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STATE CAPTURE OF BOSNIA AND HERZEGOVINA'S JUDICIARY AND PUBLIC PROSECUTION: WHAT CAN BE DONE?

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CONTENTS

3	INTRODUCTION
4	1. BECOMING A JUDGE OR PROSECUTOR
5	2. PROTECTING JUDGES AND PROSECUTORS
6	3. SANCTIONING JUDGES AND PROSECUTORS
8	4. PROMOTING JUDGES AND PROSECUTORS
9	5. MAKING JUDGES AND PROSECUTORS DISCLOSE THEIR ASSETS
10	6. FINANCING THE JUDICIARY AND PROSECUTION
11	7. ASSIGNING INDIVIDUAL CASES TO PROSECUTORS AND JUDGES
12	8. INTRODUCING CHECKS AND BALANCES FOR PROSECUTORIAL DISCRETION
13	9. INCREASING THE NUMBER OF COMPLEX AND HIGH-PROFILE CASES
14	10. MAKING THE JUDICIARY ACCOUNTABLE TO THE PUBLIC
15	CONCLUSIONS
16	ANNEX: WHAT NEEDS TO BE DONE?

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INTRODUCTION

In spite of more than two decades of intensive reforms, the majority of experts, legal professionals and the public agree: Bosnia and Herzegovina's judiciary and public prosecutors remain captured. In 2020, almost three quarters (74 percent) of citizens said they either totally distrust or tend not to trust the country's courts.¹ In 2015, nine out of ten legal professionals stated that corruption is present among judges and prosecutors.

In an attempt to push for reform, and to protect judges and prosecutors from undue political and economic influence, the European Union (EU) has deployed and financed various political and technical instruments. The Structured Dialogue on Justice, which started in 2011, aimed to facilitate discussions and develop recommendations for reforming the state-level judiciary. The EU also provided for numerous expert missions and peer reviews, including the one led by Reinhard Priebe, former German judge and high official of the European Commission, who helped North Macedonia to start dismantling its state capture. Since May 2019, the EU has also made the opening of accession talks conditional on rule of law reforms.

Under pressure to deal with attacks on the judiciary and prosecutors in the EU itself, policymakers in Brussels and other EU capitals might well ask what more they could do to support Bosnia and Herzegovina (BiH). The answer starts with a proper

understanding of *who*, if anyone, can improve the judiciary and prosecution in BiH, and *what changes are required*.

When it comes to *who*, a growing constituency of individuals and groups—within the judiciary and prosecution themselves, parliaments and different levels of government, civil society organisations and informal groups—show the interest, commitment and capacity to do it. However, they have to earn the support of the relevant actors within judicial and executive branches, as well as of political majorities in the legislative branch. It is they who will drive the reforms and make them sustainable.

To address the state capture of BiH's judiciary and prosecution, a comprehensive reform effort will be required. This policy paper, based on a study published in January 2021, takes a closer look at the role of judges and public prosecutors in BiH, as well as how to improve their selection, protection, sanctioning, promotion, financing and incentives to deal with complex and high-profile cases.² This paper also explores potential improvements to the systems for disclosing assets and assigning cases. Accountability of the judiciary, including proactive transparency and prosecutorial discretion, are also discussed. The paper aims to explain, at a concrete level, why ambition is key when drawing up reforms. It also provides suggestions for their content.

1 Regional Cooperation Council, Balkan Barometer 2020 (2020), available: <https://www.rcc.int/pubs/95/balkan-barometer-2020-public-opinion-survey>

2 "The Blindfolding Justice in Bosnia and Herzegovina? State Capture of Bosnia and Herzegovina's Judiciary and Public Prosecution" (January 2021), available: https://osfbih.org.ba/images/Progs/17+/LP/Pubs/Is_justice_in_BiH_really_blind.pdf

1. BECOMING A JUDGE OR PROSECUTOR³

The judiciary in BiH is composed of four subsystems, mirroring the administrative and territorial structure of the country. The High Judicial and Prosecutorial Council (HJPC) is the umbrella institution, responsible for appointing judges and prosecutors. According to the law, all judges and prosecutors in BiH should be appointed on the basis of merit. They should be individuals who possess integrity, high moral standing, and demonstrate professional ability with the appropriate training and qualifications.

The appointment procedure has several steps: receipt and checking of applications, qualification (written) exam, interview, ranking, and proposal of candidates to the HJPC. In the last phase, a nominated Sub-Council is formed to complete the appointment procedure. It is composed of HJPC members and selects candidates and decides whom to invite for interview. After the interviews, it recommends the best candidates for appointment.

Even among legal professionals in BiH, this procedure is recognised as controversial. For example, it allows members of the HJPC, who come from the lower courts and lack adequate qualifications, to evaluate the quality and legal knowledge of candidates who are applying to higher judicial positions. This does not guarantee that the best candidates are appointed to the most senior roles.

There are also concerns with the written test. Experts consider it too extensive and demanding. From a methodological and content perspective, it is not drawn up in a way that would help identify the most

competent candidates. The 20 percent weight given to the interview allows the scoring of candidates to be manipulated. Points can be awarded based on biased or even political criteria, allowing those with the right connections to jump to the top of the list of successful candidates.

Unsuccessful candidates report that they were not able to review the test results, check their answers to specific questions, or find out how they were rated by interviewers. Decisions lack a detailed explanation of why a particular candidate was selected and contain only generic phrases. Furthermore, the law on HJPC does not secure the right to appeal the decision.

Successful candidates are appointed without a probation period, and until they reach the mandatory retirement age of 70. The grounds for early removal from office are limited to disciplinary proceedings or permanent loss of working capacity (medical reasons).

Recommendations

The objectivity and transparency of the appointment process must improve and be based on merits, ethics and integrity. This depends on the amendment of the law on the HJPC, which should ensure that HJPC decisions on the appointment of judges and prosecutors are subject to appeal before a court.

The HJPC needs to keep more detailed documentation in relation to each candidate. It is also crucial that judges of a higher court must be appointed by their peers at the same level.

³ Ibid., p. 47f.

2. PROTECTING JUDGES AND PROSECUTORS⁴

International standards require that judges decide matters independently and impartially, free of, *inter alia*, threats, intimidations and inappropriate influences, direct or indirect. To that end, states must ensure that laws include sanctions against people seeking to influence judges in any such manner. The same standards apply to prosecutors and members of their families.

In BiH, the protection of holders of judicial functions and judicial buildings is done by the court police. Threats towards and intimidation of judges or prosecutors, as well as obstruction of justice and bribery, are regulated in the criminal codes.

Judges and prosecutors in BiH are subject to undue political, economic, and hierarchical influence. Politicians, members of the executive and parliaments at different levels of governance in BiH have routinely commented on the work of the judiciary, including individual cases and judges. In doing so they often cross the boundaries of professional and constructive criticism, and exert direct political pressure.

This influence assumes different forms. One is direct pressure from superiors. The other is self-censorship, which is more subtle: judges and prosecutors anticipate that the “wrong” decision in a case of interest to various power groups is likely to harm their career prospects.

Authorities have registered a rise in the number of threats and intimidations. Experts agree that the reasons are ineffective investigations and trials, and/or lenient sentences for those who end up being prosecuted.

Furthermore, in the last few years the work of the HJPC has been strongly criticised by experts and the public, among others, due to their alleged political connections and the misconduct of the President and members. Apart from the resignation of the HJPC President in December 2020, no significant steps have been taken to address this criticism.

Recommendations

Taking into account the importance of the HJPC, it is crucial to amend the law relating to it. These changes should clearly define the criteria, conditions and procedures for the appointment and removal of HJPC members.

Furthermore, safeguards against threats and intimidation of judges and prosecutors must become more effective in practice. Ways need to be found to end the practice of ad hominem attacks on judges and prosecutors and unwarranted criticism of the judiciary and prosecution. Politicians should also refrain from commenting on current investigations and judicial processes.

CASE STUDY

Your Very Own Prosecutor

https://osfbih.org.ba/images/Progs/17+/LP/Pubs/Is_justice_in_BiH_really_blind.pdf#page=34

4 Ibid., p. 64.

3. SANCTIONING JUDGES AND PROSECUTORS⁵

The HJPC has a responsibility to receive, register and act upon complaints against judges and prosecutors, conduct disciplinary proceedings against them, establish disciplinary liability and impose disciplinary measures. However, the rules and institutions in charge of implementing them are either redundant, or are major structural obstacles to guaranteeing a modicum of independence.

Dismissal is allowed only for serious and severe offenses, and it is seldom applied. This is when the offender is deemed unfit or unworthy to continue to hold the office, or in the case of permanent loss of working capacity. This decision is taken by the HJPC and in certain circumstances can be reviewed by the Court of BiH.

Mandatory suspension is only possible when a judge or a prosecutor is held in pre-trial detention. Discretionary suspension is possible pending criminal, disciplinary or dismissal proceedings and if the performance of official functions is impaired because of a mental, emotional, or physical condition.

Other disciplinary measures include a written warning, public reprimand, salary reduction of up to 50 percent for a maximum period of one year, temporary or permanent reassignment to another court, demotion of a court president to an ordinary judge, and dismissal.

The issue, however, is not the disciplinary measures at the Office of the Disciplinary Counsel's disposal, but insufficient clarity as to what constitutes a disciplinary offense. Some of the 23 listed disciplinary offenses in the law on the HJPC seem redundant, whereas others are already proscribed

by the criminal code and should not be dealt with through disciplinary proceedings.

The Office of the Disciplinary Counsel, as the institution in charge of disciplinary proceedings, is itself part of the HJPC. The Chief Counsel of the Office is appointed by the HJPC for a renewable four-year term. HJPC members also dominate the First Instance Disciplinary Panel and are exclusive members of the Second Instance Disciplinary Panel. The HJPC as a whole presides and decides in third instance proceedings. As a rule, its final decisions are not subject to external review by a court of law. This all creates a dependency that can lead to self-censorship in sensitive cases and brings into question the independence of the Office.

According to media reports on individual disciplinary proceedings, these disciplinary panels are inclined to hand down only minor disciplinary measures. The most severe measure removal from office was ordered only 12 times in the last 15 years, for eight judges and four prosecutors.

Another issue is the Office's lack of capacity, which undermines the efficiency and effectiveness of disciplinary proceedings. The Office receives a high number of complaints per year (1,200 on average) and initiates one-third of all proceedings *ex officio*. In 2018, the Office received 897 complaints and initiated a mere 33 disciplinary proceedings.

Neither the law nor the practice of disciplinary liability in BiH appear to serve their main purpose of ensuring accountability in the daily work of judges and prosecutors and serving as a deterrent to malpractice.

⁵ Ibid., p. 63f, p. 70f.

Recommendations

While provisions on the conditions and criteria for removal and suspension appear to be in accordance with international standards, the law on HJPC should be amended. The list of disciplinary offenses needs to be reviewed and clarified, with a view to reducing the scope for the arbitrary application of the relevant provisions in specific cases, as well as separating disciplinary offenses from negative performance evaluations. The most serious offenses need to be consistently and adequately sanctioned.

The role of the HJPC in disciplinary proceedings should be reduced, so to ensure the full institutional, financial and personal independence of the Office of Disciplinary Counsel. It should be resourced adequately. The first instance disciplinary proceedings should be dealt with by reputable jurists who are not members of the HJPC. Disciplinary proceedings should be made more transparent.

The disciplinary liability of members of the HJPC BiH, in their capacity as members of that institution (and not merely as judges or prosecutors), should be comprehensively addressed and regulated.

CASE STUDY

Lenient Sanctions for Judges' and Prosecutors' Mistakes

https://osfbih.org.ba/images/Progs/17+/LP/Pubs/Is_justice_in_BiH_really_blind.pdf#page=73

CASE STUDY

A Neighbourly Deal between A Judge and A Convict

https://osfbih.org.ba/images/Progs/17+/LP/Pubs/Is_justice_in_BiH_really_blind.pdf#page=35

4. PROMOTING JUDGES AND PROSECUTORS⁶

The career path of judges and prosecutors is not legally regulated. However, the HJPC has responsibility for establishing the criteria for the evaluation of their work. In 2018, it adopted a new set of criteria. Since it has only been applied since 2019, it is too early to analyse how well it works in practice. But to bring about positive change, it should lead to fewer generic evaluations and privilege quality over quantity in cases.

One worrying trend is that for some promotions, disciplinary sanctions are no obstacle to advancement. For example, a lenient disciplinary sanction did not affect the career of one judge on the Municipal Court in Sarajevo. After being sanctioned, he was appointed as a Federation of BiH Supreme Court judge. Another municipal court judge in Gradacac, who worked on three criminal cases related to theft, fraud and violent behaviour, received a salary cut after she did not finish examining the cases before the statute of limitations expired. Four years later, the HJPC members reappointed her for the second time as the same court's president.

Recommendations

The career advancement of judges and prosecutors must be based on merit, especially for the presidents of courts and chief prosecutors. This makes monitoring the newly adopted criteria for the evaluation of judges and prosecutors necessary. The application of these criteria should privilege the quality of cases over their quantity. This is of particular importance for the merit-based appraisal of judges.

Moreover, the career implications of disciplinary sanctions should be clarified. HJPC members who come from courts of lower instance are not qualified to evaluate the quality and legal expertise of candidates for higher courts, and should not do so.

⁶ Ibid., p. 53f.

5. MAKING JUDGES AND PROSECUTORS DISCLOSE THEIR ASSETS⁷

The law on HJPC adopts a narrow definition of the information that members of the judiciary are required to disclose. Judges and prosecutors file their statements annually, reporting their income, any activities outside of their regular job, and relevant activities of their spouses and children, including possible involvement with political parties.

Two of the most critical issues with the current disclosure system undermine its main purpose and effectiveness. First, the HJPC receives and archives, but does not have the capacity to review the information submitted (even through random checks), and in practice does not do so—despite a clear obligation. Sanctions for false reporting, or even

non-reporting, do not exist. And unlike in some other countries in the region, financial statements are not made public, citing privacy rights.

Recommendations

Changes to the disclosure system should aim to include a broader notion of relevant activities and benefits, as well as to make these publicly available. Furthermore, mandatory review of the information submitted (at a minimum through random checks) should be introduced. The non-reporting of a potential conflict of interest should be considered a serious disciplinary offense.

CASE STUDY

Judges and Prosecutors: Public Office, Classified Assets

https://osfbih.org.ba/images/Progs/17+/LP/Pubs/Is_justice_in_BiH_really_blind.pdf#page=84

⁷ Ibid., p. 79f.

6. FINANCING THE JUDICIARY AND PROSECUTION⁸

Courts and prosecutors' offices in BiH are financed from 14 different sources. Each administrative level of the judicial system (state, entity and cantonal) is financed by its own budget.

The procedure for courts and prosecutors' offices is the same as for all other recipients of the budget. Following the applicable legal provisions, the offices prepare the budget and submit it to the ministries of justice and/or finance. The latter prepare a draft budget and send it to the (respective) governments for approval. Once approved, the draft budget is submitted to the respective parliaments for a decision.

The budget allocated to the judiciary is steadily rising. But it is approximately 9.2 million EUR lower than the minimum required for efficient functioning, as estimated by HJPC.

Furthermore, the process of planning and allocation of budgets often depends on informal, even personal relations between the judges responsible and those in the executive authorities. There are examples of more generous funding being allocated to institutions whose members maintain closer connections with the executive branch, while institutions which have equal or even larger needs receive less.

A noteworthy exception to this practice is Brcko District. There, the relevant law explicitly stipulates that the executive may not modify the budget submitted by its judicial institutions.

Recommendations

It is necessary to ensure full financial independence of the judiciary, in accordance with international standards. This should be done by introducing an adequate budgeting process and a separate budget for the judiciary, administered by a body independent from the executive branch.

⁸ Ibid., p. 22f.

7. ASSIGNING INDIVIDUAL CASES TO PROSECUTORS AND JUDGES⁹

The HJPC adopted rules on automated case management in courts and prosecutor offices in BiH. The allocation of cases is done automatically according to pre-established parameters, and these are the same everywhere. Most courts and public prosecutor offices use this system. It assigns cases randomly and is intended to prevent judges and prosecutors from cherry-picking them.

Reassignment of cases is allowed. It can be performed only by the chief prosecutor and court president, on condition that they provide a written reasoning for each reassignment. The reasoning must then be filed on the online case management system.

However, the media regularly reports on problematic case reassignments. During 2017 and 2018, the Sarajevo Canton Prosecutor's Office filed three indictments on organised crime charges against lawyers, judges, court clerks and court couriers. Some clerks had manipulated the system by

temporarily turning off the automatic assignment of cases. One clerk took a bribe from a lawyer to assign his cases to a judge of his choice.

This example is the tip of an iceberg. More common is the practice of court presidents and chief prosecutors reassigning cases without appropriate reasoning, or failing to record their justification for doing so. Since there is no proper procedure to review the reassignment process, or any record of the number of reassigned cases, the current system leaves a great deal of scope for abuse.

Recommendations

The HJPC should keep a statistical record of reassignments and a review system should be installed. Monitoring of reasonings and record-keeping should be introduced and in cases where rules have been breached, appropriate disciplinary proceedings and sanctions should follow.

CASE STUDY

Special Prosecutors are Relativizing Major Crime

https://osfbih.org.ba/images/Progs/17+/LP/Pubs/Is_justice_in_BiH_really_blind.pdf#page=94

⁹ Ibid., p. 35f.

8. INTRODUCING CHECKS AND BALANCES FOR PROSECUTORIAL DISCRETION¹⁰

Prosecutors are entrusted with the authority to decide whether or not to bring criminal charges, and what charges to bring, as well as which cases can be resolved without criminal proceedings. While this is key part of their mandate, it is important to have adequate checks and balances in place to ensure accountability and prevent abuses.

In BiH, prosecutors are entrusted with initiating and conducting investigations. They have the authority to issue appropriate procedural acts, such as orders to conduct, not to conduct or terminate investigations. The prosecutor has a significant degree of discretion, except when the Chief Prosecutor instructs them differently.

Both the injured party and the person who filed criminal charges are authorized to file a complaint about an order not to conduct an investigation, but only the injured party is entitled to complain about an order to terminate it. This narrows the scope for supervising prosecutors' work. Furthermore, in the Republika Srpska the criteria for considering and deciding on complaints against decisions are not

set out clearly. In Brcko District and at the state level, no rules or guidelines prescribe the procedure for handling complaints. Furthermore, negative prosecutorial decisions are subject only to internal review.

It is also unclear whether law enforcement agencies (such as the police and tax authorities) have the right to file a complaint about an order not to conduct an investigation *after* they have filed criminal charges. The Prosecutor's Office in Banja Luka, for example, has rejected such complaints, while some offices in the Federation of BiH accepted them.

Recommendations

Prosecutorial accountability needs to be significantly enhanced, particularly in terms of introducing effective review mechanisms and transparency. So-called "negative" decisions by prosecutors, where they decided not to indict, should receive special attention. This includes ensuring that law enforcement agencies are allowed to initiate complaints, particularly in cases of corruption.

CASE STUDY

The HJPC Looked the Other Way on Judge's Poor Performance

https://osfbih.org.ba/images/Progs/17+/LP/Pubs/Is_justice_in_BiH_really_blind.pdf#page=78

¹⁰ Ibid., p. 25f.

9. INCREASING THE NUMBER OF COMPLEX AND HIGH-PROFILE CASES¹¹

The willingness of judges and prosecutors to take on complex and high-profile cases should be taken into account. These are time consuming and very often associated with some degree of personal risk, particularly in corruption cases, since the people involved possess political power, influence and financial means.

In the current appraisal system in BiH, judges and prosecutors are not given any performance credit for dealing with complex cases. In 2018, the HJPC adopted a new set of criteria for evaluating the work of judges and prosecutors. These have been in force since January 1, 2019. It is too early to analyse

the new criteria in practice, but it appears that quantitative indicators still prevail over qualitative ones. This means that lengthy procedures could result in a lower performance score. For judges and prosecutors, it is therefore convenient, less risky and even beneficial to work on more straightforward cases and achieve the required performance standards.

Recommendations

The appraisal system for judges and prosecutors in BiH should provide extra credit for dealing with complex and high profile cases.

¹¹ Ibid., p. 37f, p. 53f.

10. MAKING THE JUDICIARY ACCOUNTABLE TO THE PUBLIC¹²

Dialogue between the judicial, legislative, and executive powers and the public on the work of the judiciary is a normal occurrence in democratic societies. Such discussions are beneficial to everyone, but they need to take place with mutual respect and the understanding that the independence and impartiality of the judiciary is a fundamental part of a democratic society and needs to be preserved and strengthened.

The judiciary is responsible for demonstrating that it is using its powers for the appropriate purposes, in order to gain the trust of the public. But this accountability does not mean subordination to governments or parliaments. In this sense, it is important to distinguish between legitimate and respectful criticism, constructive proposals and undue pressure on the judiciary.

Parliaments at different levels routinely discuss the annual reports of judicial institutions. The purpose of these reports is to inform the public and other institutions about the state of the judiciary. In reality, it is common for parliaments not to adopt, or even to dismiss, the annual reports, as the Parliamentary Assembly of BiH and Sarajevo Canton Assembly have done recently. This practice has no basis in the

current legal framework and puts another form of undue pressure on the judiciary.

Transparency is considered to be a key element of the public dimension of accountability of the judiciary and prosecution. In BiH the measures intended to provide the basis for proactive transparency are currently either too general or too weak. For example, they require the building of public websites, but without indicating what kind of information they should provide.

Recommendations

Politicians, members of the executive and parliaments should find ways to set out what is considered legitimate and respectful criticism of the judiciary. Assemblies at all levels should refrain from the practice of not adopting or rejecting the annual reports of judicial institutions.

With the aim of gaining the public's trust, judicial transparency needs to be significantly enhanced in all aspects of judges' work—from the conduct of disciplinary proceedings to proactive publication of relevant information on both ongoing and completed cases, including judgments.

¹² Ibid., p. 84.

CONCLUSIONS

A closer look at these ten aspects of the judiciary and public prosecution in BiH paints a rather bleak picture of the system as a whole. Comprehensive reform is required.

It should start with the revision and update of relevant strategic documents, particularly the Anti-corruption Strategy and the Justice Sector Reform Strategy. These must address key structural deficiencies in the justice sector and set out decisive and concrete steps towards dismantling the effectively captured state of the judiciary and prosecution in BiH.

Serious and substantial changes to the High Judicial and Prosecutorial Council (HJPC) are needed. Alternative models of organisation and functioning should be considered, including the establishment of separate judicial and prosecutorial sub-councils. Moreover, the conditions and procedure for the appointment and removal of HJPC members should be based on clearly defined criteria. The role of the HJPC in disciplinary proceedings against judges and prosecutors should be reduced.

Together with changes to the appointment process for judges and prosecutors, as well as their evaluation, promotion and the disclosure system, these reforms of the HJPC and the disciplinary proceedings should be considered as a *condicio sine qua non*.

Based on these changes the EU, with other partners, should engage in designing, supporting, implementing and monitoring the evaluation process covering all judges and prosecutors in BiH. This process should lead to exclusion of all those who fail to meet the merit-based criteria.

It will not be enough to amend the laws and rules, or implement training. Changes to how things are done in BiH's judiciary and public prosecution are required. Only then can the judiciary and prosecution in BiH gain the public's trust.

ANNEX: WHAT NEEDS TO BE DONE?

Becoming a judge or a prosecutor

The objectivity and transparency of the appointment process must be increased and based on merit, ethics and integrity. This is contingent upon the amendment of the law on the High Judicial and Prosecutorial Council (HJPC), which should ensure that decisions of the HJPC on the appointment of judges and prosecutors are subject to appeal before a court.

Furthermore, the HJPC needs to keep more detailed documentation in relation to each candidate. It is also crucial that judges of a higher court be appointed by their colleagues from the same level.

Protecting judges and prosecutors

Safeguards against threats and intimidation of judges and prosecutors must become more effective in practice. Also, ways need to be found to stop the common practice of *ad hominem* attacks on judges and prosecutors and unwarranted criticism of the judiciary and prosecution. Politicians should also refrain from commenting on ongoing investigations and the judicial processes.

Sanctioning judges and prosecutors

While provisions on the conditions and criteria for removal and suspension appear to be in accordance with international standards, the law on HJPC should be amended. The list of disciplinary offenses needs to be reviewed and clarified, with a view to reducing the scope for the arbitrary application of the relevant provisions in specific cases, as well as separating disciplinary offenses from negative performance evaluations. The most serious offenses need to be consistently and adequately sanctioned.

The role of the HJPC in disciplinary proceedings should be reduced, so as to ensure the full institutional, financial and personal independence of the Offices of Disciplinary Counsel. It should be given adequate resources for its functioning. First instance disciplinary proceedings should be dealt with by reputable jurists who are not members of the HJPC. The transparency of disciplinary proceedings should be increased.

The disciplinary liability of members of the HJPC BiH in their capacity as members of that institution (and not merely as judges or prosecutors) should be comprehensively addressed and regulated.

Promoting judges and prosecutors

The career advancement of judges and prosecutors must be based on merit, especially for presidents of courts and chief prosecutors. Monitoring the newly adopted criteria for the evaluation of judges and prosecutors is therefore necessary. The application of these criteria should give qualitative measures greater weight than quantitative ones. This is of particular importance for the merit-based appraisal of judges.

Moreover, the career implications of disciplinary sanctions should be clarified. HJPC members who come from courts of lower instance are not qualified to evaluate the quality and legal expertise of candidates for higher courts, and should not do so.

Making judges and prosecutors disclose their assets

Changes to the disclosure system should aim to include a broader notion of relevant activities and benefits, as well as to make these publicly available. Furthermore, the mandatory review of the information submitted (at a minimum through random checks) should be introduced. The non-reporting of a potential conflict of interest should be considered a serious disciplinary offense.

Financing the judiciary and prosecution

It is necessary to ensure full financial independence of the judiciary in accordance with international standards. This should be done by introducing the adequate budgeting process and a separate budget for the judiciary, administered by a body independent from the executive branch.

Assigning individual cases to prosecutors and judges

The HJPC should keep a statistical record of reassignments and a review system should be introduced. Furthermore, monitoring of reasonings and record-keeping should be introduced and in cases where rules have been breached, appropriate disciplinary proceedings and sanctions should follow.

Introducing checks and balances for prosecutorial discretion

Prosecutorial accountability needs to be significantly enhanced, particularly in terms of introducing effective review mechanisms and transparency. So-called “negative” decisions by the prosecutors, where prosecutors decided not to indict, should receive special attention. This includes making sure that law enforcement agencies are allowed to initiate complaints, particularly in cases of corruption.

Increasing the number of complex and high-profile cases

The appraisal system for judges and prosecutors in BiH should provide extra credit for dealing with complex and high-profile cases and they should not result in a lower performance score.

Making the judiciary accountable to public

Politicians, members of the executive and parliaments should find ways to clearly set out what is considered legitimate and respectful criticism of the judiciary. Assemblies at all levels should refrain from the practice of not adopting or rejecting the annual reports of judicial institutions.

With the aim of gaining the public's trust, judicial transparency needs to be significantly enhanced in all aspects of their work – from the conduct of disciplinary proceedings to proactive publication of relevant information on both ongoing and completed cases, including judgments.

Strategic documents and the High Judicial and Prosecutorial Council

Revision and updates to all relevant strategic documents, particularly the Anti-corruption Strategy and the Justice Sector Reform Strategy, are needed. These must address key structural deficiencies in the justice sector and set out decisive and concrete steps towards dismantling the effectively captured state of the judiciary and prosecution in BiH.

Serious and substantial changes to the HJPC are needed. Alternative models of organisation and functioning should be considered, including establishing separate judicial and prosecutorial sub-councils. Moreover, the conditions and procedure for the appointment and removal of the HJPC members should be based on clearly defined criteria. The role of the HJPC in disciplinary proceedings against judges and prosecutors should be reduced.

Evaluation of all judges and prosecutors

Based on these changes, the EU, with other partners, should engage in designing, implementing, supporting and monitoring the evaluation process covering all judges and prosecutors in BiH. This process should lead to the exclusion of all those who fail to meet the merit-based criteria.

