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THE COMPATIBILITY OF THE SERBIAN ANTI-CORRUPTION LEGAL FRAMEWORK WITH THE REGIONAL AND INTERNATIONAL STANDARDS

The paper examines the measures that have been adopted to combat corruption on the road of Serbian transition and EU integration process with a particular emphasis placed on the most recent legislative and institutional developments in the fields of the public procurement, the corporate criminal liability, the Anti-Corruption Agency as well as other issues regulated by the Law on the Anti-Corruption Agency.

The paper also deals with the key players setting forth relevant anticorruption standards as well as with their respective monitoring mechanisms. The Serbian involvement in these mechanisms is discussed as well.

However, the progress Serbia made in the course of the anticorruption reform will be predominantly assessed in the light of the Serbian compliance with the GRECO recommendations, as GRECO has the most developed and effective monitoring mechanism thus far.

Key words: *Anti-Corruption Agency, GRECO, Serbian National Strategy for Combating Corruption, anti-corruption reform, public procurement, corporate criminal liability, Transparency International Corruption Perception Index.*

1. Introduction

Corruption is a manifestation equally damaging in all societies irrespective of their level of development. The problem of corruption in societies making a transition towards democracy is bigger and more serious, as new

demands dictate numerous tasks while the funds and means for their realization are still undeveloped or insufficient[1].

The period of isolation and political instability in Serbia has adversely affected adequate functioning of key institutions of the Government. A high level of corruption was one of the major causes that gave rise to the malfunctioning of governmental institutions. Although there have been major advances in a range of development areas in Serbia since the political changes in 2000, progress with respect to mitigating corruption has been partial and rather slow. Actually, corruption remains prevalent in many areas and continues to be a serious problem.

According to the Transparency International Corruption Perception Index (hereinafter "TI CPI") for 2009, Serbia was ranked 83 out of 180, with a rating score "3.5" on a scale of 0 to 10.[2] However, the trend of progress is evident considering that TI CPI ratings for Serbia from 2000 onwards[3] were significantly less favorable comparing to 2009 results. For instance, Serbian rating score in 2000 was 1.3, (having been ranked 89 out of 90), while in 2003 the rating score was 2.3 (being ranked 106 out of 133).

In addition, a number of polls conducted in Serbia indicate that in the past several years citizens consider corruption as the fourth most important problem in the society, after poverty, unemployment and general crime.[4]

However, the exact extent of the corruption cannot be precisely determined due to the immanent shortcomings of each given method.

For instance, when it comes to the Corruption Perceptions Index, it is worth mentioning that it has drawn increasing criticism in the decade since its launch, leading to calls for the index to be abandoned.[5]

Since 1995, Transparency International has published an annual Corruption Perceptions Index ranking the countries of the world according to "the

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[1] Serbian National Strategy for Combating Corruption ("Official Gazette of the Republic of Serbia", No. 109/05 from 9 December 2005), (Introduction).

[2] A rating score "0" represents a perception of rampant corruption and "10" represents a perception of no corruption at all. A higher score marks less perceived corruption.

[3] It is important to note that for the years 2002-2005 are presented data for Serbia and Montenegro.

[4] Serbian National Strategy for Combating Corruption, *supra* note 1, at 5.

[5] Galtung, Fredrik (2006). "Measuring the Immeasurable: Boundaries and Functions of (Macro) Corruption Indices," in *Measuring Corruption*, Charles Sampford, Arthur Shacklock, Carmel Connors, and Fredrik Galtung, Eds. (Ashgate): 101-130, available at: http://report.globalintegrity.org/methodology/readings.cfm

degree to which corruption is perceived to exist among public officials and politicians", as determined by expert assessments and opinion surveys. The organization defines corruption as "the abuse of entrusted power for private gain".[6]

The lack of standardization and precision in these surveys has been main cause for concern. The criticism has been also directed at the limited scope of the survey covered by the Index.

Firstly, the CPI's sample and methodology are variable making even basic international comparisons and tracking year-to-year changes in the individual countries difficult. The only reliable way to compare a country's score over time is to go back to individual survey sources, each of which can reflect a change in assessment." [7]

Furthermore, it is impossible to directly measure a corruption as a willfully hidden phenomenon, what further leads to unreliable and imprecise data base on an eclectic mix of opinion surveys and expert assessments.

The scope of the CPI's survey as limited to the public sector domain constitutes a source of criticism as well. More specifically, the CPI focuses on corruption in the public sector defining the corruption as the abuse of public office for private gain. In doing so, it does not coincide with the notion of corruption as defined in the Serbian National Strategy for Combating Corruption and in the Serbian Law on the Anti-Corruption Agency. Actually, unlike the existing definition of corruption under the recently adopted Serbian law,[8] the CPI does not include the private dimension of the corruption, thus neglecting all forms of corruptions such as the small and medium sized businesses as well as other sectors that are not linked to public resources.

However, the critical assessment of the existing corruption indicators as well as the exact extent of the corruption in Serbia will not be subject to review within the scope of this article. The article will examine the measures that have been adopted and taken to combat corruption on the road of Serbian transition and EU integration process with a particular emphasis placed

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[6] http://www.transparency.org/news_room/faq/corruption_faq.

[7] Nathaniel Heller, "Hey Experts: Stop Abusing the CPI", Global Integrity, available at http://commons.globalintegrity.org/2009/02/hey-experts-stop-abusing-corruption.html.

[8] Article 2 of the Law on Anti Corruption Agency defines "corruption" as a relation based on abuse of office or social status and influence, in the public or private sector, with the aim of acquiring personal benefits for oneself or another. The Law on the Anti-Corruption Agency ("Official Gazette of the Republic of Serbia", No. 97/08), unofficial translation made by the OSCE Mission to Serbia.

on some of the most recent legislative, institutional and technical developments achieved in this area. It will also point out the areas and sectors where the progress in combating corruption is not so evident and transparent. The article will also review relevant documents and standards set up by the key players at the international level in fight against corruption and the compliance of the Serbian legislation and practice with the set up criteria.

2. Key players at the international level and their respective monitoring mechanisms

The key international and regional standard-setters in the field of combating corruption are *inter alia* the United Nations, the Organisation for Economic Cooperation and Development (hereinafter "OECD"), the World Customs Organization, the Council of Europe, the European Union, the Organization of American States (hereinafter "OAS"), the African Union and the League of Arab States.[9] In the text that follows will be discussed some of the mechanisms that are of key importance for the progress of the Serbian anti-corruption reform.

2.1. United Nations

The United Nations Convention against Corruption of 2003 (hereinafter "UNCAC") is the first global instrument to harmonize anti-corruption efforts worldwide. It is widely recognized as the most promising initiative to curb the scourge of corruption. This convention is unique not only in its worldwide coverage but also in the extensiveness and detail of its provisions.[10] It complements the anti-corruption conventions of the OAS, the African Union and the CoE, the SADC Protocol against Corruption and the OECD Convention on combating bribery of foreign public officials in international business transactions,. Serbia ratified the UN Convention against Corruption in 2005.[11]

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[9] In addition, several non-governmental organizations were either founded to combat corruption or they focused their activities on anti-corruption strategies. The most significant are Transparency International and Open Society Institute.

[10] http://www.transparency.org/global_priorities/international_conventions/projects_conventions/uncac.

[11] Published in" Official Gazette of the State Union of SaM- International agreements", No. 12/05.

However, the monitoring process is still not fully developed since the state parties have taken different positions regarding the transparency of the review mechanism under the UNCAC and it prevails to be the burning issue.[12]

Although the publication of country reports is consistent with the spirit and letter of UNCAC, as it is based on transparency, some state parties still call it into the question arguing that the publishing country reports may politicize the review process. It is also worth noting that publication of country reports and recommendations is a standard practice in monitoring anti-corruption and anti-money laundering standards and documents of the OECD, the CoE as well as other aforementioned regional bodies. The outcome on this issue is of major importance to the credibility of the review process and of the UN Convention itself.[13]

2.2. OECD

The OECD has been also actively involved in setting and promoting anti-corruption standards and principles. Actually, fighting corruption is one of the priorities of the OECD. The OECD Anti-Bribery Convention of 1997[14] establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective.[15] As it has been mentioned above, the Convention itself establishes a transparent, open-ended, peer-driven monitoring mechanism to ensure the thorough implementation of the international obligations that countries have taken on under the Convention. This monitoring is carried out by the OECD

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[12] http://www.transparency.org/global_priorities/international_conventions/projects_conventions/uncac.

[13] See "Transparency is Key in the UNCAC Review Mechanism", Policy Note, #01/09, available at www.uncaccoalition.org/index.php?option=com). In preparation for the next Conference of States Parties in Doha on 9–13 November 2009, governments are in the final stages of negotiating the components of a review mechanism for the UNCAC. This policy note addresses some of the key concerns and issues on the discussion table..

[14] The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997.

[15] See http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html.

Working Group on Bribery, which is composed of members of all State Parties. Serbia as non member country to the OECD has not joined this instrument.[16]

2.3. GRECO

The Group of States against Corruption (GRECO) was established in 1999 by the CoE to monitor States' compliance with the organization's anti-corruption standards. [17]

The GRECO objective is to improve the capacity of its members to fight corruption by monitoring their compliance with the CoE anti-corruption standards. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption.

The GRECO was conceived as a flexible, efficient and transparent follow-up mechanism, called to monitor, through a process of mutual evaluation and peer pressure, the observance of the Guiding Principles in the Fight against Corruption and the implementation of international legal instruments adopted in pursuance of the CoE Programme of Action against Corruption.[18] The State Union of Serbia and Montenegro joined GRECO on 1

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[16] Besides the 30 OECD's member countries, there are eight non member countries - Argentina, Brazil, Bulgaria, Chile, Estonia, Israel, the Slovenia and South Africa that have joined this Convention However, it was argued that the fact that Serbia did not join this instrument does not present a problem as the provisions of the OECD Convention largely coincide with the provisions of other conventions that have been ratified by Serbia. See Nenadić, Nemanja, "Korupcija kao problem na putu pristupanja EU i pristupanje kao podsticaj za suzbijanje korupcije u Srbiji", Izazovi evropskih integracija: časopis za pravo i ekonomiju evropskih integracija, 2008/2, Beograd, 2008, p. 37.

[17] GRECO was established on 1 May 1999, by a Resolution adopted by 17 CoE states, following a 1998 Council of Ministers Resolution authorizing its creation. See more: Ćirić, Jovan, "GRECO u borbi protiv korupcije", Strani pravni život, 1/3, 2006, Beograd, p. 247.

[18] The GRECO currently has 44 member states and monitors the following instruments: Twenty Guiding Principles in the Fight against Corruption (1997), Council of Europe Criminal Law Convention (1999), Additional Protocol to the Criminal Law Convention on Corruption, Council of Europe Civil Law Convention (1999), Recommendation on Codes of Conduct for Public Officials (2000) and Recommendation on Common Rules against Corruption in the Funding of Political Parties. See http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp

April 2003, i.e. after the close of First Evaluation Round. Serbia thus far ratified the CoE Criminal Law Convention on Corruption of 1999[19] and Additional Protocol thereto of 2003,[20] as well as the CoE Civil Law Convention on Corruption of 1999.[21]

2.4. European Union

When it comes to the EU integrations it is noteworthy to mention that the Council Decision 2008/213/EC of 18 February 2008 on European Partnership with Serbia defines the fight against corruption as one of priorities in the process of the EU integrations.

The Communication on a Comprehensive EU Policy against Corruption is also of great relevance in this context. In order to promote anti-corruption policies in the new EU Member States, candidate countries and potential candidate countries, the Commission has drawn up ten general principles, which are annexed to the Communication.[22]

This Communication is also important as it underlines that the implementation of the existing anti-corruption instruments should be closely monitored and strengthened. More specifically, the concerned Communication points to the lack of a proper follow-up or evaluation mechanism comparable to GRECO.[23]

As part of the EU accession process, the Commission has scrutinized corruption in the framework of its regular evaluations of the progress of each of the candidate and potential candidate countries towards fulfillment of the so-called "Copenhagen criteria" (political and economic criteria as well as the ability to take on the obligations of the membership - *acquis communautaire*).

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[19] "Official Gazette of the FRY –International agreements" No. 2/02. and "Official Gazette the SaM – International agreements", No. 18/05

[20] "Official Gazette of the RS"- International agreements", No. 102/07.

[21] "Official Gazette of the RS- International agreements", No. 102/07.

[22] Nemanja Nenadic explored the level of compliance of Serbian anti-corruption policy with the given principles, supra note 17, p. 33.

[23] However, it should bear in mind that the European Anti-Fraud Office was set up in 1999 with a view to expanding the scope and enhancing the effectiveness of action to combat fraud and other illegal activities detrimental to the Community's interests. It is established as a part of the EC with a special independent status for conducting anti-fraud investigations. It collaborates with the international organizations and non-governmental institutions involved in the fight against corruption such as GRECO.

Accordingly, the Serbian EC progress reports[24] do include sections on anti-corruption policy within the chapter on political criteria as well as there is information contained in other sections of the report. Still, unlike the GRECO reporting methodology, the EC progress reports do not provide information in a precisely systematized and comprehensive manner. Some authors do recommend that when it comes to evaluation of countries' progress in the fight against corruption, EU should take into account more concrete indicators, developed on the basis of its ten principles as well as to organize permanent monitoring to cover all crucial topics involved. [25]

Owing to the fact that the EU at this stage is not in favor of upgrading evaluation mechanism as well as that the UN monitoring mechanisms is still not fully operational, this paper will assess the course of the Serbian anticorruption reform in the light of its compliance with GRECO recommendations, as it has the effective monitoring mechanism, which is the most developed thus far.

3. Compliance of the Serbian Anti-Corruption Framework with the GRECO Recommendations

Like any country that joined GRECO after the close of its Second Evaluation Round, Serbia was subject to a Joint First and Second Round Evaluation which covered the whole range of issues examined during the first two rounds. This comprehensive approach is considered indispensable both for the sake of equal treatment of all members and to gain a clear and accurate picture of the anti-corruption regulatory framework and policies of new Member States.[26]

GRECO is currently well into its Third Evaluation Round, with evaluation reports having been adopted in respect of ten member states, while others are underway.[27] Serbia should get prepared for the Third Evaluation Round, even though the Third Evaluation Round shall not start before the adoption of the Addenda to the Joint First and Second Evaluation Round, which is supposed to

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[24] See Serbia 2009 Progress Report, supra note 2 as well as for years (2006- 2008).

[25] Nemanja Nenadic, *supra* note 17, p. 45.

[26] Ninth General Activity Report of GRECO, Independent Monitoring of Party Funding, adopted by GRECO, February 2009, available at: http://www.coe.int/t/dghl/monitoring/greco/documents/2009/Greco(2009)1_ActRep2008_EN.pdf

[27] See Reports having been adopted for: Estonia, Finland, Iceland, Latvia, Luxembourg, Netherlands, Poland, the Slovak Republic, Slovenia and the United Kingdom. Reports are underway for Albania, Belgium, Denmark, France, Spain, Sweden and Norway.

take place in the first half of 2010. The GRECO Third Evaluation Round reflects virtually the full range of issues and practices regarding the transparency of party funding,[28] as well as it relates to transposition into domestic law of the corruption offences established by the reference instruments[29].

In the text that follows will be assessed Serbian progress made over the transition period with regard to Serbian compliance with some of the recommendations of the Joint First and Second Evaluation Round. According to GRECO Report from June 2008 on the compliance of the Republic of Serbia for the Joint First and Second Evaluation Rounds, Serbia complied with twelve out of twenty five recommendations. Within the scope of this paper a particular emphasis will be placed on the recommendations pertaining to public procurement matters, criminal corporate liability and the Anti-Corruption Agency.

3.1. Public Procurement Framework

3.1.1. Three Stages of the Public Procurement Reform

The Law on Public Procurement of 2002[30] was the first adopted anti-corruption law by the Serbian Parliament. It is interesting to note that public procurements were regulated for the first time after the Second World War by this law in Serbia.[31]

Although this new piece of legislation proved to be controversial,[32] the transparency of public procurement is significantly improved comparing to 1990s, when there was no institutional framework in place. It was argued that

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[28] As understood by reference to Recommendation Rec(2003)4 of the Committee of Ministers on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns.

[29] See the Criminal Law Convention on Corruption (ETS no 173), its Additional Protocol (ETS no 191) and Guiding Principle 2 (Resolution (97) 24).

[30] Law on Public Procurement ("RS Official Gazette" No. 39/2002, 43/2003, 55/2004, 101/2005, 116/08).

[31] Jovanovic, Predrag, Transparency in and external control over public procurement processes in Serbia, available at: http://www.antikorupcija-savet.sr.gov.yu/download/9-Predrag-Jovanovic-eng.doc.

[32] Public procurement was not regulated in the best manner for the following reasons: the legislation has been amended to offer the advantage to domestic suppliers and the police procurements have been exempted from the provision of the Low on Public Procurement by a Government of Serbia Decree. See Hiber, D, Begovic, B, "EU Democratic Rule of Law Promotion: The Case of Serbia", 2006, p.22.

the total lack of public procurement framework was a common feature of all Central and Eastern European countries in transition in early nineties as well.[33]

Similarly to other Central and Eastern European countries in transition, Serbia entered the second stage of reform of public procurement system as soon as it adopted the law regulating public procurement in 2002. On the other hand, opposite to those countries, Serbia entered to the second stage, approximately one decade after other concerned transitional countries. Blomberg designates this second stage of reform as "[phase] towards European integrations", while the third stage of public procurement reform, which is the final one, starts when state becomes member of the EU. It was stated that the reform in Serbia turned to be successful and that Serbia achieved the reform-related goals in a few years while it took other concerned transitional countries ten years to accomplish the same results (1990-2000).[34]

3.1.2. GRECO Recommendation on Enhancing the Implementation of the Public Procurement Law

In 2006, the GRECO also positively evaluated the Law on Public Procurement, although having done so in inexplicit manner. Actually, the GRECO only recommended enhancing the implementation of the public procurement law, without proposing any changes to the law itself. In its compliance report of 2008, GRECO concludes that recommendation i has been dealt with in a satisfactory manner.

Nevertheless that the GRECO recommendation was particularly focus on the strengthening implementation of the existing law, the Serbian authorities, meanwhile, went far beyond the given recommendation. Actually, besides strengthening implementation through anticipated trainings, the Public Procurement Law has been amended in order to further increase the independence, transparency and effectiveness of the procurement process.

3.1.3. Positive Developments

In doing so, institutional independence of the public procurement bodies, notably the Public Procurement Office and the Commission for

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[33] See P. Blomberg "Lessons Learned on the basis of Ten Years of Reform of the Systems *of* Public Procurement in Central and Eastern Europe" SIGMA report, Ohrid, 2004, cited in: Predrag Jovanović,"Javne nabavke u Srbiji, Decenija za dve i po godine", p.1. available at: http://www.transparentnost.org.yu/dokumenti/dokument4.pdf.

[34] Predrag Jovanovic, *supra* note 34, p. 3.

the Protection of Bidders' Rights in public procurement matters was ensured. Actually, these amendments empower the National Assembly to elect the President and members of the Commission for the protection of rights instead of the executive branch as it was the case before.

The transparency of the public procurement procedures have been increased by narrowing down and exhaustively listing exceptions requiring confidential procedures, so-called "confidential procurements." Nevertheless that the GRECO welcomed the envisaged amendments directed towards the increasing transparency,[35] the Serbia 2009 EC Progress Report indicates following shortcomings in the new legislation that may undermine the anti-corruption reform: the definition of public bodies, the scope of exemptions and excluded contracts and the conditions for use of the restricted procedure.

One of the key changes of the amended law is the enhanced specialization in public procurement matters through professional training and certification of those civil servants employed in the purchasing entities. Most importantly, the anticorruption clauses had been introduced.

Although, when it comes to the public procurement framework, significant progress had been made what was also acknowledged by the GRECO,[36] Serbia still has to undertake above stated actions towards full alignment with the *acquis* in the public procurement domain. Apparently, this will further strengthen the anti-corruption reform.

In addition, the Serbia 2009 EC Progress Report reads that in order to ensure full implementation of the new law, the sufficient financial resources should be ensured for the independent regulatory institutions (the Public Procurement Office and the Commission for the Protection of Bidders' Rights) as to overcome difficulties they face in carrying out their mandates. Also, it is important to strengthen the administrative capacity and coordination mechanisms of the main stakeholders in the public procurement system in particular to reduce the scope for corruption.

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[35] One of ten EU principles is in also favor of enhancing the transparency, Nenadic, Nemanja, *supra* note 17. p. 39.

[36] See Joint First and Second Evaluation Rounds Compliance Report on the Republic of Serbia, adopted by GRECO at its 38th Plenary Meeting, June 2008, available at: http://www.mpravde.sr.gov.yu/images/Report_GRECOeng.pdf.

3.2. Liability of Legal Persons for Offences of Corruption

3.2.1 GRECO Recommendation on the Introduction of the Corporate Criminal Liability

The Law on the Liability of Legal Entities for Criminal Offences has been enacted by the National Assembly of the RS in 2008.[37] Out of all former Yugoslav countries, Serbia was the last country to introduce the law pertaining to the criminal responsibility of legal entities.[38]

In its report of 2006[39], the GRECO had recommended authorities to adopt the necessary legislation to speedily implement liability of legal persons for offences of corruption providing for adequate sanctions, in accordance with the Criminal Law Convention on Corruption. We find that some parts of the Recommendation No. R (88) 18 of the Committee of Ministers to Member States concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities are also of key importance for the anticorruption reform in Serbia and as such will be subject to review later in the text.[40]

The GRECO already noted the intention of the authorities to introduce corporate criminal liability for corruption offences and welcomed the draft law, which had been prepared to this end.[41] Although the concerned draft law, which was adopted meanwhile, does not directly regulate offences of corruption, it is

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[37] Law on the Liability of Legal Entities for Criminal Offences, ("Official Gazette of the RS" No. 97/2008).

[38] Vrhovšek, M, „Uloga Zakona o krivičnoj odgovornosti pravnog lica u suzbijanju korupcije", Izazovi evropskih integracija: časopis za pravo i ekonomiju evropskih integracija, 2008/2, Beograd, 2008, p. 31.

[39] Joint First and Second Evaluation Round Report on the Republic of Serbia, adopted by GRECO at its 29th Plenary Meeting, June 2006, available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoEval1-2(2005)1rev_Serbia_EN.pdf

[40] Besides the given Recommendation and the Criminal Law Convention on Corruption the following instruments require Member States to regulate criminal liability of the enterprises for offences committed in the exercise of their activities: CoE Convention on the Protection of the Environment through Criminal Law Strasbourg of 1998, CoE Recommendation Rec. No. R (96) 8 concerning crime policy in Europe in a time of change, Programme of Action against Corruption, adopted in 1996 by the Committee of Ministers of the CoE, Convention on the Protection of the European Communities' Financial Interests of 1995.

[41] Joint First and Second Round Evaluation Report on the Republic of Serbia, *supra* note 37.

also applicable on corruption offences as it states that a legal entity shall be liable for any criminal offences constituted under a special part of the Criminal Code or under other laws, if the conditions governing the corporate liability as laid down in this Law were met.[42]

However, GRECO concluded that the concerned recommendation had been only partly implemented and it urged the state authorities to pursue this matter more vigorously through the adoption and implementation of the respective draft law as to bridge the important legal gap.[43]

Yet, it remains to be seen whether the adoption and implementation of the given law will be considered in the upcoming GRECO report as sufficient to achieve full compliance with the given recommendation.

3.2.2. Narrowly Defined Legal Ground of the Corporate Criminal Liability

Although the coming into force of the law pertaining to the corporate criminal liability constitutes a positive development, we find that the given law quite narrowly determines the legal ground of the corporate criminal liability, what may adversely affect the course of the anticorruption reform in Serbia.

Actually, like the aforementioned CoE documents[44], the recently adopted law is based on the *alter ego* theory of liability, which indicates that there is such unity between the corporation and the individual that the separateness of the corporation has ceased and holding only the corporation liable would be unjust.[45] Although, both, the recently adopted Serbian law and the CoE instruments state that the imposition of liability upon the enterprise shall not exclude a responsibility of the alleged physical perpetuator, they set forth different terms and conditions for the criminal liability of the natural person implicated in the offence. Actually, while the Recommendation[46] and the

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[42] Article 2 of the Law, *supra* note 31.

[43] See Recommendation xxiii of the Joint First and Second Round Evaluation Report on the Republic of Serbia, *supra* note 37.

[44] Recommendation No. R (88) 18 of the Committee of Ministers to Member States concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities and the CoE Criminal Law Convention on Corruption.

[45] See http://www.houston-opinions.com/law-alter-ego-piercing-corporate-veil.html.

[46] See point I.5 of the Recommendation No. R (88) 18, *supra* note 45: "The imposition of liability upon the enterprise should not exonerate from liability a natural person implicated in the offence. In particular, *persons performing managerial functions* should be made liable for breaches of duties which conduce to the commission of an offence."

Convention[47] has been interpreted as finding that the corporate criminal liability derives from the criminal liability of the natural person which is implicated in the offence, (whether he is the responsible person or other person performing managerial functions), the recently adopted Law, stipulates that liability of legal entities shall be only based upon culpability of the responsible person.[48] In other words, according to Serbian legislation, the legal person shall not be held accountable for criminal offences committed by the natural persons performing managerial functions within the enterprise other than responsible person. This limitation, inherent to identification doctrine, which has been accepted by the Serbian lawmakers,[49] will have negative impact on combating corruption and as such shall be amended.

3.2.3. Correlation between Responsibility for Commercial Offences and Corporate Criminal Responsibility

Arguably, this narrowly defined category of corporate criminal liability within Serbian legal framework is strongly influenced by the inherited concept of liability for commercial offences, which is deeply rooted in this region.

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[47] See Article 18, paragraph 1 of the Criminal Law Convention " […] legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person[…]"

[48] See Article 6 of the Law on the Liability of Legal Entities for Criminal Offences: "A legal person shall be held accountable for criminal offences which have been committed […] by a responsible person within the remit, that is, powers thereof.[…]." In addition Article 7, paragraph 1 of the concerned law finds that the liability of legal entities shall be based upon culpability of the responsible person.

[49] The traditional method by which companies are held criminally responsible in English law is under the identification doctrine. If an individual who is sufficiently senior within the corporate structure as to represent metaphorically the "mind" of the company commits a crime within the course of his or her employment, that act and *mens rea* can be attributed to the company. The company can be "identified" with these acts and held directly accountable. The identification theory, has been criticized as too narrow in that only the actions of high-level managers with decision-making authority over corporate policy trigger liability in the corporation, while a company cannot be identified with a crime committed by a person lower down in the corporate hierarchy. See http://webjcli.ncl.ac.uk/1998/issue2/clarkson2.html#Heading8 and Vrhovšek, *supra* note 39, p. 25.

Namely, in comparison with most European countries, criminal responsibility of legal persons in Serbia is not a brand-new category, mostly due to the fact that domestic legal system recognized for years responsibility of legal persons for commercial offences.[50]

The concept itself had been introduced for the first time in the legal framework of the Federal People's Republic of Yugoslavia, while the subsequently adopted and amended Law on Commercial Offences of 1977,[51] is still in force in Serbia. The need to modify or repeal the given law has been stressed lately in Serbia by various authors as to be in compliance with the new set of laws including the law regulating corporate criminal liability.[52]

The Law on Commercial Offences defines a "commercial offence" as a "violation of rules on commercial and financial business committed by legal person and responsible person within the legal person, which has caused or could have caused severe consequences and which in the provisions issued by the authorized body is specified as a commercial offence."[53]

The responsibility of legal entities for commercial offences has been regulated as *sui generis* penal responsibility.[54] The term may be misleading, and for that reason it is important to note that responsibility for commercial offences is usually characterized as steering a middle course between criminal and penal responsibility, having combined features of both forms. Consequently, as it was explained earlier in the text, the adoption of the law on strict criminal responsibility of legal persons does present a positive development.[55]

However, the new law takes almost the same position as the previous one when it comes to determination of physical perpetuators, whose actions are supposed to lead to the corporate criminal liability. In other words, the new law failed to make sharp turn towards widening the ground of the corporate criminal liability. Similarly to the Law on Commercial Offences that had

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[50] *Ibidem.*

[51] Law on Commercial Offences ("Official Gazette of the SFRY" No. 4/1977, "Official Gazette of the SRY" No. 27/92, 16/93, 31/93, 41/93, 50/93, 24/94, 28/96, 64/2001, and "Official Gazette of the RS" No. 101/2005).

[52] Vrhovšek, Miroslav, Kritički prikaz Zakona o izmenama i dopunama Zakona o javnom informisanju sa aspekta usaglašenosti sa Zakonom o privrednim prestupima, Pravni informator, available at: www.informator.co.yu/tekstovi/kritički-prikaz 1009.htm.

[53] Article 2, paragraph 1 of the Law on Commercial Offences, *supra* note 52.

[54] Vrhovšek, Miroslav, *supra* note 39, p. 31

[55] Vrhovšek, Miroslav, *supra* note 39, p. 27.

determined legal person and responsible person as sole supposed perpetuators, the Law on the Liability of Legal Entities for Criminal Offences has stated that responsible person is only possible physical perpetuator of the crime. In having done so, apparently, it failed to fully comply with the wording of Recommendation No. R (88) 18 concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities and Criminal Law Convention on Corruption.

Besides the presented shortcomings of the recently adopted law pertaining to corporate criminal responsibility it is worth mentioning that, in its compliance report of 2008, GRECO also recalled that there are no provisions establishing civil or/and administrative liability of legal persons for corruption or corruption-related offences exist. (No progress has been observed meanwhile in this regard.)

3.3. Law on the Anti-Corruption Agency[56]

The Law on Anti-Corruption Agency, adopted in November 2008, has been deemed as one of the key priorities of the Serbian Government in the EU accession process. Also, this Law has advanced the implementation of the Serbian commitments under the UNCAC, particularly one related to the existence of an appropriate independent body or bodies within the respective States Parties in charge of preventing corruption.[57] Furthermore, this law is of great significance when it comes to achieving compliance of Serbian framework with a number of GRECO recommendations. This law will be assessed in the light of meeting the GRECO recommendations.

The Law on Anti-Corruption Agency is advanced since it establishes the Anti-Corruption Agency as well as it provides the definition of corruption within the Serbian legal framework. Pursuant to this law, the Anti-Corruption Agency, as an anticorruption institutional cornerstone, shall become fully operational on January 1, 2010, while up to that time, the Ministry of Justice is competent for implementation of the National Strategy for the Fight against Corruption and its Action Plan.[58]

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[56] Law on the Anti-Corruption Agency, *supra* note 9.

[57] See Article 6 of the UNCAC.

[58] According to the Law, the AC Agency is to monitor the implementation of the Serbian National Strategy for Combating Corruption, and its Action Plan, coordinate the work of the state institutions in fighting corruption, suggest changes of current laws and recommend new laws which are of importance to fight corruption.

3.3.1 GRECO Recommendation on the Effective Monitoring of the Implementation of the Action Plan to the Strategy for Combating Corruption

The GRECO *inter alia* recommended that the Action Plan for the Implementation of the National Anti-Corruption Strategy should be adopted and that an efficient monitoring of its implementation should be ensured.[59] The GRECO later concludes that recommendation xiii had been implemented satisfactorily as the Law on Anti-Corruption Agency entrusted the Anti-Corruption Agency with the monitoring of the Anti-Corruption Strategy and its Action Plan (meanwhile adopted in 2006).[60] However, GRECO, in its compliance report, further expressed hopefulness that the Anti-Corruption Agency, which would be responsible for, *inter alia*, monitoring the implementation of the Anti-Corruption Strategy and its Action Plan, would be vested with sufficient authority and resources to effectively complete its oversight task.

We find that Agency's accountability to the National Assembly to whom it has to report annually concerning progress in implementation[61] as well as structure of Agency's Management Board involving a broad range of stakeholders coming from both governmental and nongovernmental sectors[62] ensures a sufficient level of independence in order to effectively fulfill its monitoring tasks.

When it comes to Agency's competencies, the given law entitles the Agency to monitor the implementation of the National Anti-Corruption Strategy and its Action Plan, as well as to coordinate the work of the state institutions in fighting corruption, to suggest changes of current Laws and recommend new Laws which are of importance to fight corruption.

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[59] Joint First and Second Evaluation Round Report on the Republic of Serbia, adopted by GRECO at its 29th Plenary Meeting, June 2006, *supra* note 40.

[60] The Joint First and Second Round Evaluation Report on the Republic of Serbia, *supra* note 37.

[61] See Article 3 of the Law on the Anti-Corruption Agency. In addition it is worth noting that opposite to the Anti-Corruption Agency, the Anti-Corruption Council, founded in 2001, has been limited to advising the government and as governmental advisory authority, having the status of the governmental "working group", has not been provided with a sufficient level of independence.

[62] Articles 8 and 9 of the Law on the Anti-Corruption Agency.

However, it should be kept in mind that there is a common problem of the implemetation of laws in Serbia due to the lack of human, financial and technical resources to adequately carry out respective mandates.[63] In May 2008 six independent State bodies (the Ombudsman, the State Audit Institution, the Commissioner for Free Access to Public Information, the Committee for the Suppression of Conflicts of Interest, the Public Procurement Commission and the Commission for the Protection of Bidders' Rights) expressed concerns about the difficulties they face in carrying out their duties, In particular, they complained about inadequate working conditions due to the lack of resources (staff and funding) that undermine their independence.[64]

In 2009, the Anti-Corruption Agency was already allocated premises, budgetary resources and initial technical and administrative assistance as well as its executive board was elected.

However, it will be equally important and challenging for the Serbian authorities to provide long term resources for the Anti-Corruption Agency performance. The brief comparative overview demonstrates that the sustainability of some of the EU Member States anti-corruption agencies, such as those from Slovenia and Italy, has been significantly undermined lately.[65]

3.3.2. GRECO Recommendation on Expansion of the Application of the Law on the Prevention of Conflicts of Interest in the Discharge of Public Office

The inclusion of broad definition of the term "public official" in the Law on the Anti-Corruption Agency contributes towards achieving the compliance with the GRECO recommendation xvii. Actually, GRECO recommendation xvii refers to expansion of the application of the Law on the Prevention of Conflicts of Interest in the Discharge of Public Office (hereinafter "Law on the Prevention of Conflict of Interest") so that it would include all public officials who perform public administration functions without excluding those

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[63] "The Fight against Corruption in Serbia: An Institutional Framework Overview", UNDP Serbia, Independent report, April 2008, http://europeandcis.undp.org/anticorruption/show/05788DCA-F203-1EE9-B164C824E7DA18D7.

[64] Commission Staff Working Document (Commission of the European Communities), Serbia 2008 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009. In addition the Serbia 2009 Progress Report has similar findings, *supra* note 2.

[65] Nenadic, Nemanja, *supra* note 17, p. 43.

indicated in Article 2 of the concerned Law (i.e. judges and public prosecutors[66] as well as officials appointed to organs of institutions and other organizations whose founder is the Republic of Serbia, the autonomous province, the municipalities, the towns and the City of Belgrade)[67]

Actually, in comparison with the definitions contained in Article 2 of the Law on Civil Servants[68] and Article 2 of the Law on the Prevention of Conflicts of Interest, the Law on the Anti-Corruption Agency includes a wider definition of public official as to allow for the applicability of the measures provided for by the Law on the Prevention of Conflicts of Interest to all public officials who perform public administration functions, in line with the recommendation. In particular, the notion of public official under the Law on the Anti-Corruption Agency covers any person elected, appointed or nominated to the bodies of the Republic of Serbia, autonomous province, local self-government unit, bodies of public enterprises, institutions and other organizations established by the RS, autonomous province, local self-government unit and other person elected by the National Assembly.[69]

Despite this extended concept of public officials that had been incorporated in the Law on the Anti-Corruption Agency, the GRECO, in its compliance report, concluded that recommendation xvii had been only partly implemented and it looked forward to receiving additional information on establishment of this unequivocal framework. However, in interpreting this conclusion, it shall be taken into account that at time of the completion of the GRECO compliance report, the Law on the Anti-Corruption Agency was still not adopted.

3.3.3. GRECO Recommendation on the Introduction of the Post-Service Restrictions

The Law on the Anti-Corruption Agency is also pertinent in assessing Serbian compliance with GRECO recommendations, as it introduces restrictions and control of post-employment business activities in line with the Rec-

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[66] See Article 2, paragraph 2 of the Law on the Prevention of Conflicts of Interest in the Discharge of Public Office, ("Official Gazette of the RS" No. 43/04).

[67] Article 2, paragraph 3 of the Law on the Prevention of Conflicts of Interest, *supra* note 67.

[68] Law on Civil Servants („Official Gazette of the RS", No. 79/05, 81/05, 83/05, 64/07, 67/07 and 116/08).

[69] Article 2 of the Law on the Anti-Corruption Agency.

ommendation xviii. The given recommendation xviii refers to *pantouflage* or in other words, it recommends to clearly regulate the situations where public officials move to the private sector *("pantouflage")* in order to avoid situations of conflicts of interest. In this regard is relevant Article 38 of the given law pertaining to prohibition of other employment or business relations following termination of public office as it sets forth two-year "cooling-off" period. The GRECO, in its compliance report, founded that recommendation xviii had been only partly implemented as at the time of completion of the report the Law on the Anti-Corruption Agency was still not adopted. In that regard, the GRECO having welcomed the ongoing reform process encouraged the authorities to proceed swiftly with the adoption of the given draft.

3.3.4. GRECO Recommendation on the Lowering the Value of Gifts that May be Accepted by Public Officials

The draft Law on the Anti-Corruption Agency includes specific provisions with a view to meeting recommendation xix on lowering the value of gifts that may be accepted by public officials.[70] More specifically, GRECO recommended lowering the value of any gifts that might be accepted by public officials (i.e gifts whose value does not exceed half the average monthly salary) to levels that clearly do not raise concerns regarding bribes or other forms of undue advantage.[71]

The GRECO concluded that recommendation xix has been only partly implemented. Although a general ban on the acceptance gifts in public service had been laid down in the draft Law on the Anti-Corruption Agency, GRECO found that exceptions to this general ban should be further regulated, i.e. concerning protocol/appropriate presents. Namely, the GRECO remarked, that provisions as regards handing over protocol gifts to specialized agency responsible for managing public property should be modified as to get regulated in unambiguous manner. GRECO, *inter alia*, noted that certain gifts, i.e. so- called "appropriate" gifts, may be accepted by public officials if its value does not exceed 5% of the average net monthly salary in the RS. However, the GRECO further stated that while the maximum acceptable value for the so called "appropriate" gifts was established in the draft Law on the Anti-Corruption Agency, the law failed to determine criteria on their "appropriateness".

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[70] Chapter IV of the Law on the Anti-Corruption Agency (Article 39-43).

[71] Joint First and Second Evaluation Round Report on the Republic of Serbia, adopted by GRECO at its 29th Plenary Meeting, June 2006, *supra* note 40.

3.3.5. GRECO Recommendation on the Protection of Whistleblowers

The Law on the Anti-Corruption Agency in conjunction with the Law on Civil Servants and the Law on the Prevention of Conflicts of Interests contributes towards achieving compliance with the GRECO recommendation xxi on whistleblowers' protection. More specifically, the GRECO recommended that should be ensured that civil servants who reported suspicions of corruption in public administration in good faith (whistleblowers) were adequately protected from retaliation when they reported their suspicions. Besides legal amendments of the Law on Civil Service and the Law on Free Access to Information of Public Importance incorporating the appeal mechanism, confidentiality applications and similar measures tailored for the protection of the whistleblowers, the Law on the Anti-Corruption Agency also contains specific provision aimed to ensure adequate protection of whistleblowers.

Namely, Article 56 of the Law on the Anti-Corruption Agency reads that the person whose report was used to initiate the proceedings or other person who gives a statement in the proceedings referred to in article 50 hereof may not suffer consequences. The GRECO concluded that recommendation xxi had been only partly implemented having placed particular emphasis on the need for the strengthening adequate implementation mechanism in this regard. As it has been explained earlier in the text, it is noteworthy that at the time of completion of the compliance report, the Law on the Anti-Corruption Agency was still not adopted.

4. Conclusion

The unfavorable Serbian TI CPI for 2009 clearly proves that problems of corruption in transitional countries are usually quite serious, especially in countries such as Serbia, which entered the transition from a disadvantageous position of political, economic and social isolation and instability it faced before political changes in 2000.

Although Serbia have made progress in the combating corruption, within the scope of this analysis have been identified certain areas and sectors, where the achieved progress is not so evident and transparent. For that reason these areas require further improvements.

From the legislative standpoint, it might be concluded that the Law on Anti-Corruption Agency does present a positive development. This law is

of great significance when it comes to achieving compliance of Serbian framework with a number of GRECO recommendations that have been discussed earlier in the text. More specifically, the Law on the Anti-Corruption Agency is very advanced since it establishes the Anti-Corruption Agency as independent monitoring body, includes provision on the whistleblowers' protection, as well as it sets forth restrictions concerning the post employment business activities and restrictions on the acceptance of gifts in public service. In addition, it is noteworthy that this piece of legislation provides the all-encompassing definition of the corruption as well as the extended definition of the term public official.

The trend of law reform progress is also apparent when it comes to the public procurement matters. Actually, the Public Procurement Law ensures institutional independence of the public procurement bodies as well as it increases the transparency of the public procurement procedures. Furthermore, it enhances specialization in public procurement matters as well as it introduces the anticorruption clauses. However, further improvements of the public procurement legislation are necessary as regards the scope of exemptions and excluded contracts, as well as the conditions for use of the restricted procedure.

The recently adopted Law on the Liability of Legal Persons for Criminal Offences is quite advanced as it introduces corporate criminal liability that is *inter alia* applicable on perpetuators of corruption offences. However, the undergone review demonstrates that the given law narrowly determines the legal ground of the corporate criminal liability, what may adversely affect the course of the anticorruption reform in Serbia. This narrowly defined category of corporate criminal liability within Serbian legal framework is not in compliance with the wording of Recommendation No. R (88) 18 concerning Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities and Criminal Law Convention on Corruption. Actually, the envisaged limited legal ground of the corporate criminal liability implies that only actions of the responsible persons are supposed to lead to the corporate criminal liability. This limitation, inherent to identification doctrine, which has been accepted by the Serbian lawmakers,[72] will have negative impact on combating corruption unless it is going to be amended.

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[72] The identification doctrine has been presented earlier in the text, *supra* note 50.

In a nutshell, we conclude that state authorities need to equally reinforce legislative, institutional and technical mechanisms for combating corruption, set up in line with international standards in an effective, transparent and efficient way in order to continue to promote and strength prevention and fight against corruption.

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KOMPATIBILNOST SRPSKOG ANTI-KORUPCIJSKOG ZAKONODAVSTVA SA REGIONALNIM I MEĐUNARODNIM STANDARDIMA

Rezime

Rad analizira zakonodavne i institucionalne mere u oblasti borbe protiv korupcije s posebnim osvrtom na javne nabavke, krivičnu odgovornost pravnih lica, kao i Agenciju za borbu protiv korupcije.

Napredak koji je Srbija ostvarila u suzbijanju korupcije se pre svega ocenjuje u svetlu ispunjenosti pojedinih preporuka GREC0-a.

Ključne reči: *Agencija za borbu protiv korupcije, GRECO, Nacionalna strategija za borbu protiv korupcije, javne nabavke, krivična odgovornost pravnih lica, Indeks percepije korupcije.*

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