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**NORWEGIAN COURTS  
ADMINISTRATION**



# INDEPENDENCE, ACCOUNTABILITY AND QUALITY OF THE JUDICIARY

## BOSNIA AND HERZEGOVINA

### 2018-2020

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Netherlands Council for the Judiciary  
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The Netherlands

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2018-2020

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# EXECUTIVE SUMMARY AND RECOMMENDATIONS

The High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC) is engaged in a project to improve judicial quality together with the Netherlands Council for the Judiciary and the Norwegian Court Administration. This project has two components. The first component aims at improving the performance of the courts, in particular, by strengthening case management and the management of the courts. This part of the project is a close cooperation of the Municipal Court in Sarajevo and the district court of Amsterdam and judges from Norway, and has been extended to most courts in Bosnia and Herzegovina. The second component of the project concentrates on the independence and accountability of the judiciary as a whole, as well as the quality of justice it delivers in general. This part of the project makes use of the indicators that have been developed by the European Network of Councils of the Judiciary to assess the actual state of independence and accountability, on the one hand, and quality of justice, on the other hand. Also, the method of the ENCJ to set priorities for improvement is being used. This report describes the outcomes of the second component of the project so far. It describes the process to measure the state of independence, accountability and quality that the HJPC has undertaken, and it presents the outcomes of the assessment. Conclusions are drawn as to priorities for improvement. Due to the Corona pandemic, joint follow-up activities have stalled, and this report is also meant to provide the basis for the remainder of this component of the project. The report does not review other reports, such as those of the European Commission that touch upon these topics.

Despite the external and internal problems that the HJPC faced during the project, the HJPC has applied the instruments that the ENCJ has developed, including its survey among judges on independence. It also commissioned an elaborate survey among the court users, which is highly recommended by the ENCJ. The outcome of the application of the instruments is that in BiH formal requirements for independence are largely met, except for the funding of the judiciary and the non-transferability of judges, but that the perceptions of independence are much less positive. Especially, court users and citizens in general are critical, while judges are relatively positive but less so than the European average. There is a gap between the formal safeguards and the way these safeguards are applied in practice.

With respect to accountability, arrangements are not in place in important areas, in particular the relations with the press, external review of the performance of the judiciary and transparency of accessory functions of judges including disclosure of assets. As to perceptions, judges are critical about the adherence by judges to ethical standards and the actions of relevant authorities against judicial misconduct and corruption.

As to quality, the indicators show wide variation, indicating weak and strong points. A strong point is for instance, the assessment of the quality of judicial decisions, which not many judiciaries undertake in Europe. Areas for improvement are the availability of summary and simplified procedures, digital case filing and procedures and the availability of appeal in a balanced manner.

The report shows that the HJPC and the Courts have been working to improve independence and accountability and, in particular, quality of justice. With regard to independence, some progress was made, but on major aspects (financial disclosure, appointment and promotion of judges) the HJPC became bogged down, and is dependent on legislation to move forward. On quality, including timeliness, substantial improvements were realized in recent years. With regard to timeliness progress can be unequivocally measured by means of the case administration system of the courts. Other improvements, for instance of the quality of judicial decisions, are less easily measurable but are as important.

To conclude, the main problem the BiH judiciary is facing concerns negative perceptions of judicial independence and the lack of trust in the judiciary in society, and its underlying causes. To address this problem the judiciary needs to improve:

1. Judicial ethics and the mechanisms to counter improper behaviour and corruption at all levels of the judiciary, including the HJPC itself, in particular with respect to appointment, promotion and discipline of judges. Introduction of disclosure of assets of judges and members of governance bodies such as the HJPC is urgent.
2. Communication with society, including the other state powers, the media and civil society to provide broad insight in the actual functioning of the judiciary, and to counter the spread of disinformation. This includes the introduction of external review, to be commissioned by the judiciary (HJPC) itself to protect judicial independence, in order to establish a trustworthy analysis of its functioning.

It should be stressed that the other state powers (the political system) do not function better than the judiciary, if not worse, with regard to integrity and good governance. This leads to pressures on the judiciary that hamper progress. The international community should recognize these pressures, and use its influence to protect the independence of the judiciary and its governing bodies. The negative examples of Hungary, Poland and Slovenia should be taken to heart.

With regard to quality of justice, the courts on the initiative of the HJPC have made substantial progress, for instance, with regard to timeliness. It is important to improve performance further. This is important for the parties in procedures, the economy as a whole and the standing of the judiciary in society. The steps taken to improve case management, but also court management, provide a sound basis for further progress. The continuation of new ways of working is essential, also when the co-operation with partners from abroad stops at the end of projects. In addition, the indicators show that there are important areas for innovation such as the availability of summary and simplified procedures, and, as everywhere, the digitalisation of procedures. The introduction of an integral quality management system can give permanent impetus to court performance, and can be an important factor in enhancing the trust of society in the judiciary.

To gain a common understanding of the challenges and opportunities for the judiciary of Bosnia and Herzegovina, the next step would be to discuss this report in dialogue meetings of the members of the HJPC and representatives of the Netherlands and Norwegian Councils for the Judiciary.

# 1. INTRODUCTION

Improving Judicial Quality is a comprehensive project which seeks to address various aspects of the quality of the courts and the governance thereof by the High Judicial and Prosecutorial Council (HJPC) in Bosnia and Herzegovina (BiH). In this project judicial quality not only concerns the processes at the courts, but also includes the independence and accountability of the judiciary. Both independence and accountability are conditional for quality of justice. The project started in November 2018 and runs until November 2021. It is a co-operation of the HJPC and the courts of BiH, the Netherlands Council for the Judiciary and the District Court of Amsterdam and the Court Administration of Norway, with financial support of the Netherlands Ministry of Foreign affairs and Norwegian Ministry of Foreign. Improving Judicial Quality contains two main components:

## Component I: Improving court performance

- Improving court management and efficiency
- Develop and introduce a mentoring system for newly appointed judges
- Improving the quality of court decisions
- Further development and implementation of the automated case management system for simple/undisputed court cases – SOKOP-Mal by the courts
- Improving the infrastructure of judicial buildings

## Component II: Strengthening the operations of the HJPC BiH

- Improving the process of appointment, appraisal and promotion of judges
- Assessment of independence, accountability, and quality of the judiciary according to the criteria of the European Network of Councils for the Judiciary ([ENCJ](#)),

The first component started at the Municipal Court in Sarajevo, and it has gradually expanded to other courts in BiH. It is implemented by the District court of Amsterdam and the Norwegian Judiciary in close cooperation with the court leaders and judges of the Bosnian courts concerned. The project is a continuation of a forerunner project ‘Improving Judicial Efficiency Project II’ of which the overall objective was to increase the efficiency of the courts in BiH. This project ended in June 2018 and its main output was an extensive Blueprint, which served as the basis for this new project.

The second component aims to strengthening the role of the HJPC. The HJPC plays a crucial role in the governance of the judiciary, and therefore the project focuses on this role.

This component applies International and, in particular, European standards with regard to independence and accountability of the judiciary that have been developed by, among other, the Consultative Council of European Judges (CCJE) and have been detailed and made measurable by the ENCJ. The ENCJ has developed a set of indicators for independence and accountability, and these indicators were recently improved upon and in 2020 measured again for nearly all countries of the EU, as well as Norway and the UK. As to independence, the set of indicators consists of indicators about formal safeguards of independence and indicators about how independence is perceived in society, including by judges themselves.

Quality of justice, in as far as it relates to other aspects than independence and accountability, concerns judicial procedures and decisions. This area of quality has yet to be made precise. The ENCJ has been experimenting with a set of indicators that covers a large part of this quality. The latest version of the indicators was measured for the same range of judiciaries this year as independence and accountability.

The ENCJ unites the national institutions in the Member States of the European Union which are independent of the executive and legislature and which are responsible for the support of the Judiciaries in the independent delivery of justice. Countries such as Austria and Germany have observer status, as they do not have a Council for the Judiciary, but are member of the EU. As Bosnia and Herzegovina is neither a Member State nor a candidate Member State of the EU, the HJPC cannot qualify as Observer of the ENCJ. The HJPC is, together with several other Councils from countries surrounding the EU, invited to the annual General Assembly of the network.

Because of the ambition of Bosnia and Herzegovina to join the European Union and the need for public institutions including the judiciary to comply with international/ European standards, it is sensible to introduce – and subject the judiciary to – ENCJ standards to see how far the judiciary is in the process. Moreover, it strengthens ties between the HJPC and ENCJ members. It is commendable that the HJPC wholeheartedly chooses this direction. To support this effort, Component II was introduced to the project.

This report outlines the activities and results achieved in Component II. Due to the Corona pandemic, the activities of the project came to a halt in March 2020. While the assessment of the position of the BiH Judiciary has been completed, and next steps were identified, the foreseen joint activities did not take place. As a consequence, there has to be a restart of this part of the project. This report offers the factual basis for this restart.

The report focuses on Component II, and it discusses the activities HJPC has undertaken to measure the state of affairs of independence, accountability and quality, using the ENCJ instruments, and the outcomes thereof (Chapter 2). To provide context, the ENCJ instruments are described as well in Chapter 2. In Chapter 3 the process to identify and agree on the need for change is described. It should be noted that allegations of corruption within the HJPC itself greatly complicated discussions within the project. These allegations have been taken on board during the course of the project and discussions made it clear that the HJPC struggles to achieve a satisfactory level of accountability. Accountability is an indispensable factor for a judicial system besides being independent. Still, the HJPC has been working steadily – often with partners from abroad – on improvements in the field of independence and accountability as well as quality. Chapter 4 provides an overview of these activities and their results. This includes the efforts within Component I of this project, but also those of other projects. We first discuss independence and accountability and then turn to quality of justice. Chapter 5 concludes.



## 2. OVERVIEW OF ACTIVITIES 2018-2020

### SEPTEMBER 2018 – APPLICATION OF THE 2017 ENCJ INDICATORS OF I&A

The first activity of Component II took place in the fall of 2018. A training was organized at the Netherlands Council for the Judiciary where HJPC members and representatives of the HJPC secretariat were present as well as two members of the Dutch judiciary and a Norwegian judge who are active within the ENCJ. The objective of the training was to introduce the ENCJ indicators and methodology on independence, accountability, and quality of justice to the representatives of the HJPC. The HJPC was asked to fill out the indicators questionnaire prior to the meeting, so that results could be discussed. The meeting started with an introduction on how the indicators and methodology originated, developed and function. An explanation of the methodology can be found in the next chapter. Afterwards the filled-in questionnaire was reviewed. In principle, the questions in the questionnaire are designed to fit all judicial systems (in Europe). Reality shows that this is never entirely the case and extra clarifications are necessary to make sure that the given answers fit with the intention of the questions. Also the discussions in this meeting led to some adjustments in the answers. The results of this exercise were presented during the dialogue meeting in September 2019 (see below).

### FEBRUARY 2019 – SURVEY AMONG JUDGES

In February 2019, as part of the improvement cycle, the ENCJ held for the third time a survey among judges. Because it generates valuable insights in the opinion of judges on the independence and accountability of their judicial system, it was proposed that as part of the project, the Bosnian judiciary participated in the survey. The HJPC sent a letter to the ENCJ Executive Board expressing its desire to take part in the survey. The Board approved of the participation of Bosnia and Herzegovina.

In a period of six weeks judges from all over Europe could give their opinions on diverse aspects of the independence of the judiciary, and – for the first time – also on a few aspects of the accountability of the judiciary. The results were published in the **2019 ENCJ report on independence, accountability and quality of justice**. Also, the results for Bosnia and Herzegovina were included in this report. In total 392 BiH judges participated in the survey, which is 39% of all judges in the country.

## SEPTEMBER 2019 – DIALOGUE MEETING

As part of the ENCJ improvement cycle after the indicators have been measured, meetings of judiciaries take place to discuss the results. The ENCJ has a format of small dialogue group meetings where 2 representatives of the judiciaries of 4 countries sit at the table. The first part of the meeting is used to discuss the main problems per judiciary and the second part of the meeting is used to discuss potential solutions. These potential solutions serve as the starting point for an action plan for improvement that the judiciaries are to develop afterwards.

This approach was also used in Bosnia and Herzegovina. A dialogue meeting was organised to discuss the measured indicators including the survey among judges. The entire HJPC took part in the dialogue meeting. Following the ENCJ format, representatives from 3 other countries participated in the dialogue: Norway, The Netherlands and Italy. The dialogue meeting was also used as an opportunity to discuss a recent crisis regarding allegations of corruption within the HJPC. The happenings suggested a worrying lack of understanding of the fact that accountability is a crucial counterpart to independence – an issue that needed to be addressed within the framework of the project.

The president of the HJPC and the Vice-President of the Netherlands Council for the judiciary, who was also the president of the ENCJ, presided the meeting. Firstly a presentation was given on the application of the ENCJ framework and the president of the ENCJ also gave a presentation on issues and dilemmas facing councils for the judiciary in countries where the Rule of Law is threatened, followed by a presentation of the HJPC president on the current dilemmas of the HJPC. In the afternoon subgroups were formed to discuss the vision of HJPC on the balance of independence and accountability and to identify measures that HJPC can take to improve the independence and accountability of the BiH judiciary and the HJPC, and at the same time to improve the trust of society. Also, a presentation was given by the Italian representative on crisis response to corruption allegations. This was followed by a plenary discussion and conclusions. These will be elaborated on in the chapter 'Results'.

## JANUARY 2020 – APPLICATION OF THE I&A AND QUALITY INDICATORS 2019/2020

In the ENCJ year 2019/2020 a revised set of indicators was applied by the ENCJ Members and Observers. As a step to improve the quality and credibility of the indicators, the answers to the underlying questionnaires were validated by experts from outside of the councils (or alternative governing body). As part of the current project, the HJPC measured the indicators again. The HJPC engaged two experts to validate the results: Ivanka Marković, Professor at the Law Faculty in Banja Luka and Larisa Velić, Professor at the Law Faculty in Zenica. The experts interpreted some of the question and answer options in a different way than the HJPC. Together with the ENCJ project team compromises were found which led to one final set of answers. The results are presented and analyzed in the chapter 'Results'. Furthermore, the HJPC also applied the revised ENCJ quality indicators. This happened at the same as the Independence and Accountability indicators.

# 3. MEASURING INDEPENDENCE AND ACCOUNTABILITY

## 3.1 THE INDICATOR SYSTEM EXPLAINED

Before presenting the ENCJ independence and accountability indicators and their measurement, the principles underlying the system of indicators and the system itself are recapitulated. The vision of the ENCJ can be summarised by five basic notions.

1. Independence and accountability go together: accountability is a prerequisite for independence. A judiciary that does not want to be accountable to society and has no eye for societal needs will not gain the trust of society and will endanger its independence in the short or long run. Accountability without independence reduces the judiciary to a government agency.
2. The existence of formal, legal safeguards of independence (formal independence) are not sufficient for a judge to be independent. Actual independence depends on his or her behaviour and shows in his or her decisions, and this is reflected in independence as perceived by society and its constituent groups as well as by the judges themselves (perceived independence). It should be noted that perceptions frequently differ between societal groups.
3. For the judiciary to be independent, the judiciary as a whole must be independent and the individual judge must be independent. A distinction needs to be made between the independence of the judiciary as a whole and the independence of the judge. While the independence of the judiciary as a whole is a necessary condition for the independence of the judge, it is not a sufficient condition. Individual independence can be affected by the external influence of state organisations and others, and by internal influences within the judiciary.
4. To be accountable, not only the formal requirements about accountability must be met, but also the population must perceive the judiciary to be accountable. Even if there are formal procedures objectively in place to ensure judicial accountability, the subjective perception of citizens as to judicial accountability is of equal importance. For example, judges and the judicial system may be seen as a 'closed shop', operating for their own benefit rather than for the benefit of society.
5. Accountability, like independence, relates to the judiciary as whole and to the individual judge. At the level of the judiciary as a whole, accountability means to be transparent about performance, while accountability of the individual judge relates in particular to personal aspects that may affect decisions.

As to the assessment of the formal aspects, the categorisation is done by the Councils or, in the absence of a Council, other governance bodies, using a standardised questionnaire. At the General Assembly 2019 of the ENCJ it was decided to introduce external validation of the answers to the questionnaire in view of the reliability and credibility of the indicators.

The indicators of perceived independence consist of the perceptions in society (citizens, companies), the users of the courts and the judges themselves. External surveys are available about perceptions in society such as the World Economic Forum Global Competitiveness Report, World Justice Rule of Law index and several Eurobarometer reports.

Part of the perceived indicators is derived from the survey among judges, which took place in BiH in the beginning of 2019, simultaneously with the ENCJ Members and Observers.

The ENCJ indicator system consists of a set of indicators (see below the last version) and a methodology to uniformly quantify the results. This requires a normative evaluation of what is good and bad practice.

Therefore, a points system using scoring rules is used and the following underlying principles are applied.

1. With respect to all formal safeguards, the key issue concerns the ease with which such safeguards can be removed or altered. A safeguard embedded in a constitution offers more protection than one contained in normal legislation. Legislative safeguards are more effective than those contained in subordinate legislation, general jurisprudence or tradition.
2. Judicial self-government, balanced by accountability is desirable. Where other state powers have the authority to make decisions about the judiciary, decisions based on objective criteria are to be preferred to discretionary decisions.
3. Responses based upon transparent rules are to be preferred to ad hoc reactions to particular situations.
4. Judicial decisions and procedures, including complaints processes should all preferably be formalised, public and transparent.
5. Transparency requires active dissemination of information, rather than simply making information theoretically available.

Most indicators consist of several aspects, captured by subindicators. With each subindicator, points can be earned, and a total score for an indicator is reached by combining the scores per sub-indicator. Some subindicators weigh heavier than others.

The set of indicators consists of indicators about formal aspects of independence and accountability and indicators about perceived independence and accountability. The indicators relate to the judiciary as a whole and to the individual judge, see table below.

	Independence		Accountability	
<b>Formal</b>	Judiciary as a whole	Individual judge	Judiciary as a whole	Individual judge
<b>Perceived</b>	Perceptions of a range of groups in society		Only perceptions of judges and lawyers.	

For a full explanation of the indicator system please be referred to the last [ENCJ report](#) on Independence, Accountability and Quality of Justice.

## 3.2 THE 2019 SET OF INDICATORS

### INDICATORS OF THE FORMAL INDEPENDENCE OF THE JUDICIARY AS A WHOLE

1. **Legal basis of independence, with the following sub-indicators:**
  - Formal guarantees of the independence of the judiciary;
  - Formal assurances that judges are bound only by the law;
  - Formal guarantees that judges are appointed permanently until retirement;
  - Formal methods for the determination of judges' salaries;
  - Formal mechanisms for the adjustment of judges' salaries;
  - Formal guarantees for involvement of judges in the development of legal and judicial reform.
  
2. **Organizational autonomy of the judiciary, with the following sub-indicators where there is a Council for the Judiciary or equivalent independent body:**
  - Formal position of the Council for the Judiciary;
  - Compliance with ENCJ guidelines; See below for proposed change of sub-indicators;
  - Responsibilities of the Council.

**Sub-indicator when there is no Council for the Judiciary or an equivalent body:**

  - Influence of judges on decisions.
  
3. **Financial independence, with the following sub-indicators:**
  - Budgetary arrangements;
  - Funding system;
  - Resolution of conflicts about budgets.
  
4. **Management of the court system.**
  - Management responsibility of the courts.

## INDICATORS OF THE FORMAL INDEPENDENCE OF THE INDIVIDUAL JUDGE

5. **Human resource decisions about judges, with the following sub-indicators:**
  - Selection, appointment and dismissal of judges and court presidents;
  - Selection, appointment and dismissal of Supreme Court judges and the President of the Supreme Court;
  - Compliance with ENCJ guidelines about the appointment of judges;
  - Evaluation, promotion, disciplinary measures and training of judges;
  - Compliance with ENCJ guidelines about the promotion of judges.
  
6. **Disciplinary measures, with the following sub-indicators:**
  - • Disciplinary measures can never be initiated against a judge (except in cases where there has been malice or gross negligence) for the following reasons:
    1. interpretation of the law,
    2. assessment of facts
    3. weighing of evidence in determining a case
  - Disciplinary measures can never be initiated against a judge for speaking out when democracy and fundamental freedoms are in peril;
  - Compliance with ENCJ standards about procedure re disciplinary measures against judges;
  - Competent body to make decisions about disciplinary measures against judges.
  
7. **Non-transferability of judges, with the following sub-indicators:**
  - Formal guarantee of non-transferability of judges;
  - Arrangements for the transfer of judges without their consent.
  
8. **Allocation of cases, with the following sub-indicators:**
  - Existence of a transparent mechanism for the allocation of cases;
  - Content of the mechanism for the allocation of cases.
  
9. **Internal independence, with the following sub-indicators:**
  - Influence by higher ranked judges;
  - Use and status of guidelines;
  - Influence by the management of the courts.

## INDICATORS OF THE PERCEIVED INDEPENDENCE OF THE JUDICIARY AND THE INDIVIDUAL JUDGE

### 10. Independence as perceived by society

- Flash Eurobarometer 474 (2019) 'Perceived independence of the national justice systems in the EU among the general public', Q1 and Flash Eurobarometer 475 (2019) 'Perceived independence of the national justice systems in the EU among companies', Q1;
- WEF, Global Competitiveness Report 2019, 1.07;
- WJP, Rule of Law Index 2020.

### 11. Independence as perceived by courts users

- National surveys.

### 12. Independence as perceived by lawyers

- CCBE survey, question 10.

### 13. Independence as perceived by judges

- ENCJ survey, question 16.

### 14. Judicial corruption as perceived by citizens in general

- Special Eurobarometer 470 (2017) 'Corruption', QB7;
- World Justice Rule of Law Index 2020.

### 15. Trust in justice/legal system, relative to trust in other state powers by citizens

- Standard Eurobarometer 91 Public Opinion in the European Union, table QA6a.

## INDICATORS OF THE FORMAL ACCOUNTABILITY OF THE JUDICIARY AS A WHOLE

Transparency about the functioning of the judiciary

1. **Periodic reporting by the judiciary, with the following sub-indicators:**

- Availability of annual reports;
- Publishing of the annual report;
- Scope of the annual reports;
- Periodic and public benchmarking of the courts.

2. **Relations with the press and outreach activities, with the following sub-indicators:**

- Explanation of judicial decisions to the media;
- Availability of press guidelines;
- Broadcasting of court cases.

3. **Outreach activities aimed at civil society**

- Open door days;
- Educational programmes conducted at schools
- Development of television/radio/social media programme formats to give insight in the work of the judge.

4. **External review, with the following sub-indicators:**

- Use of external review;
- Responsibility for external review.

## INDICATORS OF THE FORMAL ACCOUNTABILITY OF THE JUDICIARY AS A WHOLE

Transparency about the functioning of the judiciary: involvement of civil society in judicial governance.

5. **Participation of civil society in governance bodies of the judiciary:**

- Selection and appointment of judges;
- Disciplinary measures against judges;
- Complaints against judges and the court(s) in general.



## INDICATORS OF THE FORMAL ACCOUNTABILITY OF THE INDIVIDUAL JUDGE AND STAFF

Mechanisms to promote and maintain ethical standards of the judiciary.

6. **Complaints procedure, with the following sub-indicators:**
  - Availability of a complaints procedure;
  - Scope of the complaints procedure;
  - Appeal against a decision on a complaint;
  
7. **Withdrawal and recusal, with the following sub-indicators:**
  - Voluntary withdrawal;
  - Breach of an obligation to withdraw;
  - Request for recusal;
  - Deciding authority;
  - Appeal against a decision on a request for recusal.
  
8. **Admissibility of external functions and disclosure of external functions and financial interests, with the following sub-indicators:**
  - Policy on admissibility of external functions;
  - Authorisation for the exercise of accessory functions;
  - Availability of a (public) register of external functions of judges;
  - Availability of a (public) register of financial interests of judges.
  
9. **Code of judicial ethics, with the following sub-indicators:**
  - Availability of a code of judicial ethics;
  - Availability of training on judicial ethics;
  - Responsible body to provide judges with guidance or advice on ethical issues.

## INDICATORS OF THE PERCEIVED ACCOUNTABILITY OF THE JUDICIARY AND THE INDIVIDUAL JUDGE

10. **Adherence to ethical standards, as perceived by judges**
  - ENCJ survey, Q19.
  
11. **Adequacy of actions by judicial authorities to address judicial misconduct and corruption, as perceived by judges**
  - ENCJ survey, Q19 and 20.
  
12. **Adequacy of actions by judicial authorities to address judicial misconduct and corruption, as perceived by lawyers**
  - CCBE survey, Q11 and 12.

For later reference, it should be noted that since the last edition in 2017, several aspects have been adapted in the set of indicators. The changes are explained in detail in the [ENCJ report](#) on Independence, Accountability and Quality of Justice 2018-2019. The indicators questionnaires are available on the ENCJ website.

## 4. OUTCOMES FOR BIH OF INDEPENDENCE & ACCOUNTABILITY INDICATORS

As previously mentioned, during the course of the project the HJPC applied the ENCJ Independence and Accountability indicators twice. The 2017 edition of the indicators was applied in 2018 and the latest set of indicators (2019) was applied at the beginning of 2020. Below the 2020 results will be discussed and afterwards a comparison with the 2017 indicators is made.

### 4.1 RESULTS IN GRAPHS FOR 2020

In the graphs below the 2020 scores of the BiH judiciary are shown next to the average scores in Europe. In general it is striking that several aspects of formal independence, the light blue columns on the left, have high scores, such as legal basis, organizational autonomy, court management, HR decisions on judges and disciplinary measures. This indicates that several aspects of formal independence are well arranged in the BiH judicial system. In particular, organizational autonomy is very strong and much higher than on average in Europe. On the contrary, the score on funding is very low. Also, non-transferability of judges seems to be an issue. In Europe in general, funding is an issue, while non-transferability is not.

The dark blue columns represent the perceived independence. It gives an indication on how different groups in society perceive the independence of the judiciary and whether society believes corruption occurs within the judiciary or society trust the judiciary, relative to the other state powers. Overall, the scores for BiH on perceived independence are either rather low, or information is lacking. It is positive that data is available about the perceptions of court users. In most other European countries such data is absent. The score is, however, not high. A familiar pattern can be seen that judges are more positive about their independence than citizens. The mean score of citizens and court users is very similar.

Regarding the arrangements for accountability, the light blue columns on the right hand side, it is clear that improvement on several aspects is needed. There seems to be no form of external review and a relationship with the press is non-existent. In 2020 the indicators for perceived accountability were added. The scores on this also derive from the ENCJ survey among judges. The scores for BiH are quite low here. These concern major issues with regard to the adherence of judges to ethical standards and the adequacy of actions against misconduct and corruption. In the next sections, the outcomes are discussed in more detail.

Figure 1 Country profile BiH on Independence and Accountability 2020

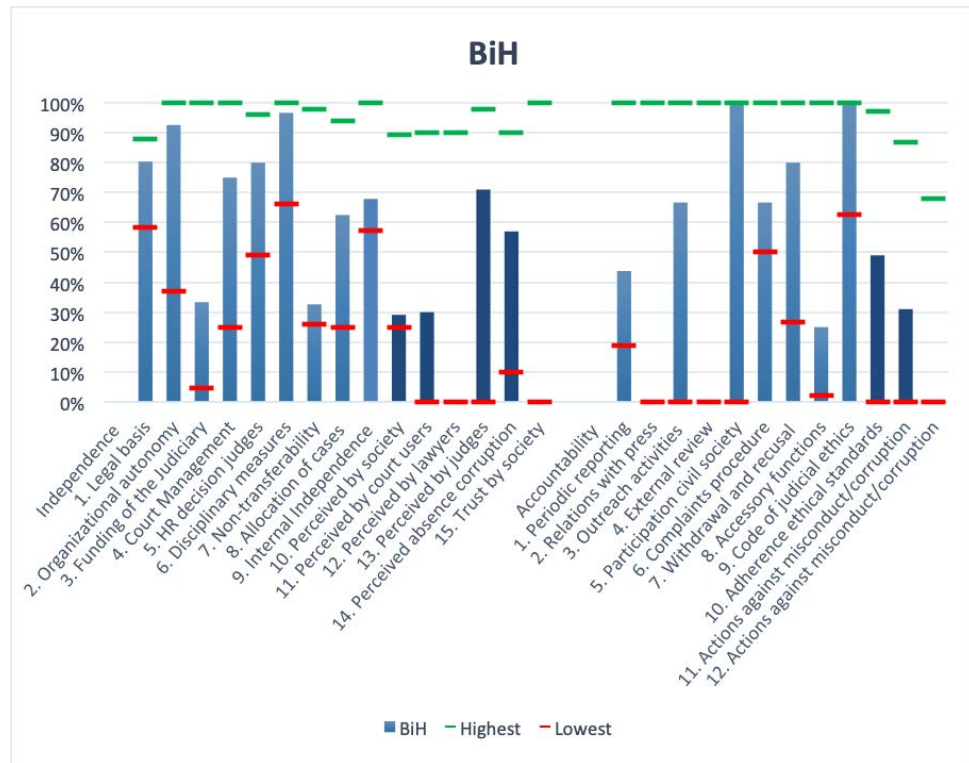
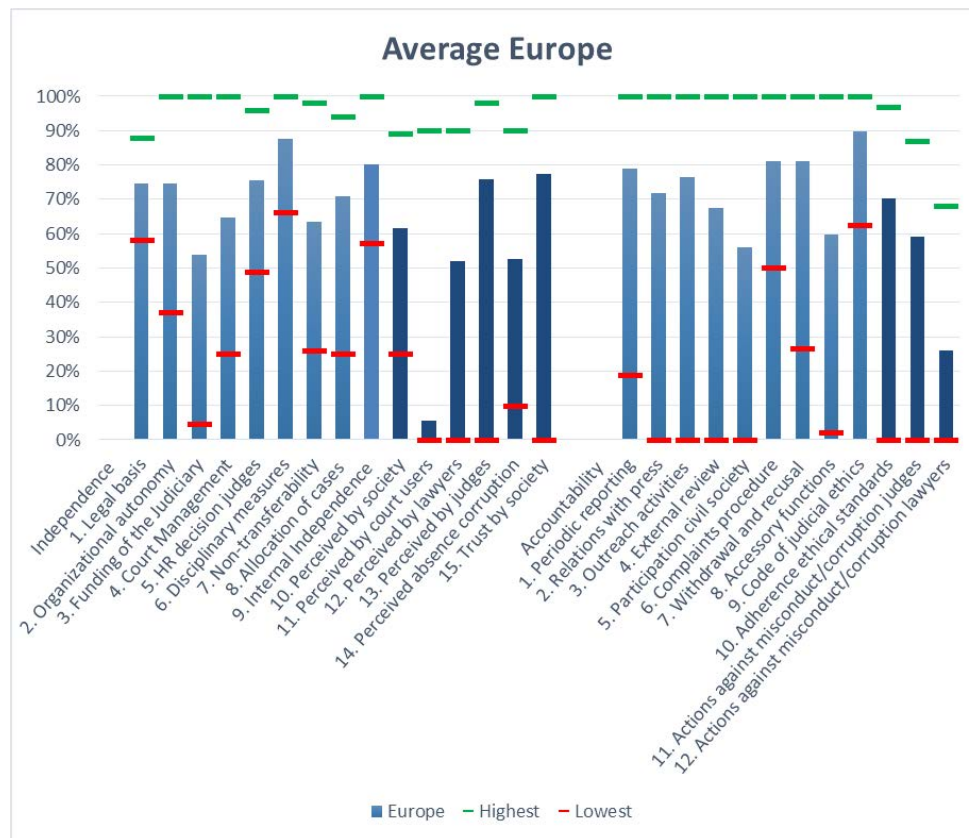


Figure 2 Average scores ENCJ Members and Observers 2020



#### 4.1.1 Formal independence in 2020

The scores on legal basis as well as organizational autonomy are quite high with respectively 80% and 93%. The legal basis indicates among other things whether judicial independence is formally guaranteed and if so, on what level. In Bosnia and Herzegovina judicial independence in general and the permanent appointment of judges until retirement are both guaranteed in the constitution or equivalent text. Furthermore judges are formally bound by law and a mechanism to fix salary of judges is determined by law. Also, it indicates that the judiciary is involved in the implementation of judicial reform. Regarding organizational autonomy the HJPC is organized in accordance with ENCJ guidelines on this matter: At least 50% of the members of the Council are magistrates and are chosen by their peers, the judicial members represent all tiers of the judiciary, members or former members of the government or parliament are not members of the Council, the Council controls its own finances and controls its own activities independently of both legislative and executive branches. The Council has a broad responsibility, from the appointment/promotion of magistrates, training, judicial discipline, judicial ethics, complaints against the judiciary, performance management, administration of courts (but not financing of the courts) and proposing legislation concerning the judiciary.

The score on funding of the judiciary is 33%, which means this is an area that needs working on. In BiH the decision making process on the funding of the judiciary is often divided over the three branches of power, while this ideally should be solely the responsibility of the judiciary. The formal proposal on the budget allocated to courts is a shared responsibility between the judiciary and the executive and the adoption of the budget for courts lies with the legislature. The executive branch is involved in the control of the budget allocated to courts and the evaluation of the budget lies with the executive. The way funding of the judiciary is arranged is also a major problem in many other European countries.

With a 75% score in 2020, the responsibility for court management mainly lies with the judiciary. However within this indicator not everything is in line with all ENCJ guidelines. The appointment of judges is not solely based on merit, there is no policy in place to encourage diversity in the appointment procedure and the appointment process does not provide for an independent complaint procedure.

Disciplinary measures has with 97% a very high score. This means formally procedures have been arranged according to ENCJ standards and that decision making in this area is the responsibility of the judiciary and not another branch of power.

The scores on allocation of cases show that the mechanism could be arranged better. The Bosnian judiciary does have a computerized system that helps with the allocation of cases, however clearly defined criteria for this are still lacking. In the event that a judge has to be removed from a case, the court president will reassign the case to another judge. Again, no clear criteria for this reassignment exist.

Finally internal independence is quite well arranged apart from the fact that it is possible for the management of the court to exert pressure in individual cases on the way judges handle their cases regarding timeliness.

### 4.1.2 Perceived Independence in 2020

The formal arrangements discussed in the previous section do not stand on their own. Aspects of independence can be perfectly arranged in law according to European standards, while society perceives a different picture. An explanation for this discrepancy could be that while the law prescribes certain rules, the actual practice is different. The law may not apply to everyone in the same manner.

Another reason for a discrepancy between formal arrangements and perceptions could be a lack of communication. It could be the case that the public and other stakeholder groups are not (fully) informed about the judiciary. Perhaps the correct information is not available in the right place, or is not available at all. The way of communicating could also make a difference. Is the judicial practice understandable to the general public?

When looking at the indicators (the dark blue columns), The independence of the judiciary perceived by society is in 2020 in BiH with 29% quite low in comparison to the average in Europe, which is 61%. The rate has also declined compared to the previous measurement. Furthermore, in BiH a court user survey has taken place in which the question whether court users perceive the judiciary as independent was asked. Only 30% of the respondents believe this is the case. Despite this low score, it is highly commendable that BiH has organized a court user survey, as this is missing in most other European countries.

In most European countries, judges rate the independence of their own judiciary the highest of all the stakeholder groups. In Bosnia and Herzegovina in 2019 71% of the judges perceived the judges in their country as independent. Regarding the perceived absence of corruption the score in Bosnia and Herzegovina is 57%, this is a bit higher than the average in Europe (51%). It still means that almost half of the respondents believe that corruption occurs within the judiciary.

The results show there is a discrepancy between the formal arrangements and the perception of independence. This is an issue that needs to be addressed.

### 4.1.3 Formal accountability in 2020

A striking issue on the accountability side is that relations with the press seem to be non-existent within the Bosnian judiciary, meaning that courts have no policy on explaining their decisions to the media, there are no press guidelines and the judiciary does not give authorization to broadcast court cases that draw particular public interest. Also there is no form of external review, which means that the performance of the courts is not reviewed on a regular basis on the request of the Council by external bodies. The scores are high on judicial ethics and withdrawal and recusal. Within Accessory functions some areas of improvement can be identified. For instance, an authorization for the exercise of accessory functions by judges is non-existent and there is no register of other jobs/functions judges have.

#### 4.1.4 Perceived accountability in 2020

Regarding accountability it is clear from the graphs that while formally there is a code of ethics for the judiciary, the judges themselves believe most judges do not adhere to these standards, meaning that the formulated guidelines do not seem to have the effect they should have on judges. Further research needs to be done on whether or not this perception is indeed true and what can be done to make judges adhere to the ethical standards more. Also, judges believe that misconduct and corruption is not effectively addressed by judicial authorities. This is a problem that may be strongly related to the previous indicator.

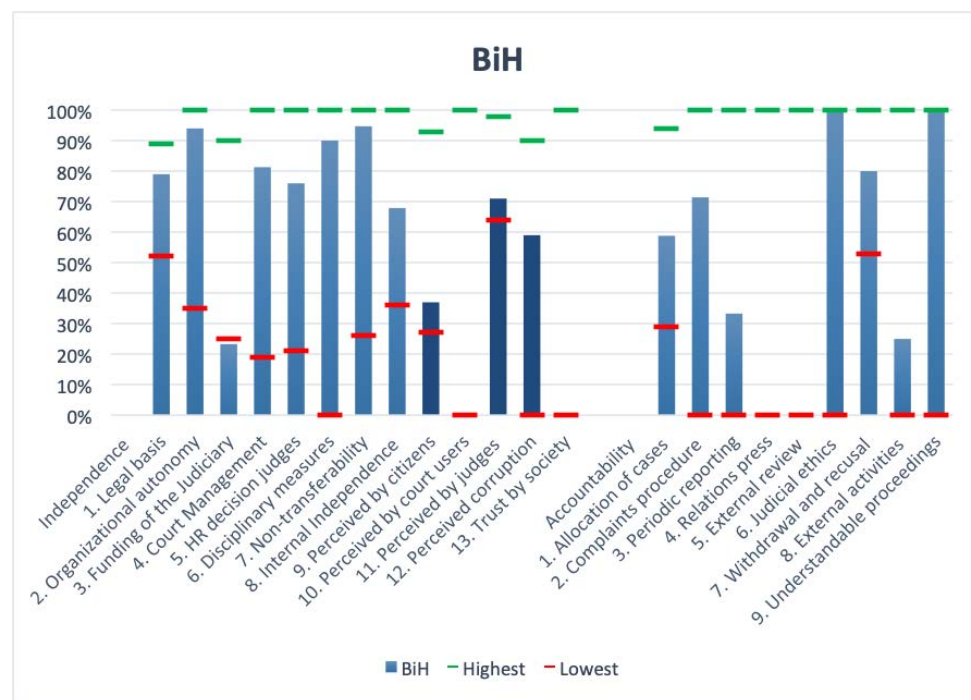
## 4.2 COMPARISON WITH THE 2017 RESULTS

Differences in scores between the 2017 and 2020 independence indicators mainly have technical reasons (figure 3). Either the scoring rules of the ENCJ have changed, or the questions have been altered.

Regarding non-transferability there is an enormous discrepancy in the scores when the two measurements are compared. The questions for this indicator have significantly changed, leading to more insight, but also different scoring. The accountability indicators have changed more than the independence indicators. Outreach activities and participation of civil society have been added as indicators, while understandable proceedings has been removed. The indicator of allocation of cases was moved from accountability to independence. The differences in scoring regarding periodic reporting and complaints procedure mainly have to do with changes in questions or scoring rules.

It is concluded that the indicators do not show much actual improvement since 2017. However, more information on the activities the HJPC has undertaken in recent years to improve their practices will be given in Chapter 5 and in the chapter on Quality of justice.

Figure 3 Country profile BiH Independence and Accountability 2017



### 4.3 COMPARISON WITH OTHER EUROPEAN COUNTRIES

The comparison with the European average presented above is an abstraction as there is no country that in all respects combines these scores. To examine the relative position of the BiH judiciary a comparison with specific countries is therefore of interest. In the next figures the country profiles of countries from the same region, Austria, Bulgaria, Slovakia and Slovenia, and a contrasting country, Norway, are presented. For a comparison with other ENCJ Members and Observers please check the last ENCJ [report on Independence, Accountability and Quality of Justice](#) (ENCJ 2020).

Figure 4 Country profile Austria

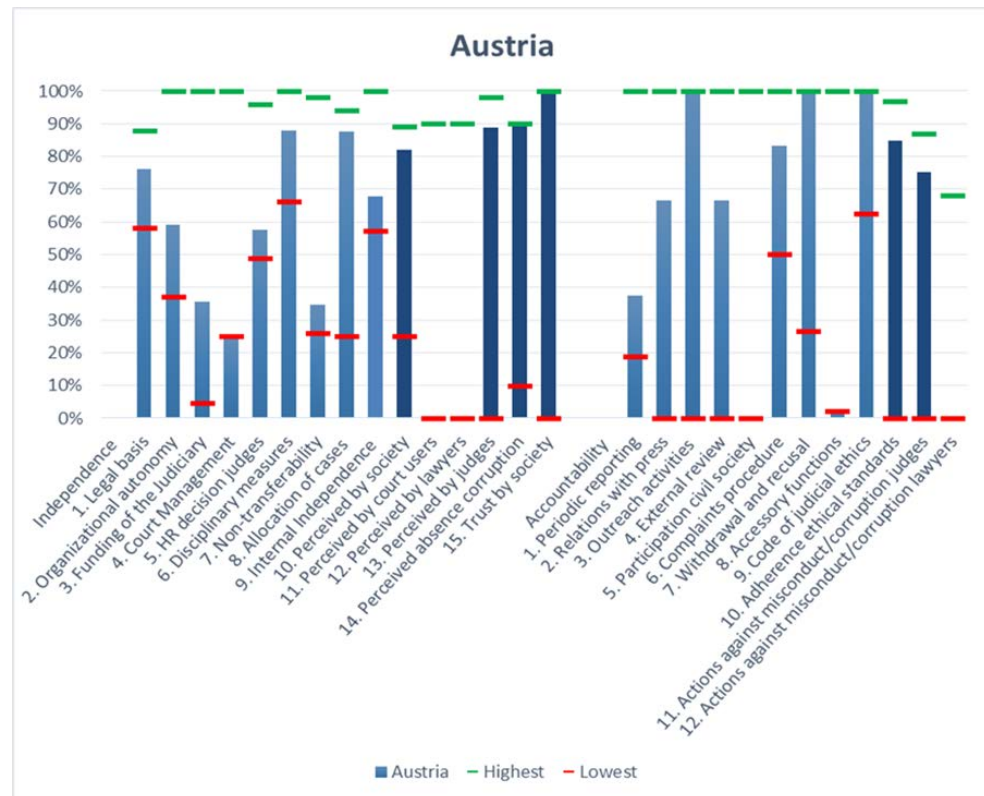




Figure 5 Country profile Bulgaria

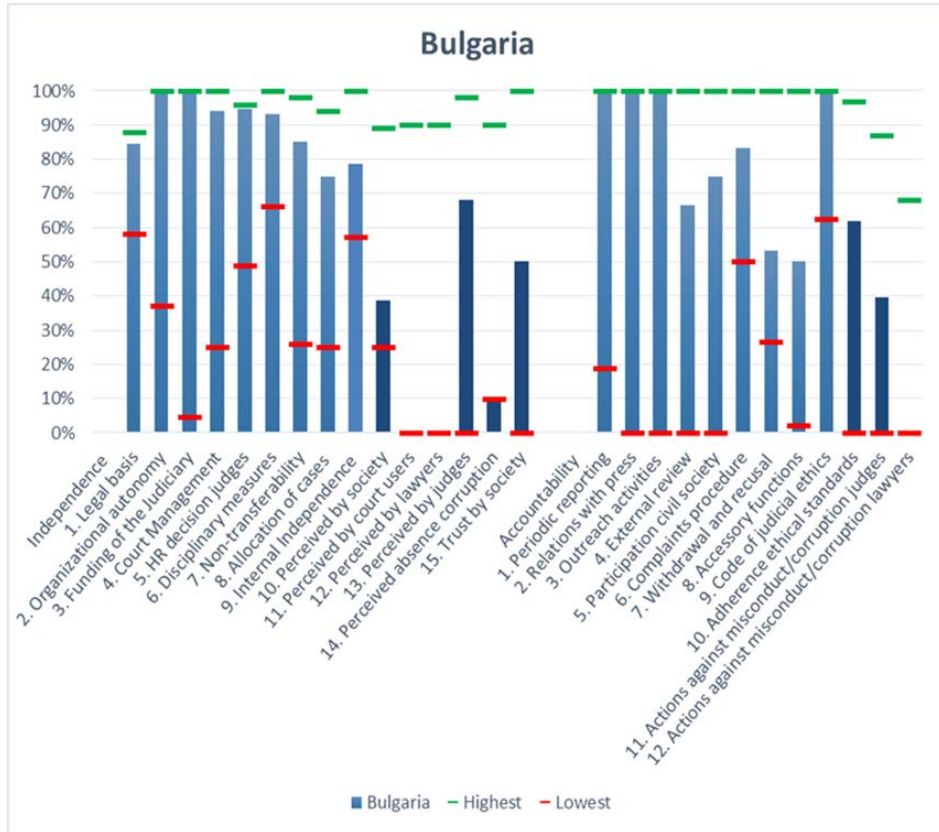


Figure 6 Country profile Slovakia

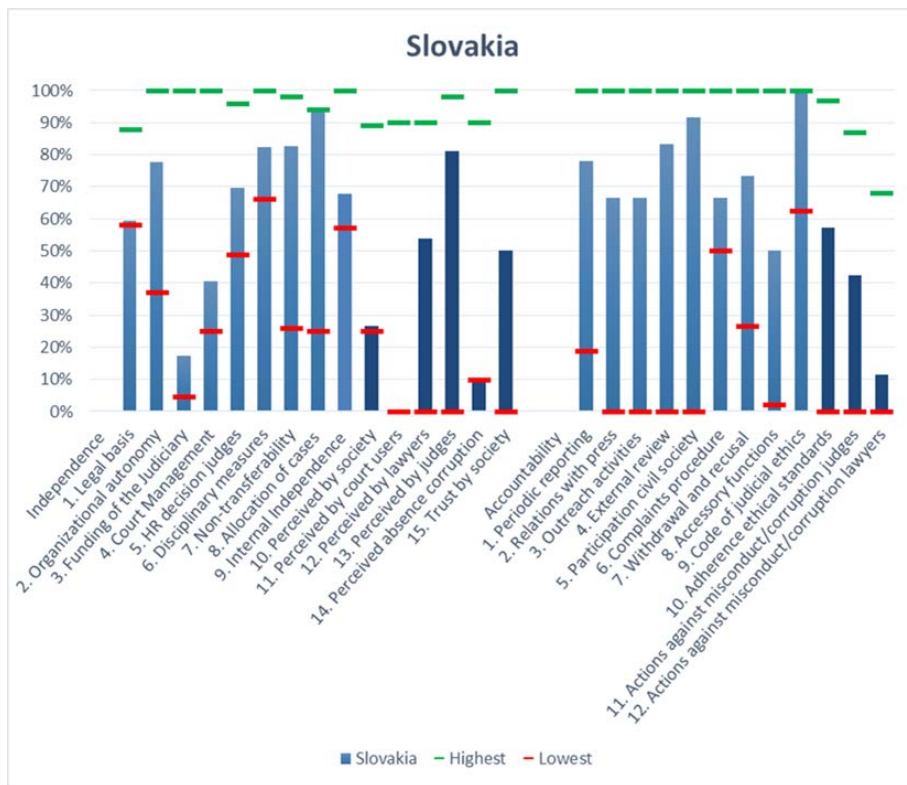


Figure 7 Country profile Slovenia

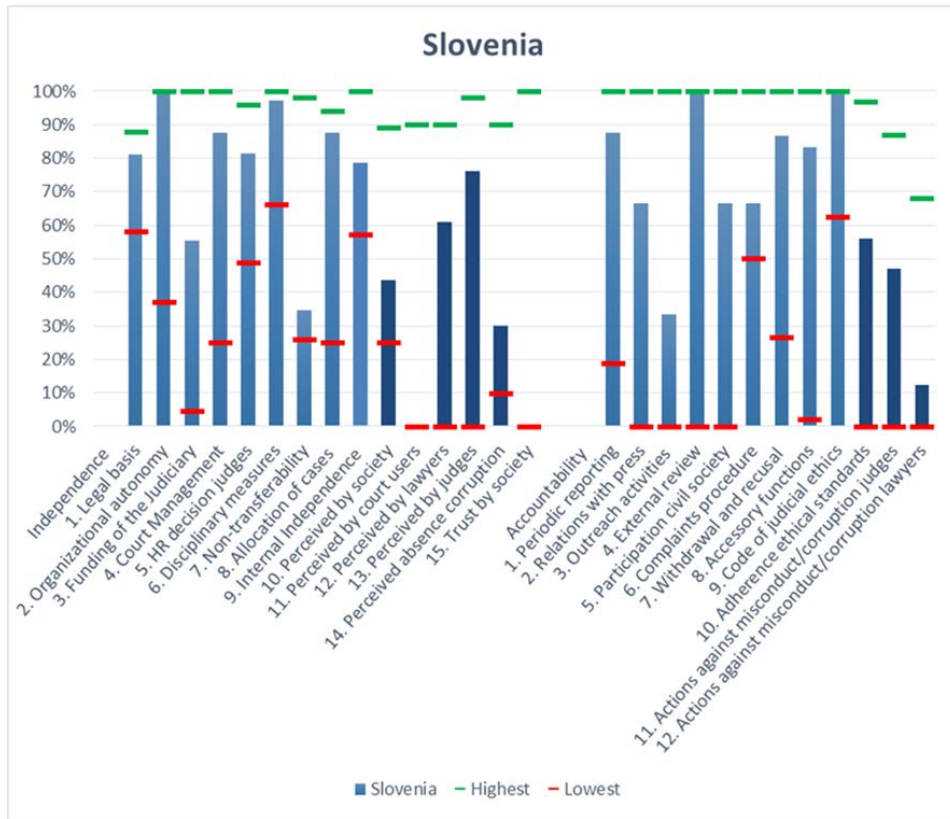
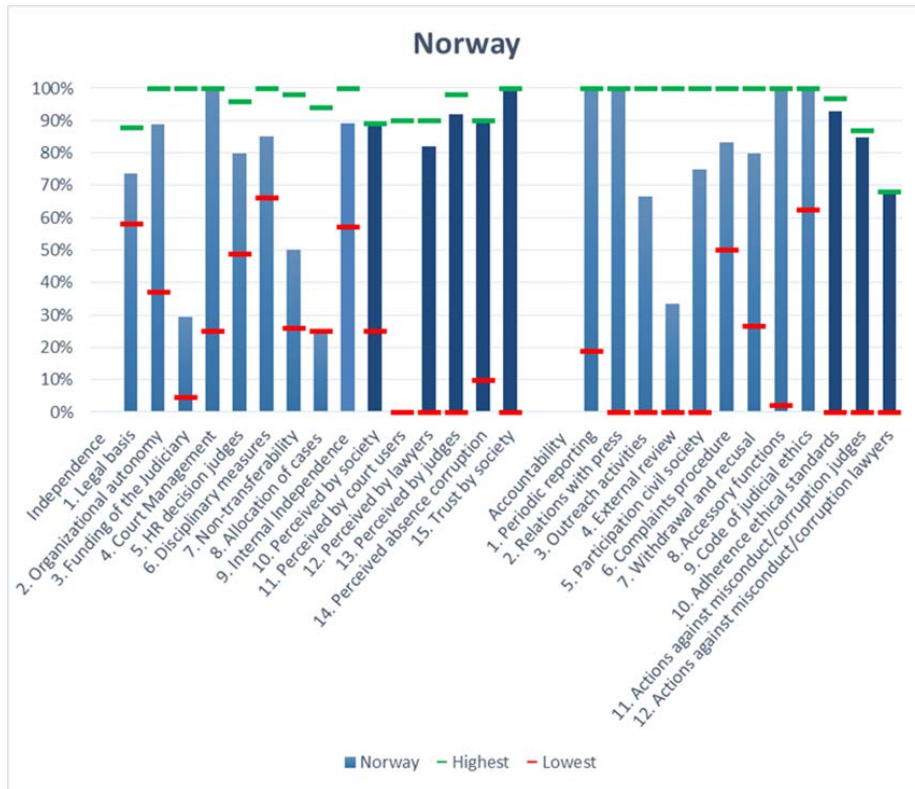


Figure 8 Country profile Norway



The profile of BiH is comparable with those of Slovenia and Slovakia, although both countries have less glaring gaps with respect to accountability. BiH seems to lag behind in this area. A positive aspect of BiH is its interest in the experience of court users. In addition, the perception of judicial corruption by the general public is more negative in both countries than in BiH. All three countries face common issues, in particular due to the negative perception of independence by the general public.

Formal safeguards are apparently much better arranged in Bulgaria than in BiH, in particular with regard to independence. Perceptions of independence are rather similar, although the score of judicial corruption is much more negative in Bulgaria than in BiH.

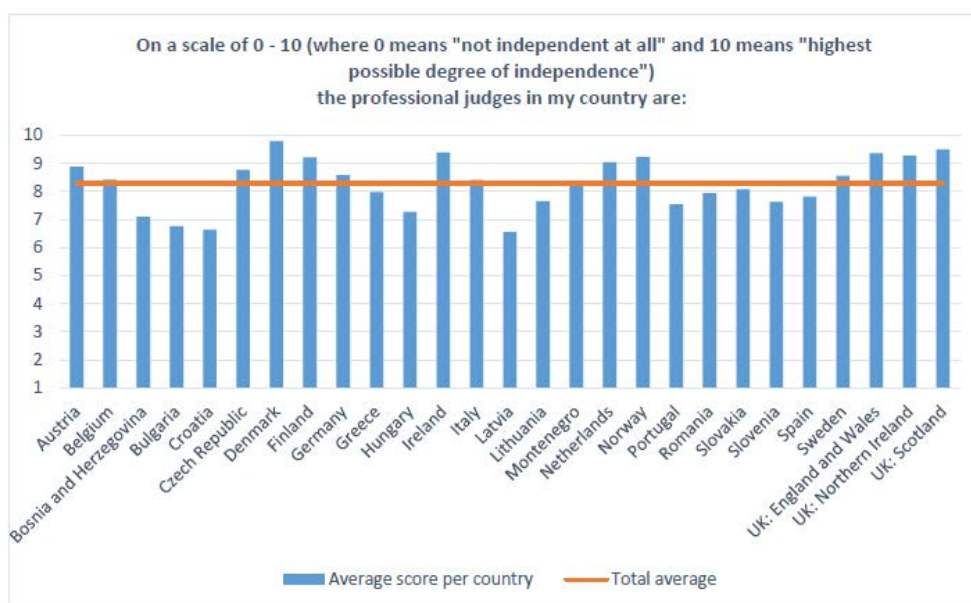
It is striking that in Austria and Norway high scores can be found with respect to the perceived independence and accountability indicators, while the formal safeguards are not particularly well arranged. In Austria there is no Council for the Judiciary. Norway has a Council, but arrangements are informal and build on mutual trust. Both countries also do not have strong scores on all aspects of accountability. The political environment in which the judiciary functions in these countries is much more conducive for judicial independence than in BiH, although in both countries there are strains visible, for instance with regard to the funding of the judiciary that require stronger formal safeguards.

The main lesson for BiH is that in relation to its challenging political environment, much has to be done to get the support of the general public. Improving its accountability would be a means to this end.

## 5. SURVEY AMONG JUDGES

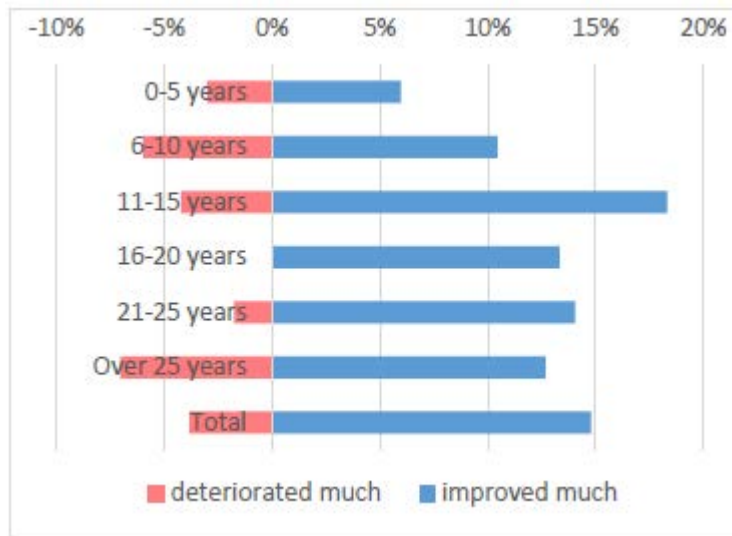
The ENCJ conducts surveys among judges and together with the CCBE among lawyers. These surveys provide the data for several indicators regarding perceptions of independence and accountability, and, in addition, in-depth information on a range of aspects of independence and accountability. BiH participated in the most recent survey among judges (2019). Below the most remarkable outcomes for BiH are shown in comparison with the other participating judiciaries. For the full results, see [ENCJ independence, accountability and quality of justice report 2018-2019](#) and the special [report on the ENCJ survey on the independence of judges 2019](#).

Figure 9 Independence of professional judges in European countries (indicator I 13)



The above figure demonstrates the average grade judges have given fellow judges in their country regarding their independence. Generally judges in Europe grade the judges in their country as quite independent. In Austria an average grade of 8,9 was given, in Denmark and Finland respectively a 9,8 and a 9,2 were given and also the Netherlands, Norway, the UK and Ireland have very high scores. The judges of Bosnia and Herzegovina gave their colleagues a 7,1, which is not a particular low score. However compared to other European countries it is in the lower range. Across Europe, the average grade is a 8,3.

Figure 10 Change of independence in BiH since start as a judge by years of experience



Most judges in Bosnia and Herzegovina believe that since they started as a judge the independence of the judiciary has positively changed. Especially the group who has been a judge for in between 11-15 years is positive about the changes that have taken place.

### Implementation of judicial decisions

Independence cannot be separated from the authority of the judge. When judicial decisions are not executed, independence may be guaranteed, but it has no practical value. Independence implies that power resides in the judge. In the survey judges were asked to assess the implementation by the government of judicial decisions that go against the interests of that government. On average across countries, 47% of judges agree with the statement that judgments against the interests of the government are usually executed. (figure 11). The variation between countries is however large. Percentages range from 15% in Latvia to 85% in Ireland. In Italy 53% of the respondents actually believe that such judgments are usually not implemented. In BiH 20% of the judges believe that these judgments are implemented, a relatively low number which implies a lack of trust of the judiciary in the government and possibly a lack of power residing in the BiH judges.

Figure 11 Implementation of judgments against the interest of government

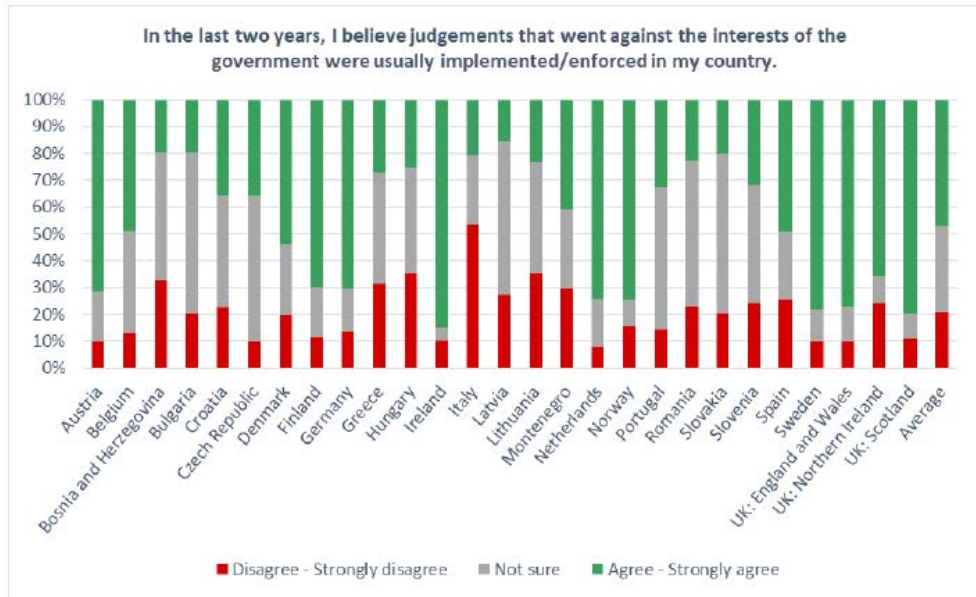
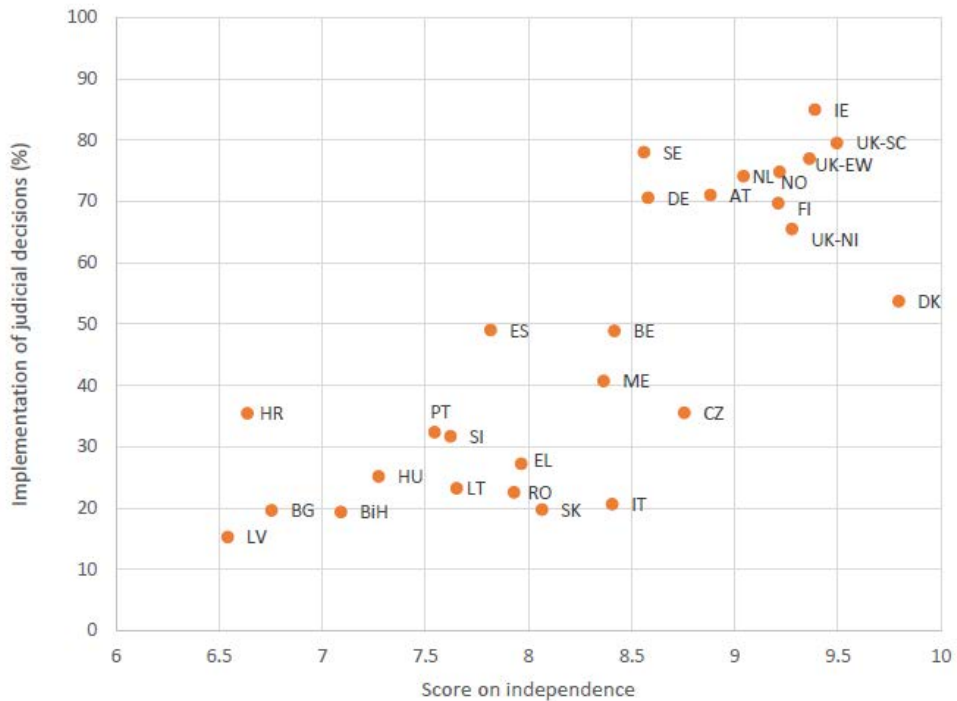


Figure 12 Judicial Independence vs the implementation of judicial decisions by government for 25 European countries, based on the survey among judges



If judicial independence and implementation of judicial decisions together define the position of the judiciary in the trias politica, it is of interest how these two dimensions are related. In figure 12 the independence score is on the horizontal axis, while the implementation of judicial decisions by government is on the vertical axis. The correlation of both dimensions is strong (correlation coefficient is 0.8), but some countries show divergent combinations. For instance, Denmark and Italy have relatively high scores on independence, but relatively low scores on implementation. Bosnia and Herzegovina has a relatively low score on both independence and the implementation of judicial decisions.

The next figures show outcomes for BiH on specific aspects of independence, and require attention of the HJPC. About 2,8% of the BiH respondents believe that it is a regular occurrence that judges in their country are involved in forms of corruption as an inducement to decide cases in a specific way. About 12,5% believes this happens occasionally or very rarely. A very large part of the respondents is not sure whether this happens (48%) and about 36,5% believes this does not happen. Even though 36,5% seems a fairly high number of respondents, compared to other countries the scores are not very favorable here. Also the finding that 48% of the respondents indicate they are not sure whether corruption has an impact on judicial decisions is a worrying signal. The overall scores for Bulgaria, Croatia, Greece, Italy, Latvia, Lithuania and Romania on this question are also not favorable.

Figure 13 Judicial corruption

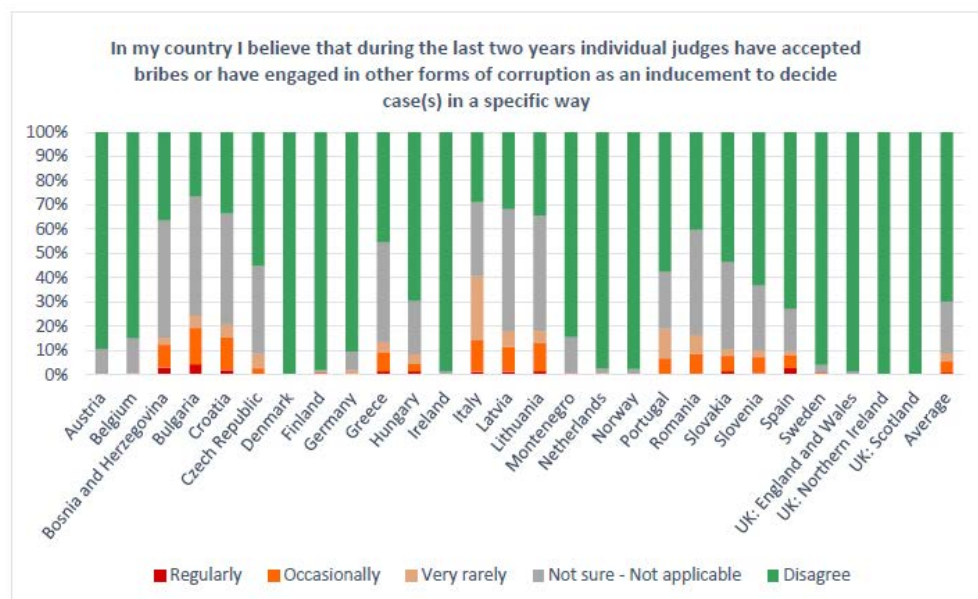
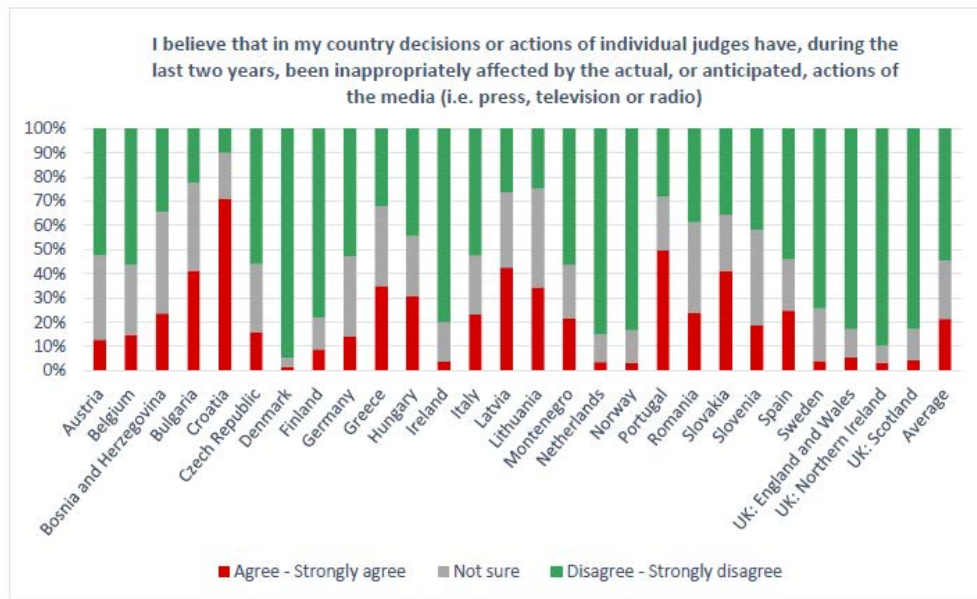


Figure 14 influence by the media



Judging from the graph above, all over Europe the media seems to have an important impact on judicial decisions or actions. Especially the result in Croatia is striking, where almost 71% believes decisions of judges have inappropriately been affected by actions of the media. In BiH it is believed the media has affected judicial decisions by 23,7% of the respondents. Although this percentage is lower than in many of the other European countries, the number of BiH respondents that disagrees with this statement is not very high either. This figure indicates the impact of the media on the judiciary is being experienced as a major problem among European judges.

Figure 15 First appointment of judges

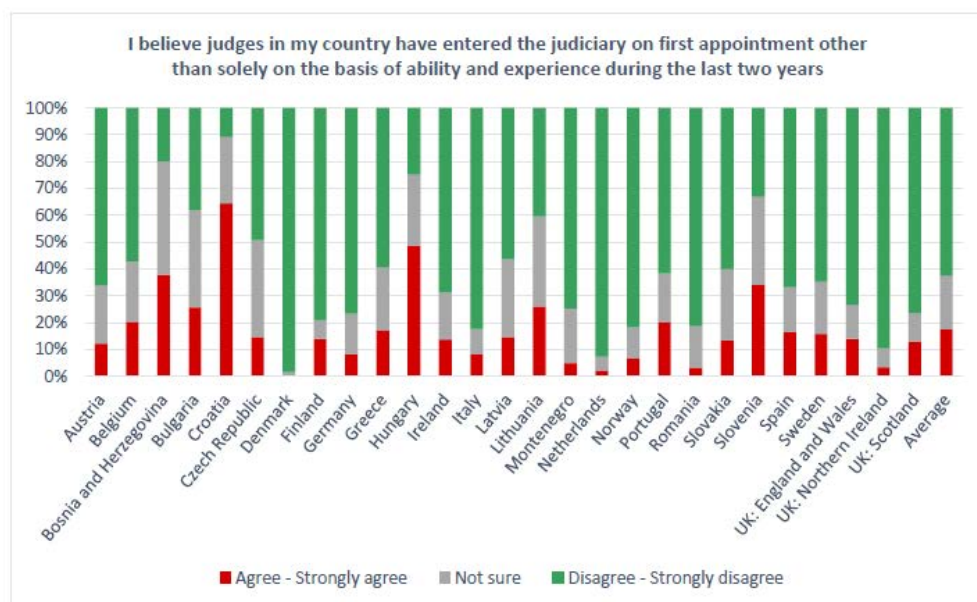
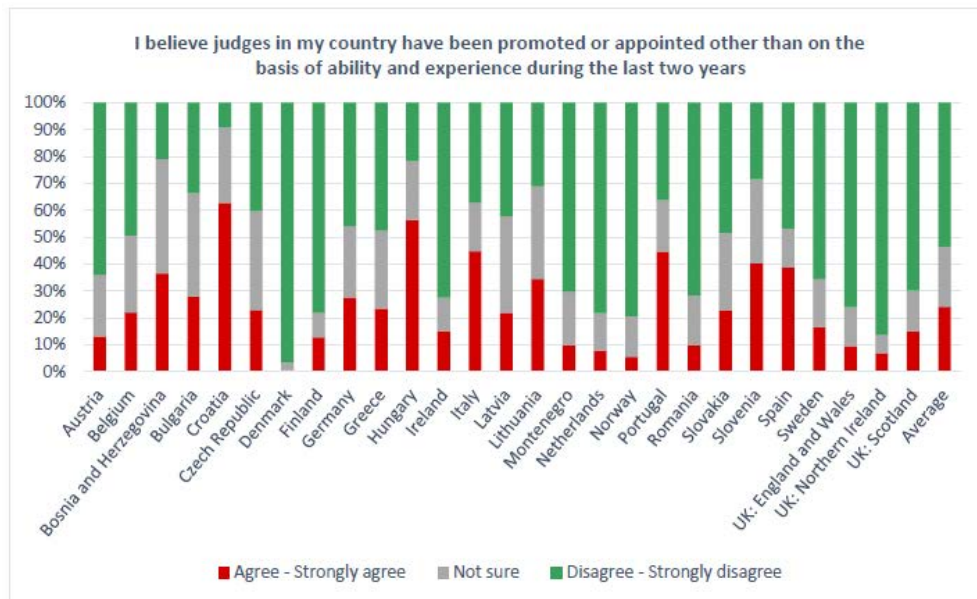


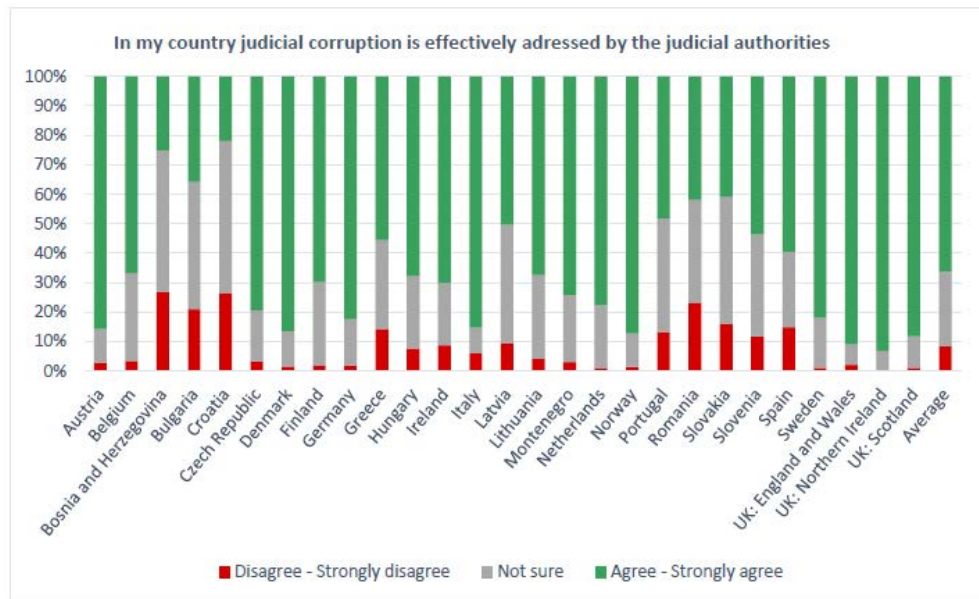


Figure 16 Promotion of judges



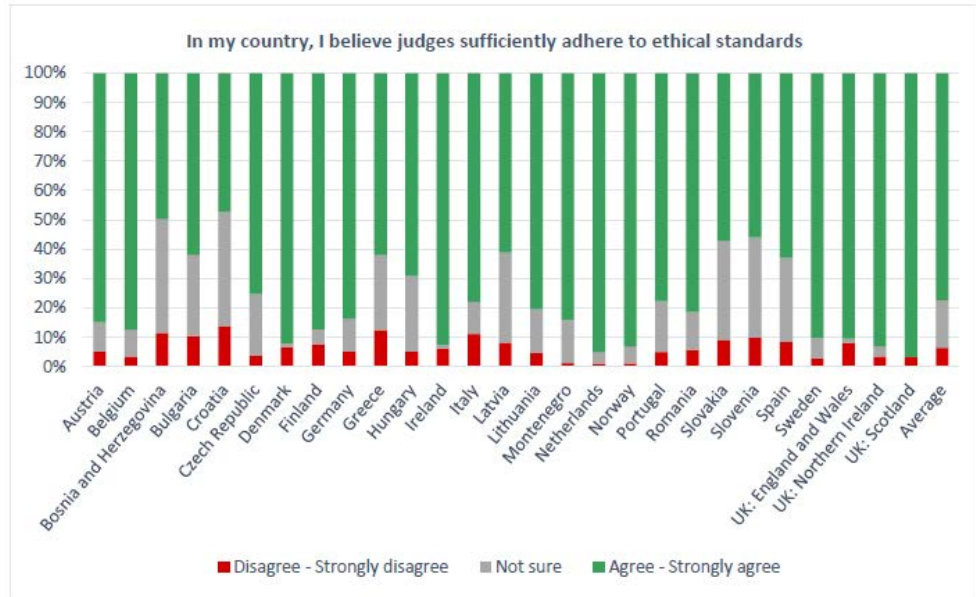
Regarding appointment and promotion of judges the BiH respondents do not generate very positive scores. With scores of only nearly 20% of the respondents that believe judges in BiH are first appointed solely on the basis of ability or experience (the other 80% is either not sure or disagrees on this matter) and similar numbers when it comes down to the promotion of judges, the judges of BiH do not seem to have trust in the appointment and promotion procedures in their judicial system. The recent leakage of a phone conversation of the former HJPC president and another former HJPC member in which the appointment of a family member as a judge was discussed links to this outcome. Similar problems seem to occur in Croatia, Hungary and Slovenia. A high level of confidence in appointment and promotion procedures can be encountered especially in Denmark, but also in the Netherlands, Norway and Northern Ireland.

Figure 17 Handling of judicial corruption by judicial authorities



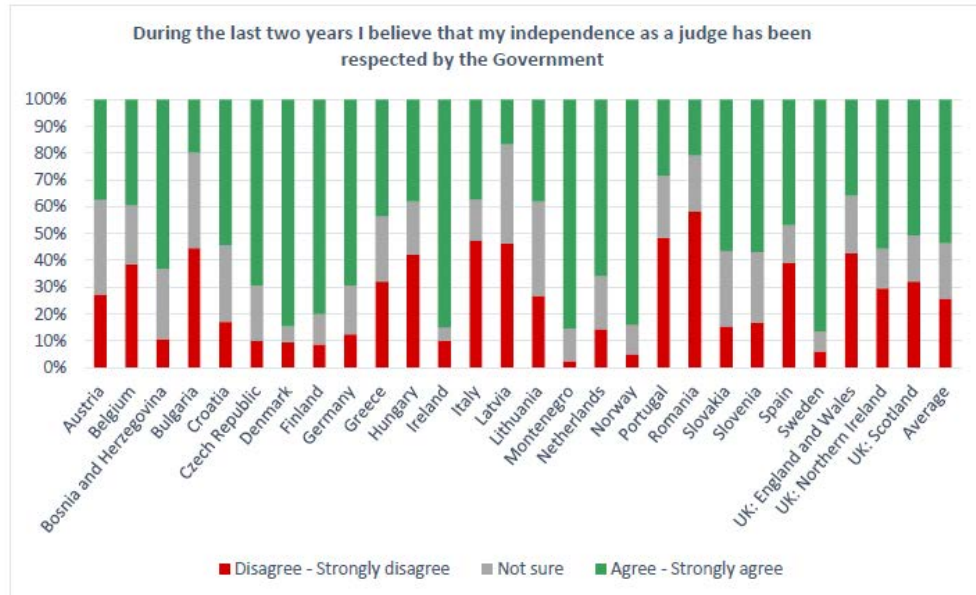
The figure above shows whether judges believe judicial corruption is effectively addressed by the relevant judicial authorities, an important aspect of accountability. In Bosnia and Herzegovina 26% of the respondents disagree with this statement, which is the highest percentage in Europe. Only 25% agrees which is also among the least favorable scores in Europe. The other respondents were not sure. The scores on this outcome indicate a serious problem regarding corruption in the judiciary and shows respondents are not satisfied about the way cases of corruption are handled within the judiciary. Recent allegations of corruption within the HJPC were not investigated on formal grounds, and this provides direct support that the current procedures are not adequate.

Figure 18 Adherence to ethical standards



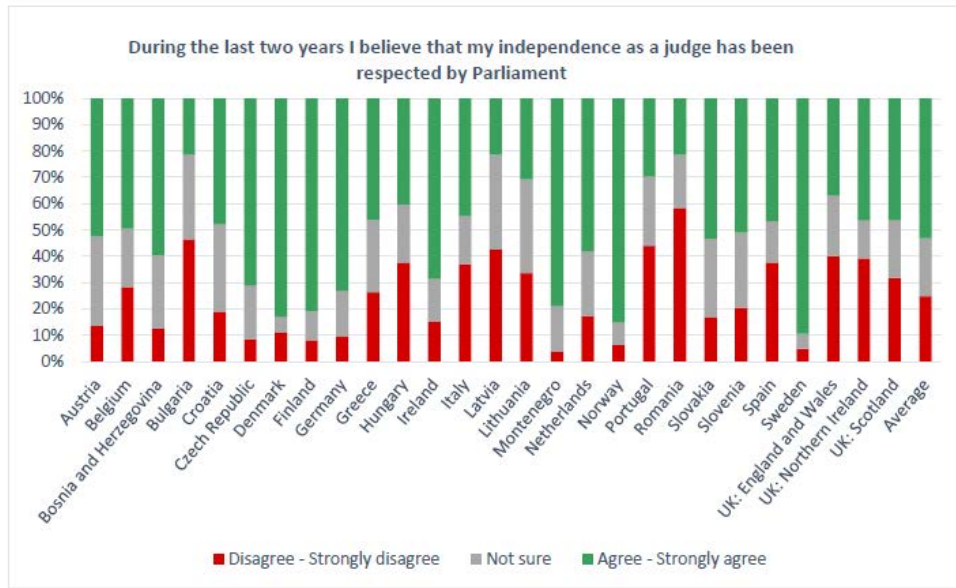
Almost 50% of the BiH respondents agree with the statement in the figure above, meaning that a little over 50% is either not sure whether judges adhere to ethical standards or disagrees. This percentage is very high, and shows a lack of trust in the integrity of judges. BiH is not alone in this respect, as Croatia and Slovenia display problems of a similar scale.

Figure 19 Respect for judicial independence by government



On the question whether the respondents feel their independence was respected by the government the answers for BiH were more positive than in many of the other European countries. The respondents experience less of a threat by the government than their colleagues in a wide range of countries, including for example Belgium, Greece, Hungary, Italy, Latvia, Lithuania, Portugal, Romania, Spain and England and Wales.

Figure 20 Respect for judicial independence by parliament



On the question whether respondents feel parliament is affecting their independence as a judge a similar outcome is encountered as in the previous figure about government. About 60% feels parliament has respected the independence of judges in the last two years.

## 6. DIALOGUE ON FOLLOW-UP

As previously mentioned, a dialogue meeting took place on 30 September 2019 in the format of the ENCJ. The reason to organize this meeting was to discuss the results of the 2017 indicators and the then recently conducted survey among judges. However, over the summer a crisis with regard to the HJPC occurred. Allegations of corruption were made and its integrity was questioned. This issue was directly relevant for the subject matter of the dialogue meeting and was addressed as well. The events of the crisis led to the question within the international community in Bosnia and Herzegovina whether the HJPC was sufficiently aware of the topic of accountability as indispensable next to independence.

Several conclusions were drawn at the dialogue meeting:

- Accountability needs to be strengthened
- Revisit the communication strategy that has been developed but not implemented. A major issue is how to deal with, what is perceived, as a hostile environment of media and parliament: disengagement is not an option;
- Speeding up of court cases remains key to getting more support of the population;
- Consider an external review of the judiciary to get and communicate an objective assessment of the performance of the judiciary;
- Implement the mechanism for financial disclosure that has been developed;
- Consider implementation of other mechanisms to address allegations of corruption at all levels;
- Consider opening up the courts to society further;
- Consider the ongoing process of preparing changes of the law on the HJPC as a vehicle for increasing accountability. This could help in achieving clearer regulation on accountability of the Council itself as well as of individual members.
- Strengthen appointment and promotion mechanisms, implement the appraisal system that has been developed
- Other issues: Reconsider open sessions of the HJPC: evaluate whether this would be productive or counterproductive

At the annual steering Board meeting in February 2020 it became clear that the remaining time of the project needs to be spent, in particular, on the topics of integrity and communication. The above conclusions were to be transformed into an activity plan for the remaining time of the project.

# 7. OVERVIEW OF ACTIVITIES OF HJPC TO STRENGTHEN INDEPENDENCE AND ACCOUNTABILITY

Over the years and thus also in the course of the project HJPC has been working on the improvement of several aspects that relate to the topics covered by the Independence and Accountability indicators. These activities took place in a range of projects, including Component I of this project. According to the ENCJ an 'improvement plan' derived from the outcomes of the indicators should not stand on its own, but need to be integrated in overall strategy and its implementation plans and constituent activities. Consistent with this approach, in this Chapter an overview is presented of the activities that have been undertaken by the HJPC and within the courts to improve the independence and accountability of the judiciary. The activities are divided in activities relating to measuring independence, strengthening independence and strengthening accountability.

## 7.1 MEASURING INDEPENDENCE

As discussed above, the HJPC has applied the instruments provided by the ENCJ. In addition, it has conducted court user surveys which is also recommended by the ENCJ.

### Court user survey

In 2019 the HJPC conducted a broad survey among the general population of the jurisdiction of four courts. The survey differentiated between respondents with and without experience with the courts. To implement this research, the HJPC BiH has hired a professional company for public opinion research, market research and consulting. This activity was a continuation of a two-year measurement of court users' satisfaction within the IPA 2012 and IPA 2013 projects. The survey provides insight in the general perceptions among the population about these courts as well as other institutions, and it measures the satisfaction level among court users in the performance of the courts.

The overall perception of the work of the courts by all respondents is mainly negative in Sarajevo, Mostar and, to a lesser extent, Tuzla and neutral in Banja Luka. 43% of them expects a fair trial in Sarajevo, 21% in Mostar and around 53% in Tuzla and Banja Luka. Much more respondents report a decline than an improvement of the performance of the courts, also with respect to the independence of the courts, over the last five years, although compared to two earlier studies some improvements are discernible. Looking at the response of the court users on specific issues, a more positive picture emerges. More respondents are satisfied about the impartiality of

the judges in these courts than dissatisfied<sup>1</sup>, and on a variety of quality aspects many respondents are satisfied.

Conducting a court user survey does not improve the independence and accountability of the judiciary per se. However, it does give valuable insights in how court users (and in this case also the population at large) view the judiciary. In BiH improvements are urgent with respect to specific performance issues in the courts, but even more urgently with regard to the independence of whole judicial system and its accountability. As not many other countries in Europe conduct such surveys it is positive that the HJPC has done so.

## 7.2 STRENGTHENING INDEPENDENCE

### Appointment of judges and prosecutors

Improving the appointment procedure: as part of the Improving Judicial Quality Project, an assessment of the testing procedure for first-time judicial appointments is undertaken in order to identify any segments where a low level of objectivity is manifest and that are susceptible to interference. After the analysis, all elements of the appointment process will be reviewed with measures and proposals offered to improve the appointment system.

The ultimate aim of the activities is to identify weaknesses in test procedures for entry-level candidates to the judiciary and the subsequent adoption of an Action Plan. The Plan would have measures to contribute to improving test procedures, all in order to have a final candidate ranking list that would only have the best qualified candidates. This would objectivise and improve the procedure for the appointment of judicial office holders, which represents one of the recommendations from the Peer Review Assessment Expert Mission (EC) to BiH.

In this context the HJPC is now implementing new procedures based on the recommendations put forward by the Peer Review Mission, which include amendments to the HJPC Rules of Procedure and amendments to the Book of Rules on Written Testing and Entrance Exams, specifically with regard to improving written testing and entrance exams, introducing more demanding test procedures and better structured interviews, introducing distinctions between first-time/entry-level judicial appointments and promotions (on the basis of customised criteria for assessing candidate expertise depending on their professional status), prescribing separate rules for the selection of court presidents and chief prosecutors (introduction of obligation to prepare and present work programmes), and also adherence to the established ranking lists (provision of exemptions that allow for deviation from ranking order). Furthermore, in 2019 two TAIEX seminars were held addressing legal remedies to contest HJPC decisions and verification of candidate suitability within the appointment procedure, and a conclusion was adopted on the necessity to prepare appropriate solutions to be integrated into the legislative and regulatory framework. Consequently, the

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<sup>1</sup> Perceptions of impartiality are generally affected by respondents winning or losing their cases.

aforementioned provisions were incorporated into the Draft Law on the HJPC BiH. The order in which candidates are ranked may be deviated from in order to ensure adequate ethnic representation, depending on other criteria such as professional experience. How soon these changes can take effect depend on the actions taken by the legislative authorities and how soon the Law on the HJPC is adopted.

## 7.3 STRENGTHENING ACCOUNTABILITY

### Development of a communication strategy

The HJPC is developing a strategy for the purpose of improving communication between the HJPC and the media, as well as other target groups and the broader public. The draft document has been prepared and considers the following issues:

- the current situation analysis (SWOT analysis),
- defining general and specific objectives of the Communication Strategy,
- target audiences,
- communication channels,
- improving transparency through social networks and
- crisis communication.

The adoption of the Communication Strategy is expected by the beginning of 2021.

This strategic document will serve as a framework for adoption of implementation documents and tools to improve the transparency of the HJPC and judiciary as a whole. The first such document are the draft Guidelines for dissemination of information on court proceedings that has already been prepared. In the forthcoming period, before it is adopted, it will be presented to the representatives of the media and non-governmental sector and judiciary itself.

An effective communication strategy not only concerns the HJPC but also the courts. The ICEA III project is underway, which is implementing the activity of build courts' capacities in proactive communication with the media and public and improving courts' transparency, as well as their operational transparency.

The aim of these activities is that by 2023, the HJPC BiH and the courts shall achieve the following:

- greater openness and transparency of the judiciary;
- strengthened court capacity for continued, proactive and efficient communication with the citizens through the media;
- strengthened awareness and better understanding of the citizens on how the judiciary works and the roles of the HJPC and courts;
- better understanding of different court proceedings by court users;
- improved media relations and cooperation;
- improved public trust in the judiciary;
- improved coordination within the judiciary in media relations.



## Financial Disclosure

With regard to financial disclosure statements, in January 2020 the HJPC adopted a new Proposal for the Book of Rules on the Submission, Verification and Processing of Financial Disclosure Statements of Judges and Prosecutors (hereinafter: the Book of Rules), due to the fact that the Personal Data Protection Agency of BiH issued a decision finding that in adopting the 2019 Book of Rules the HJPC overstepped its bounds and powers based on Article 86 of the Law on the HJPC BiH. In February 2020, acting in accordance with decision of the Court of BiH of January 2020, the HJPC repealed the 2019 Book of Rules awaiting the opinion of the Personal Data Protection Agency of BiH and the European Commission, as well as consultations with the court presidents and chief prosecutors, following which the new proposed Book of Rules may be adopted.

Furthermore, on 30th January 2020, the President of the HJPC publicly called on all judges and prosecutors in BiH to voluntarily publish their declarations of assets. A number of HJPC Council members agreed to voluntarily disclose their asset declarations, and at present the technical requirements for their publishing are being examined, in accordance with the conditions set out in the Law on the HJPC BiH. The law is not yet adopted, but it is expected to be in the coming period.

## Establishment of an Integrity Department at the HJPC

In addition, in July 2020, the HJPC adopted a new Book of Rules on the Internal Organisation and Systematisation of Posts in the HJPC that provides for the formation of an **Integrity Department** within the HJPC Secretariat that will handle the financial statements of judges and prosecutors. In addition, the Integrity Department shall also be responsible for the following:

- Monitoring the application of the codes of judicial and prosecutorial ethics and regulations on the prevention of conflicts of interest in the judiciary, proposing improvements to the HJPC BiH, and ensuring the dissemination of necessary information to judicial office holders and the public;
- Monitoring the implementation of integrity plans in judicial institutions and the HJPC BiH, suggesting improvements to the HJPC BiH and judicial institutions;
- Monitoring adherence to laws and regulations governing personal financial disclosure statements of judges and prosecutors and checking whether the statements were submitted in time and are complete;
- Providing expert and administrative support to the relevant standing committees, disciplinary panels, and other standing and interim bodies within the HJPC BiH, keeping records on their work and publishing decisions on the judicial web portal;
- Entering, updating and managing data in the existing databases and, in coordination with the ICT Department, participating in the assessment and design of software solutions/improvements for databases, systems and processes essential for supporting the operation of the Department;
- Providing expert support within the Department's scope of responsibility to the standing committees and other working bodies within the HJPC BiH;
- Participating in midterm planning, annual programming, monitoring and reporting within the HJPC BiH;
- Identifying, developing and implementing new and improved methods of work to support the development of the Secretariat of the HJPC BiH and realisation of the set goals of the HJPC BiH;

## 8. MEASURING QUALITY OF JUSTICE

The ENCJ is working on a similar set of indicators for quality of procedures and decisions as it has developed for independence and accountability. The latest version was implemented by all members and observers of the ENCJ in the first quarter of 2020. The HJPC also measured these indicators. The results are depicted below.

It has to be mentioned that in the process of the establishment of the indicators the previous set of indicators was found too subjective in nature. This made it difficult for participants to complete the questionnaire and the outcomes were not robust, as these outcomes were based on the subjective views of the person(s) completing the questionnaire and could not be verified to any meaningful degree. The revised questionnaire removed all the questions which called for subjective answers and confined the questions to those issues which could be answered objectively to a high degree. It appears from the results that this change has produced data that is insufficiently informative, and a new effort will be made to find a middle ground. The outcomes with respect to some indicators appear to be too uniform or positive and, in fact, are unlikely to reflect the actual situation in a particular judicial system. Further analysis of the questionnaire is needed and some of the indicators and scoring need to be refined. The ENCJ has published the quality results notwithstanding its conclusion that some indicators are not informative. Also in the case of BiH results need to be interpreted with caution.

## 8.1 THE 2020 SET OF QUALITY INDICATORS

Below the quality indicators established by the ENCJ in 2019 for application in 2020 are presented.

### INDICATORS OF TIMELINESS AND EFFICIENCY OF PROCEDURES

1. **Standards for judges about the duration of cases:**
  - Existence of time standards in first instance and in appeal courts;
  - Scope of the standards (total procedure or particular phases of the procedure);
  - Realisation of standards in practice at first instance and appeal courts;
  - Public access to information on the realisation of standards.
  
2. **Standards for parties about the duration of cases:**
  - Existence of time standards for parties in first instance and in appeal courts, e.g. to present documents;
  - Power of the court to impose sanctions on parties who fail to comply with time standards;
  - Authority of judges to issue case management directions (to fit the procedure to the case) in first instance and appeal courts;
  - Authority of judges to enforce the determined procedure if a party does not conform.
  
3. **Summary procedures:**
  - Existence of summary procedures in appropriate cases in first instance and appeal courts.
  
4. **Digital case filing and digital procedures:**
  - Possibility of digital case filing;
  - Possibility of digital procedures, in the sense that all communications are digital except for the hearing;
  - Possibility for litigants to inform themselves digitally about the progress of their cases;
  - Availability and development of online dispute resolution mechanisms;
  - Availability of track and trace systems for parties using online dispute resolution mechanisms.
  
5. **Specialisation of judges:**
  - Existence of specialised judges in first instance and appeal courts.

## INDICATORS OF DUE PROCESS FROM THE PERSPECTIVE OF ACCESSIBILITY

### 6. **Equality of arms (funding and costs):**

- Existence of a system under which public funding is provided to litigants without means to fight litigation themselves;
- Existence of a system to shift the costs of litigation of the successful litigant to the unsuccessful litigant.

### 7. **Commensurate effort of judges:**

- Existence of rules or regulations to determine whether a case is decided by a single judge or a panel of judges in first instance and appeal courts.

### 8. **Dealing with abusive conduct:**

- Authority of the judge to take action to prevent abuse by parties and/or their lawyers;
- Instruments available to the judge to intervene:
  - Stop or stay the proceedings
  - Order expedition of the proceedings
  - Impose fines
  - Shifting of litigation costs
  - Report to a disciplinary body.

### 9. **Availability of appeal:**

- Existence of right of appeal for an unsuccessful litigant;
- Existence of filtering system to prevent appeals which are without merit from proceeding to a full hearing;
- Impact of appeal on the execution of the order appealed against.

### 10. **Communication:**

- Existence of procedures in all official languages of the country;
- Existence of facilities at the court to provide translation when necessary.

### 11. **Access for people with disabilities:**

- Existence of special procedural and physical arrangements for people with disabilities.

### 12. **Arrangements for vulnerable people:**

- Existence of special procedural and physical arrangements for vulnerable people.

## INDICATORS OF QUALITY OF JUDICIAL DECISIONS

### 13. **Format of judgments:**

- Existence of templates for judgments in standardised types of case.

### 14. **Reasoning of judgments:**

- Existence of the requirement to reason judgments dealing with substantive issues in civil cases and verdicts in criminal cases;
- Possibility for judges to give only summary reasons where appropriate (e.g. to speed up procedures);
- Requirement for oral judgments (if permitted) to be recorded and made available to parties;
- Requirement of transcription of oral judgments in civil cases and oral verdicts in criminal cases.

### 15. **Clarity of judgments:**

- Existence of an obligation to use clear and simple language
- Primary recipients for whom reasons are written:
  - Litigants
  - Public in general
  - Other judges (such as appeal courts or Supreme Court)
  - Evaluation authorities.

### 16. **Assessment of Quality of judicial decisions:**

- Existence of an instrument to assess the quality of judicial decisions on a regular basis;
- Body in charge of the assessment;
- Link with Court User Satisfaction Survey.

### 17. **Education of judges:**

- Existence of initial training of judges on writing judicial decisions;
- Existence of the requirement for judges to participate in training courses annually.

## INDICATORS OF PUBLIC ACCESS TO THE LAW TO GUIDE SOCIETY

### 18. **Access to case law:**

- Degree to which judicial decisions in civil, criminal and family law are published at first instance and appeal courts;
- Efforts of the court to point out decisions that have high impact and/or set precedent to the public;
- Efforts of the court to make statistical information available about the outcome of cases.

### 19. **Opening up to the public:**

- Degree to which the courts provide information to the public through official sources (e.g. publications, websites) about core judicial values such as independence, impartiality and application of the law;
- Degree to which the public gets the opportunity to visit the courts and see judges at work.

## 9. OUTCOMES FOR BIH OF QUALITY INDICATORS

Below the results of the quality indicators for BiH are presented. The accompanying questionnaire is available on the website of the ENCJ. It should be borne in mind that the ENCJ quality indicators are still being developed, and the methodology will be improved further. An issue is that some of the indicators have too little differentiation, resulting in many 100% scores. As the figures below show, this is also the case for BiH. The indicators differentiate between criminal and civil law proceedings. Apparently, the differences are quite small in BiH.

Because the indicators are still being developed, the outcomes are discussed briefly here. The indicators suggest that there are some important gaps in the arrangements that are in place in BiH. These relate in particular to the availability of summary procedures, digital case filing and digital procedures, and the availability of appeal. BiH has these low scores in common with other European Countries. The scores with respect to the assessment of the quality of judgments is higher in BiH than in many other judiciaries. In these judiciaries very little is done in this area.

*Figure 21. Indicators Quality of justice, criminal law in 2020*

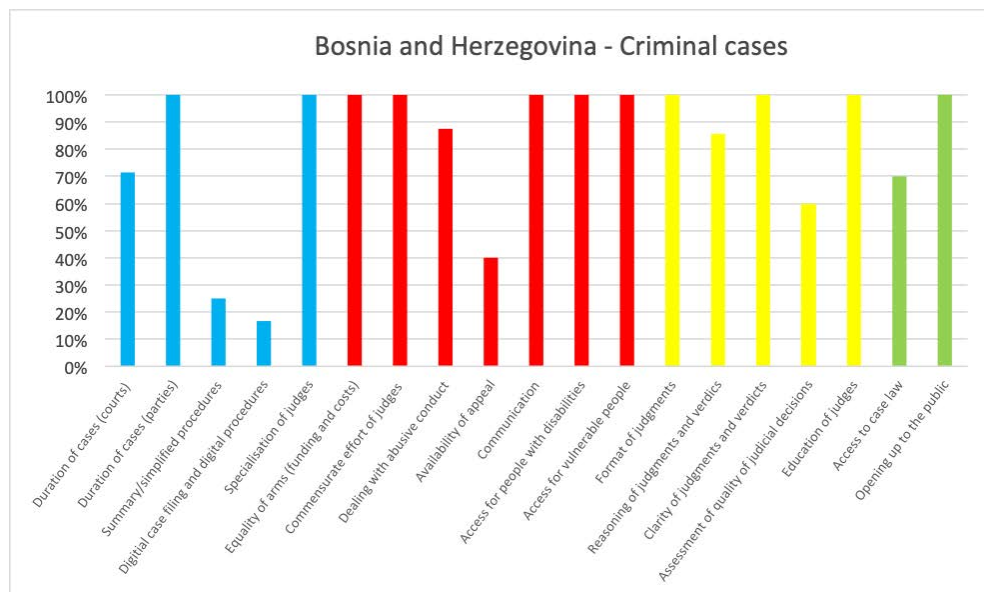
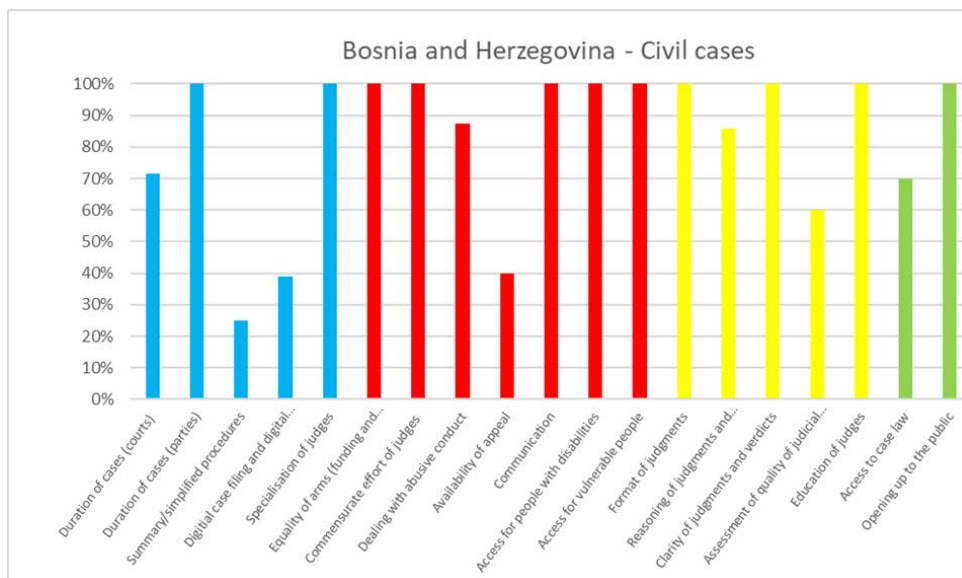


Figure 22 Indicators Quality of justice, civil law in 2020



Major areas for improvement follow from the scoring:

1. Summary or simplified procedures in appropriate cases in first and second instance. In criminal and civil law the introduction or extension of such procedures would contribute to the timeliness of judicial decisions. In both areas of law the score of 25% out of 100% indicates that there is ample room for improvement.
2. Digital case filing and digital procedures. The indicator is rated at 17% for criminal law cases and 39% for civil cases. This indicator addresses a major area of innovation for all members/observers of the ENCJ, and includes commencing and conducting proceedings (first instance and appellate) electronically, informing the parties about the progress of their cases digitally, as well as, in the longer run, the availability of entirely new online dispute resolution mechanisms.
3. Availability of appeal. This indicator strives to reach a balance between the availability of appeal as such and the prevention of appeals without merit that would only lead to delay and clog the system. It, therefore, includes as a sub-indicator the presence of a filtering system to prevent appeals which are without merit from proceeding to a full hearing. It also addresses the possibility for the appeal court to order a stay of the first instance decision if an appeal is brought. The score on this indicator is 40%, and improvements are possible.



## 9.1 QUALITY SYSTEM

It should be noted that the indicators are about the actual procedures and arrangements that are in place, but not about the quality system as such. The need in BiH for such a system was addressed in the TAIEX Conference/workshop on Raising Quality Standards in the Judiciary that took place in Sarajevo on 22-23 October 2019. The ENCJ was represented at this conference. The conclusions reached were the following.

1. The independence and accountability of judicial office holders and judicial quality are interdependent and, therefore, must be constantly in place;
2. Judicial institutions are accountable for the quality of service offered within the scope of their competences. Accordingly, institution managers must assume a more active role in the process;
3. Courts and prosecutors offices should develop quality standards, taking into consideration actual society needs and identified weaknesses of the judicial system. In coordination with the HJPC, a comprehensive quality management system should be established, defining its elements, standards, indicators and verification mechanisms as based on the best European practices and the minimum standards adopted by CEPEJ and ENCJ;
4. Judges and prosecutors should, both individually and through their institutions, continue to assume a more active role in identifying and communicating the needs of the judicial community, with reference to raising quality standards, and their application;
5. Quality must be measured periodically at regularly set intervals;
6. The courts, prosecutors offices and the HJPC BiH should define specific measures to improve the quality of the judiciary based on quality indicators;
7. In improving the quality of the judiciary, we need to advance systemic cooperation among all relevant stakeholders, including the executive and legislative authorities and, at the same time, regularly assess the level of public confidence in the judiciary.

The conclusions point to the need to approach quality of justice not only with regard to outcomes, but also from the perspective of processes and systems. The indicators presented above partly fill in points 3, 5 and 6.

# 10. ACTIVITIES OF HJCP TO IMPROVE QUALITY OF JUSTICE

A range of activities aims at improving quality of justice in a broad sense, including timeliness which is one of the most pressing needs in BiH.

## **Strategic planning.**

One of the activities of the IPA 2017 project “Building an Effective and Citizen-friendly Judiciary” is strategic planning, which aims to enhance the organisation of the work of the courts, as well as to increase the accountability of heads of judicial institutions. The activities serve to provide court presidents with a unique tool to help them develop long-term plans for the institution they manage.

## **Faster and more efficient case resolution**

### *By means of improving civil procedures at the courts*

More efficient case resolution can be reached by means of Improving civil procedures. Within the Improving Judicial Quality Project, the HJPC BiH is implementing a set of measures to improve efficiency and quality of the civil litigation proceedings. These activities can be summarized as follows.

- The activity has been initially developed within the Improving Judicial Efficiency Project II – IJEP II (2015-2018) by trilateral cooperation between the HJPC, Norwegian Courts Administration and Council for the Judiciary of the Netherlands.
- Piloting activities started within the IJEP II in two courts, the Municipal Court in Sarajevo and the Basic Court in Banja Luka,
- The activity was continued through the IJQ Project thanks to the positive results achieved in the IJEP II implementation.
- So far, the activity was implemented in 24 courts (since 2015). Currently, it is being implemented in the last 6 target courts (phase III).

Other HJPC activities with the aim of resolving cases faster and more efficiently are discussed below.

### *By means of an IT-system for small claims*

Within the Improving Judicial Quality Project, there is an ongoing activity of development and implementation of the **SOKOP Mal System** (System for Electronic Submission and Processing of Small Claims / the so-called “utility” cases). The system enables the court to act automatically and efficiently in a higher number of cases. It contributes to savings of human and financial resources and the reduction of the number of unresolved utility cases in courts.

### *By means of backlog reduction plans in the courts*

Since 2010 the courts have regularly been drawing-up backlog reduction plans. Every plan contains a list of cases that the court intends to resolve during the calendar year. The purpose of the plans is to focus on resolving cases according to initial filing date.

As a result of this activity the courts have succeeded in reducing the length of pending cases. By way of a designated responsible committee, the HJPC BiH regularly monitors the realisation of the backlog reduction plans, and on a quarterly basis publishes the results on the judicial web portal. The benefits are twofold as, on the one hand, the goal is to increase accountability of judges for their work, and on the other hand, the HJPC enhances its relations with the public by making information on court operations publicly available.

#### ***By means of reorganising business processes in the courts***

Improving business processes of the courts by reorganisation of court operations and human resources, was initially developed within the framework of the Improving the Efficiency of the Courts and the Accountability of Judges and Prosecutors in BiH Project (ICEA II).

The aim of the activity is to improve the internal organisation of the courts through the delegation of tasks from judges to trainee/volunteers and other non-judicial staff in order to create a setting where judges can execute their primary task – trying cases.

#### ***By means of developing court efficiency standards***

For the first time, the HJPC BiH is working on establishing indicators for court efficiency standards. The purpose of the indicators is to enable the HJPC BiH, as a regulatory body, identify which courts and in which segments are experiencing difficulties in their work. Upon identifying problems, the HJPC BiH will provide additional support to the courts where issues were found. Furthermore, court presidents will also be able to promptly identify any problems in their courts and in which segment of operation they occur (human resources, quota achievement, average length of proceedings, etc.). This activity is being carried out as part of the IPA 2017 Project. The indicators were adopted at the HJPC session on 22/10/2020. They represent the nine major statistical indicators that point to the existence of problems in the performance of a court. The indicators are currently in the testing phase and will be presented and made available to the courts at a later stage. After testing has been completed, the indicators will be placed on the HJPC BiH website and be available to the general public.

#### ***Assessment of the quality of court decisions***

Within the Improving Judicial Quality Project, the HJPC BiH conducted its first ever assessment of the quality of court decisions in civil proceedings based on a sample of 100 decisions. The assessment included judgements handed down by municipal/basic courts, cantonal/district courts and the Court of BiH over the previous 5 years. The analysis was carried out by an expert team of distinguished judges from BiH, Norway and the Netherlands, in the period March-October 2020. The data gathered is currently being processed.

The following results will be achieved in 2021:

- Guidelines and a Judgment Writing Manual will be developed;
- Training will be carried out through the JPTC's of FBiH and RS based on the Guidelines and the Manual in order to improve judgment drafting skills.

The aim of the activity is to standardise the quality of court decisions as well as to clearly define quality criteria for court decisions which will, ultimately, form an element of the overall performance evaluation for judges.

### Developing a mentoring system

The HJPC BiH is introducing a mentorship system in the courts, which was initiated as a result of the TAIEX Peer Review of the initial training and continuing professional development of judges and prosecutors in Bosnia and Herzegovina (2017). The activity is being implemented within the framework of the Improving Judicial Quality Project together with the advisory assistance of representatives of the judiciaries of Norway and the Netherlands.

### Strengthening court management

Under the Improving Judicial Quality Project, the HJPC BiH is implementing activities to improve court management. The activity was initiated with the Improving Court Efficiency II Project (2015 – 2018) in the Municipal Court in Sarajevo. Based on the results that were achieved, the project activity was continued with the Improving Judicial Quality Project. This activity is focused on strengthening the role of heads of departments/divisions in 18 target courts, as middle management that is crucial for achieving the standards for judicial efficiency and quality. In that respect, the following results were achieved:

- Court management quality has been improved with a more proactive role taken by court department heads which was missing in the past – this was achieved through specialised training for court presidents and department heads;
- Guidelines were developed for the appointment of court department heads, establishing a more transparent procedure for the selection and appointment of court department heads based on pre-determined criteria, a defined candidate profile together with other conditions that need to be fulfilled. The selection process has been completed in most courts throughout BiH in line with the procedure.
- The experts from Netherland and Norway established a peer-to-peer based cooperation with the target courts, which resulted in reorganised processes in the civil litigation departments of the courts, strengthened procedural discipline, reduced the duration of proceedings and the introduced of team work.

Also, through the JPTCs specialised training is being organised on communication and leadership skills, as well as training for intervision group leaders (a specific method for resolving issues within a team).

## 10.1 RESULTS OF ACTIVITIES

The results with regard to the reduction of backlogs and the duration of court procedures are measurable by means of the court statistics. According to data of the HJPC, the backlog reduction plans of the courts resulted in the completion of over 1.2 million of the oldest cases at the courts from 2011 to this day.

The total number of pending non-utility cases in the courts dropped by over 50% when comparing year-end 2019 with 2011. As for the age breakdown of backlogs at the courts, major reductions were achieved of the number of pending cases:

- 10 years and older reduced by 91%;
- between 5 and 10 years old reduced by 88%;
- between 3 and 5 years old reduced by 70%;
- between 1 and 3 years old reduced by 68%;
- up to one year old reduced by 38%.

# 11. CONCLUSIONS AND NEXT STEPS

Despite the external and internal problems that the HJPC faced during the project, the HJPC has applied the instruments that the ENCJ has developed to assess the state of independence, accountability and quality of justice, including the survey among judges on independence. It also commissioned an elaborate survey among the court users, which is highly recommended by the ENCJ. The outcome is that in BiH formal requirements for independence are largely met, except for the funding of the judiciary and the non-transferability of judges, but that the perceptions of independence are much less positive. Especially, court users and citizens in general are critical, while judges are relatively positive but less so than the European average. There is a gap between the formal safeguards and the way these are applied in practice. The survey among judges shows negative perceptions among BiH judges regarding corruption in the judiciary, the appointment and promotion system, adherence to ethical standards and the influence of the media on judicial actions or decisions.

With respect to accountability, arrangements are in important areas not in place, in particular the relations with the press, external review and accessory functions including disclosure of assets. As to perceptions, judges are critical about the adherence by judges to ethical standards and the actions of relevant authorities against judicial misconduct and corruption.

As to quality, the indicators show wide variation, indicating weak and strong points. A strong point is for instance, the assessment of the quality of judicial decisions, which not many judiciaries undertake in Europe. Areas for improvement are the availability of summary and simplified procedures, digital case filing and procedures and the availability of appeal in a balanced manner.

The report also shows that the HJPC and the Courts have been working to improve independence and accountability and, in particular, quality of justice. With regard to independence, some progress was made, but on major aspects (financial disclosure, appointment and promotion of judges) the HJPC became bogged down, and is dependent on legislation to move forward. On quality including timeliness substantial improvements were realized. With regard to timeliness progress can be unequivocally measured by means of the case administration system of the courts. Other improvements, for instance of the quality of judicial decisions, are less easily measurable but important as well.

To conclude, the main problem the BiH judiciary is facing concerns negative perceptions of judicial independence and the lack of trust in the judiciary in society. To address this problem the judiciary needs to improve:

1. Judicial ethics and the mechanisms to counter improper behaviour and corruption at all levels of the judiciary, including the HJPC itself, in particular with respect to appointment and promotion of judges. Introduction of disclosure of assets of judges and members of governance bodies such as HJPC is also urgent.
2. Communication with society, including the other state powers, the media and civil society to provide broad insight in the actual functioning of the judiciary, and to counter the spread of disinformation. This includes the introduction of external review, to be commissioned by the judiciary (HJPC) itself to protect judicial independence, in order to establish a trustworthy analysis of its functioning.

It should be stressed that the other state powers (the political system) do not function better than the judiciary, if not worse, with regard to integrity and good governance. This leads to pressures on the judiciary that hamper progress. The international community should recognize these pressures, and use its influence to protect the independence of the judiciary. The negative examples of Hungary, Poland and Slovenia should be taken to heart. It was shown above that also the mechanism of the funding of the judiciary requires improvement. This is a typical area where the pressure of the other state powers becomes apparent.

With regard to quality of justice, the courts on the initiative of the HJPC have made substantial progress, for instance, with regard to timeliness. It is important to improve performance further. This is important for the parties in procedures, the economy as a whole and the standing of the judiciary in society. The steps taken to improve case management, but also court management, provide a sound basis for further progress. The continuation of new ways of working is essential, also when the co-operation with partners from abroad stops at the end of projects. In addition, the indicators show that there are important areas for innovation such as the availability of summary and simplified procedures, and, as everywhere, the digitalisation of procedures. The introduction of an integral quality management system can give permanent impetus to court performance, and can be an important factor in enhancing the trust of society in the judiciary.<sup>2</sup>

To gain a common understanding of the challenges and opportunities for the judiciary of Bosnia and Herzegovina, the next step would be to discuss this report in dialogue meetings of the members of the HJPC and representatives of the Netherlands and Norwegian Councils for the Judiciary.

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2 See also [Sterk and Van Dijk \(2021\)](#) in Verfassungsblog and [Van Dijk \(2021\)](#).

