committing the offence, this element can be proved only through circumstantial evidence. This is recognized even in the UN Convention Against Corruption which at art. 28 reads: “knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances”.¹²³

The Mission notes that no special investigative measures involving interception of communications were employed in the cases observed above. In addition to this, the prosecution made poor attempts – or none at all – to establish a set of factual circumstances which could point to the intent of the defendants. While this is a clear shortcoming, it also needs to be acknowledged that the gathering of this kind of circumstantial evidence can be a particularly difficult task as it may require, for example, an extensive and comprehensive financial investigation to track movements of money and to identify suspicious patterns in tracing the money. Another difficult task for the prosecution is to fathom the type and scope of circumstantial evidence that can

¹²⁰ Specifically, the criminal offence of “Accepting Gifts and Other Forms of Benefits” at the state level requires the punishment of “an official or arbiter or juror judge or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person or an international official, who demands or accepts a gift or any other benefit for himself or another person or who accepts a promise of a gift or a benefit for himself or another person in order to perform within the scope of his official function an act, which ought not to be performed by him, or for the omission of an act, which ought to be performed by him or whoever mediates in such bribing of an official or responsible person”; see Criminal Code of BiH, art. 217(1).

¹²¹ *Stipe Prlić et al.*, Court of BiH Verdict of 4 November 2016, page 66.

¹²² *Ibidem*, pages 66-67.

¹²³ United Nations Convention Against Corruption (UNCAC), New York, 2004.

be deemed to be sufficient to secure a conviction. From the analysis of the verdicts and decisions in the cases monitored, it has been noted that courts in BiH are giving little guidance to the prosecution with regard to what could, in principle, constitute relevant factual circumstances for proving intent in corruption offences. In Italy, for example, the Court of Cassation, acknowledging the difficulties in proving *mens rea*, has identified a list of factual indicators which are deemed symptomatic of the intent of procuring the undue gain or damage as part of the offence of abuse of office.¹²⁴

This kind of guidance is basically absent in the case-law in BiH. This is part of a broader problem concerning the quality of the case-law and the reference to precedents in the national judicial system. This issue is addressed more in depth in the following section dedicated to the performance of judges.

3.2.3 *Inadequate capacity of judges in applying and interpreting the law in a reasoned and predictable manner*

The skills of judges in the application and interpretation of the law are mainly displayed in the written decisions they issue during the judicial process. First instance verdicts and decisions on appeal, in particular, can be viewed as the milestones of any type of criminal proceeding. In this regard, it is generally recognized that the quality of a judicial decision “depends principally on the quality of its reasoning”.¹²⁵ According to the established case-law of the European Court of Human Rights, “reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based”.¹²⁶ According to that court, this principle is fundamental because “reasoned decisions serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part” and “oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence”.¹²⁷

The evaluation of the quality of judicial decisions, however, cannot represent a forum for checking and second-guessing the reconstruction of facts by judges as this approach would overstep the limits of appropriate oversight over the work of the judiciary and arguably impinge upon its independence. Addressing this risk requires the identification of relevant, clear and widely-recognized standards which characterize convincing legal reasoning in a judicial decision.

Bearing this in mind, this report refers to the criteria identified by the Consultative Council of European Judges (CCJE) to evaluate this matter while respecting the

¹²⁴ See Corte di Cassazione, Sez. V Penale - Sentenza 8 giugno 2017, n.28608, para 3, available at <http://www.neldiritto.it/appgiurisprudenza.asp?id=14787#.Wg2qKUqnHIU>

¹²⁵ CCJE, Opinion no.11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions, December 2008, p. 13, <https://wcd.coe.int/ViewDoc.jsp?id=1924745&Site=COE>.

¹²⁶ See Council of Europe, Guide on article 6 of the European Convention on Human Rights, at p. 23, http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

¹²⁷ Ibidem

boundaries of judicial independence. According to the CCJE, the reasoning of a decision must be: consistent, clear, unambiguous and not contradictory; must allow the reader to follow the chain of reasoning which led the judge to the decision; must respond to the parties' submissions, i.e. to their different heads of claim and to their grounds of defence; and should refer to the relevant provisions of the constitution or relevant national, European and international law as well as, where appropriate, to national, European or international case-law.¹²⁸

In addition to proper reasoning, respect for the rule of law requires that criminal laws are enforced in a uniform and predictable way, thereby ensuring legal certainty and security for individuals. In its *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, the Venice Commission underlined how “the fragmentation of the judicial and prosecutorial system raises difficulties relating to legal certainty”.¹²⁹ More specifically, “as there is no institutionalised relationship between the judicial and prosecutorial systems of the four units, the courts and prosecutors from different units can easily interpret similar or even identical provisions of their respective legal orders differently”.¹³⁰

Against this background, this section identifies four main critical issues relating to judicial performance which have emerged with significant frequency during the monitoring of corruption cases: (a) insufficient oversight by judges in the review of indictments; (b) unclear or insufficient reasoning in judicial decisions; (c) the related concern of unharmonized case-law and failure to refer to precedents in the reasoning; and (d) lack of an adequate sentencing policy in cases where the accused is convicted.

(a) Inadequate judicial review of indictments

The issue of judicial oversight on indictments is closely connected to the shortcomings observed in the previous section with regard to the formulation of charges by prosecutors. Many of the examples presented there with regard to the lack of, or unclear identification of, one or more of the elements of the offence, also reveal flaws in the review and confirmation of those indictments by the preliminary hearing judge. According to the criminal procedure codes in all four jurisdictions, this judge, before confirming an indictment, must ensure not only that a grounded suspicion has been established, but also that the indictment is properly drafted and contains all the requirements foreseen under the law. In case that the indictment is unclear or does not contain all the necessary requirements, the preliminary hearing judge can either dismiss it or send it back to the prosecutor for corrections.¹³¹

¹²⁸ CCJE, Opinion no.11 (2008), cit.

¹²⁹ Venice Commission, *Opinion on Legal Certainty*, para. 57. On the judicial and prosecutorial institutional framework see Chapter II above.

¹³⁰ *Ibidem*.

¹³¹ Criminal Procedure Code of BiH, Art. 228, Criminal Procedure Code of FBiH, Art. 243, Criminal Procedure Code of RS, Article 243, Criminal Procedure Code of BD BiH, Art. 228.

The Mission observed only a few cases in which the judge properly exercised adequate oversight by asking for the prosecutor to correct a flawed indictment. For example, in the above-mentioned case against **Ivo Križanac**, the factual description of charges in the initial indictment did not include any reference to the blanket provision allegedly violated by the accused. It also failed to identify the transfer of funds which would constitute the undue gain.¹³² As these are essential elements of the crime of abuse of office, according to the Mission's monitoring data, the preliminary hearing judge returned the indictment to the prosecution for amendments. An amended version of the indictment (only partially addressing the flaws identified by the court) was filed one month later and was confirmed by the court.¹³³

On the other hand, as already pointed out, in many other cases, preliminary hearing judges confirmed seriously flawed indictments. In the case against **Ankica Franković** before Kiseljak MC, the defendant was charged with accepting a bribe in connection with the performance of her duties as a clerk at the cantonal employment office in Kiseljak and with a second related charge of forging documents and fraud.¹³⁴ The preliminary hearing judge confirmed the indictment without noticing that the second charge had fallen under the statute of limitation.¹³⁵ The charge was subsequently dropped by the prosecution¹³⁶ while the accused signed a plea bargaining agreement with regard to the first charge.¹³⁷

In one of the above-mentioned cases against **Zdravko Krsmanović** before Foča BC, one of the counts contained in the indictment relates to the forging an official document but because it did not identify the document in question, it lacked a crucial element of the offence.¹³⁸ While the preliminary hearing judge confirmed the indictment, during the trial the prosecution decided to drop the charge in relation to this accusation.¹³⁹ The second count of the confirmed indictment, charging the accused with abuse of office, did not include a clear reference to the blanket provision that the accused, as a Mayor, allegedly violated when he decided to employ 19 workers.¹⁴⁰ While the prosecutor tried to correct this flaw by amending the indictment during the trial, the accused was nevertheless acquitted on this charge.¹⁴¹

¹³² *Ivo Križanac*, Central Bosnia Canton Prosecutor's Office Indictment of 15 April 2013, page 1.

¹³³ *Ivo Križanac*, Central Bosnia Canton Prosecutor's Office Amended Indictment of 17 May 2013.

¹³⁴ *Ankica Franković*, Central Bosnia Canton Prosecutor's Office Indictment of 1 July 2016, pages 1-2.

¹³⁵ *Ankica Franković*, Decision by Preliminary Hearing Judge of the Kiseljak Municipal Court of 8 July 2016.

¹³⁶ *Ankica Franković*, trial hearing held on 26 April 2017.

¹³⁷ *Ankica Franković*, Kiseljak Municipal Court Verdict of 26 April 2017.

¹³⁸ *Zdravko Krsmanović*, Trebinje District Prosecutor's Office Indictment of 20 June 2013.

¹³⁹ *Zdravko Krsmanović*, trial hearing held on 3 April 2015.

¹⁴⁰ *Zdravko Krsmanović*, Trebinje District Prosecutor's Office Indictment of 20 June 2013, pages 2-5.

¹⁴¹ *Zdravko Krsmanović*, Foča Basic Court Verdict of 26 May 2015; Trebinje District Court Verdict of 18 December 2015. For further details on poor prosecutorial performance in this case, see Chapter 3.2.2(b) above.

In the complex case against **Tomislav Martinović et al.** before the Court of BiH,¹⁴² the confirmed indictment was seriously flawed as essential elements of the crimes were missing in all 12 counts of the indictment. In general, the factual descriptions of the counts failed to indicate the official capacity of the accused, to identify their intent and to describe the manner in which they perpetrated the offence.¹⁴³ The indictment clearly did not comply with basic legal requirements of the BiH CPC. Some of the most visible flaws were corrected during trial when the prosecutor filed an amended indictment. During the trial, the prosecutor dropped all charges in relation to five of the 11 defendants – perhaps not surprising given that the indictment lacked factual descriptions of essential elements of the offences allegedly committed by these individuals. The court ultimately acquitted all the defendants but one, who was convicted on a single charge.¹⁴⁴

In sum, an analysis of how preliminary hearing judges address flawed indictments reveals that judges frequently confirm indictments which should be dismissed or sent back for corrections. This is concerning considering that the oversight role of the preliminary hearing judge is fundamental with a view to avoid that individuals (intentionally or unintentionally) are accused of a crime based on poor evidence and inadequately defined charges as well as to ensure that resources in the justice system are not wasted in the conduct of long and expensive proceedings which are likely to result in acquittals.

(b) Unclear or insufficient reasoning in judicial decisions.

According to the applicable criminal procedure codes, a verdict should include an introductory part, an enacting clause, reasoning, and instructions on the legal remedy.¹⁴⁵ In the reasoning, the court “shall specifically and completely state which facts the Court finds to be proven or unproven, and on what grounds, providing specifically an assessment of the credibility of contradictory evidence, the reasons why the Court did not sustain the various motions of the parties, the reasons why the Court decided not to directly examine the witness or expert whose testimony was read, and the reasons guiding the Court in ruling on legal matters and especially in ascertaining whether the criminal offense was committed and whether the accused was criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act”.¹⁴⁶ In a significant number of cases monitored by the Mission, the verdict did not adhere to or fully satisfy these requirements.

¹⁴² The case concerned 11 defendants who, in different capacities as officials of the Herzegovina-Neretva Canton (HNC), abused their office in the period 1998-2006.

¹⁴³ *Tomislav Martinović et al.*, Prosecutor’s Office of BiH Indictment of 13 December 2007.

¹⁴⁴ *Tomislav Martinović et al.*, Court of BiH Verdict of 12 June 2012.

¹⁴⁵ Criminal Procedure Code of BiH, Art. 290; Criminal Procedure Code of FBiH, Art. 305; Criminal Procedure Code of RS, Art. 304; Criminal Procedure Code of BD BiH, Art. 290.

¹⁴⁶ Criminal Procedure Code of BiH, Art. 290 (7); Criminal Procedure Code of FBiH, Art. 305(7); Criminal Procedure Code of RS, Art. 304(7); Criminal Procedure Code of BD BiH, Art. 290(7).

In the above-mentioned case against **Edhem Bičakčić and Nedžad Branković**, the verdict was ambiguous with regard to the grounds for acquitting the defendants.¹⁴⁷ In the enacting clause, the Sarajevo CC concluded that the acquittal was motivated by the failure of the prosecutor to prove decisive facts relevant to the case.¹⁴⁸ The verdict's reasoning does coherently demonstrate that there was no evidence of intent to commit the offence as well as no evidence of undue gain by the defendants.¹⁴⁹ However, at the end of its reasoning portion, the verdict states that the prosecution did not prove the existence of the criminal offence of abuse of office.¹⁵⁰ This conclusion does not support the reason given for the accused's acquittal, however. Rather, such reasoning would suggest a different ground for acquittal, namely that the charged act does not constitute a criminal offence.

Another problem in this verdict is the omission of a summary of the main arguments and objections posed by the parties during the proceedings, as required by the CPC. This omission would not be particularly concerning if the defence of Bičakčić had not raised the issue of double jeopardy during his opening arguments at the main trial, as noted by the second instance court in its verdict. As this objection was founded, and the first instance panel failed to address this issue in the verdict, the mistake was thus rectified only during the appeal phase.¹⁵¹

In other verdicts, flaws in the reasoning were specifically related to the manner of presentation and evaluation of the evidence.

In the above-mentioned case against **Edhem Bičakčić and Dragan Čović**, the court made a general conclusion that the statements of the witnesses were not fully credible as they were inconsistent and in contradiction with other testimonies. Without questioning the conclusion, it should have been supported by concrete examples and analysis of those witness statements to ensure clarity of reasoning. However, only some of the witnesses' statements were analysed in the verdict, while others were not.¹⁵²

Similarly, in the case against **Kasim Sarajlić** before Zenica MC, the first instance verdict did not reproduce the content of the witness statements and did not connect the statements to the elements of the crime to explain why certain facts were proved and others were not.¹⁵³ Deciding on appeal, Zenica CC on the grounds the court of first

¹⁴⁷ Under art. 299 of the CPC FBiH, the court shall pronounce the verdict acquitting the accused of the charges in the following cases: (a) if the act with which he is charged does not constitute a criminal offense under the law; (b) if there are circumstances which exclude criminal responsibility; (c) if it is not proved that the accused committed the criminal offense with which he is charged.

¹⁴⁸ *Bičakčić and Branković*, Sarajevo Cantonal Court Verdict of October 13, 2010, page 1.

¹⁴⁹ *Ibidem*, pages 19-25.

¹⁵⁰ *Ibidem*, page 26.

¹⁵¹ *Bičakčić and Branković*, FBiH Supreme Court Verdict of 21 March 2012. For more details on this case, see above at Chapter 3.2.1.

¹⁵² *Bičakčić and Čović*, Court of BiH First instance verdict of 8 April 2010, page 59.

¹⁵³ *Kasim Sarajlić*, Zenica Municipal Court Verdict of 12 May 2016.

instance had failed to provide a complete evaluation of the presented evidence, quashed the verdict and ordered a retrial.¹⁵⁴

In the above-mentioned case against **Tomislav Martinović et al.** before the Court of BiH, the first instance verdict, in the convicting part, presented the evidence but it did not assess it in light of the essential elements of the crime of abuse of office. In fact, the entire reasoning was structured around the arguments presented by the parties, without referencing and linking the evidence to the elements of the crime. The essential elements of the crime were mentioned when the court concluded that the accused exceeded the limits of his authority and acted with direct intent.¹⁵⁵ The panel, however, did not systematically address each element and it did not refer to the evidence presented at trial. For example, the intent was analysed only by mentioning that the accused was aware and willing to commit the crime.¹⁵⁶ However, the reasoning did not elaborate on the comprehensive notion of intent for this crime, which includes, for example, that the accused acted with intent to acquire some gain.¹⁵⁷ The conclusion on the existence of intent was not supported by reference to any evidence presented in court. The court, in this regard, stated that the fact that the accused personally signed illegal decisions over an extended period of time proved that he acted with the prescribed intent.¹⁵⁸ The court also omitted to mention the other elements of the crime, namely those related to the consequence of crime, i.e. the undue gain, as well as to demonstrate the causal connection (i.e. nexus) between the actions of the accused and the consequence.

Similarly, in the above-mentioned case against **Abdulkadir Tutnjević** before Novi Travnik CC,¹⁵⁹ the reasoning was not structured in a way that the elements of the crime – abuse of office – would be identified and addressed separately. The reasoning did not include a list of the elements of the crime, as well as a reference to the evidence which would prove each of the elements. By neglecting to clarify which pieces of evidence were linked to each element of the crime, the verdict fails to fulfil the requirements of the applicable CPC.

In the above-mentioned case against **Ivo Križanac** before Novi Travnik CC concerning the alleged illegal appropriation of funds, the reasoning in the first instance verdict was inadequate both with regard to the assessment of the evidence and to the interpretation of the legal provisions defining the elements of the crime. Out of 60 pages of the verdict, 56 are dedicated to listing the evidence which was presented during the trial and to providing a summary of the testimonies as well as the main arguments and motions of the parties.¹⁶⁰ The assessment by the court is presented in only four pages.¹⁶¹ While

¹⁵⁴ *Kasim Sarajlić*, Zenica Municipal Court Verdict of 12 May 2016 and Zenica Cantonal Court Verdict of 16 August 2016.

¹⁵⁵ *Tomislav Martinović et al.*, Court of BiH Verdict of 29 August 2011, paras. 66-67.

¹⁵⁶ *Ibidem*, para. 67.

¹⁵⁷ See Article 220 of the CC of BiH.

¹⁵⁸ *Ibidem*, para. 67.

¹⁵⁹ *Abdulkadir Tutnjević*, Novi Travnik Cantonal Court Verdict of 5 October 2015.

¹⁶⁰ *Ivo Križanac*, Novi Travnik Cantonal Court Verdict of 20 May 2014.

¹⁶¹ *Ibidem*, pages 56-60

length is not, as such, an indicator of quality, it should be noted that the court, in its reasoning, did not assess each piece of evidence individually and in their mutual connection and did not consider each element of the crime separately.¹⁶²

In short, it can be said that the court in this case did not conduct an independent evaluation of evidence, but rather passively accepted the arguments of the defence. This approach resulted, among other things, in endorsing the defence legal argument according to which the identification of the person or entity damaged as a result of the conduct constitutes an essential element of the crime of abuse of office.¹⁶³ Although the court stated in its verdict that “the criminal offense of abuse of office or official authority cannot be committed unless there is a physical or legal person who suffered damages”,¹⁶⁴ it did not explain why it decided so or cite previous case-law supporting this stance. Moreover, this interpretation seems at odds with the legal definition of the offence, which requires that the perpetrator, as a result of his conduct, either acquires a benefit to himself or to another person, *or* causes damage to another person *or* seriously violates the rights of another [emphasis added].¹⁶⁵ In other words, as these are possible alternative and not cumulative results, it is difficult to understand the legal basis for the court’s position. As the prosecution failed to raise this specific issue as one of the grounds of the appeal, the Supreme Court of FBiH did not clarify this crucial legal matter in its decision.¹⁶⁶

Concerns in relation to unclear or inconsistent interpretation of substantive and procedural law were also noticed in the case against **Obren Petrović** before Doboj BC. The defendant was charged with abuse of office in the capacity of Mayor of Doboj.¹⁶⁷ With regard to the application of procedural law, this case is particularly troubling because of the interpretation by the court of the exceptional legal remedy of reopening of the proceedings. As in many other civil law countries, the domestic criminal procedure allows for the reopening of a case following a final and binding verdict only in some exceptional circumstances.¹⁶⁸ One such exceptional circumstance under the applicable CPC is when new facts are presented or new evidence submitted, which, despite due attention and caution, could not be presented at the main trial, and which could result in the acquittal of the defendant.¹⁶⁹ In this case the accused had initially been convicted on the basis of a plea bargaining agreement (PBA) that was accepted by the Doboj BC

¹⁶² Ibidem.

¹⁶³ Ibidem, page 52.

¹⁶⁴ Ibidem, page 58.

¹⁶⁵ Under art. 383 FBiH CC, abuse of office is committed by “An official or responsible person in the Federation of Bosnia and Herzegovina institutions who, by taking advantage of his office or official authority, by exceeding the limits of his official authority or by failing to execute his official duty to the benefit of himself or another person, causes damage to another or seriously infringes rights of another”.

¹⁶⁶ *Ivo Križanac*, FBiH Supreme Court Verdict of 7 May 2015.

¹⁶⁷ *Obren Petrović*, Doboj District Prosecutor’s Office Indictment of 5 October 2006.

¹⁶⁸ Criminal Procedure Code of BiH, Art. 327; Criminal Procedure Code of FBiH, Art. 343; Criminal Procedure Code of RS, Art. 343; Criminal Procedure Code of BD BiH; Art. 327.

¹⁶⁹ RS CPC, Art. 343.1(c).

in June 2007.¹⁷⁰ In July 2012, upon appeal of the defence, the same court allowed the reopening of the proceedings on grounds of the existence of new facts.¹⁷¹ The new facts cited by the court were found in a verdict of the Supreme Court of the RS in the related case against **Mirko Stojčinović et al.**¹⁷² The two defendants in this case (one of whom was the Deputy Mayor of Doboj) had been finally acquitted for the same facts for which Mr. Petrović had been convicted.¹⁷³ The acquittal was based on a peculiar interpretation of the elements of the crime of abuse of office.

While the issue concerning the application of criminal law in this case is addressed below, here the key issue is that a verdict of acquittal in a related case (namely a legal finding) was accepted in itself as a new fact justifying the reopening of the proceedings against an already sentenced defendant. This legal stance seems at odds with the principle of legal certainty and with the commonly accepted interpretation of the conditions for the granting of this legal remedy. According to the official commentary to the criminal procedure code, “new facts and evidence presented in support of the request for reopening of the criminal proceedings must be new in their essence”, meaning that this request “cannot be filed because the court erred in its evaluation of evidence or because of new interpretation of evidence presented earlier, or because of violation of the law”.¹⁷⁴ In this light, the decision to reopen the proceedings in this case seems to be incompatible with a reasonable interpretation of the criminal procedure.

The renewed proceedings ended with the acquittal of the defendant.¹⁷⁵ As already pointed out in the previous section on prosecutorial capacity, in this case the factual description of the abuse of office charge included in the indictment against Obren Petrović was flawed.¹⁷⁶ This is because, on the one hand, the description specified that the defendant had committed the criminal conduct by taking advantage of his office of Mayor of Doboj; on the other hand, however, the incriminating acts pointed to a different modality of commission, namely exceeding the limits of his authority, as the acts in question were not the competence of the mayor. The first instance reasoning on the acquittal, albeit not very clear, seems to be based on this argument, namely that the conduct described in the indictment did not correspond to the indicated modality of commission.¹⁷⁷ The court of appeal, however, took a different and more problematic stance on this point. In rejecting the prosecution’s appeal, the reasoning of the Doboj DC reads that since the crime of abuse of office:

¹⁷⁰ *Obren Petrović*, Doboj Basic Court Verdict of 19 June 2007.

¹⁷¹ *Obren Petrović*, Doboj Basic Court Decision of 6 July 2012.

¹⁷² *Mirko Stojčinović et al.*, RS Supreme Court Verdict of 30 November 2010.

¹⁷³ Actually Petrović and Stojčinović had been indicted in the same case initially. Their cases were separated only because Petrović accepted the PBA while the case against Stojčinović moved to the trial phase.

¹⁷⁴ See Commentary on BiH CPC, Group of authors, 2005, at page 817.

¹⁷⁵ *Obren Petrović*, Doboj District Court Verdict of 31 July 2017.

¹⁷⁶ See 3.2.2 above.

¹⁷⁷ *Obren Petrović*, Doboj Basic Court Verdict of 14 February 2017, page 14: “[F]or the defendant to be able to use his office in the described manner, it is necessary that determining the beneficiaries of subsidies based on the relevant Decision on subsidizing of electricity users be within the responsibilities of the municipal mayor”.

“can be committed only by an official or responsible person, this court holds that the first-instance court was right when it annulled the earlier conviction and acquitted the defendant due to the lack of evidence because the evidence presented by the defence in the reopened proceedings points to the conclusion that the defendant was not responsible for determining beneficiaries of subsidies for electricity, and accordingly did not have the capacity of an official or responsible person in relation to the implementation of the RS Government Decision on subsidizing of users of electricity from the category of households”.¹⁷⁸

This reasoning is concerning because it seems to imply that, when committing illegal acts that are outside the scope of their official competences and responsibilities, an individual ceases to act in the capacity of an official or responsible person. As this status is an essential pre-condition for the commission of the crime of abuse of office, its absence would automatically result in a *de facto* exclusion of a range of punishable conducts in which an official is exceeding the limits of his office. Such interpretation results in an impunity gap in relation to those very criminal conducts in which the distortion of the public function is particularly serious. It must be pointed out that the Doboj DC based this interpretation on the previous stance taken by the Supreme Court of RS in connection with the related case against Mirko Stojčinović et al. In its decision, the Supreme Court affirmed that:

“in the impugned verdict the court rightly concludes that regardless of the fact that as Deputy Mayor he had the capacity of an official within the meaning of Article 147(3) of the CC of RS, defendant Mirko Stojčinović did not have this capacity in the concrete case, and accordingly he could not have abused his office in the described manner”.¹⁷⁹

While this interpretation may not be exactly the same as the one adopted by the Doboj DC, it is nevertheless confusing as it does not distinguish between two different elements of the crime of abuse of office, namely the status of official or responsible person on the one hand, and the modality of the commission of the offence (i.e. by taking advantage or by exceeding the limits of the office). An additional problematic feature of the courts' decisions in these cases, is that neither the reasoning of the Doboj BC on the reopening of the proceedings, nor the reasoning of the Supreme Court of RS on the elements of the abuse of office, included reference to previous case-law supporting these controversial stances.

(c) *Unharmonized case-law and failure to refer to precedents in the reasoning*

The Mission observed a general failure by courts to refer to precedents in their decisions in the overwhelming majority of cases reviewed for this report. This is concerning because in functional judicial systems, precedents play a major role in ensuring legal certainty, guidance and authority as well as equality before the law, regardless of whether they

¹⁷⁸ *Obren Petrović*, Doboj District Court Verdict of 31 July 2017, page 4.

¹⁷⁹ *Mirko Stojčinović and Milenko Cvijanović*, RS Supreme Court Verdict of 30 November 2010, page 4.

are formally legally binding according to the legal tradition of the specific country. In Germany, for example, although not legally binding, precedents of the appellate courts are normally referred to and followed by lower courts, while departure from them needs to be pointed out and justified.¹⁸⁰ It is hereby argued that the systematic failure to refer to precedents by both higher and lower level courts in BiH, together with the absence of a supreme court at the state level having the role to ensure consistency in the case law,¹⁸¹ represent major factors hindering legal certainty and equality before the law in BiH, including in corruption related cases. To be more specific, the absence of reference to precedents in judicial decisions on corruption cases often gives the impression that each case is decided in a vacuum, with no effort being made to demonstrate that similar cases are treated alike. In this situation the possibility of inconsistent outcomes in similar cases is almost a certainty.

The Mission has indeed identified instances in which inconsistent interpretation of the law resulted in radically different outcomes in similar cases. One such instance is related to the standard of proof required by courts to prove the essential element of personal gain or damage as a result of the criminal conduct in the basic (i.e. non-aggravated) form of abuse of office.¹⁸² The diverging stances expressed by the Zenica CC in two different cases concerned whether the gain or damage should be proved *in concreto* or just *in abstracto*. In the second instance decision in the case against **Senka Balorda et al.**, the appeal panel rejected the prosecution appeal against the acquitting first instance verdict. The lower court justified its acquittal by arguing that the prosecution had failed to demonstrate that the illegal appointment by the defendant of certain individuals, to the managing board of a public body had resulted in a benefit for those persons.¹⁸³ In the appeal the prosecutor argued that the very fact that these persons were appointed should be sufficient to demonstrate that gain was acquired and, therefore, that this element of the crime was present.¹⁸⁴ The appeal court, however, argued that:

“the appointment of these persons to the managing board in itself cannot be considered as acquiring gain for another person. In criminal law nothing is assumed and everything has to be proved. Therefore, if it follows from the fact that these persons were appointed to the managing board that they acquired some benefit, this had to be described in the indictment and supported with concrete facts: who acquired benefit, what type of benefit (material or non-material) and the amount of that benefit and then prove all of that, which the prosecution failed to do”.¹⁸⁵

¹⁸⁰ See Ninon Colneric, Guiding by cases in a legal system without binding precedents: the German example, Stanford University, June 2013, <https://cgc.law.stanford.edu/commentaries/7-judge-colneric/>

¹⁸¹ See Venice Opinion paras. 57 and 65.

¹⁸² The non-aggravated form of abuse of office as foreseen in art. 383.1 of the FBiH CC requires that the official or responsible person, by taking advantage of his office or official authority, by exceeding the limits of his official authority or by failing to execute his official duty, acquires a benefit to himself or to another person, or causes damage to another person or seriously violates the rights of another.

¹⁸³ *Senka Balorda et al.*, Zenica Municipal Court Verdict of 9 September 2016, pages 11-12.

¹⁸⁴ *Senka Balorda et al.*, Zenica Cantonal Court Verdict of 24 February 2017, page 2.

¹⁸⁵ *Ibidem*, pages 2-3.

This stance, endorsing an *in concreto* notion of gain, is at odds with that expressed by the same court in a similar case (against **Kasim Sarajlić**) concerning the illegal appointment of five persons by the director of a public company. In this case, the first instance court convicted the defendant.¹⁸⁶ The defence challenged the verdict on the grounds that the court had found that the conduct of the accused had caused damage to others notwithstanding that the prosecution had not specified this element in the indictment. The Zenica CC, rejecting the appeal and confirming the conviction, stated that:

“it is perfectly logical that by employing persons who did not meet the necessary requirements for employment, other persons who did meet all requirements for the relevant positions were prevented from obtaining employment. It is clear that in this manner some persons suffered damages while others were enabled to acquire benefit.”¹⁸⁷

Accordingly, the court concluded that:

“For the criminal offense from Article 383(1) of the CC of FBiH, it is not prescribed as a legal element of the offense that concrete material gain was acquired for another person, or that other person suffered concrete damages, but it is sufficient that a person acquired any benefit and that in the process the rights of others were violated.”¹⁸⁸

In this situation the opposite stances taken by the same court of appeal on a key legal issue in two similar cases resulted in two opposite outcomes: an acquittal in the first case and a conviction in the second. It is worth noting that the two decisions were rendered just months apart, namely in February and May 2017. Proper reference to precedents by the court in its verdicts could have prevented a situation which dramatically illustrates the fragility of the principle of equality before the law arising from a lack of harmonization in the interpretation of corruption offences.

Another instance of unharmonized interpretation of the law concerns the stances taken by the Appellate Court of the BD and the Supreme Court of RS in proceedings concerning two high profile corruption cases. The diverging opinions treated two legal matters: whether perpetration in the form of attempt is admissible with regard to charges of aggravated abuse of office; and the limits of a court’s power to change the factual description of the charges contained in the indictment and to change the legal qualification of the offence proposed by the prosecution.

In the case before the BD Basic Court, the defendant **Miodrag Trifković** was accused, in his capacity as director of Brčko District Tax Office, of illegally reducing the amount of taxes due by a private company.¹⁸⁹ As the undue gain allegedly acquired by the company was almost 100,000 BAM, he was initially charged with an aggravated form of abuse

¹⁸⁶ *Kasim Sarajlić*, Zenica Municipal Court Verdict of 12 May 2016.

¹⁸⁷ *Kasim Sarajlić*, Zenica Cantonal Court Verdict of 30 May 2017, pages 5-6.

¹⁸⁸ *Ibidem*, page 6.

¹⁸⁹ *Miodrag Trifković*, Brčko District of BiH Prosecutor’s Office Indictment of 28 December 2012.

of office under the BD CC.¹⁹⁰ During the trial, however, the prosecution amended the indictment and changed the modality of commission of the offence from completed to attempted;¹⁹¹ this decision was due to difficulties encountered during the trial by the prosecution in quantifying the gain. The first instance panel of the BD BC accepted the amended indictment and convicted the defendant on the charge of attempted abuse of office in its aggravated form.¹⁹² The Appellate Court of the BD, however, quashed the verdict and acquitted the defendant on this count.¹⁹³ In its reasoning the Court explained, in one sentence and with no reference to precedents, that abuse of office can be committed in the form of attempt only in its basic form, i.e. the one that does not foresee any specific quantification of the gain, but merely refers to any gain or damage as a result of the criminal conduct.¹⁹⁴ As a result, the Appellate Court's opinion that attempt to commit the aggravated abuse of office is not possible, was one of the grounds on which the defendant was acquitted. It should be noted in this regard that, although under the criminal procedure judges are not bound by the legal qualification proposed by the prosecution, the court of appeal neglected to discuss in its decision the possibility to re-qualify the conviction from the qualification endorsed by the first instance court to the one that was, in principle, considered to be admissible by the appellate court, namely attempt to commit the basic form of abuse of office.

The legal stances expressed by the BD Appellate Court in this case are at odds with those of the RS Supreme Court in the case against **Sreten Telebak et al.** The first defendant was accused (along with 13 other co-defendants) that, in the capacity of general manager of RS Railways in Dobož, he illegally sold some assets of the company to other companies at a low price.¹⁹⁵ As the alleged gain for these companies was in the amount of more than 1 million BAM, the defendant was charged with the commission of an aggravated form of abuse of office under the RS CC.¹⁹⁶ From the evidence presented during the trial before the Banja Luka DC, it emerged that the gain which was allegedly the result of the criminal conduct of the accused had failed to materialize. The contract on which the disputed selling was based had been terminated by the buyer before the gain materialized. Acknowledging this fact, the first instance court in its verdict changed the factual description and legal qualification of the charge against Telebak from completed to attempted commission of the aggravated form of abuse of office and accordingly convicted the defendant on this charge.¹⁹⁷

¹⁹⁰ BD CC, art. 377.3 envisages a more severe punishment (compared with the basic form of the offence) in case that the gain resulting from the conduct of the perpetrator exceeds 50,000 BAM.

¹⁹¹ *Miodrag Trifković*, Brčko District of BiH Prosecutor's Office Amended Indictment of 22 January 2014.

¹⁹² *Miodrag Trifković*, Brčko District of BiH Basic Court Verdict of 18 February 2014.

¹⁹³ *Miodrag Trifković*, Brčko District Appellate Court Verdict of 23 April 2015. The defendant was convicted on a separate additional count of abuse of office.

¹⁹⁴ *Ibidem*, page 14: "...because of the legal character of the criminal offense under Article 377, paragraph 3 (aggravated form of the offense) the attempt to commit this criminal offense is not possible, but potentially, in this concrete case, the prosecution could have charged the defendant with attempting to commit the basic form of this criminal offense under Article 377, paragraph 1 of the Criminal Code of Brčko District of Bosnia and Herzegovina."

¹⁹⁵ *Sreten Telebak et al.*, RS Special Prosecutor's Office Indictment of 13 June 2008.

¹⁹⁶ RS CC, Art. 347.4.

¹⁹⁷ *Sreten Telebak et al.*, Banja Luka District Court Verdict of 1 July 2010, pages 43, 48.

The Supreme Court of RS, while upholding the first instance verdict, did not address at all the question of whether the aggravated form of abuse of office can be committed in the modality of attempt. While it is true that the defence did not specifically raise this point, it must be noted that the criminal procedure requires the appeal court to quash the verdict *ex officio* in case against violations of the criminal law to the detriment of the accused.¹⁹⁸ It must be assumed, therefore, that the RS Supreme Court stance on this issue is the opposite of the one adopted by the BD Appellate Court as seen above. The Supreme Court, on the other hand, directly addressed the defence argument that, in changing the facts and the legal qualification of the charge from the completed to the attempted modality of perpetration, the first instance court had violated the principle of correspondence between the verdict and the charges included in the indictment.¹⁹⁹ The Supreme Court rejected this argument by reasoning that:

“[T]here is no exceeding of charges when the court changes the factual description of the indictment by adapting it to the established state of facts. This is because charges are not exceeded if the addition or change in description of the offense from the indictment concerns irrelevant facts or relevant facts of the same type of criminal offense, but a more lenient offense than the one in the indictment.”²⁰⁰

Regardless of whether this conclusion is correct or not, it must be noted that no relevant precedent was cited in support. In any case, it is difficult to reconcile the permissive stance of the Supreme Court of RS with regard to the application of this principle, with the approach taken by the BD higher court in the case seen above.

In conclusion, the stances and approaches adopted by the two higher courts in BD and RS in these two cases appear diametrically different and ultimately led to opposite outcomes (acquittal in the first, conviction in the second). Such situations seriously undermine the principle of equality before the law and legal certainty in BiH.

(a) Inadequate sentencing practice

In many of the monitored cases which ended with conviction, the Mission observed a marked leniency in sentencing. In some serious corruption cases the judges imposed sentences below the minimum statutory limit without proper justification.²⁰¹ According to domestic criminal law, a court is allowed to impose a punishment below that limit only when this option is expressly foreseen in the law or when the judges establish the existence of extraordinary mitigating circumstances.²⁰²

¹⁹⁸ RS CPC, Art. 320.

¹⁹⁹ Respect of this principle, which is prescribed in all CPCs applicable in BiH (see RS CPC, Art. 294), is linked to the protection of the rights of the accused and the right to equality of arms in particular under the ECHR (see *Drassich vs Italy*)

²⁰⁰ *Sreten Telebak et al.*, RS Supreme Court Verdict of 28 April 2011, page 11.

²⁰¹ It is important to note in this regard that under the criminal codes of BiH (art. 42a) and of the FBiH (art. 43a), a prison sentence of 12 months or fewer shall automatically be converted to a fine (equivalent to 100 convertible marks per day of prison sentence) upon the petition of the condemned person. In BD (art. 43a), a prison sentence of 12 months or fewer shall be converted to a fine at the same daily rate. In RS, with the last set of amendments to the criminal code passed in July 2017, the possibility of converting a prison sentence with a fine has been excluded.

²⁰² Criminal Code of BiH, Art. 49; Criminal Code of FBiH, Art. 50; Criminal Code of RS, Art. 38; Criminal Code of BD BiH, Art. 50.

In the case against **Tihomir Gligorić** before Banja Luka DC, the defendant was sentenced in first instance to one year of imprisonment for the criminal offence of unconscientious behaviour in office. Under the RS CC, this crime is punishable by imprisonment for a term from one to eight years.²⁰³ While the established damage to the public budget resulting from the conduct of the accused was rather serious (approximately 265,000 BAM), the first instance court imposed the minimum prescribed sentence as it established the existence of mitigating circumstances such as existence of family, children, no previous criminal record and lapse of time between the commission of the offence and the punishment.²⁰⁴ These are factors mentioned almost by default by various courts throughout BiH as mitigating circumstances.²⁰⁵

The RS Supreme Court, however, found the first instance court's sentencing too severe and, at the appeal stage, lowered the sentence to six months of imprisonment. It reasoned this decision by arguing that, in the absence of aggravating circumstances, the above-mentioned mitigating circumstances, considered cumulatively, can be qualified as extraordinary and justify the imposition of a sentence below the minimum statutory limit.²⁰⁶ This judicial practice has indeed been observed in other categories of cases (war crimes for example)²⁰⁷ and seems to be rather frequent.²⁰⁸ It is difficult, however, to reconcile this interpretation with the letter and spirit of the law and with the prevailing judicial stance according to which extraordinary mitigating circumstances must be of a special nature (that is, different from other more common circumstances) in the sense that their existence must greatly reduce the danger of the offense and the guilt of the perpetrator.²⁰⁹

²⁰³ Criminal Code of RS, Art. 354.

²⁰⁴ *Tihomir Gligorić*, Banja Luka District Court Verdict of 19 September 2016.

²⁰⁵ OSCE Mission to BiH, *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014–2016*, p. 63-67, <http://www.osce.org/mission-to-bosnia-and-herzegovina/324131?download=true>

²⁰⁶ *Tihomir Gligorić*, RS Supreme Court Verdict of 26 January 2017, page 6.

²⁰⁷ OSCE Mission to BiH, *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014–2016*, p. 63-67, <http://www.osce.org/mission-to-bosnia-and-herzegovina/324131?download=true>

²⁰⁸ *Mehmed Topčagić*, BD Basic Court; *Sreten Telebak et al.*, Banja Luka DC; *Stevo Savić*, Zvornik BC.

²⁰⁹ See Commentary to BiH CC, p. 280, where it is explained that “the court may reduce punishment whenever it deems that there are highly extenuating circumstances suggesting that the purpose of punishment can be achieved by a lesser punishment. In doing so, the court will take into consideration all circumstances that are considered extenuating in regular meting out of punishment (Art. 41), but provided that they are characterized as highly extenuating circumstances, which means that the extenuating circumstances in question are such that they significantly reduce the danger of the offense and guilt of the perpetrator. Here the law gives power to the court to decide, based on overall evaluation of all circumstances surrounding the commission of the offense, whether to use the possibility of reduction. These are extraordinary powers that our courts use very often, and according to some, these powers are abused because by doing so an exception is in fact turned into a rule. In this way, reduction of punishment in practice is treated as regular meting out of punishment, and sometimes courts tend not to mention and reason these highly extenuating circumstances, which is an essential violation of the criminal procedure provisions and the ground for quashing the verdict”.

Closely connected to the problem of undue leniency is the failure of the system to ensure consistency and proportionality in the sentencing policy applied in corruption cases throughout BiH. This means, for example, that sentences imposed in serious cases of corruption are often more or less equal to sentences meted in less serious or petty corruption cases. The cases against **Veroljub Janjičić** (director of the Bobar Insurance Company) and **Darko Jeremić** (president of the Board of Directors of Bobar Insurance Company) before Bijeljina BC were related to the financial collapse of Bobar Bank in RS. The two defendants signed PBAs with the prosecution and were sentenced to six months of imprisonment while the damage to the injured parties was quantified in approximately 8 million BAM.²¹⁰

This sentence seems very lenient in absolute terms and especially if compared with the two-and-a-half years of imprisonment and 18,000 BAM fine received upon PBAs by **Mersed Šerifović and Suad Čamdžić** in their cases before Tuzla CC.²¹¹ The defendants were convicted as intermediaries in delivering to the FBiH Minister of Agriculture bribes paid by farmers in the amount of approximately 800,000 BAM.²¹² On the opposite end of the spectrum in terms of gravity of the conduct, stands the case against **Rešo Šarić** before Zenica MC. The accused was convicted with a PBA for attempting to bribe the Director of the Federal Institute of Pension and Social Insurance with 500 Euros in order to expedite a decision on his pension. For this, he was sentenced to eight months of imprisonment, with one additional year of probation.²¹³

The striking inconsistency between these sentencing practices undermines not only the deterrent effect of criminal law, but also the principle of equality before the law and undermines citizens' trust in the rule of law. The Mission notes, in this regard, that the domestic institutions have already acknowledged in the *BiH Anti-Corruption Strategy 2015-2019* the problems caused by the inadequacy and leniency of the sentencing policy in corruption cases.²¹⁴

In this regard, the Mission notes that, under the Strategy, the HJPC, together with the Judicial and Prosecutorial Training Centers in FBiH and RS, is tasked to take measures to ensure a more effective deterrence for corruption offenses through the adoption of a harmonized and more severe sentencing policy throughout the BiH judicial system.²¹⁵ The Mission's findings underline the necessity of this measure.

²¹⁰ *Darko Jeremić*, Bijeljina Basic Court Verdict of 25 November 2016; *Veroljub Janjičić*, Bijeljina Basic Court Verdict of 16 March 2017

²¹¹ *Mersed Šerifović*, Tuzla Cantonal Court Verdict of 1 April 2016; *Suad Čamdžić*, Tuzla Cantonal Court Verdict of 8 April 2016.

²¹² *Mersed Šerifović*, Tuzla Cantonal Court Verdict of 1 April 2016, pages 1-6; *Suad Čamdžić*, Tuzla Cantonal Court Verdict of 8 April 2016, pages 1-6.

²¹³ *Rešo Šarić*, Zenica Municipal Court Verdict of 21 June 2017.

²¹⁴ BiH Anticorruption Strategy 2015-2019, Agency for the Prevention of Corruption and Coordination of the Fight against Corruption of BiH (APIK BiH), December 2014.

²¹⁵ See HJPC Letter of 6 September 2016.

CHAPTER IV –

RECOMMENDATIONS

As stated at the outset, the recommendations contained within this report are based on TM findings stemming from the monitoring of a sizeable number of corruption cases. This assessment does not purport to offer an exhaustive picture of every issue or problem relevant to the processing of corruption cases in BiH. However, it has clearly demonstrated the existence of certain structural problems. The below recommendations address these problems. Within its final report, due at the end of 2018, the ARC project will follow-up on these recommendations and further explore issues affecting judicial response to corruption.

To the executive and legislative authorities of BiH, FBiH, RS and Brčko District

1. The material and procedural criminal legislation relevant for the processing of corruption cases should be harmonized across all jurisdictions in BiH. Political authorities at the state and entity level should commit themselves to harmonizing the legal framework as part of their efforts to fight corruption (see Chapter 2.1 and 2.2).
2. In this regard, the priority in the short term should be to adopt harmonized amendments to the four criminal procedural codes in accordance with the requirements set under the Decision of the Constitutional Court of BiH of June 2017. The amendments should strike a fair balance between the rights of individuals recognized under international human rights instruments and the need to ensure the effective prosecution of corruption and other serious crimes (see Chapter 2.2).
3. With a view to streamlining the harmonization process in the medium term, the Ministry of Justice of BiH, together with the MoJs at the entity level, should consider re-establishing a standing body of experts (following the CCIAT precedent) with the mandate of preparing harmonized amendments to criminal laws at all levels of authority in BiH (see Chapter 2.1).

To the High Judicial and Prosecutorial Council BiH

1. With a view to stimulating the processing of high level corruption cases, the HJPC should consider the adoption of criteria which adequately differentiate between high and low level corruption cases when it comes to the calculation of the “orientation quota”, namely the number of cases that should be processed by each individual judge or prosecutor (see Chapter 3.1).
2. With a view to harmonizing the interpretation of corruption-related legislation by facilitating the reference to existing jurisprudence in judicial decisions, the

HJPC should ensure that relevant jurisprudence is systematically gathered and disseminated to all relevant courts. In this regard, specific guidelines should be developed to regulate and streamline the preparation and compilation of case law summaries or digests grasping the essence of the relevant point of law discussed in each decision (see Chapter 3.2.3.c).

3. The HJPC and the executive authorities should augment the capacity of the prosecution and of law enforcement agencies with specific regard to the investigation of financial aspects of corruption. The prosecution, in particular, should have access to, and make use of, continuous assistance from forensic accountants and other financial experts during the investigation. The availability and quality of courts' financial experts should also be improved (see Chapter 3.2.2.b).
4. The HJPC should develop specific guidelines and training materials on drafting indictments in corruption cases.

To the prosecutors' offices at the state, entity and BD levels

1. The procedure for raising and deciding upon conflicts of jurisdiction between the BiH PO, the entity POs and the BD PO should be clarified through judicial interpretation or legal amendments if necessary (see Chapter 3.2.1).
2. Prosecutors should improve the quality of indictments in corruption cases. The indictment should be structured so that it is clear to which element (factual or mental) a specific fact refers to. In this regard, prosecutors should consider changing the way of presenting factual description of charges in indictments with a view to enhance their clarity and comprehensibility. Chief prosecutors should exercise proper oversight on drafting and finalization of indictments in corruption cases (see Chapter 3.2.2.a).
3. With a view to improve the evidence gathering process in corruption cases, specific guidelines should be developed with regard to establishing the financial aspects of the crimes, the criminal intent of the defendants, the existence of a common intent among different perpetrators and the use of factual circumstances to prove these elements (see Chapter 3.2.2.b).

To courts at the state, entity and BD levels and to the panels on harmonization of jurisprudence in BIH

1. The procedure for raising and deciding upon conflicts of jurisdiction between state and entity courts and between courts in different entities should be further clarified through judicial interpretation (see Chapter 3.2.1).
2. Judges at the preliminary phase of the proceedings should ensure that indictments which do not comply with the necessary legal requirements are not confirmed. (see Chapter 3.2.3.a).
3. Judges should strengthen the quality of their reasoning in corruption cases. In particular, the reasoning should clearly address each element of the crime separately

and assess the evidence by linking it to the relevant element of the crime. Also, judges at both trial and appellate levels should refer to relevant jurisprudence with a view to improving coherence and certainty in the application of the law (see Chapter 3.2.3.b and Chapter 3.2.3.c).

4. Inconsistencies in the application of material or procedural criminal provisions specifically relevant for the processing of corruption cases should be identified and solved with a view to improve clarity and predictability of the law.²¹⁶ In the absence of a supreme court of BiH (the establishment of which is obviously politically sensitive but legally compelling), the task of harmonizing the case-law throughout the Country should be carried out by harmonization panels. The panels, in particular, should systematically address the specific challenges posed by corruption cases with regard to the application and interpretation of criminal and procedural law (see Chapter 3.2.3.c).
5. Courts throughout the BiH judicial system should adopt a harmonized sentencing policy in high level corruption cases, which would take into due account the gravity of the crime and ensure the deterring function of punishment (see Chapter 3.2.3.d).

²¹⁶ While the provisions in need of clarification should be eventually identified by the judicial authorities, some problematic issues were identified in this report, namely: the boundaries of the power of the court to change the factual description of the charges contained in the indictment and to change the legal qualification of the offence proposed by the prosecution; whether gain or damage as an element in the crime of abuse of office should be proved *in concreto* or just *in abstracto*; whether aggravated form of abuse of office can be committed in the form of attempt; what in principle constitute relevant factual circumstances for proving intent in corruption offences; the nature of extraordinary mitigating circumstances.

ANNEX A

SUMMARY OF FINALIZED CORRUPTION CASES ANALYSED IN THIS REPORT

Court of BiH

1. *Edhem Bičakčić and Dragan Čović* – High level corruption

Under April 2009 indictment, defendants Edhem Bičakčić and Dragan Čović were charged that, in the period 1999-2000, acting in their capacities as the FBiH Prime Minister (Bičakčić) and FBiH Deputy Prime Minister and Minister of Finance (Čović), they abused their office by approving the allocation of money from 1999 and 2000 FBiH Budget for resolving housing issues of persons working in the legislative, executive and judicial bodies of BiH and FBiH, whereby they allegedly acquired benefit for another person in the amount of 3,671,398.76 BAM, causing damages to the FBiH Budget in the same amount. The beneficiaries of this funding were FBiH politicians, diplomats, directors of public companies, former army generals, judges, prosecutors and others. In April 2010, the Court of BiH acquitted defendants Bičakčić and Čović in the first instance. In January 2011, the appellate panel of the Court of BiH upheld the acquittal.

2. *Tomislav Martinović et al.* – High level corruption

Under December 2007 indictment, Tomislav Martinović and ten co-defendants were charged under 12 counts of the indictment that in the period 1998-2006, acting in their different capacities as the government and Ministry of Interior (MoI) of Herzegovina-Neretva Canton (HNC) officials, they abused their office by acting contrary to the relevant rules and regulations in the process of donating old police cars and procurement of new police cars, paying 1.3 million BAM over three years to a private company to provide security for facilities of the HNC government, ministries and other cantonal administrative bodies, continuing to pay salaries and other benefits to redundant employees, to mention only a few of the charges. In August 2011, the Court of BiH found defendant Dragan Mandić guilty on one count and sentenced him to one year imprisonment while other defendants were acquitted. In its verdict, the first-instance panel of the Court of BiH dismissed some of the charges against defendants Dragan Brkić, Tomislav Martinović and Srećko Glibić. In June 2012, the appellate panel of the Court of BiH revised the first-instance conviction in relation to defendant Mandić increasing his sentence to 3 years imprisonment. Furthermore, the appellate panel revoked the first-instance acquittal in relation to one specific count of the indictment that charged defendants Martinović and Glibić with continuing to pay salaries and other benefits to redundant employees, ordering a retrial. In December 2012, following

a retrial, defendants Martinović and Glibić were acquitted of the charge of abuse of office.

3. *Stipe Prlić et al.* (Gibraltar) – High level corruption

Under May 2015 indictment, defendants Stipe Prlić, Zoran Bakula and Neven Kulenović were charged that, in the period 2007-2008, acting in their capacities as general manager, president of the management of public enterprise *Hrvatske Telekomunikacije d.o.o.* Mostar (Prlić), member of the management of public enterprise *Hrvatske Telekomunikacije d.o.o.* Mostar (Bakula) and owner of *SV-RSA d.o.o.* company Sarajevo (Kulenović), they abused their office and committed the criminal offense of bribe receiving (Prlić and Bakula) by acting contrary to the relevant rules and regulations in awarding contract for the development of “Integrated strategy for planning and media buying in relation to target groups of public enterprise HT d.o.o. Mostar, and the planning and media buying in BiH” worth 4,450,000 BAM to *SV-RSA d.o.o.* company Sarajevo owned by defendant Kulenović (charged with bribe giving). In November 2016, the Court of BiH acquitted all three defendants in the first instance. In May 2017, the appellate panel of the Court of BiH dismissed the prosecution’s appeal as inadmissible given that it had not been filed within a statutory deadline. Subsequently, the Court of BiH rendered the decision declaring November 2016 first-instance verdict as final and binding in this case.

4. *Nikola Šego et al.* – Medium level corruption

Under January 2010 indictment, the BiH Prosecutor’s Office charged seven officials of the BiH Ministry of Transport and Communications, including Nikola Šego, Mirko Šekara, Enis Ajkunić and four co-defendants, with abuse of office. The prosecution dropped charges in relation to four defendants. In December 2011, the prosecution amended the indictment charging the remaining three defendants Šego, Šekara and Ajkunić with deciding in 2006 on the allocation of international road transport permits, the so called CEMT (European Conference of Ministers of Transport) permits, to companies in BiH contrary to the relevant rules and regulations. In June 2012, the Court of BiH found the defendants guilty of abuse of office and sentenced each of them to two years imprisonment. In June 2013, the appellate panel of the Court of BiH revised the first-instance verdict and increased the sentence to three years imprisonment for each of the defendants. After two decisions of the Constitutional Court of BiH (BiH CC), one from October 2014 and the other from January 2016, in which the BiH CC found a violation of the right to a fair trial under Article 6(1) of the ECHR and accordingly quashed two verdicts of the Court of BiH, in November 2016 the appellate panel of the Court of BiH acquitted all three defendants. In February 2017, the third-instance panel of the Court of BiH upheld full acquittal of all three defendants.

5. *Mujo Smajlović* – Medium level corruption

Defendant Mujo Smajlović was charged under October 2015 indictment that in the period 2012-2015, in his capacity of an investigator of the State Prosecutor’s Office, he abused his office by requesting and receiving bribes from several persons, suspects in

the cases investigated by the State Prosecutor's Office, in the amount of around 20,000 BAM. In January 2017, the Court of BiH sentenced in the first instance defendant Smajlović to two and a half years imprisonment, ordering the seizure of proceeds of crime in the amount of around 20,000 BAM and banning him from performing official duties in the period of five years. In August 2017, the appellate panel of the Court of BiH upheld the conviction.

6. Sedinet Karić (PBA) (the case against *Kemal Čaušević et al.* (Pandora) – Medium level corruption

Defendant Kemal Čaušević, in his capacity of Director of the Indirect Taxation Authority of BiH, is charged along with Anes Sadiković and Sedinet Karić, owners of companies dealing with the import of textiles, and in relation to the import of large quantities of textiles from Turkey, China and Hungary to BiH. Defendant Čaušević allegedly promised that their companies would enjoy privileged status during the import procedure so as to reduce the amount of imported goods for customs clearance and skip detailed control and verification of invoices. In return for this preferential treatment, defendant Čaušević allegedly requested from co-defendants Sadiković and Karić 1,000 BAM per truck of imported textile. Sadiković and Karić are charged with giving a bribe totaling 1.72 million BAM in the period from 2007 to 2011 for the import of 1,700 truckloads of textiles. Defendant Čaušević is moreover charged with abuse of office and money laundering. As alleged in the indictment, defendant Čaušević used the illicit gain to purchase land and property estimated at 1.2 million BAM in Sarajevo. In July 2017, defendant Karić signed a plea agreement with the prosecution and was sentenced to one year of imprisonment convertible to a fine in the amount of 36,500 BAM.

7. Ana Milićević, Luca Cobre (PBAs) (the case against *Boris Kordić et al.*) – Medium level corruption

Defendant Boris Kordić, along with four other defendants, is charged with organized crime, abuse of office and extortion. The case concerns alleged extortion of money and services from foreign citizens working in the field of religious tourism in the area of Međugorje in the period from 2012 to 2014. The group of defendants includes two officials of the BiH Service for Foreigners' Affairs. In March 2017, defendants Ana Milićević and Luca Cobre signed plea agreements with the prosecution. Defendant Milićević received a suspended sentence while defendant Cobre was sentenced to one year imprisonment.

8. Mladen Vidović (PBA) – Low level corruption

Defendant Mladen Vidović was charged under November 2016 indictment that in 2014, in his capacity as a police officer at the Brod border crossing, he requested and received bribe in the amount of 50 BAM. In February 2017, he signed a plea agreement with the prosecution and the Court of BiH imposed a suspended sentence on him.

Sarajevo Cantonal and Municipal Courts

9. *Edhem Bičakčić and Nedžad Branković*, Sarajevo Cantonal Court – High level corruption

Under April 2009 indictment, defendants Edhem Bičakčić and Nedžad Branković were charged that in 2000, acting in their capacities of FBiH Prime Minister (Bičakčić) and general manager of “Energoinvest” D.D. Sarajevo (Branković), they abused their office by acting contrary to the relevant rules and regulations in enabling defendant Branković to acquire ownership right over the apartment in Sarajevo worth 217,983 BAM and thereby allegedly causing damages to “Energoinvest” d.d. Sarajevo in the amount of 150,000 BAM and to the FBiH Budget in the amount of 114,000 BAM. In October 2010, Sarajevo Cantonal Court acquitted defendants Bičakčić and Čović in the first instance. In March 2012, the FBiH Supreme Court upheld the acquittal in relation to defendant Branković, while in relation to defendant Bičakčić it rendered the verdict dismissing the charges given that defendant Bičakčić was charged and acquitted of the same criminal offense by the Court of BiH’s appellate verdict from January 2011.

10. *Dragan Čović*, Sarajevo Cantonal Court – High level corruption

The case against Dragan Čović was transferred to Sarajevo Cantonal Court as a result of the appellate panel of the Court of BiH finding in June 2008 that it did not have the subject matter jurisdiction to rule on this case. In its first-instance verdict from November 2006, the Court of BiH sentenced defendant Čović to five years imprisonment on the abuse of office charge. Sarajevo Canton Prosecutor’s Office filed the indictment in July 2011 charging defendant Čović that in the period 2000-2001, acting in his capacity of the FBiH Minister of Finance, he abused his office by acting contrary to the relevant rules and regulations in exempting *Lijanović d.o.o.* company Široki Brijeg from paying special taxes on mechanically deboned poultry meat, whereby he allegedly acquired benefit for *Lijanović d.o.o.* company Široki Brijeg in the amount of 120,000 BAM and *MI* (Meat industry) *Lijanović d.o.o.* in the amount of 1,736,878, BAM which is the amount of damages caused to the FBiH Budget, and indirectly BiH Budget. In May 2012, Sarajevo Cantonal Court acquitted defendant Čović. In October 2013, the FBiH Supreme Court upheld the acquittal, dismissing also the appeal by the FBiH public attorney as not having been filed within the statutory deadline.

11. *Izet Arslanagić (PBA)* (the case against *Edin Arslanagić et al.* (Bosnalijek), Sarajevo Cantonal Court – Medium level corruption

In December 2015, the Sarajevo Canton Prosecutor’s Office charged Edin Arslanagić (former CEO of *Bosnalijek*) and six other defendants with organized crime, abuse of office, money laundering and tax evasion. This case concerns alleged syphoning off for private interest of millions of BAM out of the public enterprise and pharmaceutical company *Bosnalijek*. One of the defendants, Izet Arslanagić, signed a plea agreement and in December 2016 Sarajevo Cantonal Court (CC) sentenced him to one year imprisonment.

12. *Dragica Miletić*, Sarajevo Municipal Court – Medium level corruption

Prosecutor's Office of BiH charged in 2014 a suspended judge of the Court of BiH, Dragica Miletić with abuse of office in relation to the alleged abuse of her right to transportation costs from Sarajevo to her place of residence in Banja Luka in the capacity of BiH Public Defender in the period February-December 2009, whereby she allegedly damaged the Budget of BiH in the amount of 1,796 BAM. The Court of BiH transferred the case to Sarajevo Municipal Court (MC). In November 2015, Sarajevo MC acquitted defendant Miletić. In April 2016, Sarajevo Cantonal Court revoked the first instance verdict and ordered a retrial. Following a retrial, Sarajevo MC acquitted defendant Miletić in May 2016.

13. Armin Kulovac (PBA) (The case against Živko Budimir et al.), Sarajevo Municipal Court – Low level corruption

Defendant Živko Budimir is charged along with four other co-defendants with abuse of office and bribery in connection with the granting of pardons to two convicted persons in the period from 2011 to 2013 when he was President of FBiH. Additionally, defendants Budimir and Željko Asić are charged with taking a bribe in return for securing the employment of one person in a public electric utility company in Mostar. Since the beginning of the trial in September 2015, the proceedings were separated in relation to defendant Saud Kulosman, defendant Asić and defendant Petar Barišić, while defendant Armin Kulovac signed a plea agreement with the prosecution and in December 2016 Sarajevo Municipal Court found him guilty of the bribe giving charge and imposed a suspended sentence on him.

14. Seid Fazlagić (PBA) (the case against *Amir Zukić et al.*), Sarajevo Municipal Court – Low level corruption (Defendant Fazlagić was convicted on the charge of accessory after the fact)

March 2017 indictment charges Amir Zukić and eight other defendants, including Seid Fazlagić, with taking money for employment in public sector (*Elektroprivreda*) and health services. In June 2017, defendant Fazlagić (defendant Zukić's driver) signed a plea agreement with the prosecution and Sarajevo Municipal Court found him guilty of the accessory after the fact charge and sentenced him to 8 months imprisonment.

Tuzla Cantonal and Municipal Courts

15. Mersed Šerifović, Suad Čamdžić (PBAs) (the case against *Jerko Ivanković Lijanović and Stipe Šakić*), Tuzla Cantonal Court – Medium level corruption

Under December 2015 indictment, defendants Jerko Ivanković-Lijanović and Stipe Šakić, former FBiH Minister of Agriculture, Water Management and Forestry, and advisor to the minister respectively, are charged with abusing their positions to the effect of demanding from users/beneficiaries of the agricultural incentives allocated by the Ministry to pay out to them 50 per cent of received amounts under the threat of not allocating to them the funds earmarked for agricultural producers. In this way,

defendants Lijanović and Šakić allegedly obtained illicit gain in the amount of at least 800,000 BAM by disbursing money only to those farmers who had previously agreed to pay them half of the money they received. The other two co-defendants, charged as intermediaries between defendants Lijanović and Šakić and farmers, Mersed Šerifović and Suad Čamdžić, signed plea agreements in April 2016 and received two-and-a-half years imprisonment sentences each, along with a supplementary fine of 18,000 BAM each.

16. *Samir Aljukić et al.*, (PBAs in relation to two defendants Amir Bajrić and Nihad Okić) Tuzla Municipal Court – Medium level corruption

Under August 2015 indictment, defendant Samir Aljukić was charged together with three other defendants that in the period 2010-2014, in the performance of different police duties including the position of police commissioner in Tuzla Canton (TC), he abused his office by among other things condoning the taking of bribe by police officers, relieving police officers of disciplinary responsibility contrary to the relevant regulations, extortion, demanding and receiving favors from businessmen in the Tuzla area. In April 2016, Tuzla Municipal Court sentenced in the first instance defendant Aljukić to three years imprisonment and defendant Adnan Đulović to one year imprisonment. Defendant Đulović was also ordered to pay a fine in the amount of 1,200 BAM to compensate the damage caused to the TC Budget. In June 2017, Tuzla Cantonal Court upheld the conviction. Other two defendants Amir Bajrić and Nihad Okić both signed plea agreements with the prosecution and received suspended sentences.

Bijeljina District and Basic Courts

17. Veroljub Janjičić and Darko Jeremić (PBAs) (the case against *Veroljub Janjičić et al.*) – High level corruption

Defendants Veroljub Janjičić and Darko Jeremić were charged under August 2016 indictment that in the period 2013-2014, in their capacities as director of *Bobar osiguranje a.d.* Bijeljina (Janjičić) and president of the managing board of *Bobar osiguranje a.d.* Bijeljina (Jeremić), they acted contrary to the relevant regulations, thereby allegedly causing damages to *Bobar osiguranje a.d.* Bijeljina in the amount of 8,021,907.40 BAM. In November 2016, defendant Jeremić signed a plea agreement with the prosecution and Bijeljina Basic Court (BC) sentenced him on the charge of business mismanagement to six months imprisonment. In March 2017, defendant Janjičić also signed a plea agreement and received the same sentence of six months imprisonment.

18. *Slavka Aleksić* – Low level corruption

Defendant Slavka Aleksić was charged under April 2016 indictment that in the space of four days (Feb-Mar 2016), as a member of the administrative staff of the Agricultural and Medical High School in Bijeljina, she called on the phone a parent of one of the students, falsely introducing herself as the girl's head and anatomy teacher and offering to change the girl's failing grade for the anatomy class to the minimum passing grade

in exchange for 200 BAM. In April 2017, the prosecution amended the indictment replacing the charge of accepting bribe with impersonation. In May 2017, Bijeljina Basic Court acquitted defendant Aleksić of the impersonation charge. In August 2017, Bijeljina District Court upheld the acquittal.

19. *Amela Hajdarević* – Low level corruption

Under December 2015 indictment defendant Amela Hajdarević was charged that in the period 2011-2015, in her capacity as prosecutor of the Doboj District Prosecutor's Office she failed to issue a prosecutorial decision, which resulted in the statute of limitations for criminal prosecution in one of her cases. In the indictment, the prosecution moved the court to issue the warrant for pronouncement of sentence and to fine defendant Hajdarević in the amount of 2,000 BAM. In December 2016, Bijeljina Basic Court acquitted defendant Hajdarević in the first instance. In March 2017, Bijeljina District Court upheld the acquittal.

Zvornik Basic Court

20. *Stevo Savić* (PBA) – High level corruption

February 2017 indictment charged defendant Stevo Savić, a former Mayor of Zvornik, that in the period 2002-2004, he enabled a private company *VMV Inžinjering* to construct three residential buildings in Zvornik without paying related fees to the municipality in the amount of 288,378,05 BAM, which is the alleged amount of damage caused to the Budget of Zvornik municipality. Defendant Savić signed a plea agreement with the prosecution, and in June 2017 Zvornik Basic Court sentenced him to six months imprisonment.

21. *Nermin Sarajlić* (PBA) – Low level corruption

Defendant Nermin Sarajlić was charged under March 2017 indictment that in the period 2016-2017, in his capacity as a police officer in Zvornik, he changed information in the official police records for some persons making it possible for these persons to complete car registration or extend their driving licenses without having paid earlier traffic tickets, thus causing unspecified damage to the RS Budget. In June 2017, defendant Sarajlić signed a plea agreement with the prosecution and was sentenced to two months imprisonment.

Travnik and Novi Travnik Cantonal and Municipal Courts

22. *Abdulkadir Tutnjević*, Travnik Cantonal Court – High level corruption

Defendant Abdulkadir Tutnjević was charged under December 2011 indictment that in the period 1994-2002, in his capacity as the director of public enterprise Šipad-Vranica d.o.o. Fojnica and at the same time director of private company Šipad-Fojnica d.o.o. Fojnica, he was taking bank loans for the benefit of private company Šipad-Fojnica d.o.o. Fojnica and mortgaging assets of public enterprise Šipad-Vranica d.o.o. Fojnica

as a collateral, whereby he allegedly caused damages to the company in the amount of more than 2 million BAM. In July 2013, Travnik Cantonal Court (CC) acquitted defendant Tutnjević. In September 2014, the FBiH Supreme Court reversed the first instance verdict and ordered a retrial. Following a retrial, Travnik CC again acquitted defendant Tutnjević in October 2015. In July 2016, the FBiH Supreme Court upheld the full acquittal.

23. Ivo Križanac, Novi Travnik Cantonal Court – High level corruption

April 2013 indictment charged defendant Ivo Križanac that in the period 1998-2000, acting in his capacity of the director of *Impregnacija-Holz d.o.o.* company Vitez, he abused his office and allegedly caused damages to the company in the amount of 1,769,412.93 BAM. More specifically, defendant Križanac was charged with having misappropriated company's funds in the above noted amount by registering these funds as his own stake in the company. In its May 2014 verdict, Novi Travnik Cantonal Court acquitted defendant Križanac. In May 2015, the FBiH Supreme Court upheld the acquittal.

24. Bogomir Barbić (PBA), Travnik Municipal Court – Medium level corruption

Under December 2015 indictment, defendant Bogomir Barbić was charged with abuse of office in his capacity as the director of Busovača Health Centre. In April 2016, defendant Barbić signed a plea agreement with the prosecution and Travnik Municipal Court imposed on him a suspended sentence. The court also ordered seizure of proceeds of crime from defendant Barbić in the amount of 37.156,79 BAM.

Zenica Cantonal and Municipal Courts

25. Romana Brkić et al. – Medium level corruption

Under February 2015 indictment defendant Romana Brkić, a former minister of justice in Zenica-Doboj Canton (ZDC) and a suspended judge of Banja Luka Basic Court, was charged with abuse of office, which she allegedly committed by drafting, signing and verifying the certificate on her husband Dženaid Brkić's successful passing of the professional exam for employees and trainees in ZDC institutions in support of his job application in the Tešanj Municipal Court, although she knew that her husband had never sat for the exam. Co-defendant Dženaid Brkić was charged with forging a public document. In June 2016, Zenica Municipal Court sentenced both defendants to seven months imprisonment. In November 2016, Zenica Cantonal Court upheld the conviction in relation to defendant Romana Brkić, while in relation to defendant Dženaid Brkić, the court reduced his sentence to five months imprisonment.

26. Senka Balorda – Low level corruption

Under December 2013 indictment, defendant Senka Balorda was charged that in 2012, acting in the capacity of Zenica-Doboj cantonal minister of health, she abused her office by breaching procedures for appointment of members in the Cantonal Health Insurance Steering Board. Zenica Cantonal Prosecutor's Office appended to the indictment the

warrant for pronouncement of sentence moving the court to impose a suspended sentence on defendant Balorda. In May 2014, Zenica Municipal Court imposed a suspended sentence on defendant Balorda. In September 2014, Zenica Cantonal Court confirmed the suspended sentence.

27. *Senka Balorda et al.* – Low level corruption

Under November 2015 indictment defendant Senka Balorda was charged that in the period 2011-2012, acting in her capacity as Zenica-Doboj Canton (ZDC) minister of health, she abused her office by acting contrary to the relevant rules and regulations and in doing so acquired benefit for several persons, including five co-defendants, in the form of compensation for their membership in the interim managing board of the ZDC Addiction Diseases Institute. In September 2016, Zenica Municipal Court acquitted all defendants. In February 2017, Zenica Cantonal Court upheld the full acquittal.

28. *Kasim Sarajlić* – Low level corruption

Defendant Sarajlić was charged under November 2015 indictment that in the period 2012-2015, in his capacity as the director of public enterprise *Grijanje d.o.o.* Zenica, he abused his office by employing five persons contrary to the relevant regulations and in spite of them failing to meet the necessary requirements. In May 2016, Sarajlić was convicted in the first instance to one year and six months imprisonment. Under the first instance verdict, Sarajlić was banned from performing any managerial duties in the state and public companies and institutions. In August 2016, Zenica Cantonal Court (CC) revoked the first-instance conviction and ordered a retrial. Following the retrial, defendant Sarajlić was again sentenced to the identical imprisonment sentence and the identical security measure was imposed on him. Finally, in May 2017, Zenica CC reduced the sentence to one year imprisonment while confirming the security measure.

29. *Mugdin Musić, Sejad Sivac and Zulfikar Musić (PBAs)* (the case against *Mugdin Musić et al.*) – Low level corruption

Under October 2014 indictment, defendant Mugdin Musić and two co-defendants were charged that in the period 2010-2014, in their capacity as the Zenica prison deputy director for resocialization and treatment (Mugdin Musić), staff member in the prison's rehabilitation and educational unit (defendant Sejad Sivac), they were taking money from prisoners serving their sentences there in exchange for providing them with benefits, such as furlough, that prisoners were already entitled to. All three defendants signed plea agreements with the prosecution and in the period April-December 2015, Zenica Municipal Court sentenced them to five months imprisonment (Zulfikar Musić), six months imprisonment (Mugdin Musić) and ten months imprisonment (Sivac). In its December 2015 verdict, Zenica Municipal Court instructed defendant Sivac that he could appeal the verdict contrary to the standard practice that by pleading guilty a defendant forfeits his right to appeal the decision on criminal sanction. In February 2016, Zenica Cantonal Court dismissed the appeal, not as inadmissible but on merits, and confirmed the sentence of 10 months imprisonment imposed on defendant Sivac.

30. *Rešo Šarić* (PBA) – Low level corruption

April 2017 indictment charged defendant Rešo Šarić that in 2016, he attempted to bribe the director of FBiH Pension and Disability Fund (PIO/MIO) Nihad Pašalić, by handing an envelope with EUR 500 to his secretary with the aim of speeding up the process of deciding on his pension application. The director of FBiH Pension and Disability Fund reported the case to the police. In June 2017, defendant Šarić signed plea agreement with the prosecution and received a suspended sentence.

31. *Admir Arnaut* – Low level corruption

Zenica-Doboj Prosecutor's Office indicted Admir Arnaut in July 2015 that in the period Jun-Nov 2014, in his capacity of police officer, he abused his official authority by giving information and concrete advice to criminals in relation to destruction of evidence. In October 2016, Zenica Municipal Court (MC) sentenced Arnaut to 2 years and 4 months of imprisonment. No security measure of ban on performing police duties was requested by the prosecution or imposed on defendant Arnaut by the court. There was no appeal in this case and in November 2017, the first-instance verdict by Zenica MC became final and binding.

Visoko Municipal Court

32. *Alija Hadžibadić* – Low level corruption

Under December 2011 indictment, defendant Alija Hadžibadić was charged that in 2009, in his capacity as the Mayor of Olovo, he abused his office and acted contrary to relevant regulations in dismissing the managing board of Olovo Health Center, allegedly causing them damages in the amount of 17,150 BAM. In December 2012, Visoko Municipal Court (MC) imposed a suspended sentence on defendant Hadžibadić. Under this verdict, defendant Hadžibadić was also ordered to compensate three former management board members in the above noted amount. In December 2013, Zenica Cantonal Court (CC) reversed the first instance verdict and ordered a retrial. Following the retrial, Visoko MC imposed identical suspended sentence on Hadžibadić in September 2015. Finally, Zenica CC confirmed this verdict in June 2016.

Kiseljak Municipal Court

33. *Ankica Franković* (PBA) – Low level corruption

July 2016 indictment charged defendant Ankica Franković that in 2006, in her capacity as employee of the Employment Bureau in Kiseljak, she was taking bribes from several persons in order to ensure their participation in the employment program and their benefitting from financial incentives provided through the program. Defendant Franković was also charged with providing false information in her loan request filed with a microcredit organization in 2006. In April 2017, defendant Franković signed a plea agreement with the prosecution and Kiseljak Municipal Court (MC) imposed a

suspended sentence on her. As for the forging documents and fraud charges, Kiseljak MC dismissed these charges as inadmissible because of the expiry of the statute of limitations.

Mostar Cantonal and Municipal Courts

34. Dragan Čović et al., Mostar Cantonal Court – High level corruption

Under January 2010 indictment, defendant Dragan Čović was charged along with six other defendants that in 1999, acting in his capacity as the FBiH Deputy Prime Minister and Minister of Finance, as well as President and Chairperson of the Managing Board of public enterprise JP “HPT” (*Hrvatske pošte i telekomunikacije*) d.o.o. Mostar (defendant Čović) and other defendants in their capacity as members of the Managing Board of JP “HPT” d.o.o. Mostar, they abused their office in the process of transfer of “HPT” d.o.o. Mostar majority stake in “Eronet” d.o.o. company Mostar worth 4,674,059.50 BAM to three private companies: “*Hercegovina osiguranje*” d.o.o. Mostar, “*Alpina Comerc*” d.j.o. Široki Brijeg and “*Croherc AG*” d.j.o. Mostar. In June 2011, Mostar Cantonal Court acquitted all defendants. In March 2013, the FBiH Supreme Court upheld the full acquittal.

35. Jure Džida, Mostar Municipal Court – Medium level corruption

Defendants Pavo Pehar and Jure Džida were originally charged under September 2011 indictment that in 2010 defendant Pehar received a loan from the FBiH Development Bank in the amount of 490,000 BAM for the purpose of expanding his existing business facility in Čitluk. Defendant Pehar contracted the services of defendant Džida’s construction company *Dom 90*, which carried out the planned construction works, preparing allegedly false invoices (invoices cover the period of two weeks) to the full amount of 490,000 BAM although the actual value of carried out works was 108,201.34 BAM. In November 2013, defendant Pehar signed a plea agreement with the prosecution and Mostar Municipal Court imposed on him a suspended sentence of four months imprisonment with a one year probation period. Defendant Džida’s case proceeded to trial and two years later, in November 2015, he received an identical suspended sentence to the one imposed on defendant Pehar. In December 2016, Mostar Cantonal Court confirmed the suspended sentence imposed on defendant Džida.

Banja Luka District and Basic Courts

36. Sreten Tebak et al., Banja Luka District Court – High level corruption

Under June 2008 indictment, defendant Sreten Tebak was charged along with thirteen other co-defendants, that in the period 2001-2006, acting in their capacities of general manager of the company “*Željeznice Republike Srpske*” (RS Railways) a.d. Doboj (Tebak), the head of Technical Wagon Service of “*Željeznice Republike Srpske*” a.d. Doboj (defendant Cvijan Filipović), employees in the Technical Wagon Service (defendants Zoran Stjepanović and Slobodan Mirković) and members of the Managing Board of

“Željeznice Republike Srpske” a.d. Doboj (defendants Borka Trkulja, Branislav Carević, Zoran Pušac, Srećko Šaran, Branko Petković and Momčilo Vračar), they abused their office in the process of providing land, the property of *“Željeznice Republike Srpske” a.d. Doboj*, for use by *“Peti neplan” d.o.o.* company Niševići, the sale of freight wagons, the property of *“Željeznice Republike Srpske” a.d. Doboj*, to *“Panon-vagon” d.o.o.* company from Subotica and the use of freight wagons, the property of *“Željeznice Republike Srpske” a.d. Doboj*, by private company *“Helikon” d.o.o.* from Nikšić, thereby allegedly acquiring benefit for these three companies in the total amount of 1.152,837.39 BAM and causing damages in the same amount to *“Željeznice Republike Srpske” a.d. Doboj*. In July 2010, Banja Luka District Court sentenced in the first instance defendant Telebak to 1 year and 10 months imprisonment, defendant Filipović to 1 year and 1 month imprisonment, while defendant Stjepanović and other defendants received sentences ranging from three to ten months imprisonment. In April 2011, the Supreme Court of Republika Srpska upheld the convictions.

37. *Goran Škrbić et al.*, Banja Luka District Court – High level corruption

Under July 2008 indictment, defendant Goran Škrbić and eight other defendants were charged that in the period 2002-2003, acting in their capacities of director of the RS Privatization Agency (Škrbić) and deputy director of the RS Privatization Agency (defendant Milan Kovačić), they abused their office by enabling private companies to buy capital in previously state-owned companies in special auction, whereby they allegedly caused damages to the RS Budget in the amount of around 49 million BAM. In June 2009, Banja Luka District Court acquitted all defendants. In March 2010, the RS Supreme Court upheld the full acquittal of all defendants.

38. *Tihomir Gligorić*, Banja Luka District Court – High level corruption

Defendant Tihomir Gligorić was charged under July 2015 indictment that in the period 2008-2013, in his capacity as the Head of RS Administration for Geodetic and Property Affairs, he breached the Law on salaries of RS Administration employees. As alleged, acting contrary to the law, defendant Gligorić used RS Administration for Geodetic and Property Affairs funds by signings lease contracts and paid accommodation for employees, which, according to the provisions of the relevant legislation, employees were not entitled to. In September 2016, Banja Luka District Court (DC) sentenced defendant Gligorić in the first instance to one year imprisonment. Additionally, Banja Luka DC ordered defendant Gligorić to reimburse the RS Budget in the amount of 264,297.40 BAM. In January 2017, the RS Supreme Court revised the first instance verdict reducing the sentence to 6 months imprisonment, while the rest of the verdict remained unchanged.

39. *Milovan Čerek*, Banja Luka District Court – Medium level corruption

Under October 2012 indictment, defendant Milovan Čerek was charged that in the period 2010-2012, acting in his capacity as the mayor of Brod municipality, he abused his office by receiving bribe in the amount of 126,000 BAM to approve the payment to

“2D Živković” d.o.o. company Derventa for works carried out by the company on the construction of Aqua park in Brod. In March 2013, Banja Luka District Court sentenced defendant Čerek in the first instance to three years and eight months imprisonment. He was also ordered to pay a fine in the amount of 24,000 BAM and was banned from performing any managerial duties in the state and public companies and institutions in the period of five years. In September 2013, the RS Supreme Court upheld the conviction.

40. *Mirko Stojić*, Banja Luka District Court – Medium level corruption

Under August 2011 indictment, defendant Mirko Stojić was charged that in the period 2005-2007, acting in his capacity of general secretary and chief of cabinet of the then RS President Milan Jelić, he committed a series of abuses involving also activities on the construction of RS Presidential Palace. In November 2011, Banja Luka District Court sentenced defendant Stojić in the first instance to five years imprisonment. The court also fined defendant Stojić in the amount of 32,115 BAM and ordered that proceeds of crime in the amount of 35,000 BAM be seized from him. In April 2012, the RS Supreme Court quashed the first-instance verdict and ordered a retrial. In November 2012, the RS Supreme Court reduced defendant Stojić’s sentence to two years imprisonment while decisions on fine and forfeiture of proceeds of crime remained unchanged.

41. *Srđan Ljubojević* (PBA), Banja Luka District Court – Medium level corruption

Under September 2012 indictment, defendant Srđan Ljubojević was charged that in August 2012, in his capacity as general manager of public enterprise “Šume Republike Srpske” (RS Forests), he requested and received bribe in the amount of 10,000 BAM to approve the payment to “Vral Audit” company Banja Luka for carried out auditing services. Defendant Ljubojević signed a plea agreement with the prosecution and in November 2012, Banja Luka District Court sentenced him to one year imprisonment, ordering him also to pay a fine in the amount of 10,000 BAM.

42. *Duško Račić*, *Stanko Obradović* (PBA), (the case against *Zoran Perduv et al.*), Banja Luka Basic Court – Medium level corruption

Defendant Zoran Perduv is charged, together with eight other defendants, with accepting a bribe, forgery of documents, exerting improper influence, and abuse of office. The defendants in this case are medical doctors and administrative staff, all employed at RS Pension and Disability Insurance Fund, RS University Clinical Centre and Banja Luka Health Centre. The case concerns receiving a bribe in return for providing false medical documentation to persons using it for the purpose of being declared unfit to work and ultimately receiving disability pensions. In May 2016, two defendants, Duško Račić and Stanko Obradović signed plea agreements and were sentenced to six months imprisonment (Račić) and a suspended sentence (Obradović).

43. *Ljiljana Petković* (PBA), Banja Luka District Court – Low level corruption

Defendant Ljiljana Petković was charged under February 2017 indictment that in 2016, in her capacity as the tax inspector, she failed to report irregularities observed during the inspection of lounge bar *Marshall* in Kozarska Dubica, in return for which she received 2,000 BAM. In March 2017, defendant Petković signed a plea agreement with the prosecution and Banja Luka District Court sentenced her to five months imprisonment, along with a 5,000 BAM fine. Additionally, she was banned from performing her official duties in the period of two years.

44. *Boris Elčija*, Banja Luka District Court – Low level corruption

In its March 2016 indictment RS Special Prosecutor's Office charged defendant Boris Elčija with a criminal offence of trading in influence. As alleged in the indictment, defendant Elčija, owner of a driving school, requested and received 100 BAM from a candidate who was about to take a driving test, in return for allegedly giving this money to a member of the driving test panel and enabling the candidate to pass the driving test. The driving test candidate reported the offence and the prosecution used special investigative measures. In July 2016, Banja Luka District Court sentenced defendant Elčija to two months imprisonment. In September 2016, the RS Supreme Court revised the first instance verdict in relation to the decision on sentence and imposed on defendant Elčija a fine in the amount of 3,000 BAM.

45. *Marinko Lovre* (PBA), Banja Luka District Court – Low level corruption

In March 2017, RS Special Prosecutor's Office filed an indictment against defendant Marinko Lovre on the charges of accepting bribe and issuing or using a false medical or veterinary health certificate. In May 2017, defendant Lovre signed a plea agreement with the prosecution and Banja Luka District Court ordered him to pay a fine in the amount of 20,000 BAM. Additionally, the court ordered a seizure or forfeiture of proceeds of crime in the amount of 500 EUR.

Prijedor Basic Court

46. *Nenad Karanović* – Low level corruption

Under December 2013 indictment, defendant Nenad Karanović was charged with abuse of office or official authority. In his capacity as internal transactions officer at Unicredit Bank Banja Luka - Branch Office Prijedor, in 2008, defendant Karanović allegedly misused his access to the corporate application CAK to illegally transfer the total sum of 184,280 BAM, thereby causing damages to Unicredit Bank Banja Luka in the said amount. In June 2015, Prijedor Basic Court sentenced defendant Karanović to one year imprisonment, ordering him also to pay damages in the above noted amount. In March 2016, Banja Luka District Court upheld the conviction.

Srebrenica Basic Court

47. Božana Rankić (PBA) – Low level corruption

Defendant Božana Rankić was charged under February 2017 indictment that in July 2015, in her capacity as an assistant in the Srebrenica municipal administration, she verified a statement, which she knew to be false, allegedly given by a Serbian citizen to the effect that he agreed with the construction of gas station on the land plot in Skelani, which he had sold to *Auto Moto Trade d.o.o.* company Bratunac. In May 2017 defendant Rankić signed a plea agreement with the prosecution and Srebrenica Basic Court imposed on her a suspended sentence.

Livno Cantonal and Municipal Courts

48. Uroš Makić, Livno Municipal Court – Medium level corruption

Defendant Uroš Makić was charged under November 2014 indictment that in the period 2009-2012, in his capacity as Mayor of Bosansko Grahovo, he abused his office by approving the payment of funds to *Miora d.o.o.* company Banjaluka without prior approval of the municipal council and without the company substantiating the incurred costs, by engaging services of *Mig Elektro* company circumventing a required tender procedure, and paying his fine ordered by the Livno Municipal Court and a tuition fee at Travnik University for a staff member of Bosansko Grahovo municipality from the municipal funds, thereby causing damages to the municipal budget in the amount of 16,000 BAM. In May 2015, Livno Municipal Court (MC) sentenced defendant Makić in the first instance to one year imprisonment. In June 2016, Livno Cantonal Court (CC) reversed the first instance verdict and ordered a retrial. In November 2016, following a retrial Livno MC acquitted defendant Makić. Finally, in February 2017 Livno CC upheld the acquittal.

Bihać Municipal Court

49. Dario Jurić (PBA) – Medium level corruption

Under September 2016 indictment, defendant Dario Jurić was charged that in 2011, acting in his capacity as the Education Minister in Una-Sana Canton (USC), he pressured the director of public institution USC Archives Bihać, Fikret Midžić to employ defendant Jurić's wife in this institution, which Midžić eventually did by employing Sanja Jurić as archives technician. In October 2016, defendant Jurić signed a plea agreement with the prosecution and Bihać Municipal Court imposed on him a suspended sentence.

50. Fikret Midžić (PBA) – Low level corruption

In the case related to Dario Jurić case, in June 2016 USC Prosecutor's Office charged defendant Fikret Midžić that in 2011, acting in his capacity as the director of public institution USC Archives Bihać, he abused his office by employing USC education

minister Dario Jurić's wife, Sanja Jurić, as archives technician in this institution contrary to the relevant rules and regulations. In August 2016, defendant Midžić signed a plea agreement with the prosecution and Bihać Municipal Court imposed on him a suspended sentence identical to the one imposed on defendant Jurić.

51. Željko Stupar – Low level corruption

Under March 2015 indictment, defendant Željko Stupar was charged that in 2013, acting in his capacity as police officer in Bosanski Petrovac, he abused his office by misappropriating money in the amount of 1,800 BAM from speeding tickets. In September 2016, Bihać Municipal Court sentenced him in the first instance to three months imprisonment. Defendant Stupar was also ordered to reimburse the Budget of USC in the amount of 1,800 BAM. Defendant Stupar appealed the first-instance verdict, moving Bihać Cantonal Court (CC) to replace imprisonment with community service. In January 2017, Bihać CC upheld the conviction and sentence of imprisonment.

52. Adnan Behrem (PBA) – Low level corruption

Under June 2014 indictment, defendants Adnan Behrem and Anes Pašić were charged that in June 2012, acting in their capacity as police officers in Bihać, they abused their office by making a driver of the vehicle with Croatian license plates pay a fine in the amount of 102 BAM for a non-existent traffic offense. In November 2015, defendant Behrem signed a plea agreement with the prosecution and Bihać Municipal Court imposed on him a suspended sentence.

53. Fuad Tahrić (PBA) – Low level corruption

Under October 2015 indictment, defendant Fuad Tahrić was charged that in September 2009, acting in his capacity as police officer in Bihać, he abused his office by entering false information in his official record of the traffic accident and thus enabling one of the persons involved in the accident to claim money from insurance based on this false report. Defendant Tahrić signed a plea agreement with the Prosecution and in August 2016 Bihać Municipal Court imposed on him a suspended sentence.

54. Željko Kecman (PBA) – Low level corruption

Under January 2016 indictment, defendant Željko Kecman was charged that in the period 2011-2014, acting in his capacity as employee of the Social Work Center in Bosanski Petrovac and temporary guardian of one of the center's protégés, he abused his office by keeping monthly benefits intended for the protégé's support to himself in the total amount of 13,968.91 BAM. Defendant Kecman signed a plea agreement with the prosecution and in June 2016 Bihać Municipal Court (MC) imposed on him a suspended sentence of eighteen months imprisonment. Bihać MC also ordered defendant Kecman to compensate the injured party within six months, or otherwise imprisonment sentence would be activated. Finally, Bihać MC banned defendant Kecman from carrying out duties of a temporary guardian to any protégé of the Centre for Social Work in Bosanski Petrovac and elsewhere in BiH in the period of two years.

55. *Amel Alagić* – Low level corruption

Under December 2015 indictment, defendant Amel Alagić was charged that in June 2012, acting in his capacity of the director of public institution USC Directorate of Regional Roads, Bihać, he abused his office by acting contrary to the relevant rules and regulations in the process of employment of six persons. In September 2016, Bihać Municipal Court imposed on defendant Alagić a suspended sentence, banning him also from performing any managerial duties in public companies and cantonal, city and municipal bodies in the period of one year. In March 2017, Bihać Cantonal Court (CC) confirmed the suspended sentence and security measure.

Brčko Appellate and District Courts

56. *Dragan Pajić* (PBA) – High level corruption

Defendant Dragan Pajić was charged under February 2013 indictment that in the period 2010-2011, in his capacity as the mayor of Brčko District, he abused his office by circumventing tender procedure in contracting services for the construction of gynecology ward in Brčko Hospital and in the employment process, and by using official cars and drivers for the transport of his family members. In October 2014, Brčko District Basic Court (BC) found defendant Pajić guilty in the first instance in relation to unauthorized use of office property and fined him in the amount of 5,000 BAM. In April 2015, Brčko District Appellate Court (AC) reversed the first instance verdict and ordered a retrial. In May 2015, defendant Pajić signed a plea agreement with the prosecution and Brčko District BC sentenced him to one month imprisonment.

57. *Miodrag Trifković* – Medium level corruption

Defendant Miodrag Trifković was charged under December 2012 indictment that in the period 2001-2003, in his capacity as director of Brčko District Tax Office, he abused his office by acting contrary to the relevant regulations in the employment process and by reducing the amount of tax debt to *IEG d.o.o.* company Brčko, thereby allegedly causing damages to the budget of Brčko District in the amount of 97,500 BAM. In February 2014, Brčko District Basic Court (BC) found defendant Trifković guilty on both counts and sentenced him to one year and two months imprisonment. In April 2015, Brčko District Appellate Court (AC) revised the first instance verdict and reduced the sentence to six months imprisonment on account of having acquitted defendant Trifković of the other charge concerning the reduction of tax debt.

58. *Niko Stoparić* – Low level corruption

Defendant Niko Stoparić was charged under October 2016 indictment that in 2015, in his capacity as the head of education department in the Brčko District Government, he failed to execute decision of the BD BiH Appellate Court. The Prosecution also appended to the indictment warrant for pronouncement of criminal sentence moving the court to impose on defendant Stoparić a suspended sentence. In April 2017, Brčko District Basic Court found defendant Stoparić guilty and fined him in the amount of

3,000 BAM. In September 2017, Brčko District Appellate Court upheld the conviction and fine.

59. *Mehmed Topčagić* (PBA) – Low level corruption

Defendant Mehmed Topčagić was charged under September 2016 indictment that in 2013, in his capacity as a public procurement assistant in Brčko District Government, he ordered books for High School of Economics in Brčko from *Elea d.o.o.* company Brčko and paid a higher price than the market one, with the difference amounting to 1,573.06 BAM. In October 2016, defendant Topčagić signed a plea agreement with the prosecution in relation to the charge of unconscious behavior in office and Brčko District Basic Court (BC) imposed on him a suspended sentence, ordering him also to pay 1,573.06 BAM into the budget of Brčko District within six months.

60. *Ferhat Čejvanović et al.*, Brčko District Basic Court – Low level corruption

November 2016 indictment charged defendant Ferhat Čejvanović that, in his capacity as the head of Sector for Agriculture, Forestry and Water Management in the Brčko District Government, he acted contrary to the relevant regulations in failing to control if services by *Agip d.o.o.* company Brčko on covering agricultural roads with gravel and ditch cleaning were provided up to the agreed standard of quality, which allegedly caused damages to the Budget of Brčko District of BiH in the amount of 6,076.57 BAM. Co-defendant Janko Josipović, in his capacity as the representative of Agip company, allegedly signed and stamped false information on provided services and was charged with forgery of official documents. The prosecution appended warrant for pronouncement of sentence (WPS) to the indictment, proposing a 1,000 BAM fine for defendant Čejvanović and a suspended sentence for defendant Josipović. In December 2016, the Brčko District Basic Court accepted the warrant for pronouncement of sentence and sentenced defendants Čejvanović and Josipović accordingly.

Doboj District and Basic Courts

61. *Obren Petrović* – Medium level corruption

Defendant Obren Petrović, a Mayor of Doboj since 2002, was charged in 2006 along with three other co-defendants Milenko Cvijanović, Zoran Žole and Mirko Stojčinović with abusing his office by giving subsidies intended for the most vulnerable categories of population to legal entities, including radio and TV stations, football and handball clubs, water supply company in the Doboj area, in the amount of around 120,000 BAM. Two defendants, Žole and Petrović pleaded guilty in June 2007 and were sentenced to three months imprisonment and ordered to pay fines in the amount of 2,000 BAM (Žole) and 20,000 BAM (Petrović). The case against the other two defendants was completed in 2009, with the RS Supreme Court acquitting them of all charges. In January 2011, defendant Petrović filed a motion to the Doboj Basic Court (BC) to reopen the proceedings against him, with the court initially dismissing the motion as inadmissible in December 2011. However, after this decision was repealed by the Doboj District Court (DC), Doboj

BC granted the motion in July 2012. In April 2016, Doboj BC rendered the acquitting verdict declaring the June 2007 verdict in relation to defendant Petrović null and void. Doboj DC again quashed this verdict in August 2016 returning the case to the first instance court for retrial. In February 2017, the Doboj BC rendered a new verdict with the same effect, i.e. declaring the July 2007 verdict against defendant Petrović null and void. In its July 2017 verdict, Doboj DC confirmed the February 2017 verdict by the Doboj BC.

62. Milorad Novaković, Mirko Blažanović (PBAs) (the case against *Milorad Novaković et al.*) – Medium level corruption

Defendants Milorad Novaković and Mirko Blažanović were charged under October 2011 indictment that in the period 2007-2011, in their capacities as Doboj prison director (Novaković) and an assistant director in the prison's rehabilitation and educational unit (Blažanović), they were taking money from prisoners in exchange for benefits. In July 2015, defendants signed plea agreements with the prosecution and were sentenced for accepting bribe to six months imprisonment (Novaković) and four months imprisonment (Blažanović), with the proceeds of crime in the amount of 7,000 BAM seized from them.

63. *Ljubinka Kolundžija* – Low level corruption

Defendant Ljubinka Kolundžija was charged under March 2013 indictment that in her capacity as sanitary inspector in the Doboj area, she requested and received a bribe in the amount of around 500 BAM in the exchange for not reporting irregularities in the grocery shop and beauty salon inspected in the period September-October 2012. In December 2015, Doboj Basic Court (BC) found defendant Kolundžija guilty of accepting bribe in relation to one count and imposed on her a suspended sentence. In April 2016, Doboj District Court (DC) repealed the first instance verdict and ordered a retrial. In June 2016, Doboj BC rendered a new verdict with the identical suspended sentence. In November 2016, Doboj DC again ordered a retrial, this time before Doboj DC. Finally, in March 2017, Doboj DC sentenced defendant Kolundžija to six months imprisonment.

64. *Bratislav Serafijanović* – Low level corruption

Defendant Bratislav Serafijanović was charged under May 2016 indictment that in his capacity as forester in RS Forests, Doboj Branch Office, he failed to make an official record of illegally harvested trees in his area of responsibility, allegedly causing damages to the company in the amount of 39,877.64 BAM. In December 2016, Doboj Basic Court acquitted defendant Serafijanović. In June 2017, Doboj District Court upheld the acquittal.

Modriča Basic Court

65. Ljubomir Dugonjić – Low level corruption

Under April 2015 indictment, defendants Ljubomir Dugonjić and Željko Duronjić were charged that in March 2015, acting in their capacity as police officers in Šamac, they took a bribe in the amount of 200 BAM in return for not reporting a traffic offense. In March 2017, Modriča Basic Court fined defendant Dugonjić in the amount of 4,000 BAM. In August 2017, Doboje District Court confirmed the conviction and fine.

Foča Basic Court and Trebinje District Court

66. Zdravko Krsmanović – Medium level corruption

June 2013 indictment charged defendant Zdravko Krsmanović that in 2012, acting in his capacity of Foča Mayor, he abused his office by acting contrary to regulations in the process of employment of staff in the municipal administration and adoption of amendments to the Rulebook on internal organization and systematization of posts in the municipal administration, thereby allegedly causing damages to the municipal budget in the amount of around 50,000 BAM. As for specific charges, defendant Krsmanović was charged with abuse of office or official authority, forging or destroying an official document and breach of rights during recruitment and periods of unemployment. In May 2015, Foča Basic Court found defendant Krsmanović guilty in the first instance on the charge of breach of rights during recruitment and periods of unemployment, acquitting him in relation to the other two charges. Additionally, the court ordered defendant Krsmanović to pay a fine in the amount of 2,000 BAM. In December 2015, Trebinje District Court confirmed the conviction and fine.

67. Zdravko Krsmanović (2) – Medium level corruption

Defendant Zdravko Krsmanović was charged under June 2014 indictment that in 2012, acting in his capacity as the Mayor of Foča, he abused his office by allocating 59,360 BAM to a private construction company Petković d.o.o. Novo Goražde for renovation of facade on the residential/commercial building *Plavi neboder* in Foča. In September 2015, Foča Basic Court acquitted defendant Krsmanović in the first instance. In December 2015, Trebinje District Court upheld the acquittal.

