Leveraging Procedural Reforms to Improve Commercial Justice in Bosnia and Herzegovina

June 2019

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Abbreviations and Acronyms

BD	Brčko District
BAM	Bosnian Convertible Mark
BiH	Bosnia and Herzegovina
BL	Bankruptcy Law
CCJE	Consultative Council of European Judges
CCS	Cantonal Court in Sarajevo
CE	Council of Europe
CEPEJ	European Commission for the Efficiency of Justice
CMS	Case Management System
CPL/CPLs	Civil Procedure Law/Civil Procedure Laws
EC	European Commission
ECtHR	European Court of Human Rights
ECHR	European Convention of Human Rights and Fundamental Freedoms
EU	European Union
FBiH	Federation of Bosnia and Herzegovina
FIC	Foreign Investors Council
Guidelines	Guidelines for Civil Case Processing of the Municipal Court in Sarajevo
Guidelines on Service of Process	Guidelines on Service of Process via Public Postal Operators
HJPC	High Judicial and Prosecutorial Council
IFC	International Finance Corporation
IT	Information Technology
LEW/LEWs	Law on Expert Witnesses/Laws on Expert Witnesses
LPB	Law on Bankruptcy Proceedings
MSMEs	Micro, Small, and Medium Size Enterprises
RS	Republika Srpska
SOKOP Mal	System for the Electronic Submission and Processing of Small Claims
Study	World Bank Feasibility Study on Improving Commercial Case Management in the Federation of Bosnia and Herzegovina
WB	World Bank

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About the Report

This Report is produced under the Bosnia and Herzegovina (BiH) Commercial Justice Technical Assistance Project financed by the UK Good Governance and Investment Climate Reform Trust Fund. The objective of the Project is to support justice institutions in implementing reforms that improve efficiency and access to commercial justice in BiH, building on the recommendations of the UK-funded 2016 Feasibility Study on Improving Commercial Case Management in the Federation of Bosnia and Herzegovina (FBiH). The Project is part of a broader World Bank initiative to raise awareness of reform opportunities and inform policy dialogue on the efficiency, quality, and access to justice across countries in the Western Balkans, with a view to improving the performance of justice systems in these countries.

The Project comprises five components, as follows: (1) strengthening commercial departments and commercial courts in FBiH and Republika Srpska (RS), respectively, through analysis of caseloads and workloads, and providing recommendations to reengineer processes, reduce backlog and strengthen court management; (2) fast-tracking small claims, based on results of comparative legal analysis of civil procedure in BiH and in several countries of the European Union (EU); (3) increasing access to justice for micro, small, and medium enterprises (MSMEs) through developing guides to increase legal literacy among firms; (4) capacity building through developing and implementing peer-led counseling and supplementary training for commercial judges; and (5) implementing procedural reforms to close loopholes and reduce bottlenecks in case processing through proposals for legislative amendments.

This Report is delivered under Component 5 of the Project. It examines procedural inefficiencies and practices that cause the greatest delays in commercial case processing in BiH, and based on best practice examples, offers recommendations to ease bottlenecks and minimize inefficiencies through amendments to civil procedure rules and selected trial processes.

Acknowledgments

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Executive Summary

1. **Speedy and efficient case processing plays a vital role in maintaining and improving the quality of the judicial system as a whole; all who seek justice have the right to obtain a decision within a reasonable time at the end of a fair and equitable procedure.** Procedural justice puts emphasis on the procedure itself and a just decision within a reasonable time. The importance of procedural justice is particularly accentuated under Article 6, Section 1 of the European Convention on Human Rights (ECHR) and Chapter 23 of the European Union (EU) accession process, *“Judiciary and fundamental rights”*, which requires continuous and concerted efforts on reforming the judiciary to achieve efficiency, effectiveness, and a high standard of adjudication — all essential factors to safeguard the rule of law. This can be done, in part, through expediting commercial case processing and enhancing the ability of courts to deliver the same (or higher) quality services in less time and with less pressure and burden on judges and staff.
2. **In BiH, there is plenty of room for improvement of court performance in commercial case processing.** This is evident both from available statistics on the duration of commercial cases¹ certain stages of commercial cases in first and second instance, as well as from BiH scores on the ease of enforcing contracts in the 2019 Doing Business Report². Statistics obtained from the HJPC show that certain stages of commercial cases can last 20 times longer than the statutory periods. According to the 2019 Doing Business Report, the time needed to resolve a commercial dispute through a local first-instance court in BiH is 595 days. Currently, BiH ranks 75th on ease of enforcing contracts, compared to 71st in the 2018 report and 64th in the 2017 report. Notably, BiH quality of judicial processes index, which evaluates whether a country has implemented a series of good practices that promote quality and efficiency in the court system, dropped from 11 to 10.5 over the past three years. Although this drop is not in itself substantial, it suggests that no concerted actions were taken to improve efficiency of judicial processes in commercial dispute resolution.
3. **This Report focuses on recommendations for the improvement of civil procedure rules and selected trial processes with the aim to increase procedural efficiency and reduce bottlenecks in commercial case processing in BiH.** The following aspects of case processing in BiH are analyzed in the Report: (i) service of process; (ii) hearings and adjournments; (iii) expert witnesses; (iv) bankruptcy trustees; (v) court fees; (vi) internal court rules; and (vii) use of the Case Management System (CMS). The accompanying recommendations are developed in response to the existing legal framework that governs these selected aspects of commercial case processing and rely on existing good examples from BiH courts, the regulatory framework of countries that share the same legal heritage as BiH with a particular focus on EU and Council of Europe member states, the European Court of Human Rights (ECtHR) case law, as well as recommendations and opinions of international institutions on judicial efficiency.
4. **It may not be possible or practical to implement all of the reforms at once; rather, a phased approach to implementation is recommended.** Preliminary prioritization of select reforms that can be impactful in the short, medium, and long term is provided in Recommendations Overview-Table 2 at the end of the Report. Proposed sequencing of reform takes into account the anticipated level of impact and risks associated with implementation of individual recommendations. Apart from general risks, such as

¹ Cases between enterprises, that is, business-to-business cases.

² The enforcing contracts indicator measures the time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality and efficiency in the court system.

limited capacity to implement reforms, resistance due to inertia or vested interests, fragmentation of stakeholders, lack of political will to improve commercial case processing, lack of coordination between institutions, and so forth. Special consideration was given to country-specific and area-specific risks which could highly influence implementation of certain reforms. Notably, all reforms which require amending primary laws are set as long-term goals due to the complex governance structure in BiH which makes this process more cumbersome and time-consuming compared to other countries in the region. This particularly stands for procedural laws which are overarching laws and require a strong consensus for change, and for those laws whose amendment will be required only following accession to the EU (for example, postal laws). In contrast, organizing the training of relevant actors in different fields (judges, post officers, court couriers, expert witnesses, bankruptcy trustees, administrative staff, and so forth), as well as conferences and other knowledge-sharing events is set as a short-term goal. The Recommendations Overview Table further outlines the authority responsible for implementation of individual recommendations.

5. **To avoid duplication of effort and build synergies in the reform process, it is vital to coordinate the reform proposals put forward in this Report with existing initiatives/projects aimed at enhancing procedural efficiency, and to develop a systematic and synchronized implementation strategy.** Organized institutional efforts around selected strategic initiatives would help develop a consolidated approach to addressing procedural inefficiencies and reducing bottlenecks in commercial case processing. An integrated planning and design policy would save time and funds. As procedural laws are the same for both civil and commercial cases, existing initiatives that are aimed at addressing issues in civil case processing or otherwise impact civil case processing should also be taken into consideration. The HJPC would be best positioned to coordinate these efforts and bring together overlapping initiatives which share the same subject-matter and/or the same policy objectives. This particularly stands for the capacity development initiatives (trainings for judge, and/or other trial participants) as well as initiatives to strengthen and expand cooperation between higher and lower instance courts/individual judges to improve case management and harmonize practices. Some of the recommendations set forth in this Report serve as support to existing initiatives, and can be used to guide and enhance the reform process.

Service of Process

6. **It is the overall perception of courts and trial participants that service of process substantially prolongs trials; HJPC statistics also show that the rate of unsuccessful deliveries in courts is not negligible.** In practice, service of process takes more time than necessary, both when serving documents within BiH and abroad. Service must often be repeated several times until done adequately, which further prolongs trials.

7. **Public Postal Operators have exclusive rights over service of process, based in postal regulations; this exclusivity, however, is contrary to Civil Procedure Laws (CPL/CPLs).** In practice, some courts fully rely on public Postal Operators to conduct service of process. Some courts have set up internal delivery services, but even for these courts, part of the service is conducted by public Postal Operators. It seems that no BiH courts hire private agencies for the service of process although service by private operators is envisaged under CPLs.

8. **Post officers often do not perform service of process in accordance with relevant civil procedure rules; courts have no mechanism to sanction or improve the performance of post officers.** Post officers are obliged to conduct the service of process in accordance with the Guidelines on Service of Process via Public Postal Operators (Guidelines on Service of Process), passed by the BiH Agency for Postal Traffic.

However, trial participants and judges claim that rules are often not complied with in practice. Notably, delivery notes are not properly filled out by post officers (for example illegible signature, no date, insufficient or no reasons for failed delivery) and, in some instances, the personal delivery cannot be completed for a significant period of time. Also, delivery of court letters via mail is not fully digitalized and cannot be efficiently tracked. This also creates a perception of undue influence of post officers by addressees (usually defendants).

9. As reported by judges and the BiH Ministry of Justice, international service of process is very slow, and **it sometimes may take more than 12 months to serve a letter outside the country**. By way of comparison, international experience shows that service of process under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents usually takes **two to four months**.³

Recommendations and Next Steps

10. The Guidelines on Service of Process could be improved **to solve issues recurring in practice**. Post officers' performance could be enhanced if **public postal operators would introduce and impose specific disciplinary measures against post officers** for inadequate service of process, particularly when issues with delivery of letters are flagged by courts, or **incentives for good performance (for example, bonuses)**. Courts and postal operators could **enter into a service-level agreement that includes provisions on performance standards, penalties for insufficient process, as well as bonuses for exceptional performance**. Court remedies could include the court's right to liquidated damages, repeated delivery free of charge, fee refund, and tracking procedures, as well as Postal Operators' right to bonuses for higher delivery success rates.

11. **Courts would benefit from introducing uniform rules on the work of court couriers**. The Model Rulebook for Court Couriers could be further improved to allow working in shifts or in the evening, envisage specific sanctions for couriers for breach of duty/bonuses for good performance, and so forth.

12. **CPL RS/CPL FBiH could be amended to improve service of process rules**. It would be beneficial for civil procedure rules to allow for electronic service of process in commercial cases for businesses that have access to the Internet, to introduce a simplified procedure of delivery once parties are duly informed of proceedings, to introduce monetary sanctions for unnotified changes of address, to align the service of process requirements with ground realities, and to facilitate faster international service of process.

13. **Training for post officers/court couriers could be introduced**. Trainings could focus on the practical aspects of service of process, particularly those which are most problematic in practice. Both entry-level and continuous trainings should be organized. Trainings could also be attended by court couriers. **It would be advisable to also organize trainings for judges/designated judicial associates/RS and FBiH Ministries of Justice for performing international service of process**. Recurrent trainings would ensure that all participants are well-informed of all channels through which service of documents abroad can be conducted.

14. **E-book and e-tracking of postal delivery of court documents would enhance service of process efficiency**. E-book for service of process could be developed to track delivery of court letters and should

³ Please see: <http://torrilegalservices.com/legal-services/international-service-of-process/>;
<http://internationalbusinesslawadvisor.com/7-steps-to-effectuate-international-service-of-process-under-the-hague-service-convention/>.

optimally be connected with CMS to keep records of postal deliveries. This would enable accurate and timely tracking of writs sent and easier collection of data on unsuccessful deliveries. **Information on e-tracking could be used by court presidents and judges to ensure adequate delivery.** CMS could create periodic reports on deliveries for court presidents, and judges could monitor issues of insufficient service of process on individual cases and flag issues to court presidents.

15. **Long term – the BiH Law on Postal Operators, FBiH, and RS Laws on Postal Services could abolish the monopoly of public postal operators over service of process – both the reserved right to deliver court letters and the reserved right to deliver letters which weigh up to 1000g** (for example, from the moment of the EU accession). This would ensure opening of the market for postal services starting at the moment of accession, without having to wait for the new acts on postal operators / postal services to be rendered. One could consider abolishing the reserved right of Postal Operators to deliver court/administrative letters even before the BiH EU accession.

Hearings and Adjournments

16. **Poor case management creates inefficiencies in case processing.** It is the overall perception of higher instance courts and trial participants that judges' management skills should be improved to enable case processing without undue delays.

17. **As reported by judges and confirmed by statistical data as well as legal and business community representatives, court hearings are rarely scheduled within CPL FBiH/CPL RS prescribed deadlines; once scheduled, they are often postponed/adjourned for reasons which can be attributed both to judges and parties.** Judges are overly lenient towards the parties and allow procedural activities to be postponed and hearings adjourned for reasons that can be easily avoided or are otherwise not justified – for example, because attorneys have another hearing scheduled at the same time at the same or another court, or because parties claim that they are negotiating a settlement. Sometimes, hearings are adjourned indefinitely to obtain missing evidence or scheduled days/months apart due to their inability to present all the evidence in a day. **Also, adherence to the prescribed deadlines is rarely monitored by court presidents *ex officio* (save for few exceptions);** consequently, reaction in case of undue postponement of hearings/other trial activities is often lacking.

Recommendations and Next Steps

18. Modelled on CPL RS, CPL FBiH could **introduce a set of specific rules for commercial cases.** Both the CPL RS and CPL FBiH could introduce **stricter rules on gathering evidence**, at least for commercial cases, and include: instructive or even preclusive deadlines within which a court would wait for evidence to be obtained (no indefinite postponements for missing evidence); hearings of witnesses through teleconference; specific rules on when postponement/adjournment of hearings is allowed; stricter rules on the timeframe for when evidence can be presented and on how to prioritize evidence. Changes to procedural laws require strong political will and wide consensus.

19. **Trainings for judges could be organized in various fields.** Some training modules could focus on developing soft skills such as: encouraging parties to reach an amicable settlement of the dispute, enhancing procedural discipline of the parties through better handling of the parties' procedural requests/proposals (evidence proposals, requests for postponement/adjournment of hearings, and so forth); communicating with parties/other trial participants, organizing trial activities, and using all available CMS functionalities to improve case management (notably those which enable reporting and

analysis of data), etc. Further, in coordination with the HJPC, RS, and FBiH Training Centers could organize tailor-made trainings for commercial judges in specific commercial law areas, such as intellectual property rights, corporate governance, stock market and securities, and so forth.

20. **It would be useful to introduce new CMS functionalities for improved case management and to increase the capacity of judges and judicial staff for use of CMS for case management and monitoring.** CMS could keep track of scheduled hearings as well as postponements/adjournments of hearings and the reasons for such postponements/adjournments, monitor efficiency and effectiveness of the time the casefiles are under review (*evidencija*), and track all important steps in the judicial process. This information could be used to produce periodic reports. Court presidents could regularly review these reports and ask for explanations from individual judges.

21. **It is recommended to develop decisional practice to address procedural inefficiencies and disseminate it through briefs, trainings, conferences, and meetings.** With support from the HJPC and in coordination with existing initiatives, this could enhance cooperation between higher and lower level courts. For instance, higher courts could, through their decisions on appeal/periodical reviews, address shortcomings identified in first-instance proceedings with respect to case management, and support first-instance courts in dismissing superfluous requests by the parties (primarily evidence proposals and requests for postponement/adjournment of hearings).

22. **Promotion of amicable settlements of disputes might be considered.** Lawyers could be incentivized through higher settlement fees to advise their clients to settle rather than proceeding to litigation.

Expert Witnesses

23. **Low-quality expertise and delays in producing expert opinions cause procedural inefficiencies.** Data collected from courts and through on-spot review of case files show that unnecessary delays in producing expert opinions, absence from hearings, objections to expert witness opinions, and so forth, cause adjournments of scheduled hearings and prolong trials. As reported by experienced judges, experts are knowledgeable in their field of expertise, **but some lack knowledge of trial requirements** and produce opinions that are of little or no use for the court. Experts are not continuously trained.

24. **Courts do not manage/monitor expert witness work adequately nor do they use all available tools to increase efficiency of experts' work.** This is confirmed both by legal and business community representatives as well as higher-instance judges. Further, statistics show that over 70 percent of recorded instances of delay in submission of the expert witness opinion go unnoticed by the court. **Judges lack knowledge in the fields of expertise** common for commercial disputes, leading them to **excessively rely on expert opinions** or allow parties to excessively review and comment on such opinions, thus causing adjournments and delays. **Closed case review revealed that judges sometimes give unclear instructions (overly broad and not precise enough) to expert witnesses.**

25. Ministries of Justice **do not revoke expert witnesses' license on grounds of unethical, incompetent, or inadequate work.** Tools which would ensure expert witness accountability exist only on paper and are seldom applied in practice.

Recommendations and Next Steps

26. **Consideration might be given to improving the expert witness regulatory framework.** Regular calls for appointment, calls for appointment on request of courts, and mandatory trainings could be introduced as part of the Laws on Expert Witnesses (LEW/LEWs). Expert witnesses could be allowed to take trainees, interns, and associates. Courts could be vested with the power to initiate proceedings against expert witnesses and even revoke their licenses. Parties would benefit from a clear right to report wrongdoings of expert witnesses to all relevant authorities.

27. **Expert witnesses in FBiH could be mandated to regularly update their knowledge-base.** The continuous training of experts in their fields of expertise as well as in trial requirements could potentially be set out as a requirement. Competent bodies could keep a record of experts' trainings/specializations and, optimally, attendance should be a precondition for license renewal.

28. **It may be beneficial for judges to be required to have a general understanding and knowledge of the common issues for which experts are usually called in** (for example, reading financial statements or calculation of default interest rates). This way, judges will have more capacity to manage the work of expert witnesses, for example, to precisely determine the subject matter, scope of expertise, and review expert opinions. **Some simple trial management techniques and tools could be used to improve efficiency and strengthen accountability of expert witnesses**, such as (i) setting out the exact date when the expert witness opinion should be received; (ii) frequently reviewing case files outside of hearings to keep track of all required activities; (iii) monitoring of adherence to deadlines and justifications for breaches; (iv) scheduling hearings to allow enough time between hearings; and (v) providing only selected (electronic) copies of document case files to expert witnesses. To further improve transparency of expert witness work, relevant data on the engagement of expert witnesses in trials (date for submission of the opinion, adherence to set deadlines, justification for breaches, and so forth) could be recorded in the CMS and then used to produce statistical reports on expert witness work.

Bankruptcy Trustees

29. **The new RS Bankruptcy Law (BL) improved the overall status of bankruptcy trustees.** Supported by a World Bank Group Project, the regulatory framework governing bankruptcy trustees in RS was reformed. As a result, in RS, the list of bankruptcy trustees was recently updated, and appointed trustees are now attending four to five trainings per year that are organized in cooperation with the World Bank Group. These trainings are mandatory and the Ministry of Justice keeps attendance records. In trials, bankruptcy judges are obliged to regularly monitor the work of bankruptcy trustees and react to any wrongdoing. **In FBiH, a new Draft Law on Bankruptcy Proceedings is currently before the Parliament;** the reforms set forth are being modelled on RS BL and aim to increase efficiency of the work of bankruptcy trustees.

30. **Higher-instance judges and representatives of the legal and business community indicate that bankruptcy judges sometimes do not manage the work of bankruptcy trustees in an adequate manner and lack specialization in managing bankruptcy cases.** Bankruptcy trustees are sometimes left to handle cases at their own pace and discretion. **The FBiH Ministry of Justice does not seem to adequately monitor bankruptcy trustees' work**, nor impose sanctions on trustees who conduct their work in an unprofessional and/or unethical manner. **As reported by judges and lawyers, bankruptcy trustees lack necessary skills to manage complex bankruptcy cases.** In FBiH, a single bankruptcy trustee often serves as a trustee for

too many companies, which causes efficiency issues and creates a perception of a lack of integrity in the selection process for bankruptcy trustees.

Recommendations and Next Steps

31. **Bankruptcy trustees could be required to regularly update their knowledge-base.** Bankruptcy trustees would benefit from attending regular trainings in bankruptcy law and company management (including all fields that are relevant for running a business).

32. **Judges would benefit from attending trainings and knowledge-sharing events in bankruptcy case management.** In coordination with the HJPC, commercial judges could be trained to better manage bankruptcy trustees' work and bankruptcy cases in general.

33. **The monitoring of trustees' work and qualifications could be improved.** Both the RS and FBiH Commissions for conducting professional examination/trainings of bankruptcy trustees⁴ could regularly report to the Ministries of Justice on conducted trainings/specializations of bankruptcy trustees and other observations on trustees' work. Courts and parties could be vested with more authority to react to unprofessional or unethical work of trustees.

Court Fees

34. **Rules on court fees, their amounts, collection process, and statute of limitations are not uniform and differ greatly across entities/cantons.** Court fees are subject to continuous negotiations between governments at all levels and they reflect the complex state organization. **Such an incoherent and unclear system threatens to create perverse incentives for all parties involved, affects public perceptions of the judiciary, and makes access to courts in different cantons/entities unequal.**

35. **The structure of court fees might create incentives for vexatious litigation.** There is no one single fee to be paid at the outset of the procedure. This reduces the costs of filing a claim. Further, **even if applicable filing fees are not paid, courts will still proceed with reviewing the case.** This means that meritless motions can be filed without cost. Only in some cantons do parties face fines in case of failure to pay fees in due time. In practice, judges spend a lot of time calculating court fees and supervising the collection process. The lack of uniformity of rules and practices on fees, the various consequences in situations where fees are not paid, as well as the lack of clarity on collection efforts in each canton and entity, all **make it unclear to what degree parties are aware of the actual state of affairs and in which territories and for what disputes parties engage in frivolous litigation.**

Recommendations and Next Steps

36. **Policy makers could consider unifying court fees across cantons/entities (both in terms of their amount and the collection process).** This would allow equal access to justice and increase predictability in the justice system. **A single fee payable at the outset of the procedure could be introduced.** A longer limitation period for the collection of court fees could be envisaged to facilitate the collection process. Collection and monitoring processes could be **delegated to administrative staff or even moved out of courts.**

⁴ These Commissions are appointed by the RS/FBiH Ministry of Justice and have certain powers in bankruptcy trustees' licensing process and the monitoring of trustees' work.

37. As the system of court fees is not coherent and is very much fragmented, **it is advisable to conduct a separate analysis of court fees and assess their impact** on resource management and operation of courts. Such analysis should **go beyond examining only the impact on trial efficiency**.

Internal Court Processes

38. **There are mechanisms in place which enable cooperation between lower and higher-level courts, but their implementation could be improved.** As reported by judges interviewed, lower-instance courts do not use all available mechanisms to address controversial procedural matters to higher-instance courts, although their judgments are often overturned on procedural grounds. Some activities to increase cooperation between higher and lower courts are underway, coordinated by the HJPC.

39. **Both judges and legal and business community representatives stress that the available HJPC case law database is modest and does not have an adequate search engine.** Judges lose a lot of time searching for guidance on how to process cases and sometimes even resort to *Google search* instead of the existing database of judgments.

40. **Reassignment of cases leads to serious inefficiencies and is sometimes perceived as not being sufficiently transparent.** Rules are not clear as to when and how the reassignment of a case occurs, there is room for discretion and arbitrariness, and cases are sometimes not reassigned in an appropriate order. In some instances, it takes months and even years for a case to be assigned to a new judge.

Recommendations and Next Steps

41. **It is highly recommended to improve the existing HJPC database.** The database could be populated by all decisions rendered by appellate courts and its search engine and decisions categorization could be improved.⁵

42. **The RS and BiH Rulebooks on Internal Court Processes could be amended to introduce:** (a) regular (for example, biannual/annual) **meetings of court presidents at first and second instances** (RS and FBiH) to address issues related to court efficiency and discuss possible methods for improvement; (b) regular (for example, biannual/annual) **meetings of commercial department presidents at same instance**, to address issues and share experiences related to case management, adherence to deadlines, and other relevant aspects of commercial case processing. Videoconferencing could be used to facilitate organization of these meetings. (c) Appellate courts could record and produce periodical (for example, biannual/annual) reviews of **examples of practices that cause most inefficiencies and/or 'best practices examples' in first instance case processing**. Showcasing good/bad examples of case management could be included in judicial training curriculums and online training materials.

43. **Reassignment of cases could be monitored by the HJPC more closely.** This could be done by flagging to the HJPC when reassignment of a case is delayed (more than a month), reassignment does not happen for some predetermined (most common) reason, or a reassignment is flagged by the parties as not being transparent/justified.

⁵ More specific recommendations will be provided under a separate TA Component.

CMS

44. **CMS is uniform for all BiH courts at the HJPC and is a powerful tool for case management.** However, CMS can be further improved to enhance efficiency of case processing. **Some new functionalities could be introduced or old functionalities improved** – CMS does not currently flag pending tasks to judges, nor does it allow judges to categorize cases or organize their workload according to their own criteria, and there is no knowledge-sharing database, and so forth.

45. **As reported by the HJPC, courts do not use all available CMS functionalities to their fullest capacity to ease case management and monitoring.** At the same time, individual judges report that registration of all procedural activities in CMS is burdensome. Failure to use and adequately enter data in CMS sometimes results in incomplete and inaccurate statistics.

Recommendations and Next Steps

46. **Consider introducing new/upgrading existing CMS functionalities and making corresponding adjustments to relevant bylaws to facilitate use of such functionalities:** for example, flagging pending tasks, creating special folders for inactive cases, or introducing knowledge management databases, and so forth. **User experience surveys should be regularly used to examine whether and how CMS could be improved to further automatize processes and improve user-friendliness.**

47. **Courts could use existing CMS functionalities to produce periodic (for example, quarterly) reports on procedural inefficiencies.** As a lot of data entered into the CMS is quantifiable (duration of case stages, periods of case inactivity, number of hearings, number of witnesses/expert witnesses per case, and so forth), CMS can be a useful tool to process such data and produce systematic reports on recurrent issues in case processing. Court presidents could be mandated to review such reports and ask for reasons for delays/unusual activities from acting judges, and even spot corruption. CMS reports could be used as a baseline to **track progress** in procedural efficiency of case processing.

48. **Regular trainings in usage of CMS would be very useful.** Although mandated, CMS trainings should also be regular in practice. Judges/other court staff would benefit from regular trainings in usage of CMS, as well as use and analysis of CMS data. Curriculums for these trainings could be based on the most frequent user mistakes. Available CMS functionalities for better case management could be showcased to judges during case management and soft skills trainings.

Introduction

49. **‘Justice delayed is justice denied’, and this is particularly critical for commercial cases.** Pending commercial cases slow down the economy, freeze valuable assets, and pull them off the market. Slow case processing means longer financial uncertainty for businesses and a decrease in their business activity and investments. Further, unresolved cases lead to case backlogs, which, in turn, create additional inefficiencies. Therefore, a well-functioning economy requires resolving commercial cases in a timely manner. This Report thus aims to advise on the procedural reforms needed to close loopholes and reduce bottlenecks to expedite commercial case processing before BiH courts.

50. **Efficient case processing underpins every justice system.** The court system’s ability to efficiently process cases and the quality of justice are significantly affected not only by how the courts are organized and managed, but also by whether and which procedural tools are available to judges, and how these tools are used in practice. In other words, the quality of the outcome of any case depends heavily on the quality of the previous procedural steps. Therefore, to ensure the protection of civil rights in a judicial system, it is important to reduce undue delays, ensure effectiveness of court proceedings, and provide the necessary transparency and foreseeability to the users of that system. It is for this reason that, within broader justice system reforms, efforts need be made towards higher effectiveness of the procedures applied and stronger guarantees that decisions will be made and enforced within a reasonable time.

51. **The right to a fair trial within a reasonable time (Article 6 of the ECHR) is fundamental to democracy and the rule of law.** The ECHR underlines the importance of administering justice without delays that might jeopardize its effectiveness and credibility. As an ECHR signatory, BiH is required to organize its judicial systems in such a way that BiH courts are able to guarantee everyone’s right to a final decision within a reasonable time. From 1959-2018, ECtHR issued 39 judgments against BiH for violations of the right to a fair trial (Article 6 of the ECHR).⁶ In five of these judgments, the ECtHR found that unreasonable length of proceedings before BiH courts was a violation of Article 6.

52. **As a potential candidate for EU membership, BiH is bound to secure legal guarantees for fair and efficient trial procedures, and reform its judiciary to achieve efficiency, effectiveness, and a high standard of adjudication.** According to the 2018 European Commission Annual Report for BiH, BiH has *some level of preparation* to implement the *acquis* in this area. As it is stated in the EC report, some progress was made but, overall, judicial reform in BiH proceeds at a slow pace. Plenty of room for improvement was identified in the following fields: trainings for judges, monitoring and measuring day-to-day activities in courts, collecting and processing statistical data, securing jurisprudence consistency, transparency, and reasonable lengths for court proceedings, as well as reducing the backlog of pending court cases.

53. **Reportedly, poor court performance is one of the key factors affecting the business climate in BiH.** According to the 2018 Investment Climate Statement (Statement), the BiH market is open to foreign investments, but obstacles to investments are numerous – complex legal and regulatory frameworks and government structures, nontransparent business procedures, corruption, insufficient protection of property rights, and a weak judicial system are only some of them.⁷ According to the Statement, “*BiH has a clogged court system and it often takes several years for a case to be brought to trial. Moreover,*

⁶ Source: https://www.echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf.

⁷ Available at: <https://www.state.gov/e/eb/rls/othr/ics/2018/eur/281565.htm>.

*commercial cases with subject matter that judges do not have experience adjudicating, such as intellectual property cases, are often left unresolved for lengthy periods of time. Most judges have little to no in-depth knowledge of adjudicating international commercial disputes and require training on applicable international treaties and laws.”*⁸ According to the 2018 World Justice Project, BiH is characterized as a system *declining in rule of law performance*, with unreasonable delays and ineffective enforcement as key factors influencing its civil (and also commercial) justice. According to the 2019 Doing Business Report, BiH was ranked 89th out of 190 economies, which is the lowest ranking in the Western Balkans. Notably, BiH’s score in enforcing contracts is one of its four lowest scores.

Focus of the Analysis

54. **This Report focuses on examining commercial case processing in RS and FBiH.** BiH is largely decentralized and is made up of autonomous entities, FBiH and RS entity, and a self-governing administrative unit, Brčko District (BD). FBiH is further decentralized to 10 cantons. In FBiH, commercial case processing is entrusted to Municipal Courts in the administrative centers of 10 cantons (in first instance) and Cantonal Courts (in second instance). Both Municipal and Cantonal Courts are courts of general jurisdictions which, besides commercial cases, review all other types of cases. In RS, commercial cases are handled by specialized commercial courts: District Commercial Courts (in first instance) and the High Commercial Court (as the only second-instance court for commercial matters in RS). Trial processes in commercial cases in RS and FBiH are governed by separate entity-level civil procedure laws. In BD, specific procedural laws are in place and specific courts have been established to deal with BD cases (BD Basic Court - in first instance, and BD Appellate Court - in second instance). However, BD covers only a small area of BiH (one small city) and no significant efficiency issues have been raised for BD courts.

55. **This analysis considers “commercial cases” as business-to-business cases (cases between enterprises)** given that: i) there is a system of specialized commercial courts in RS, while in FBiH civil courts handle commercial cases; ii) certain types of cases are handled by civil courts in both entities (basic/district courts in RS and municipal/cantonal courts in FBiH) although in their nature they are commercial (for example labor or administrative disputes); and that iii) the existing CMS does not have a single category for commercial cases but these cases are organized in different categories (claims of legal entities and other). This approach also ensures comparability of data.⁹

56. **This Report will not discuss performance of specialized commercial courts in RS versus performance of courts of general jurisdiction processing commercial cases in FBiH.** The World Bank Feasibility Study on Improving Commercial Case Management in the Federation of Bosnia and Herzegovina¹⁰ (Study) conducted in 2016 analyzed the performance of FBiH courts and options for improving their efficiency and quality. *Inter alia*, the study compared existing procedures for processing commercial cases in FBiH and RS to examine whether establishing specialized commercial courts in FBiH would be a viable option for FBiH. According to the Study, establishing separate court structures in FBiH was found to be cost-prohibitive, without any sound evidence that it would improve case processing efficiency in any meaningful way. Instead, the Study recommended reorganizing and strengthening existing commercial case departments in FBiH. Building upon these findings, this Report focuses on

⁸ *Idem*.

⁹ More details on the working definitions of a ‘commercial case’ and ‘commercial justice’ are provided in the Methodology section (Annex 1 of the Report).

¹⁰ Available at: <http://documents.worldbank.org/curated/en/736251485261261184/pdf/112223-WP-P158166-PUBLIC.pdf>.

increasing procedural efficiency and reducing bottlenecks within the existing court structures in FBiH, and does not proceed to examine the overall efficiency of these structures compared to the efficiency of RS commercial courts.

57. **The HJPC 2017 statistics¹¹ show that the average duration for commercial case resolution in RS and FBiH is high.** In some RS/FBiH courts, the average duration for commercial cases in 2017 exceeded 500 days for first-instance proceedings, and 900 days for appellate proceedings¹². These numbers are very high when compared both to statutory deadlines and European averages. Namely, according to statutory deadlines, first-instance proceedings should finish in cca. 180 days (in FBiH)/120 days (in RS), while decisions on appeal should not take longer than cca. 130 days. These durations are also high when compared to statistical data for other European countries.¹³ For example, in the Cantonal Court in Sarajevo (CCS), judges have reported that they are only now processing commercial appeals dating back from 2010 and 2011. The situation is particularly dire given that the CCS is the key court resolving the biggest commercial cases in BiH, as most companies in BiH are seated in Sarajevo. Please see below the figures on commercial case duration at first- and second-instance courts based on statistics obtained from the HJPC.

Figure 1. Commercial Case Duration (first instance)

Figure 2. Commercial Case Duration (second instance)

58. **The 2019 Doing Business Report also finds that it takes 595 days¹⁴ to resolve a commercial dispute before a first-instance court in BiH.** Time is counted from the moment the lawsuit is filed, until the payment is made (including both the days during which actions take place and the waiting periods in between), and is recorded based on case study assumptions set out in the report. By way of comparison, the Doing Business Report regional average (Europe and Central Asia) is 496.4 days

¹¹ Statistics only cover commercial cases (PS) and do not include commercial small claim cases (Mals).

¹² Based on statistical data on the average duration of cases provided by HJPC. Statistics only cover commercial cases (PS) and do not include commercial small claim cases (Mals).

¹³ According to the 2018 EU Justice Scoreboard, statistics for 2016 show that the time needed to resolve litigious civil and commercial cases was up to 300 days (first instance) and up to 400 days (second instance) for the majority of countries observed. The scoreboard is available at: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf.

¹⁴ The 2019 Doing Business Report, p. 159.

59. **As the analysis showed, long durations for commercial cases at first and second instances is a result of both poor court organization and procedural inefficiencies.** For a company, a court case is a singular problem which needs to be resolved efficiently regardless of the needs of different courts which are processing a single case. First-instance courts are the ones that conduct most of the procedural activities (service of process, hearings, call for expert analysis, and so forth), so for them, improving procedural rules and processes is key to expediting commercial case resolution. However, organizational issues also impact case processing at first instance. Judges and representatives of the legal and business communities reported that, even at first instance, large case backlogs, an insufficient number of commercial judges/judicial associates, the frequent use of sick leave, and so forth, make it impossible to schedule trial activities within prescribed deadlines and, thus, inevitably cause delays.¹⁵ For second-instance courts, since these courts usually only work on case file review and rarely summon hearings, good court organization is vital to enable efficient adjudication of cases.

60. **Noting that organizational issues also impact the efficiency of case processing, this Report focuses on solving procedural issues and ensuring that civil law rules are applied in a manner that would best allow for fast commercial case processing.** The Report aims to support procedural reforms to close loopholes and reduce bottlenecks in commercial case processing, to make policymakers better equipped to improve procedural efficiency, and to limit procedural abuse. Reforms that can increase procedural efficiency but are primarily related to court management and organization are not covered by this Report.¹⁶

61. **This Report focuses on (i) issues that were identified at the Project design phase as causing the greatest concerns for efficient case processing; and (ii) selected rules on internal processes identified during the analysis by courts as impacting procedural efficiency in commercial cases.** This Report primarily analyzes the following issues: how to ensure responsible and efficient service of process within BiH and abroad; how to reduce the number of adjournments per case and improve case management by judges; how to better regulate expert witnesses and bankruptcy trustees to prevent delays stemming from, or otherwise related to, their work; and how to improve the system for court fees to discourage vexatious litigation. In addition to these four topics, this Report also covers selected rules on internal procedures, and touches on issues related to internal procedures (including the caselaw database¹⁷) and CMS. These topics were flagged by interviewed stakeholders as recurrently causing issues in case processing and are addressed to the extent necessary to provide a comprehensive overview of procedural inefficiencies in BiH courts. Each of these issues is examined in a separate chapter of the Report. For each issue, the Report first outlines the existing legal framework in RS and FBiH and the trial processes that are relevant for the issue concerned. The Report then analyzes implementation of legislation in practice, highlighting good practice examples across the country. An overview of the main findings is then presented. To validate the findings empirically and to pin-point the main reasons for the existing issues, the Report relies on the results of more than 50 key informant interviews with judges and judicial staff in over 6 cities and 20 judicial institutions across BiH, statistics collected from the HJPC, and the opinions of the business and legal community expressed through an informal survey (Perception Survey).¹⁸ To examine expert witness engagement in commercial cases, the team used statistics collected in 4 BiH

¹⁵ 52 percent of Perception Survey respondents deem that organizational issues (for example judges being overburdened with cases) lead to delays in case processing.

¹⁶ These matters are mentioned on occasion only to capture all important findings and ensure comprehensiveness of the Report.

¹⁷ Development of the case law database will be further explored under a separate project component.

¹⁸ Perception Survey on Commercial Case Processing Efficiency collected 37 responses. Responses were provided by commercial law firms, individual commercial lawyers, and business community representatives (legal departments) (Perception Survey).

courts through tailor-made questionnaires on the engagement of expert witnesses. The team also conducted on-the-spot review of closed cases and gathered invaluable information on the quality of the work of expert witnesses to examine the link between engaging experts and the overall efficiency of trials.¹⁹ Finally, the Report outlines recommendations to address the issues identified, relying, to the extent possible, on existing good examples from BiH courts, the regulatory frameworks of countries that share the same legal heritage as BiH, ECtHR case law, as well as recommendations and opinions on judicial efficiency of international institutions. The Report also cites which authority is responsible for implementation of individual recommendations and sequences the implementation of potential reforms to short, medium, and long term (Please see Recommendations Overview Table 2 at the end of the Report). The proposed sequencing of reforms takes into account the anticipated level of impact and risks associated with implementation of individual recommendations, and can be subject to further adjustments depending on whether and which risks will materialize, by when, and to what extent this affects the implementation process. Implementation activities should be adaptive, flexible, and phased around key decision points to be taken by BiH policymakers.

62. The recommendations could be grouped into three strategic areas of reform based on common objectives and anticipated level of effect on case processing, and prioritized in the following order:

1. **Recommendations related to case management, hearings and adjournments, and service of process** (recommendations listed in Sections I and II in combination with recommendations listed in Sections VI and VII). These activities should have priority given the widespread impact on efficiency of commercial case processing. Reform will also have a cross-cutting effect on processing other types of cases at court.
2. **Recommendations on improving status and role of expert witnesses and bankruptcy trustees.** Reforming these areas will have significant effect but only for cases where expert witnesses or bankruptcy trustees appear (recommendations listed in Sections I and II in combination with recommendations listed in Sections III and IV).
3. **Improving the system of court fees** (Section V) – further analysis is needed to assess the full impact of the existing court fees system.

63. Given that the Report proposes a broad range of recommendations whose implementation is associated with varying risks, policy makers are advised to also secure measures to mitigate those risks such as:

- a. **Delays due to the large number of activities that need to be conducted** can be mitigated through entity-tailored phased approaches and periodic monitoring of activities that attract the most traction, with the possibility of adjusting focus and resources;
- b. **Fragmentation and lack of coordination between stakeholders (for example, courts and postal operators, cantonal/entity governments, Ministries in different sectors)** can be mitigated through the establishment of focal points in each institution that will ensure proper communication and coordination, as well as local presence for informal consultations;
- c. **Limited capacities to implement reform (for example organization of trainings, IT developments)** can be mitigated through hands-on supervision of implemented activities and adaptation of phasing and pace where necessary (for example the highest priority could be given to training of judges);
- d. **Lack of political will to implement reform (for example cancelation of exclusivity rights of postal operators, change of primary laws, notably procedural laws)** can be mitigated

¹⁹ For detailed information on methodology, please see Annex 1 of the Report.

- through dialogue on options and reform proposals, regular meetings, consultations, and engagement activities to inform on the benefits of the reform and to build ownership for implementation;
- e. **Resistance to change due to inertia or protection of vested interests (for example, change of primary laws, notably postal and procedural laws)** can be mitigated through technical assistance in change management, trainings, and outreach campaigns to various stakeholders to encourage ownership and build momentum.

64. **This Report is primarily aimed at BiH policy makers and justice institutions, notably the Ministries of Justice, HJPC, and courts, as well as other bodies, authorities, and institutions whose competencies affect commercial case processing before BiH courts.** The Report can serve as guidance for policy makers as it presents findings that can be leveraged to facilitate justice sector reform and improve transparency and efficiency of the justice system in BiH. The Report can be used as a tool for court managers, court presidents, judges, and other judicial practitioners to meet their responsibilities in improving the quality of services offered by the judicial system. Last but not least, this Report can be used to increase the overall awareness of the legal and business community about the importance of responsible behavior in trial to help secure expedient processing of commercial cases.

Service of Process

65. **Service of process is one of the key procedural activities in trials.** It is very important for service of process to be conducted in line with civil procedure rules. Insufficient service of process (service which does not meet the civil procedure norms) is a serious procedural error that can jeopardize the validity of a trial and can lead to retrials. Because of this, if, during trial, service of process is insufficient, it has to be redone. Such repeated attempts to achieve successful service of process prolong duration of the case and postpone trial activities.

66. **Insufficient service of process can even lead to a violation of Article 6, Section 1 of the ECHR (right to a fair trial).** The ECtHR has taken the view that inability to properly serve documents on parties/other trial participants is a potential violation of ECHR Article 6, Section 1. The general concept of a fair trial (and equality of arms) includes the parties' right to have notice of and reply to the observations filed or evidence adduced by the other party. To make sure this right is duly respected, courts must take appropriate measures to ensure that parties are notified of all important facts and are able to show evidence confirming receipt of notification by the addressee.²⁰

Legal Framework and Trial Requirements

Domestic Service of Process

67. **Service of process in commercial cases in BiH is governed by two different sets of rules: civil procedure law rules and postal law rules.** The (i) civil procedure law rules are contained in CPL RS and CPL FBiH, while the (ii) postal law rules are contained in the BiH Law on Postal Operators, RS and FBiH Laws on Postal Services, and their bylaws (together: Postal Laws).

68. **The texts of civil procedure rules and postal rules are contradictory – civil procedure rules allow for entities other than public postal operators to perform service of process, while postal rules give exclusivity to the public postal operators.** According to CPL RS and CPL FBiH, service of process can be conducted via: (i) public postal operators; (ii) legal entities registered for delivery services; or (iii) court couriers.²¹ According to the Postal Laws, service of process in court and administrative proceedings is a service reserved for public postal operators.²² Namely, public postal operators have two reserved rights with respect to service of process: (i) a reserved right to deliver court/administrative letters; and (ii) a reserved right to deliver letters which weighs up to 1000g (thus including nearly all court letters).

69. **In practice, post officers and court couriers perform the service of process for BiH courts.** Some courts have hired court couriers to conduct the service of process. Still, all courts rely at least partially on public postal operators to conduct the service of process. First, due to lack of funds, not all courts have internal courier services and these courts are fully dependant on postal operators. Second, those courts that do use court couriers do so only for service in the area near the court, while for more distant servicing

²⁰ ECtHR judgment in the case *Zavodnik vs. Slovenia*, application no. 53723/13, 21 May 2015; ECtHR judgment in the case *Gankin and Others v. Russia*, applications nos. 2430/06, 1454/08, 11670/10 and 12938/12, 31 May 2016.

²¹ Article 337 of the Civil Procedure Law of FBiH and Article 337 of the Civil Procedure Law of RS.

²² Article 9 of the Law on Postal Services of RS, Article 9 of the Law on Postal Services of FBiH and Article 6 of the Law on Postal Operators of BiH.

(for example, intercity/inter-entity service of process) they still hire public postal operators. The analysis could not identify a single court which hires private agencies to conduct their service of process.

70. **Although attempts were made to harmonize the system of internal court delivery, the desk review did not reveal uniform rules on the work of court couriers.** Under the HJPC Project for Reduction of Case Backlogs in BiH Courts (2008-2011), a model Rulebook for Court Couriers²³ was drafted, which courts and prosecutors were invited to adopt and implement in practice. No further information on adoption/implementation of the model Rulebook is available. According to the model Rulebook, court couriers deliver court writs every day (including on weekends and afternoons) and conduct the service of process within the court area. Couriers are to undergo both entry-level and continuous trainings for delivery of court writs. Complaints regarding the work of court couriers can have adverse consequences on the overall evaluation of their work. However, the model Rulebook does not further specify which measures will be taken towards court couriers who perform their work in an inadequate manner.

71. **Post officers, when conducting service of process, are obliged to apply civil procedure rules set forth in the Guidelines on Service of Process.** The General Conditions for Provision of Postal Services of BiH (General Conditions) stipulate that court letters are to be delivered to the recipient, his/her/its legal representative, or authorized representative in accordance with the laws governing delivery of letters in court and administrative proceedings (that is, in accordance with service of process rules). On the basis of the General Conditions, the BiH Agency for Postal Traffic enacted the Guidelines on Service of Process via Public Postal Operators. These guidelines set out uniform rules for the delivery of court letters by post officers (that is, service of process rules), fully aligned with criminal procedure rules and to a large extent aligned with civil procedure rules. The General Conditions further envisage that postal operators and courts can also reach an agreement on a specific procedure for delivery of court letters by post officers, provided that such procedure is in accordance with civil procedure rules on service of process.²⁴

72. **The Guidelines on Service of Process set forth other details and specific activities that should be taken when conducting service of process.** They are based on the CPL RS and CPL FBiH rules on service of process to natural and legal persons.²⁵

73. **According to the Postal Laws, if post officers do not conduct service of process in accordance with civil procedure rules, courts may: (i) file a monetary claim against the postal operator; and/or (ii) request repeated delivery free of charge.** Neither the CPL FBiH nor the CPL RS stipulate sanctions for service of process conducted in breach of applicable civil procedure rules. Judges do not have the ability

²³ Available only in the local language at: https://pravosudje.ba/vstv/faces/docservlet?p_id_doc=4237.

²⁴ Article 85 of the General Conditions for Provision of Postal Services of BiH.

²⁵ The following are the key CPL RS and CPL FBiH rules on service of process: (a) Service of process to natural persons is done through personal handover of the court letter to the recipient, his/her adult household members (or neighbor/housekeeper, with their consent), or his/her colleagues (with their consent). If the letter cannot be served in any of the above manners, a notice will be left to the recipient, informing him/her of the date and time of the next delivery attempt (in case of a lawsuit), or of the 15 day-deadline to collect the letter from the court (in case of other court letters). When this deadline lapses, the service of process will be deemed successful. Civil procedure rules further envisage consequences if the recipient cannot be found at the address specified in the lawsuit and his/her actual address cannot be determined, at which point the writ will be returned to the court, and the court will order the other party to find out the address of the recipient from public records. (b) Service of process to legal persons is made as a handover of the court letter to the person authorized to receive letters, or an employee. If the letter cannot be served to the address specified in the lawsuit, it will be delivered to the address of the recipient's registered seat (if it differs from the address stated in the lawsuit). If the service of process cannot be performed at that address either, it will be conducted via a notice board located on court premises.

to sanction postal operators and/or post officers for insufficient service of process. Both acts only stipulate that the court can sanction a natural/legal person for avoiding service of process absent a valid justification, or for deliberately preventing or hindering the service of process of another.²⁶ Further, the Postal Laws introduce the right for users of postal services (courts included) to file a complaint to the postal operator for inadequate delivery (late delivery, failure to deliver, loss/damage to the court letter) and claim damages in accordance with postal regulations. Only if the requested compensation is not paid by the postal operator before a certain deadline can damages then be claimed in court proceedings.²⁷ Further, the Guidelines on Service of Process envisage the right of the courts to request a new delivery free of charge in case of inadequate service of process. The act, however, does not specify this procedure any further. There are no rules which set out bonuses or other benefits to incentivize diligent delivery or higher rates of successful delivery.

International Service of Process

74. **Service of process to parties located abroad is done mostly via diplomatic channels.** According to the CPL FBiH and CPL RS, service of process to persons located abroad is to be conducted via diplomatic channels, unless otherwise stipulated in the law itself or in an international agreement.²⁸ As a rule, this process is conducted through the Ministry of Justice and/or the Ministry of Foreign Affairs (courts → RS/FBiH Ministry of Justice → BiH Ministry of Justice → Ministry of Foreign Affairs). For countries that are not signatories to The Hague Service Conventions and do not have an international bilateral agreement with BiH in force,²⁹ letters rogatory are to be sent via diplomatic channels, through the BiH authority in charge of foreign affairs. If the service of process is to be made to BiH citizens located outside the country, it is to be conducted via the Post Office or a consular/diplomatic representation office of BiH in the foreign country.³⁰

75. **Parties that are located abroad and do not have a local attorney are served via a local agent for service of process.** A party located in a foreign country (be it plaintiff or defendant) has the obligation to appoint, already in its initial act, an agent for service of process purposes in BiH (Agent). Should they fail to do so, the court will set a reasonable deadline for such appointment to be made. If the defendant fails to appoint an Agent within that time, the court will appoint an Agent for the defendant. Plaintiff is to make a down payment for the court-appointed Agent (but failure to do so does not entail consequences).

76. **Any change of address for a party /party's representative/Agent has to be reported to the court.** Parties or their representatives are obliged to inform the court of such change of address. If the change is not reported to the court, the court will order that each subsequent service of process be done via notice board until the party or its representative informs the court of their new address. Civil procedure rules envisage monetary fines for Agents who fail to notify the court of such change of address.³¹

²⁶ Article 409 of the CPL FBiH and Article 409 of the CPL RS.

²⁷ Article 18 of the Law on Postal Operators of BiH, Article 57 of the Law on Postal Services of RS, Article 44 of the Law on Postal Services of FBiH.

²⁸ According to the publicly available information, bilateral conventions on judicial cooperation were concluded between BiH and 26 other countries. Information available at: <https://www.hcch.net/en/states/authorities/details3/?aid=762>.

²⁹ Requests for international legal assistance (service of process included).

³⁰ See Articles 338 and 418 of the CPL FBiH and Articles 338 and 418 of the CPL RS.

³¹ On changes of address and service of process via local Agents, see Articles 352, 353, and 408 of the CPL FBiH and Articles 352, 353, and 408 of the CPL RS.

Relevant Findings

Inadequate Service of Process as a Key Cause of Inefficient Trials

77. **Inadequate service of process is perceived as one of the key obstacles to efficient processing of commercial cases.** As reported by the majority of BiH courts (commercial judges, court presidents, administrative staff), Ministries of Justice, and the HJPC, insufficient service of process is perceived as a leading cause of procedural inefficiencies in commercial cases. Existing analyses on BiH courts efficiency also state that lack of proper service often leads to inefficiencies in case processing (delays in process, annulment of first instance judgments due to insufficient process, and so forth).³² Finally, opinions of the business and legal community expressed through the Perception Survey showed that more than 60 percent of respondents view service of process in BiH as a cause of long trials.

78. **Statistical data on service of process confirm that unsuccessful delivery rates in commercial cases are not negligible.** To illustrate, between 2015 and 2017, service of process for commercial cases in two key courts in the country failed in almost 10 percent of cases. In Commercial Court in Banja Luka, it failed in close to 10 percent of cases per year, while in Municipal Court in Sarajevo, the insufficient process rate was between 10 percent and 13 percent during the three-year period. This data refers to service of process attempted in commercial cases (PS) and commercial small claim cases (Mals), namely, cases where most court documents are served to companies, that is, legal entities (B2B cases). It is believed that rates would be much higher if they included commercial cases where delivery needs to be made to natural persons (B2C cases, such as labor disputes, and so forth).

Figure 3. Service of Process in Commercial Cases – Unsuccessful Delivery Rate (2015)
(Source: HJPC Statistics)

79. **Also, 2017 statistics collected by the BiH Agency for Postal Traffic³³ show that 14 percent of court-requested deliveries were unsuccessful, of which 35 percent of court letters were returned to the court with an “addressee did not collect the letter”³⁴ [nije tražio] notice.** In 37 percent of cases, delivery failed because the recipient was unknown at the address or moved from the address. In 19 percent of cases, the recipient was not found at the address or was on travel.

³²Management of Court Proceedings, practicum prepared under the EU-funded project “Consolidation and further development of the judicial communication and information system”; Reports prepared under the “Project for Reduction of Case Backlogs in Courts” and “Improving Judicial Efficiency Project”, both implemented by the HJPC with support from Norway and Sweden.

³³ Detailed statistics are available only for the RS Post Office.

³⁴ An “addressee did not collect the letter” [nije tražio] notice refers to situations when the addressee was not at the address at the time delivery was attempted. In such cases, the public postal operator would leave a notice of delivery indicating the time and place (post office location) for the court letter to be collected. If the addressee does not collect the court notice by the specified deadline and at the specified place, the court letter is returned to the court.

Figure 4. RS Post Office - Returned Court Letters (2017) (Source: BiH Agency for Postal Traffic Statistics)

Time Needed to Serve a Court Letter in BiH / Abroad

80. **Service of process in commercial cases is slow, as it can take more than 15 days for city and more than 30 days for intercity/inter-entity service of process.** According to most opinions expressed by the business and legal community Perception Survey participants, serving a court document within a city takes more than seven days once the service of process is ordered by the judge, while, according to 28 percent of respondents, delivery takes longer than 15 days. For intercity/inter-entity service of process, experiences show that a court document usually reaches the recipient within 15 days from the date of dispatch; however, some experiences (44 percent) show that this period can span even longer (sometimes even twice as long).

Figure 5. Time Needed to Deliver a Court Letter in the City (Source: Perception Survey)

Figure 6. Time Needed for Intercity or Inter-Entity Service of Process (Source: Perception Survey)

81. **International service of process in commercial cases is particularly slow as it usually takes months, if not years, to deliver a court letter outside of the country.** Serving court documents abroad is too complex by law and, depending on the country where service needs to be made, can involve actions

from several ministries and embassies. Due to substantial delays in international service of process, some crucial trial activities cannot be performed or are adjourned for months, or even years.

Box 1 – Service of Process to Persons Located Abroad

In one case reviewed by the Cantonal Court in Sarajevo, it took a year and a half to reach a witness located in Sweden. In another case before the District Commercial Court in Banja Luka, a lawsuit would not be served on a defendant living in Ukraine for more than two years.³⁵

BiH courts do not always ensure effective service of process in BiH upon request of foreign courts. This sometimes results in retaliatory measures by foreign countries. For instance, Germany and France often refuse to provide any form of legal assistance to BiH courts because BiH courts do not ensure adequate service of process on request of German/French courts.

Work of Post Officers

82. **Inadequate service of process can be attributed to the work of post officers more than to the work of court couriers.** It is the overall perception and experience of interviewed judges that post officers do not perform service of process in accordance with relevant civil procedure rules – for example, delivery notes are not properly filled by the post officer (illegible signature, no date, insufficient or no reasons for failed delivery). On the other hand, it was reported by almost all interviewed judges that service of process via court couriers is much more efficient and causes no significant issues in practice. Also, 65 percent of Perception Survey participants stated that service of process via post officers is inefficient compared to service of process via court couriers.

Box 2 – Service of Process by Post Officers – Issues in Practice

In commercial cases, it happens that a court orders a lawsuit to be served on a company. Yet, upon delivery, the Post Office delivery receipt states: “*Delivery not made, recipient deceased*”.

Sometimes as indication of undue practices are instances when opened envelopes with broken seals are returned, with information of the Post Office: “*Delivery not made, recipient not at the address*”.

These and other similar practices give rise to suspicions of corruption and undue influence in the work of postmen. Without an efficient tracking system and award/sanction mechanisms, the risk that postmen be subject to undue influence and/or engage in corrupt practices in coordination with addressees increases.

83. **Yet, statistics collected by the BiH Agency for Postal Traffic show that courts hardly ever file complaints about the incompetence of post officers.** On 656,202 deliveries in 2017, the RS Post Office received only 200 complaints on the work of post officers, 95 percent of which were declared unfounded. On 1,643,366 deliveries, FBiH Post Office received only 56 official complaints, 90 percent of which were rejected.

84. **Some courts believe that incompetent work from post officers is caused by deficiencies in the Guidelines on Service of Process.** As reported by the RS Post Office, some courts have found that service of process conducted in line with the Guidelines does not meet the necessary civil procedure standards,

³⁵ No information on current status of delivery was available to the Project team

especially in case of personal delivery. This is often the case when the letter is returned to the court with a “did not collect the letter” notice.

85. **Public postal operators have no incentive to perform the service of process in line with relevant rules, as there are no clear sanctions for breaches.** Neither the postal rules nor the civil procedure rules provide for sanctions for post officers in case they breach service of process rules. Under the CPL RS and CPL FBiH, the court has no power to sanction or influence post officers to deliver court documents in accordance with the civil procedure delivery rules. According to the Postal Laws, courts, like any other postal services users, are entitled to damage claims in case of postal omissions. However, these claims are only monetary compensations and, as such, are insufficient to rectify serious procedural inefficiencies caused by inadequate service of process which, in the end, is to the detriment of the parties in trial. Also, it is questionable whether and to what extent parties/courts can initiate damage claims for postal omissions (in larger courts, it is difficult and time consuming to monitor every instance of insufficient process and file damage claims within the prescribed deadlines).

86. **In theory, if post officers fail to conduct the service of process in line with civil procedure rules, courts can request that the Post Office repeat the service of process free of charge.** This possibility, however, only has practical value in smaller courts as the process of requesting repeated service of process for free is time-consuming and requires additional engagement of court staff. Namely, this process usually includes delivery of the returned letter to the Post Office, together with a request for repeated delivery free of charge and, sometimes in practice, even a meeting with the Post Office. In courts that serve more than 100 letters per day, it is virtually impossible to benefit from this right.

Exclusivity of Postal Operators in Serving Court Writs

87. **Inefficient service of process can be partly attributed to the Post Office’s monopoly over intercity/inter-entity service of process.** This exclusivity removes any competitive pressure on public postal operators, thus lowering the quality of postal services while keeping the price for those services very high.³⁶

³⁶ On how monopoly affects quality/price of postal services and behavior of public postal operators, please see: Robert J. Shapiro, *How the U.S. Postal Service Uses Its Monopoly Revenues and Special Privileges to Subsidize Its Competitive Operations*, Sonecon, October 2015, available at: http://www.sonecon.com/docs/studies/Study_of_USPS_Subsidies_for_Its_Competitive_Operations-Robert_Shapiro-Sonecon-October_21_2015.pdf.

Box 3 – Private Agency for Service of Process – Municipal Court in Živinice

In 2005, service of process in Živinice Municipal Court was tendered out and the private agency “Parapost” was hired to serve letters for this court. Parapost services covered the entire territory of BiH.

The price per unit charged by Parapost was BAM 1.98, compared to BAM 2.5 charged by the Post Office. The Post charged the same fee to the court, regardless of whether the court letter was properly delivered or not, while Parapost only charged a fee for duly delivered letters.

This solution contributed to higher efficiency in the service of process, and Parapost’s success rate was 100 percent.

For the period from July to December 2005, Parapost delivered 10,769 court letters and charged a total of BAM 21,322 (while the Post Office would have charged BAM 26,922 for the same number of letters). This led to semi-annual savings for the court in the amount of BAM 5,600.

Soon after performance of service of process was tendered out, public postal operators launched an initiative to amend the Postal Laws and introduce exclusive right of the Post Office in conducting the service of process.

88. The Post Office actively imposes its exclusivity status and blocks courts that attempt to engage other courier services providers. Once exclusivity was introduced, postal operators began filing lawsuits against courts that tried to set up their own delivery service (that is, use court couriers). Only through active efforts and engagement of the BiH Ministry of Communications and Transport and other relevant institutions was it agreed that engagement of court couriers will be tolerated. This arrangement is in line with postal regulations but goes against civil procedure rules. Service of documents via any courier service other than public postal operators or court couriers is not tolerated in practice.

Parties’ Negligence with Respect to Service of Process

89. Insufficient service of process is sometimes caused by the parties’ failure to notify the court of a change of address/close of business, or they purposely avoid being served. Often, companies do not operate where they are registered, which prevents efficient delivery of court documents to their accurate address.³⁷ Also, a number of companies exist in the register but are in practice not operating. These so called ‘dormant’ companies cannot be found at registered addresses as they have ceased their operation long ago. Often times companies resort to operating out of the registered seat for the specific purpose of avoiding being served. For cases when it is evident that parties (particularly defendants) avoid service of process, some courts use court police as a last resort to deliver court notices, although this right of the courts is not set out in civil procedure rules.

90. Insufficient service of process is sometimes caused by plaintiff’s failure to put a down-payment for defendant’s local Agent in cases of international service of process. Currently, judges rarely appoint local Agents to receive court notices for parties seated abroad as this procedure is costly and time-consuming. Plaintiff often fails to pay the down payment for the appointment of the Agent, while the CPL RS and CPL FBiH do not stipulate any consequences for failing to make these payments.

³⁷ As reported by the Court President of the Istočno Sarajevo Commercial Court, about 50 companies listed their seat as the same address, but inspection showed that no business premises actually exist at that address, just an apartment building.

Courts' Reluctance to Ensure Efficient Service of Process

91. **Courts are sometimes reluctant to ensure more responsible service of process.** Judges repeat service of process several times (either via Post or via court couriers) instead of using the possibility to serve parties via notice board located in court premises. As noted above, in case of defendants located abroad, judges rarely (if ever) appoint a local agent for service of process (or are hesitant to react if plaintiff fails to make a down payment for such appointment).

92. **According to the BiH Ministry of Justice, about 10 percent of letters rogatory are incomplete and have to be sent back to courts for correction.** Serving a document out of the country is a complex procedure. Requirements are often very technical and vary depending on the country. Likewise, judges sometimes lack information on how to adequately complete service of process outside of the country. This causes additional delays in trials, as such requests have to be amended/supplemented before being sent out of the country.

No Digitalization of Service of Process

93. **Delivery tracking is currently not in use when it comes to delivery of documents served.** RS and FBiH postal operators have confirmed that electronic tracking and real-time status updates by court presidents and judges for each notice is technically feasible, but this possibility is not used in practice. Enabling tracking would make it much simpler for courts to monitor delivery and collect data on delivery quality and speed, and would thus strengthen the control and oversight of delivery done by individual post officers.

94. **There are no E-books for service of process and courts excessively rely on delivery notes.** Delivery notes [*povratnica*] are notes which are returned to the courts after an attempted delivery. These notes are used as confirmation of whether delivery was successful and if not, why not. Delivery notes are supposed to be scanned and tracked in the CMS. However, this practice is not strictly followed by court administrators (judges claim that CMS data on service of process is inaccurate/incomplete). Since a delivery note is just a fragile piece of paper which could easily be lost or damaged, lack of tracking information could hamper the entire process and result in repeated deliveries and delays.

Recommendations and Next Steps

Amendments to Postal Laws to Improve Service of Process Rules

95. **Long term, consideration might be given to amending the BiH Law on Postal Operators and the FBiH and RS Laws on Postal Services to abolish the monopoly of public postal operators over service of process and further liberalize the postal market.** It is advisable to abolish exclusivity with respect to both reserved rights of public postal operators to deliver: (i) letters in court/administrative proceedings; and (ii) letters which weigh up to 1000 g (thus including nearly all court letters).³⁸ Further, consideration might

³⁸ Please note that the Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC With Regard to the Full Accomplishment of the Internal Market of Community Postal Services sets out the following: “[i]n the light of the studies carried out and with a view to unlocking the full potential of the internal market for postal services, it is appropriate to end the use of the reserved area and special rights as a means of ensuring that the universal service is financed”. On 1 January 2006, the weight threshold of the reservable area under the EC postal services has reduced from 100

be given to reducing the price threshold for courier services in order to secure competitiveness of private postal operators vis-à-vis the Post Office. Currently courier services fall outside of the scope of reserved services for public operators, but only if the tariff charged for such services is at least 10 times higher than the regular postal tariff. Given that cancellation of the postal exclusivity is a policy issue with effects going beyond the service of process, policymakers could consider assessing economic implications of this measure (among other things, impact on jobs and growth) and, if needed, design social protection mitigation measures to manage identified risks. Due to the complexity and anticipated impact of this regulatory change on vested rights of public postal operators, it is unlikely that the change will be implemented before BiH's accession to the EU and, as such, could be set as a long-term goal. What could be done now, as the new Law on Postal Operators is in preparation, is to include provisions which would abolish public postal operator reserved rights but with a deferred implementation date (for example, from the moment of accession to the EU, or even at an earlier stage). This would ensure opening of the market for postal services already at the moment of accession, without having to wait for the new acts on postal operators / postal services to be rendered post accession. One could consider abolishing this reserved right (that is, the right to deliver court/administrative letters) even prior to the EU accession.

grams to 50 grams. The price threshold, which must also be met for mail to be within the reservable area, was reduced from 3 times to 2.5 times the standard price for basic priority mail items. In Serbia, which is an EU-accession candidate, the weight threshold of the reservable area is 350 grams, while the price threshold is 5 times the standard price for basic priority mail items. Croatia abolished reserved postal services altogether.

Box 4 – Comparative Examples – Service of Process

In **Austria**, service of documents is, in principle, conducted by the Post Office, some other universal service provider, or by court couriers. Service of court writs can be also done through a court-appointed administrator, by way of a public announcement, special electronic legal correspondence system (*Elektronischer Rechtsverkehr*), or electronic delivery services in accordance with the provisions of the Service of Documents Act. In case of an unsuccessful delivery attempt, the recipient is informed that the document has been deposited for collection by means of a deposit notice (placed inside the letterbox or affixed to the entrance doors). If the addressee or a substitute recipient refuses to acknowledge receipt of the document without a valid legal reason for doing so, the document is left at the delivery location or, if this is not possible, deposited without any written notification. The act of leaving or depositing the document renders service effective.³⁹

In **Germany**, whenever documents are served by court initiative, they are always served by the court's registry which is entitled to select the method of service according to its best judgement. The following possibilities are available: service on an attorney at law in exchange for an acknowledgement of receipt, lawyer-to-lawyer service, postal delivery of court letters (most common), or delivery via court couriers. In case of an unsuccessful delivery, the recipient is informed that the documents have been deposited for collection by means of a deposit notice (placed inside the letterbox). In case of an unjustified refusal to receive the writ, the document will be left at the delivery location, or, if this is not possible, returned to the court.⁴⁰

In **Croatia**, documents can be served by mail, court courier or another court employee, through a competent administrative body or a notary public, or in premises of the court; alternatively, service can be effected via e-mail in accordance with special regulations.⁴¹ In cases where both parties are represented by attorneys, the court may order the party representatives to send submissions directly to one another.⁴² If the addressee declines to accept the delivery, this will be recorded on the delivery note and the document is then deemed to have been served.⁴³

96. **Service-level agreements between courts and postal operators could be reached to introduce civil law sanctions for postal operators in case of inadequate delivery (courts' right to liquidated damages, repeated delivery free of charge, fee refund) and positive performance bonuses for postal operators.**⁴⁴ Once full e-tracking of delivery giving easy access to data on work of post officers is enabled, liquidated damages in favor of courts and positive performance bonuses in favor of postal operators would provide higher incentives for postal operators to ensure adequate delivery of court documents by their employees. Further, it would be beneficial for the agreement to specify the right of the courts to request repeated delivery free of charge or a fee refund.

97. **The Guidelines on Service of Process could be amended to resolve issues that are recurrent in practice, particularly issues regarding "addressee did not collect the letter" [*nije tražio*] notices.** The BiH Agency for Postal Traffic could, together with courts and public postal operators, amend the Guidelines to make them more practice-oriented and facilitate the work of post officers. The Guidelines could govern in more detail personal delivery to respond to civil procedure standards and avoid uncertainties in

³⁹ Source: https://e-justice.europa.eu/content_service_of_documents-371-at-en.do?member=1.

⁴⁰ Source: https://e-justice.europa.eu/content_service_of_documents-371-de-en.do?member=1.

⁴¹ Article 133 of the CPA (Croatian Civil Procedure Act).

⁴² Article 133c of the CPA.

⁴³ Article 149(3) of the CPA.

⁴⁴ Parties could consider including in their agreement standard provisions from shared services arrangement / framework agreements for procurements.

practice. Finally, the Guidelines could introduce rules for keeping track of unsuccessful deliveries by the Post Office. As an alternative to the above-mentioned business cooperation agreement, the Guidelines could further specify the right of the courts to request repeated delivery free of charge and introduce the right to a fee refund.

98. **Internal acts of public postal operators could envisage specific rules on disciplinary measures against post officers for inadequate service of process and positive performance bonuses, as well as enhance supervision over postmen's work, particularly once full e-tracking of delivery is enabled.** Disciplinary measures in case of repeated inadequate service of process (particularly if such inadequacy has been flagged by the courts), on the one hand, and a performance bonus scheme, on the other, would incentivize post officers to conduct delivery in a more professional manner. To determine the exact modalities of these incentives, a behavioral economics experiment could be conducted. To further enhance transparency, public postal operators could be bound to regularly inform courts of sanctions imposed against post officers for failure to deliver letters in line with civil procedure rules.

Amendments to Civil Procedure Laws to Improve Service of Process Rules

Domestic Service of Process

99. **A “once served, always served” model of delivery could be introduced in the CPL RS and CPL FBiH.** This model would reduce the number of times service is required once parties/other trial participants are duly informed of the proceedings / take part in proceedings, which would disincentivize them from engaging in practices that would frustrate or delay service of process. As such, a party that was once duly served a court document would be subject to stricter rules on service in the future (for example, such party should be mandated to inform the court of absence from the address for a period longer than 15 days).

100. **Amendments to the CPL RS and CPL FBiH could be made to introduce monetary sanctions for parties whose address does not match data in the court register/BiH Agency for Identification Documents, Registers and Data Exchange.** The current regulatory framework governing the status of natural and legal persons in BiH envisages monetary sanctions for failure to notify the competent authorities of a change in personal/business data (address/seat included); however, these provisions are seldom (if ever) applied. If judges were able to directly impose sanctions on parties whose actual address is different than their registered one (or are operating out of their registered seat), this would incentivize entrepreneurs/companies to timely inform competent authorities on any changes in registered data. Alternatively, judges could inform the court that keeps the register/BiH Agency for Identification Documents, Registers and Data Exchange of a party's failure to report changes of registered data, and request sanctions to be imposed on that party.

101. **Long-term amendments to the CPL RS and CPL FBiH could be considered to allow service of process to be made electronically, in accordance with special regulations.** Electronic service of process enables significant savings in both time and funds, provides clear confirmation of receipt, and reduces the risk of any undue influence in the process. This serving method is particularly suitable for commercial cases, where the parties are legal entities which may already have e-mail addresses and, in some cases, even qualified electronic signatures. According to the Doing Business reports, electronic service of process is a welcomed effort and contributes to efficiency of trials. For electronic service of process to be possible, key enablers for e-business have to be recognized (that is, electronic identification, electronic documents, electronic signatures, and electronic delivery services have to be given the required legal effect by law).

Further, a well-designed electronic signature process, supported by the right technology and effective methods to authenticate (or verify) the actual identity of persons signing the document, has to be developed for the implementation of rules to be possible. Since regulation of e-business in BiH is still under development, electronic service of process can be set as a long-term goal.

Box 5 – Comparative Examples of Electronic Service of Process

In **Austria**, there is a special system for electronic service of documents by courts called the *Elektronischer Rechtsverkehr* (electronic legal correspondence) system, or the ERV. Among other things, persons who are required to participate in this system are lawyers and counsel for the defense, notaries, credit and financial institutions, the office of the state attorneys at the Ministry of Finance, and Bar Associations. Other people may also participate in this system but are under no requirement to do so.

Where service is performed using the ERV, electronically transmitted documents are deemed to have been served on the working day immediately following their arrival in the electronic domain of the addressee.

Alternatively, service of process can also be performed via electronic delivery service in accordance with the provisions of the Service of Documents Act (Section 89a(3) of the Court Organization Act in conjunction with Sections 28 et seq. of the Austrian Service of Documents Act).⁴⁵

In **Germany**, court writs can also be served electronically. For the purpose of the electronic transfer, a legitimate electronic signature must be attached to the document and the document must be protected from unauthorized access by third parties. Every lawyer, notary, court-appointed enforcement officer, tax consultant, as well as public law authority, body, or institution is required to accept electronically served documents. Documents may only be served electronically on other parties to the proceedings if they have expressly agreed to the transfer of electronic documents. The documents may also be transferred using a De-Mail secure email system.⁴⁶

102. **A meeting between postal operators and courts could be organized to discuss further amendments to the civil procedure rules on service of process.** For instance, these amendments could ensure that: (i) the guidelines by which post officers act are aligned with the CPL RS/CPL FBiH, especially in “addressee did not collect the letter” cases; (ii) the rules on service of process take into consideration ground realities and what can actually be done by postmen on the field; and (iii) the rules on the delivery slip are improved to ensure simple tracking of deliveries and to enable usage of e-notes once full e-tracking of delivery is enabled.

International Service of Process

103. **Amendments to the CPL RS and CPL FBiH could be made to stipulate dismissal of a claim in case of failure by the plaintiff to lay down payment for the defendant’s local Agent.**⁴⁷ Commercial judges in the Municipal Court in Mostar are already dismissing claims in cases where plaintiffs do not make a down payment for the defendant’s local Agent (although civil procedure rules are silent on this matter) and, as such, are avoiding indefinite delays in case processing. Practically, these sanctions would enhance discipline on the part of plaintiffs and ensure procedural efficiency.

⁴⁵ Source: https://e-justice.europa.eu/content_service_of_documents-371-at-en.do?member=1.

⁴⁶ Source: https://e-justice.europa.eu/content_service_of_documents-371-de-en.do?member=1.

⁴⁷ This solution is already stipulated in Article 146 of the Croatian Civil Procedure Code.

104. **Amendments to the CPL FBiH and CPL RS could be made to allow direct international service of process unless otherwise stipulated in international agreements.** The CPL FBiH and CPL RS could envisage that service of process abroad is to be conducted directly to a party unless some existing international agreement explicitly requests service of process via diplomatic or other channels. This solution would give legal effect to practices that are already being applied by judges.

105. **The CPL FBiH and CPL RS could task plaintiffs with translation of the lawsuit to be served abroad.** The plaintiff could be required when filing the lawsuit to provide the court with its translation into the language of whatever country the defendant is located in (this is already requested from plaintiffs by some courts). This should not be the court's responsibility, particularly not in commercial matters.⁴⁸

Organizing Trainings to Ensure More Responsible Service of Process

106. **It would be highly beneficial for post officers to undergo regular and recurrent training for conducting service of process; these trainings could also be attended by court couriers.** Overall, experience shows that trainings contribute to a more responsible performance by post officers and prevent unnecessary delays. Newly hired post officers could undergo trainings immediately after commencement of their employment. Potentially in collaboration with the FBiH and RS Training Centers, there could be further considered for implementation of these trainings.

107. **Judges and/or other court staff (associates or judicial associates) would also benefit from attending trainings in international service of process.** These trainings could be organized recurrently to keep judges and/or other court staff (associates or judicial associates in charge of international legal assistance in courts) informed of all available options for conducting the service of process vis-à-vis other countries. Some multilateral and bilateral agreements allow direct service of process; however, others require that service be conducted through diplomatic channels. These trainings would reduce the number of incomplete requests for service of process that are submitted to the Ministries of Justice. Further, persons in charge of the international legal assistance in the RS and FBiH Ministries of Justice could also attend these trainings to be able to timely react to incomplete letters rogatory, that is, before they reach the BiH Ministry of Justice.

108. **Designating one judicial associate per court to be in charge of the international legal assistance would increase efficiency of the process; even more so if the designated individual is recurrently trained.** It would be optimal for each court to have a specific judicial associate assigned to international legal assistance and assist judges in the service process. This person would also closely monitor fulfilment of letters rogatory. Courts would benefit from having a trained administrative officer who can help judges organize the necessary translations/other technical matters related to international service of process. Such person should be in direct communication with the relevant justice and foreign affair individuals and be continuously trained for these matters.

⁴⁸ For instance, EU Regulation No 1393/2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters envisages that the applicant bears any costs of translation prior to the transmission of the document. If the document is sent without accompanying translation, the addressee is advised that he/she/it can refuse to accept such document.

Improvement of the Internal Court Delivery Systems

109. **To harmonize the work of court couriers across the country and increase their efficiency, the model Rulebook for Court Couriers could be improved and adopted by all courts which use internal courier services.** The Rulebook could set forth specific rules on sanctions and performance bonuses for couriers (a behavioral economics experiment could be conducted to determine the exact modalities for such incentives) and could introduce the change in ‘serving hours’ of the couriers (for example, work in shifts). Further, to ensure the uniform application of rules on all court couriers, the Rulebook could be made mandatory for all courts (for example, provisions on engagement of court couriers could be included in the BiH Rulebook on Internal Court Processes or the Rulebook for Court Couriers could be enacted by the competent Ministries of Justice).

Introducing Tracking/Monitoring of Service of Process Efficiency

110. **E-tracking of service documents could be enabled and E-book for delivery slips could be introduced; it would be optimal for courts to have full access to tracking data.** Delivery notes can be barcoded, and barcode numbers linked to the case number, so as to efficiently track delivery status and success rates. This would speed up the process, enable accurate and timely tracking of writs sent, and make easier the collection of data on unsuccessful deliveries. Improved tracking of service of process and the reasons for unsuccessful deliveries would reduce the risk of corruption and undue influence on postmen. It would be beneficial for courts to have complete information on such tracking. Internally, administrative staff in courts could be tasked with monitoring the delivery process and informing judges of issues with deliveries in their cases.

111. **CMS could be improved to better track the service of process in courts.** It could introduce different markings for service of process via post officers/court couriers and a drop-down list of reasons for unsuccessful delivery. This would provide more complete statistical data on service of process. It would also enable court presidents to easily monitor the service of process in the court and react to any inefficiencies vis-à-vis public postal operators in a timely manner. These functionalities could be further enhanced by introducing e-book and e-tracking of delivery.

112. **It would be optimal for E-book of service of process to be connected to CMS.** This would further improve tracking efficiency and would allow for automatic collection of data on unsuccessful deliveries. This functionality would require connecting CMS to postal information systems via some web services platform. The first step would be the signing of a Memorandum of Understanding between the HJPC and Post Offices to define the scope of the data exchange. The second step would be to design the functional specification for CMS enhancement and a web services platform. The third step is development and implementation. Due to in-house development of CMS functionalities, special attention would need to be paid to ensuring sufficient developer resources for this task.

113. **In order to monitor the work of post officers, courts could perform regular internal analyses of the services of process in court cases and submit recurrent issues to the Post Office.** For instance, the Municipal Court in Tuzla is regularly convening general sessions and analyzing service of process performed in its court cases. These sessions provide insightful information on the system’s inefficiencies regarding service of process, which allows the court president to then hold occasional meetings with postmasters to address recurring issues. Meetings at this level already have yielded positive results. This

was also noted in the District Commercial Court in Doboj, as it appears to have increased responsible behavior by postmen.

Increasing the Efficiency of International Service of Process

114. **According to information provided by the BiH Ministry of Justice, consideration might be given to accelerating the processes for BiH to enter into bilateral agreements with Qatar, Kuwait, Saudi Arabia, and Ukraine.** There are activities on concluding agreements with listed countries in order to facilitate international legal assistance between them and BiH. Without these agreements in place, according to information provided by the BiH Ministry of Justice, the international service of process is cumbersome vis-à-vis these countries and has to be conducted through the Ministry of Foreign Affairs (in addition to the Ministry of Justice).

Better Use of Existing Tools for Efficient Service of Process

115. **To enhance responsible behavior of trial participants, judges could more often sanction local Agents for nonnotification of change of address, parties for avoiding service of process, as well as any other person preventing or hindering the completion of service of process.** Both the CPL FBiH and CPL RS are clear on judges' power to sanction local Agents for any change of address without notifying the court, and parties for avoiding service of process. Courts could use this opportunity to enhance procedural discipline for these trial participants.

116. **Court presidents could monitor the efficiency of service of process.** Currently, CMS allows court presidents to monitor whether judges apply provisions on the service of process as prescribed, as it enables them to see whether the service of process was duly conducted, whether sanctions were imposed against trial participants for nonnotified service of process, and so forth. This functionality could be used by court presidents more often. Court presidents can monitor work of individual judges through random review of cases in the CMS.

Hearings and Adjournments

Legal Framework and Trial Requirements

117. Both in RS and FBiH, civil and commercial case processing is split into several phases, with procedural activities/actions clearly delineating procedural steps. First, when a lawsuit is filed, the court prepares the case for trial (by examining the lawsuit, delivering the lawsuit to the defendant, receiving defendant's reply, scheduling the preparatory hearing, deciding on evidence to be presented, and scheduling the main hearing). Once all preparatory actions are taken, court holds the main hearing (where all relevant evidence is presented) and renders a judgment.

118. There are differences between the CPL FBiH and CPL RS rules on postponement/adjournment of hearings, deadlines, and other matters related to case management. The CPL RS contains a set of provisions on case processing which are applicable only to commercial cases.⁵⁰ The CPL FBiH, on the other hand, does not introduce specific rules for the processing of commercial cases. It only envisages specific rules (mostly shorter deadlines) for labor disputes and disputes arising from bills of exchange and checks.

⁴⁹ This outline does not include extraordinary legal remedies, but only refers to the process until the judgment is in full force and effect [*pravnosnažna presuda*].

⁵⁰ A similar legislative solution exists in the Serbian Civil Procedure Code and the Croatian Civil Procedure Code.

119. **Both under the CLP FBiH and CPL RS, judges are to schedule one preparatory and one main hearing per case.**⁵¹ Preparatory hearings should be used to condense the collection of evidence to one trial point, after which the main hearing serves only as a review of the evidence collected and leads to adjudication. Equally, Council of Europe (CE) Principle No 1 provides that the proceedings should consist of not more than two hearings: the first being a preliminary hearing of a preparatory nature and the second used for taking evidence, hearing arguments and, if possible, issuing a judgment.⁵²

Preparatory Hearing

120. **Both the CPL RS and CPL FBiH contain rules on preparatory hearings that are to prevent delays in the pretrial stage.** They stipulate sanctions for failure by parties to attend the hearing, and envisage that, as a rule, all facts and evidence should be presented/proposed prior to the preparatory hearing:

- a. **Scheduling.** According to the CPL RS and CPL FBiH, the court schedules the preparatory hearing in consultation with the parties. The preparatory hearing is to be held within 30 (FBiH) / 15 (RS) days from the date of (i) receipt of the reply to the claim, (ii) expiration of the deadline for submitting the reply, or (iii) receipt of the reply to the counterclaim. In urgent cases in RS, the court may decide to schedule the preparatory (or the main) hearing immediately after preliminary examination of the claim.
- b. **Required or not.** According to the CPL FBiH, the preparatory hearing is mandatory, unless the court determines that there are no disputed facts between the parties, or that, due to the simplicity of the case, holding the preparatory hearing is not necessary. According to the CPL RS, however, the preparatory hearing will be scheduled only in case the court establishes that said hearing, due to the complexity of the case and other circumstances, would contribute to a faster and more efficient resolution of the dispute.⁵³
- c. **Facts and evidence.**⁵⁴ When called into the preparatory hearing, both parties are notified of their obligation to present all the facts on which they base their claims and propose evidence in support of such facts. The parties are required to furnish all documents and objects they wish to use as evidence. New facts and evidence can be presented/proposed at a later stage, but **only** if the parties demonstrate that they were unable, without their fault, to present/propose said facts/evidence at the preparatory hearing.
- d. **Preparation for the main hearing.** At the preparatory hearing, the court decides which evidence will be presented at the main hearing. The court can subsequently revoke this decision. The court will also specify the deadline within which the appointed expert witness is to submit his or her expert opinion, taking into account that said opinion has to be delivered to the parties at least 8 days before the main hearing.

⁵¹ Article 11 of the CPL FBiH and Article 11 of the CPL RS.

⁵² Council of Europe Recommendation No. R (84) 5 on the Principles of Civil Procedure Designed to Improve the Functioning of Justice (CE Principles) Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e19b1> Appendix to CE Principles, p. 2.

⁵³ CE Principle No 4 states that the court should, at least at first instance, be empowered to decide, having regard to the nature of the case, whether written or oral proceedings, or a combination of the two, should be used, except in cases expressly prescribed by law.

⁵⁴ CE Principle No 5 states that the parties' claims, limitations, or defenses and, in principle, their evidence, should be presented at the earliest possible stage of the proceedings, and in any event, before the end of the preliminary stage, if there is one.

- e. **Failure to attend.** If a properly summoned plaintiff fails to attend the preparatory hearing, the claim will be deemed to have been withdrawn. If a properly summoned defendant fails to attend the preparatory hearing, the hearing will be held without him/her/it.⁵⁵

Main Hearing

121. **The CPL RS and CPL FBiH also govern in detail the main hearing:**

- a. **Scheduling.** The main hearing is to be held within 30 (FBiH)/15 (RS) days from the date of the preparatory hearing, at the latest. Further, in RS, the main hearing can be scheduled via e-mail. According to both acts, the court can decide that the main hearing be held immediately after the preparatory hearing. In case the main hearing cannot be completed in one day, it is to be scheduled for two or three consecutive days.
- b. **Failure to attend.** If the plaintiff does not attend the main hearing, the lawsuit will be deemed to be withdrawn. If the defendant does not attend the main hearing, the hearing will be held in his/her/its absence. Witnesses can be fined by the court in case they do not attend the hearing (in spite of being properly summoned) or refuse to testify absent a valid justification.⁵⁶ In case of failure to appear, the court can issue a warrant to apprehend the witness.⁵⁷ Expert witnesses can be fined by the court in case they fail to attend the hearing (in spite of being properly summoned), fail to submit their expert opinion prior to the specified deadline, or refuse to provide their expertise without a valid reason.
- c. **Witnesses.** The CPL FBiH and CPL RS stipulate that witnesses will always be called to the main hearing to testify.⁵⁸ Both acts are silent on the possibility of using the written testimony of a witness located abroad or hearing the witness through a conference call, using a tone or optical recording device.⁵⁹ No rules are in place to give guidance on how to hear witnesses who are inaccessible to the court.
- d. **Amendments to claim.** The CPL FBiH and CPL RS enable the plaintiff to amend his/her/its claim by the end of the preparatory hearing, or until the beginning of the main hearing if the preparatory hearing was not held. Only exceptionally will the court allow amendments to the claim at a later stage.⁶⁰

⁵⁵ For relevant rules on the preparatory hearing, please see Articles 75, 76, 77, 81, 82, 84, and 102 of the CPL FBiH and Articles 75, 77, 81, 82, 84, 102, and 433 of the CPL RS.

⁵⁶ This is in line with the CE Principle No 1 - the court should be able to summon witnesses and appropriate sanctions (fines, damages, and so forth) should be applied in cases of unjustified nonattendance of such witnesses. When a witness is absent, it is for the court to decide whether the case should continue without such evidence.

⁵⁷ CE Principle No 1 envisages that if an expert appointed by the court fails to communicate his/her report or is late in communicating it without good reason, there should be appropriate sanctions. These might take the form of reduction of fees, payment of costs or damages, as well as disciplinary measures taken by the court or by a professional organization, as the case may be.

⁵⁸ Only exceptionally will witnesses who, due to their age, illness, or serious physical defect, cannot come to court, be heard in their premises.

⁵⁹ This solution is envisaged in the Serbian Civil Procedure Code, but not in the Croatian Civil Procedure Code.

⁶⁰ Only if doing so is not aimed at unnecessarily prolonging the proceedings, and the defendant agrees to said amendments. Without the defendant's consent, the court will allow amendments to the claim only if the main hearing does not have to be postponed, and the plaintiff was unable (without its fault) to amend the claim at an earlier stage.

- e. **Reassignment.** In case of reassignment of the case to a new judge, the court can decide, in consultation with the parties, not to present evidence that was previously presented, but only to read minutes of the previous hearing.⁶¹

Postponement/Adjournment of Hearings

122. **According to both the CPL FBiH and CPL RS, judges should only postpone/adjourn hearings in exceptional circumstances and for a limited period of time.**⁶²

- a. **Postponement.** According to the CPL RS and CPL FBiH, the court can postpone a scheduled hearing only if: (i) the necessary legal presumptions to hold the hearing are not met; or (ii) relevant evidence cannot be obtained until the hearing. The court is obliged to examine whether any of these obstacles exist at least eight days (FBiH)/three days (RS) before the date of the hearing.
- b. **Adjournment.** The court can adjourn a hearing on request of the parties if: (i) it is not possible to present evidence, without fault of any of the parties; or (ii) both parties propose adjournment in order to negotiate a settlement. Each of the parties can request adjournment of the hearing for the same reason only once. However, if it is not possible to present a certain piece of evidence at the scheduled hearing, the court can still decide to proceed with the hearing and schedule a new hearing only to present such evidence.
- c. **Deadlines.** According to the CPL RS and CPL FBiH, hearings cannot be postponed/adjourned for more than 30 days (FBiH)/15 days (RS). Exceptionally, if certain pieces of evidence cannot be presented to the court within these deadlines, the court can allow more time to obtain said evidence, and, on this basis, further postpone/adjourn the main hearing. However, if such evidence is not obtained within this additional time, the main hearing will be held irrespective of said evidence not being presented to the court.⁶³

Relevant Findings

Unjustified Postponement/Adjournment of Hearings

123. **Poor case management is seen as one of the key causes of inefficiency in commercial case processing.** According to higher instance courts, the majority of postponements/adjournments in cases could be avoided if the civil procedure rules were correctly applied by first instance judges. Judges lack proactivity in managing cases and leave it to attorneys to decide on the case dynamics at their own discretion. The perception is that hearings are often not scheduled within the prescribed deadlines, so cases are inactive for months, sometimes even years. Analytical reports on BiH court efficiency also attribute procedural inefficiency to poor case management.⁶⁴

⁶¹ For relevant rules on the main hearing, please see Articles 57, 94, 97, 114, 142, 410, and 411 of the CPL FBiH and Articles 57, 94, 97, 114, 142, 410, 411, and 433g of the CPL RS.

⁶² According to CE Principle No 1, no adjournment should be allowed except when new facts appear or in other exceptional and important circumstances. According to CE Principle No 8, in urgent cases, no adjournments should be allowed (or only brief adjournments).

⁶³ For relevant rules on postponement/adjournment of hearings, see Articles 111, 112, 113, and 129 of the CPL FBiH and Articles 433d, 112, 113, 433dj, and 129 of the CPL RS.

⁶⁴ For example, inefficient management of cases by acting judges, insufficient use of mechanisms aimed at increasing procedural efficiency, insufficient engagement of judges towards more efficient resolution of cases, and insufficient preparation of judges in the pretrial stage. In *Management of Court Proceedings*, p. 48.

Scheduling of Hearings and Other Trial Activities

124. **Court hearings are rarely scheduled within CPL FBiH and CPL RS-prescribed deadlines mainly due to organizational issues.** Experienced commercial judges have confirmed that organizational issues, primarily large case backlogs, make it impossible to schedule hearings within the prescribed deadlines. Perception Survey results show that more than 80 percent of respondents think that hearings are scheduled in breach of deadlines set by civil procedure rules.

125. **2017 statistics obtained from the HJPC confirm that hearings are almost never scheduled within statutory deadlines.** For instance, at the Commercial Court in Banja Luka, the average time needed to hold a preparatory hearing after response to the claim was filed was 962 days, while for some cases, this period lasted up to 2,246 days (compared to the 15-day statutory deadline in the CPL RS). In the Municipal Court in Sarajevo, the average time needed to hold a preparatory hearing after the response to the claim was submitted was 556 days (in some cases up to 2,869 days), compared to the 30-day statutory deadline under the CPL FBiH.

Figure 7. Duration of Case Stages in First Instance Court Proceedings (Source: HJPC Statistics)

126. **Further analysis of the 2017 data showed that extremely high values have very little impact on the average times needed for completing each trial stage (average times listed in the figure above) so, for most cases, averages apply.** Extremely high values appear in almost every stage of a court process. However, the number of cases with high values are negligible compared to the total number of cases. For instance, in only 1 percent of all cases⁶⁵ the time between the main hearing and the decision was longer than 70 days (compared to all-courts average of 43 days), and in only six cases across the board did the time between the preparatory hearing and the main hearing exceed 600 days (compared to all-courts average of 135 days).

127. **2019 Doing Business Report for BiH also confirms that statutory deadlines are typically not adhered to in first instance proceedings.** According to the report, 385 days is needed for the trial and judgment phase in first-instance proceedings. This phase includes all trial activities from the moment the case is served on the defendant, until the deadline to appeal elapses. The situation in BiH is better than in Serbia (495) and North Macedonia (437), but somewhat worse than in Croatia (365), Montenegro (365), and Albania (300). Further, the case management index for BiH courts is low (3.5 out of 6), primarily

⁶⁵ 19,824 cases were analyzed.

because stipulated time standards and rules on adjournment are not respected in over 50 percent of cases. In this aspect, BiH stands out regionally.

Postponement of Hearings Ex Officio and Lack of Proactivity in Case Management

128. **Court hearings are repeatedly postponed/adjourned, thus causing months or even year-long delays in trials.**⁶⁶ As reported by higher-instance judges, courts often schedule six to seven hearings per case instead of one to two hearings as prescribed by the CPL RS/CPL FBiH.

129. **Judges sometimes postpone hearings on their own initiative.** This is often caused by the fact that judges: (i) are overburdened with cases (for example, in Mostar it was reported that there were more than 600 cases per judge (not necessarily just commercial cases, as judges are often assigned other cases as well due to organizational issues such as lack of judges and/or large case backlogs; (ii) accept all evidence proposals without filtering them; and/or (iii) lack case management skills. It happens that too much evidence is used in a case, or a court uses trial time to establish irrelevant facts or calls too many (expert) witnesses. If all evidence cannot be presented in one day, the main hearing is rescheduled several times, months apart, instead of being scheduled for a period of two or three consecutive days. More than 40 percent of Perception Survey respondents believe that postponements/adjournments of hearings happen for reasons attributable to judges (or court organization).

130. **Another reason for frequent postponement of hearings is the inability to obtain evidence from abroad (often “key” witnesses cannot be brought to court).** Currently, neither of the laws set an instructive deadline for obtaining missing evidence. This leads to indefinite postponement of hearings whenever “key” evidence cannot be obtained. In fact, key evidence in practice is almost any evidence, as first-instance judges rarely filter out critical evidence. Knowing this, parties often propose additional evidence, particularly witness statements in commercial cases, without any real need and only to prolong the trial.

⁶⁶ According to CEPEJ, numerous adjournments of hearings, either of the court’s own motion or at the parties’ request, and excessive intervals between hearings have been considered causes for unreasonable delay by the ECtHR. If a court allows many adjournments, it encourages lawyers, not prepared for their cases, to ask for a new adjournment. In this way the judge’s hearing time will be underused.

Box 7 – Postponement of Hearings to Obtain “Key” Evidence in BiH and Abroad

In one case reviewed by the Cantonal Court in Sarajevo, it took a year and a half to reach a “key” witness located in Sweden only to find out that the witness does not remember the facts he was to testify on.

Also, in one case before the District Commercial Court in Banja Luka, a “key” witness was unavailable because he moved to Australia. The case has been pending since 2012 because the court is unable to reach the witness and conduct the hearing. The court is weary of deciding the case without the witness testimony. Because the RS CPL is silent on such issues, the court fears that the second-instance court would overturn its judgment if the witness is not heard.

However, in other European countries, procedural rules provide case management tools which enable judges to avoid such procedural problems. For example, according to the German Civil Procedure Code, an application to admit evidence can be rejected on procedural grounds if the evidence cannot be obtained, or the taking of evidence is hampered by an obstacle of uncertain duration, the relevant time limit has elapsed, and the proceedings would be delayed in other respects (Section 356 of the Code of Civil Procedure). According to the Austrian Civil Procedure Code, it is also possible to set a time limit for obtaining evidence that is likely to delay the proceedings (Section 279(1) ZPO). Once this has expired, the application to admit evidence may be rejected.

Postponement/Adjournment by Request of Parties/Attorneys

131. **Judges allow postponement/adjournment by request of parties almost routinely, although such requests are often not substantiated.** Judges are overly lenient with parties and often approve requests for postponement/adjournments which are contrary to civil procedure rules and should be dismissed (for example, postponement/adjournment for the same reason is requested more than once), are otherwise unjustified and/or unsubstantiated (for example, could easily be avoided by the party who requested the adjournment), or are plain examples of procedural abuse.⁶⁷ More than a half of Perception Survey respondents believe that it is not necessary to provide a justified reason for postponement of hearing and support it by relevant evidence.

Figure 8. Postponement/Adjournment of Hearings on Request of Parties (Source: Perception Survey)

⁶⁷ These practices are not in line with the CCJE Opinion or CE Principles, as judges should control from the outset the timetable and duration of proceedings, setting firm dates, having (and being willing wherever appropriate to exercise) power to refuse adjournments, even against the wishes of both parties, and control the abuse of procedure, through sanctions on a party or lawyers.

132. **Hearings are often postponed because attorneys have another hearing scheduled at the same time in the same or a different court.** This is mostly the case with preparatory hearings as courts usually unilaterally set the date of the preparatory hearing and summon the parties without prior consultations. Such practice causes recurrent rescheduling of hearings until an adequate time is found. Judges allow postponement for conflicts in attorneys' schedules even though neither CPL FBiH nor the CPL RS envisage this as a reason for postponement. According to some of the interviewed judges, this is seen as a mechanism to secure parties' right to be heard and right to an attorney, but also to ensure attorneys can provide quality legal services.

133. **Efforts to negotiate a settlement is often deemed a justified reason to postpone a hearing multiple times.** To promote the amicable settlement of disputes in BiH, judges repeatedly allow for a hearing to be postponed because of efforts to negotiate a settlement. It is the experience of 60 percent of Perception Survey respondents that hearings are rescheduled for this reason more than once (contrary to both the CPL RS and CPL FBiH). Often, efforts to negotiate a settlement are not genuine and are only used as a tool to prolong the trial.

134. **Hearings are often postponed to allow a party more time to analyze evidence.** Parties often abuse their procedural rights and attempt to prolong the trial by supplying additional and sometimes irrelevant evidence at advanced stages of the trial process (often after the preparatory hearing). As higher-instance courts seem to frequently overturn judgments for denial of the parties' right to be heard (that is, for denial of the right to supply new evidence), first-instance judges often accept all evidence without filter, irrespective of when the new evidence is supplied or even of the relevance of said evidence for the case.⁶⁸ Consequently, once the submission of new evidence is accepted by the court, a party is always given additional time to analyze new evidence supplied and the proceedings are prolonged. Over 65 percent of Perception Survey respondents think that first-instance courts allow presentation of unnecessary evidence.

Judges' Role in the Amicable Settlement of Disputes

135. **First-instance judges do not instruct parties to use in-court settlement often enough.** Although civil procedure rules oblige judges to use every endeavour possible for the parties to reach an in-court settlement of the dispute, they often just inform parties of this opportunity, but rarely take focussed action towards reaching an amicable resolution of the dispute. This is caused by judges' lack of proactivity, but also by their lack of skills necessary for this dispute resolution mechanism to be effectively used. Also, insufficient use of amicable settlement of disputes is exacerbated by attorneys' behaviour, as attorneys do not have any incentives to advise their clients to reach a settlement.

Other Issues on Case Management Which Cause Delays

136. **Case management is not monitored, and judges schedule court activities sometimes keeping the so-called *evidencija* indefinitely.** *Evidencija* is the time when the judge is scheduled to look at a case and schedule the next trial activity. An example: a lawsuit is filed, and the court dispatches the lawsuit for reply by the defendant. Then it writes on the case file that, for example, in two months it will open the

⁶⁸ These practices are contrary to CE Principle No 3, according to which the court should control the taking of evidence, exclude witnesses whose possible testimony would be irrelevant to the case, and limit the number of witnesses on a particular fact where such a number would be excessive.

file again and check its status. Often, cases are taken on *evidencija* and then for months nothing happens, and no trial activity is conducted or scheduled. Or *evidencija* is set at a much later date than necessary so the case does not move forward for a long period of time. In most of courts, the length of case inactivity is not monitored by the court president or other court staff (although doing so is possible using the Business Intelligence System in the CMS). Over 70 percent of responders of the Perception Survey think that judges often or even very often postpone taking procedural actions for no particular reason.

Figure 9. Unjustified Postponement of Trial Activities (Source: Perception Survey)

137. **HJPC statistics on parties' motions to court presidents regarding the status of their case [*urgencija*] confirm the above perception of judges' lack of proactivity in managing cases.** For instance, in 2015, parties filed a total of 826 motions to the president of the Commercial Court in Banja Luka, asking about the status of their case and requesting that the statutory deadlines be adhered to. Although there was a decline in the number of motions filed over the course of the next two years, it still remains significant, with 467 motions filed in 2017. In the Municipal Court in Sarajevo, parties complained to the court president about the duration of their case 450 times per year on average in the observed period (2015-2017).

138. **FBiH courts are reluctant to liquidate inactive companies and close so-called 'dormant cases'; dormant cases are marked in the system as pending even though trial activities cannot be scheduled.** Both in RS and FBiH, a number of companies exist in the register but are not operating in practice. These companies have ceased their operations long ago, but their owners have failed to liquidate them, so cases involving such companies cannot be closed. To resolve this issue, an *ex officio* liquidation of company procedure was introduced in RS.⁶⁹ For example, the Dobož Commercial Court has liquidated more than 2700 'dormant' companies since 2014 and closed a significant number of cases involving such companies. However, FBiH courts are still hesitant to liquidate companies in this procedure because the FBiH Law on Registration of Business Entities does not describe this procedure in detail, as is the case in RS.

139. **Judicial inertia and indefinite postponement of trial activities raise doubt as to the existence of corruption and undue influence on judges.** With corruption being one of the major concerns in the BiH judiciary,⁷⁰ undue delays in trials could be seen as a sign of undue influence on courts to manipulate the

⁶⁹ Under this procedure, companies which failed to align company bylaws with regulations and update their business registry data can be liquidated *ex officio*. Use of *ex officio* liquidation process will help ensure that company data registered reflects the actual state of affairs. So far, RS courts have used these processes and benefitted immensely from *ex officio* liquidation.

⁷⁰ On corruption in BiH, please see the 2018 European Commission Annual Report for BiH and the 2018 Investment Climate Statement for BiH.

length and/or outcome of proceedings. This is particularly the case when there is a lack of supervision and adherence to mechanisms for monitoring and measuring the day-to-day activities in courts.

Recommendations and Next Steps

Amendments to the Civil Procedure Law to Introduce Specific Rules for Commercial Cases and Increase Procedural Efficiency

140. **The CPL FBiH could be amended to introduce specific rules governing the processing of commercial cases.** These rules would enhance procedural efficiency, primarily at the municipal court level. Rules could be modeled after CPL RS rules on commercial cases.

141. **Both the CPL RS and CPL FBiH could be amended to introduce the possibility of hearing witnesses through conference call, using a tone or optical recording device.**⁷¹ This is in line with CE Principle No 1, according to which, to facilitate the taking of evidence, provision should be made for the use of modern technical means, such as telephone or videoconference, in appropriate circumstances. This possibility would enable judges to avoid delays caused by their inability to bring a witness to court and speed up the evidentiary procedure (especially since technical prerequisites are in place in the majority of courts). One could even consider introducing an obligation for a party proposing a witness to bring said witness to court or facilitate reaching the witness by the court.⁷²

Box 8 – Hearing Witnesses through a Conference Call – Comparative Overview

In **Germany**, witnesses may be heard via videoconferencing if, on application, the parties concerned give their consent. Consent of the witness is also required, as the transmission affects their personal rights.

Similarly, in **Austria**, examination of witnesses using video technology is possible and used in lieu of examination pursuant to requests for judicial assistance, and for reasons of economy of process.

In **Serbia**, witnesses can be heard via conference call or a witness statement can be read instead of hearing the witness (such statement needs to be certified by the court/other public authority).

142. **Both the CPL RS and CPL FBiH could be amended to set a specific time period within which the main hearing can be postponed due to inability to obtain evidence.** A preclusive (or at least an

⁷¹ Appendix to CE Principles, p.2.

⁷² “An appropriate reform of the evidentiary rules [...] should go a step further and deal with the collection of evidence. From the beginning, the parties and the judge should agree on the evidence to be presented, and on the consequences of the failure to provide such evidence at the hearing. Regularly, the parties should not only take the initiative, but also effectively ensure that the evidence is collected, although the court may occasionally help them when a certain piece of evidence cannot be obtained without official support or a court order. The bottom line should be that, in principle, no major delays should occur if some proposed piece of evidence (for instance, a document or a witness) is not available at the trial. In such a situation, the judge should decide according to the burden of proof rules. As shocking as this might be to a Mediterranean lawyer, this type of approach can certainly be the best generator of change: necessity is the best teacher. So, the imminent prospects of losing the case (for instance, if the proposed party witness would not appear at the hearing) could instantly change the ‘social discipline of citizens’ and reverse the trends of their non-appearing when called as witnesses.” – In: van Rhee CH, Uzelac A (eds) Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ, Intersentia, Antwerp, p.86. Also, in England and Wales, a party who wishes to rely on the evidence of a witness must serve a witness statement and must call the witness to give oral evidence at trial.

instructive) deadline to obtain missing evidence would enhance proactiveness of parties in securing evidence, and judges in disposing of the case.⁷³ This approach would also be in accordance with:

- the principle of formal truth which is applied in commercial (and other civil) cases, according to which a court's factual and legal findings should be fully consistent with the evidentiary material presented by the parties (unlike the principle of substantive truth, according to which the court's findings should correspond to the fullest extent possible to reality);⁷⁴
- rules on burden of proof which allow the court to make a decision even if proposed evidence is not presented to the court (failure of the party to meet the burden of proof for a specific fact will be interpreted to the detriment of that party);⁷⁵
- right of parties to request the reopening of proceedings would remedy any concerns that might arise if a preclusive deadline on obtaining evidence is set. A party is entitled to request the reopening of proceedings in case it discovers new facts, or finds or gets the opportunity to use new evidence, on the basis of which a more favorable decision would have been rendered.⁷⁶ This right can be used within five years from the date the judgment became final and binding.

Box 9 – Soft Law on Hearings and Adjournments

Under the Improving Judicial Efficiency Project initiated and implemented by the HJPC, the Municipal Court in Sarajevo has, in cooperation with the Cantonal Court in Sarajevo and the Amsterdam District Court, adopted and published Guidelines for Civil Case Processing (Guidelines) to improve case management.

These Guidelines were adopted to resolve recurrent issues related to case management and procedural inefficiencies in commercial cases. Among other things, the Guidelines govern the postponement/adjournment of hearings and clarify when postponement/adjournment is not justified. On the basis of these Guidelines, as reported by the Sarajevo Court President, judges are able to dismiss superfluous and abusive requests for postponement/adjournment of hearings. Efforts are being made to roll out the Guidelines for application in other courts throughout BiH.

143. Both the CPL RS and CPL FBiH could be amended to govern in more detail postponement/adjournment of hearings. Some solutions set forth in the Guidelines adopted by the Municipal Court in Sarajevo help clarify some of the CPL FBiH provisions on postponement/adjournment of hearings and leave little room for abusive behavior of parties or discretionary behavior of judges. Some of these solutions could also be introduced in the CPL RS and CPL FBiH to give specific guidance to judges when ruling on requests for postponement/adjournment:

⁷³ In Austria, an application by a party to obtain evidence must be rejected if the court considers it to be irrelevant (Section 275(1) of the Code of Civil Procedure) or if it is submitted with the intention of delaying the proceedings (Sections 178(2), 179, and 275(2) of the Code of Civil Procedure). It is also possible to set a time limit for gathering evidence that is likely to delay the proceedings (Section 279(1) ZPO).

⁷⁴ More on the difference between formal and substantive truth in civil procedure in for example, Stanislaw Frankowski, Adam Bodnar, *Introduction to Polish Law*, p. 122.

⁷⁵ *"The bottom line should be that, in principle, no major delays should occur if some proposed piece of evidence (for instance, a document or a witness) is not available at the trial. In such a situation, the judge should decide according to the burden of proof rules. As shocking as this might be to a Mediterranean lawyer, this type of approach can certainly be the best generator of change: necessity is the best teacher. So, the imminent prospects of losing the case (for instance, if the proposed party witness would not appear at the hearing) could instantly change the 'social discipline of citizens' and reverse the trends of their non-appearing when called as witnesses."* In: van Rhee CH, Uzelac A (eds) *Civil Justice between Efficiency and Quality: From Ius Commune to the CEPEJ*, Intersentia, Antwerp, p.86.

⁷⁶ Article 257 of the Civil Procedure Law of FBiH and Article 257 of the Civil Procedure Law of RS.

- a. Parties are obliged to simultaneously submit their request for postponement/adjournment to both the court and the opposing party;
- b. If the hearing is scheduled without prior consultation with parties, postponement can be allowed only if the request is submitted within eight days from receipt of a summons (untimely requests are allowed only under exceptional circumstances, in case of justified reasons or *vis major*);
- c. In case a hearing is scheduled in consultation with parties, postponement is only allowed for justified reasons or in case of *vis major*;
- d. Postponement for justified reasons or *vis major* must be requested by the end of the business day following the day when the unforeseen event justifying postponement occurred;
- e. The following reasons will not be deemed justified: (i) another hearing before the same or a different court, which was scheduled or planned after the scheduling of the hearing the party is now seeking to postpone; (ii) health reasons not supported by relevant medical findings obtained right before the hearing; (iii) urgent or serious reasons of a family nature, if the request is not substantiated by evidence or relevant documents confirming that said family reasons are urgent and unforeseen; (iv) vacation or business trips of lawyers; (v) waiver of the power of attorney immediately before the scheduled hearing and lack of time for the new lawyer to adequately prepare for the case; and (vi) cancellation of the power of attorney contrary to the provisions of the Attorney Act;
- f. The adjournment of hearings will not be allowed to analyze documents proposed as evidence in the initial act, but only those enclosed at the preparatory hearing;
- g. The adjournment of hearings will not be allowed if a legal associate who lacks the capacity to represent the party attends the hearing (value of the matter in dispute exceeds BAM 50,000).

144. **Both the CPL RS and CPL FBiH could be amended to simplify the rules for commercial cases:**

- a. **Facts and evidence.** Parties could be obliged to present all facts and evidence already in their initial acts,⁷⁷ and only be allowed to present new facts and propose new evidence at the preparatory hearing if they show that they were not able to do so in their initial acts.⁷⁸ This would contribute to better preparedness of the judges for the case, more efficient organization of hearings and presentation of evidence, as well as disincentivize parties from resorting to superfluous evidence proposals;
- b. **Representation.** Currently, representation at the preparatory hearing can be delegated to a replacement attorney or a legal associate without the explicit consent of the represented party. It could be considered to allow attorneys to delegate representation to a replacement attorney even for the main hearing without explicit consent of the party.⁷⁹ This would enable them to better organize their work and not request postponement of hearings due to

⁷⁷ Similarly, 2002 reforms of the Dutch Civil Procedure Code introduced a duty for both the claimant and the defendant to supply sufficient information in their statements of claim and defense, respectively, and to indicate the available evidence. By way of this duty, the legislature aimed to put an end to the traditional approach of litigants in Dutch civil procedure to disclose as little information as possible in the early stages of the action.

⁷⁸ This is in line with CE Principle No 5, according to which “*a vital aspect of efficient case management is the need to crystallize the parties’ claims and the nature of their evidence at the earliest possible stage. In line with the CCJE Opinion, it is no longer acceptable for parties to be able to correct and supplement their cases and evidence almost without restriction. Parties are entitled to “a fair ...hearing within a reasonable time” of their claim or defense, not to indefinite opportunities to present further and different cases - and especially not so by way of a second instance hearing on appeal*”.

⁷⁹ This solution is envisaged in the Serbian Civil Procedure Code (Article 89), the Croatian Civil Procedure Code (Article 95), the German Civil Procedure Code (Section 81), and the Austrian Civil Procedure Code (Section 31).

another hearing scheduled for the same time. Also, it would enable judges to dismiss abusive requests for postponement;

- c. **Evidence.** Specific provisions could provide guidance on supplying and prioritizing evidence in trial. Currently, the CPL RS and CPL FBiH do not envisage that certain type of evidence will have advantage over another. This, however, could be introduced when it comes to commercial cases. In commerce, except under extraordinary circumstances, witness testimony almost never carries the same weight as documents or expertise.⁸⁰

Enabling Ex Officio Liquidation in FBiH

145. **Consideration can be given to amending the FBiH Law on Registration of Business Entities to enable *ex officio* liquidation of ‘dormant’ companies.** Modelled on the RS Law on Registration of Business Entities, the FBiH counterpart could be amended to introduce provisions on the procedure of *ex officio* wind-down of companies that have failed to harmonize their bylaws with existing regulations, using information from RS courts on their experience in applying the *ex officio* liquidation of companies.

Organizing Trainings to Improve Case Management

146. **It is advisable to organize case-management trainings for judges.** These trainings could be organized and held by the RS and FBiH Training Centers recurrently (and not only following the appointment of judges). These trainings could focus on developing soft skills such as: encouraging parties to reach amicable settlements of disputes; enhancing the procedural discipline of parties through better handling of their procedural requests/proposals (evidence proposals, requests for postponement/adjournment of hearings, and so forth); cooperation with the parties to achieve early identification of the issues, by exchange of information and evidence, which may enable parties to better respond to procedural timetables and court actions. Further, to optimize use of CMS, some training modules could be focused on usage of various CMS functionalities and the importance of responsible, accurate, and timely registration of procedural activities in the system. This could include, among other things, basic-level trainings in registration of procedural activities through a series of quick and simple steps, advanced trainings in using CMS data to produce reports on procedural efficiency at the court level (for example, all cases in which case inactivity reaches a certain threshold and reasons for such inactivity, the number of postponements/adjournments per case, and the reasons for such postponements/adjournments) and analyzing these reports to improve case management, as well as tailor-made trainings for court presidents in supervising the work of individual judges through CMS, monitoring use of CMS by court staff, and setting parameters for the use of CMS. To avoid duplication of effort, all future actions could build upon existing curricula and training materials already prepared by the RS and FBiH Training Centers, and be coordinated by the HJPC with other capacity development initiatives/activities that are currently underway.

147. **Judges would benefit from attending trainings in specific fields/topics of commercial law such as intellectual property issues, corporate governance, private equity investments, derivative markets, capital markets transactions, banking rules, and regulatory transformations and developments.** Such

⁸⁰ This would not be a unique example in practice. For instance, in Belgium, a written instrument always ranks higher than witnesses and presumptions. Witness testimony and presumptions may be relied on only if the documentary evidence is incomplete or if it is impossible to produce documentary evidence. Also, the Italian legal system attaches greatest weight to public documents and irrebuttable presumptions. In Poland, Articles 246 and 247 of the Code of Civil Procedure lay down the principle that documentary evidence is superior to the testimony of witnesses or parties.

trainings could be delivered both in the traditional form as well as through peer-to-peer events (seminars, knowledge-sharing forums, and so forth). These trainings would provide judges with sufficient knowledge to handle even the most complex commercial cases and properly and efficiently examine all submissions and evidence (particularly expert opinions). In turn, this would reduce the number of decisions overturned on appeal.

Introducing New CMS Functionalities to Increase Efficiency of Case Management

148. **CMS could keep track of scheduled hearings of attorneys.** Using ID numbers assigned to all licensed attorneys in the system, CMS could keep track of scheduled hearings before all BiH courts and automatically flag whether an attorney has another hearing scheduled at the same time (or on the same day, taking into account the location of the other hearing and travel time) in the same or a different court. This would increase transparency and reduce the frequency of postponements.

149. **CMS could keep track of all postponements/adjournments of hearings and the reasons for such postponement/adjournment.** CMS attempts to monitor reasons for adjournments, but to improve the system of monitoring, it could include a specific drop-down list of reasons for postponement/adjournment of hearings (as prescribed by the CPL RS and CPL FBiH), of the period of postponement/adjournment (within deadlines prescribed by the CPL RS and CPL FBiH), and a separate column for longer postponements/adjournments (for example, to obtain a missing evidence) and their justification. Daily reminders could be introduced for judges (or their assistants) if this information is not entered in the system. Similarly, the system could flag cases in which there are no registered hearings or the information on postponement/adjournment of hearings is not entered. This would enable court presidents to closely monitor the work of individual judges and would enable internal analyses of postponement/adjournment of hearings in cases.

150. **In particular, CMS could be used to monitor efficiency and effectiveness of the time the casefiles are under review (*evidencija*) to incentivize judges to regularly schedule new trial activities.** Currently, the duration of case inactivity (*evidencija*) and the reasons for such inactivity are not systematically monitored by the court president or other court staff, although technical prerequisites are in place. CMS stores data on all instances of *evidencija* in a case, based on which reports can be created for court presidents. Consideration might be given to keeping track of the reasons behind case inactivity (for the sake of simplicity and easier monitoring, a drop-down menu of predetermined reasons could be developed, for example, inability to obtain evidence, pending action by a party, and so forth). This would enable court presidents and/or other court staff to monitor the work of judges more closely and timely react to unjustified delays.

151. **Increasing the capacity of judges and judicial associates to use CMS is necessary to yield all the benefits of having an advanced CMS IT system in place for use by all courts throughout BiH.** CMS could track the most important steps⁸¹ in the judicial process and the duration between them⁸² as per CE

⁸¹ According to the CEPEJ Checklist of Indicators for the Analysis of Lengths of Proceedings in the Justice System (CEPEJ Checklist) Available at: https://www.euromed-justice.eu/en/system/files/20090706170227_Coe.Timemanagementchecklist.doc.pdf.

⁸² These are: i. Instigation of proceedings; ii. Service of process upon the other party; iii. Receipt of the response by the other party; iv. Making of procedural orders by the court; v. The use and timing of preparatory conferences or preliminary hearings; vi. Beginning of the trial stage (first oral hearing on the merits); vii. Existence and duration of technical expertise; viii. Duration and number of hearings on the merits of each case; ix. Conclusion of the trial stage; x. Decision-making in the first-instance

principle no 5. CMS already tracks some of the most important steps in a court case, taking into account not only statutory deadlines but also foreseeable/optimal timeframe of court proceedings. Keeping track of some additional procedural activities might be considered – for example, technical expertise (existence, duration), number of witnesses examined, duration of hearings, enforcement. In practice, the major issue seems to be that CMS users (primarily judges) do not enter into the system all data necessary to track key procedural steps in a case (for example, they sometimes do not register hearings or service of the claim/response to the claim by the party concerned). This often results in inaccurate statistics. To overcome this issue, it is advisable to organize recurrent trainings for judges/judicial associates/other court staff in responsible and efficient usage of CMS as noted above, enhance some CMS functionalities to provide for greater possibilities for case monitoring, and finally, by request of judges/court presidents, make CMS functionalities for case monitoring more user friendly.

152. Improved, systematic tracking of trial activities and adjournments would lower the risk of corruption and undue influence within courts. Monitoring of key trial activities through CMS would increase transparency and visibility of the work of courts, as it is one of the most efficient devices for eradicating corruption. Availability of this data in the CMS would keep court presidents and/or other court staff alert as to any unusual activities in trials and enable all interested persons to keep track of judicial errors, particularly those associated with nonadherence to the prescribed time standards.

Developing Decisional Practice to Improve Efficiency in Case Management

153. Appellate courts could, through their decisions on appeal, support first-instance courts in dismissing superfluous requests for postponement/adjournment of hearings. When ruling on appeal, courts could examine whether there were deficiencies in case management by the first-instance judge. For instance, they could inspect whether postponement/adjournment of hearings by first-instance courts was justified or not. Also, when annulling a decision on appeal for failure to present evidence, appellate courts could provide lower-instance courts with reasons why such evidence is relevant and why it should have been presented in the first-instance proceedings. This would enable lower-instance courts to act more proactively when assessing evidence proposals.⁸³

154. To report on the above-mentioned practices, higher-instance courts should periodically issue a brief review of first-instance judgments highlighting positive and negative practices in case management by first-instance courts. This practice would harmonize decisional practice of first-instance courts in procedural matters and would lead to more efficient and responsible case management, and consequently to more disciplined behavior by the parties and other trial participants. This knowledge could be gathered by the HJPC and made available to all courts through different knowledge-sharing platforms available in BH (training centers, e-case databases, and so forth).

(preliminary decisions, partial judgments, final judgments); xi. Announcement and delivery of the first instance decision (judgment) to the parties; xii. Launching of legal remedies (appeal, etc.) and their impact on the duration of the proceedings; xiii. Appellate hearings and decisions; xiv. Preliminary decisions and orders in higher courts (e.g. announcement of the judgement or delivering reasons); xv. Course and results of the appellate and other proceedings (e.g. reversal of a decision or sending the case for re-trial); xvi. Other (extraordinary) stages and remedies (e.g. re-opening of a case or constitutional review); xvii. Effectiveness of the decision, enforcement.

⁸³ This is in line with CE Principle No 5, according to which, on appeal, the court should not normally admit facts which were not (or, the CCJE would suggest, could not reasonably have been) presented at first instance unless: a. they were not known at first instance; b. the person presenting them was not a party to the proceedings at first instance; or c. there is some special reason for admitting them.

155. **Entity-level (or state-level) conferences could be organized to discuss the shortcomings identified in first-instance processing of commercial cases.** Based on reviewed cases, higher and lower level courts of both entities (or of the entire BiH) could hold biannual/annual conferences to discuss recurrent issues in case processing (both in terms of procedure and in terms of substance). These conferences would serve as a forum to present higher courts' review of good and bad examples in case processing, the most common reasons for overturning decisions on procedural/substantive grounds, as well as obtaining guidance from higher courts on matters relevant for case processing. Key conclusions could be circulated among judges and stored in CMS.

Promoting Amicable Settlements

156. **To further promote the amicable settlement of disputes, it would be beneficial to incentivize lawyers to encourage settlement.** As suggested in the Consultative Council of European Judges (CCJE) Opinion no. 6 (2004) on Fair Trial Within a Reasonable Time and Judge's Role in Trials taking into account Alternative Means of Dispute Settlement (CCJE Opinion),⁸⁴ in some countries where lawyers' fees are regulated by statute, the legislature, in order to provide an incentive for lawyers to encourage settlements, has raised the statutory settlement fees for lawyers to 150 percent of their normal full fee. This could be considered in BiH as well.

⁸⁴ Available at: <http://vssold.justice.bg/en/evro/ccje/Opinion%206.pdf>.

Expert Witnesses

157. **Objective fact-finding is the basis of any court process, particularly when it comes to commercial cases; expert witnesses play a key role when specialized facts need to be established and complex issues analyzed.** The European Commission for the Efficiency of Justice (CEPEJ) issued the Guidelines on the Role of Court-appointed Experts in Judicial proceedings of Council of Europe's Member States (CEPEJ Guidelines).⁸⁵ The CEPEJ Guidelines provide a set of good practices on expert witness work, examining key topics such as: the subject matter of expert opinions, the persons acting as experts, the selection, duties, and rights of experts, and so forth.⁸⁶

158. **In 2018/2019, the World Bank conducted a comparative analysis of expert witness role in judicial systems of the Western Balkans (BiH included).** The report *Examining the Experts - A Comparative Analysis of the Role of Expert Witnesses in Court Systems of the Western Balkans*⁸⁷ provides a comparative overview of the role of expert witnesses in civil and criminal cases in four selected countries – Serbia, Montenegro, North Macedonia, and BiH. It analyzes implementation of the legislation in practice and highlights both examples of best practices and common challenges in the region. This report compares data obtained through questionnaires circulated to 22 courts in four countries and closed review of more than 1,100 cases. Taking into account its broad scope of analysis and variety of data sources used, the report was also used as guidance for this analysis and its findings were taken into consideration when designing recommendations for improvement in BiH.

Legal Framework and Trial Requirements

Licensing of Expert Witnesses

159. **Licensing of expert witnesses in BiH is governed by entity-level laws – LEW FBiH and LEW RS.** In both RS and FBiH, the licensing procedure includes: (i) a call-for-appointment by the Ministry of Justice *ex officio* (in RS and FBiH) or on proposal of court/courts in case of identified need for expert witnesses (only in FBiH); (ii) qualification exam organized by the Expert Commission;⁸⁸ (iii) appointment proposal by the Expert Commission; and (iv) decision on the appointment by the Ministry of Justice. In FBiH, before making its appointment proposal to the Federal Ministry of Justice, the Expert Commission requests the opinion of courts, prosecutors and regional bar associations on expert witness candidates who passed the

⁸⁵ The CEPEJ Guidelines are available at: https://www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf.

⁸⁶ The EGLE Guide is available at: <https://experts-institute.eu/wp-content/uploads/2018/03/2016-01-07-eeee-guide-to-good-practices-egle-en-brochure.pdf>. For more on expert witnesses also see: *Civil-law expert reports in the EU: national rules and practices published by the Policy Department: Citizens' Rights and Constitutional Affairs*, European Parliament, available on: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_IDA\(2015\)519211_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_IDA(2015)519211_EN.pdf), and the *CEPEJ Study on the role of experts in judicial systems of the Council of Europe Member States*, available at: https://static1.squarespace.com/static/534f89eee4b0aedbe40ae270/t/558a6d15e4b0dfba0a2afcc8/1435135253774/3rev_2014_CEPEJ-GT-QUAL_RoleExperts_en.pdf.

⁸⁷ Available at <http://documents.worldbank.org/curated/en/381771552633135539/Examining-the-Experts-A-Comparative-Analysis-of-the-Role-of-Expert-Witnesses-in-Court-Systems-of-the-Western-Balkans>.

⁸⁸ In FBiH, the Expert Commission consists of the President of the Supreme Court of FBiH or a judge he/she appoints, the President of the Bar Association of FBiH or an attorney he/she appoints, the Chief Federal Prosecutor or a prosecutor he/she appoints, one representative of the Federal Ministry of Justice (as permanent members), and three experts in relevant fields (as temporary members). In RS, the Expert Commission consists of at least two experts from the area of expertise concerned, and one representative of the Ministry of Justice.

qualification exam. In both entities, expert witnesses are licensed for the period of six years with the possibility of license renewal. Ministries of Justice keep the Directory and the Register of Expert Witnesses.⁸⁹

160. **Unlike the LEW RS, the LEW FBiH does not envisage specific licensing requirements in terms of education / prior professional experience of expert witness candidates.** According to the LEW RS, to be appointed, experts need to: (i) hold a university degree and have at least five years of experience in the relevant field; (ii) have secondary school qualifications in the field for which there is no higher education; or (iii) have secondary school qualifications and at least 15 years of prior experience as an expert witness. The LEW FBiH stipulates that an expert witness must have adequate education, professional experience and expertise in a certain field. An expert witness candidate is to submit a biography, proof of adequate education, letters of recommendations and a list of last ten cases in which he/she was engaged as an expert witness (if he/she already performed expert witness work).⁹⁰

161. **Both in RS and FBiH, expert witnesses are required to pass a professional exam in order to be appointed; in RS, knowledge of trial requirements is also tested.** In both FBiH and RS, the exam is organized by Expert Commissions and tests knowledge in the field of expertise. In RS, candidates also take a written exam on trial requirements.⁹¹

Specialization of Expert Witnesses

162. **Unlike the LEW RS, the LEW FBiH does not require mandatory continuous training for expert witnesses.** In RS, specialization of expert witnesses is organized by the Ministry of Justice annually, in accordance with the Rulebook rendered by the Ministry. The specialization encompasses lectures on both field of expertise and trial processes. The Ministry of Justice keeps records on expert witnesses who attended specialization. Expert witnesses who fail to attend mandatory specialization trainings will not have their licenses renewed. In FBiH, once appointed, expert witnesses undergo a one-time training. The training program encompasses lectures in the field of expertise and trial requirements. Expert witnesses who fail to attend this training will not have their license renewed. Only in the event of amendments to relevant procedural laws, as well as developments in relevant fields of expertise, the FBiH Expert Commission may organize additional trainings and specializations.⁹²

Monitoring of Expert Witness Work

163. **Expert Commissions and Ministries of Justice are key authorities for supervising expert witness work; competence-levels of these Expert Commissions differ across entities.** In FBiH, the Expert Commission conducts periodical assessment of expert witness work, and to that end, obtains information, court records, and opinions of professional associations and expert associations. The Expert Commission is further entitled to issue public warnings to expert witnesses or propose dismissals to the FBiH Ministry of Justice. In RS, the Expert Commission rules on objections to expert witnesses' work and proposes

⁸⁹ For relevant rules on the expert witness licensing process, please see Articles 4, 7, 10, 11, 14, and 18 of the LEW FBiH and Articles 4, 7, 8, 10, and 11 of the LEW RS; also see Article 9 of the Rulebook on Expert Witness Qualification Exam of FBiH.

⁹⁰ See Article 3 of the LEW RS and Articles 3 and 5 of the LEW FBiH.

⁹¹ Article 6 of the Rulebook on Expert Witness Qualification Exam of RS and Article 5 of the Rulebook on Expert Witness Qualification Exam of FBiH.

⁹² See Articles 26 and 34 of the LEW RS, Articles 2, 3, 5, and 6 of the Rulebook on Expert Witness Training of FBiH.

sanctions to the RS Ministry of Justice.⁹³ The RS Expert Commission is not required to conduct periodical assessments of expert witness work, nor can it impose sanctions for expert witness wrongdoing.

164. **Expert witnesses are subject to sanctions for unprofessional/unethical work.** If an expert witness performs work in an unprofessional or unethical manner, fails to comply with the deadlines set for carrying out expert witness work without justification, is disobedient to or disrespectful of the court or parties, does not take over assigned cases, or there is some other serious objection to his/her work, the RS Ministry of Justice/FBiH Ministry of Justice and FBiH Expert Commission can sanction the expert witness by way of a (i) written warning (only in RS), (ii) public warning, or (iii) dismissal (in RS and FBiH).⁹⁴ Both in RS and FBiH, only the Ministries of Justice are entitled to dismiss expert witnesses.

165. **Both LEW RS and LEW FBiH use trial participants/courts to monitor expert witness work.** Court presidents monitor the work of expert witnesses and inform the Minister of Justice of their observations, remarks and/or monetary sanctions imposed against expert witnesses. Parties, their representatives/attorneys, as well as professional associations and expert associations may file objections to expert witnesses' work. Remarks are to be submitted in writing to the Minister of Justice.⁹⁵

Engagement of Expert Witnesses in Trials

166. **Both the CPL FBiH and CPL RS lay down the rule: one expertise = one expert witness.** More expert witnesses can be engaged for expertise in more than one field. Expert witnesses are proposed by the parties and selected primarily from the list of permanent court experts for a specific field of expertise. Complex expertise is delegated to an expert institution (hospital, laboratory, university, and so forth). If specialized institutions that are qualified for particular fields of expertise exist (expertise of counterfeit money, graphology, dactyloscopy, and so forth), such expertise shall primarily be delegated to those institutions.

167. **Parties propose and courts decide on the scope/subject matter of the expertise and the expert witness; courts set the deadline for producing the expert opinion.** On proposal of the parties, the court decides on the expert witness, the scope/subject matter of expertise, and sets the deadline for submission of the expert opinion. The CPL FBiH and CPL RS envisage that the expert witness is to produce the opinion and submit it to the court before the main hearing, unless the court decides otherwise. Further, the court must share the expert opinion with the parties at least 8 days before the main hearing is set to begin.

168. **Expert witnesses are obligated to produce their opinions in a timely manner and in accordance with the rules of science and profession.** In case the appointed expert witness fails to submit the opinion timely, or submits an expert opinion that is unclear, incomplete, contradictory, or contravening the established circumstances, the court will request the written opinion of the parties and appoint a new expert witness (in case of untimeliness), or leave an additional deadline to supplement and/or clarify the opinion (in case of poor quality expertise). If the expert witness fails to submit a clear and comprehensive opinion within the additional deadline, the court will appoint a new expert witness. In case of delay, the court can impose a fine of BAM 100 – BAM 1,000.

⁹³ See Articles 16 and 17 of the LEW RS and Articles 22, 23, and 25 of the LEW FBiH.

⁹⁴ Article 17 of the LEW RS and Article 25 of the LEW FBiH.

⁹⁵ See Articles 19 and 20 of the LEW FBiH and Articles 14, 15 and 16 of the LEW RS.

169. **As a rule, expert witnesses' attendance is not required for holding the main hearing; unjustified failure to attend is a reason to impose sanctions.** The main hearing will be held even if the expert witness does not attend the hearing unless the court deems that the presence of the expert witness is necessary to supplement/clarify the opinion, in which case it will adjourn the hearing. In case the appointed expert witness fails to attend the hearing without a justified reason, the court can impose a fine on that expert witness in the amount of BAM 100 – BAM 1,000.⁹⁶

170. **The LEW RS and LEW FBiH also govern expert witness engagement in trials.** An expert witness is obliged to comply with the deadline set by the court. If the expert witness cannot submit the opinion in time, he/she/it is obliged to notify the court at least 10 days before the expiration of the deadline, and submit a statement of its reasons for not completing the work, a brief overview of the performed work, as well as a new deadline for the opinion to be submitted. In case of more complex expertise, where the initial deadline set by the court is rather long, the expert witness is obliged to submit to the court monthly reports on the work performed.⁹⁷

171. **Neither the LEW FBiH nor LEW RS institutionalize expert witness trainees, associates, or other expert witness staff.** Although the CEPEJ Guidelines provide that expert witnesses should have the right to hire support staff,⁹⁸ neither of the two acts introduce this right nor govern rights/duties/responsibilities of expert witness staff. Without comprehensive legal framework, legal certainty, and proper incentives it cannot be expected that expert witnesses would hire support staff to increase work efficiency.

Relevant Findings

172. **Commercial case processing is often inefficient because of low quality expertise and delays in producing expert opinions.** Expertise is regarded as the “queen of evidence” in commercial cases. Commercial disputes almost always require expertise in various fields (most notably accounting, construction, transportation, and so forth), without which it is extremely difficult (if not impossible) to decide a case. However, it often happens that an expertise has to be conducted several times by several experts to obtain a quality opinion. Also, unnecessary delays in producing expert opinions, absence from hearings, and other issues related to expert witness work cause adjournments of scheduled hearings and prolong trials. Sample statistics⁹⁹ show that every fourth trial adjournment is caused by reasons related to expert witness work.

⁹⁶ For relevant rules on the engagement of expert witnesses in trial, see Articles 149, 150, 154, 155, 156, 157, and 411 of the CPL FBiH and Articles 149, 150, 154, 155, 156, 157, and 411 of CPL RS.

⁹⁷ Article 24 of the LEW RS and Article 32 of the LEW FBiH.

⁹⁸ The CEPEJ Guidelines para. 25.

⁹⁹ Statistics based on data obtained through review of a random sample of closed cases in selected courts.

Figure 10. Adjournments Related to Expert Witness Work (Source: Sample Statistics)

Low Quality Work of Expert Witnesses

173. **Judges report that there are very few skilled expert witnesses that provide expertise for commercial cases.** There are many expert witnesses on the list of registered witnesses, but according to judges, few of them are adequately skilled to work on complex cases, particularly in commercial cases. Consequently, skilled expert witnesses end up being overburdened with work, which causes delays in them producing their opinions. The business community, however, does not share judges' opinion. Namely, more than 70 percent of respondents state that expert witnesses are competent enough to conduct expertise in their fields.

174. **In more than 18 percent of cases, expert witness opinions, once prepared, undergo revisions.** Sample statistics show that expert witnesses sometimes perform their work in an unprofessional manner – opinions are incomplete, incoherent, or contradictory. This leads to requests for clarification of the opinion, sometimes even for the engagement of new expert witnesses for the same expertise, thus prolonging the trial and creating additional costs for the parties.

Figure 11. Expert Witness Opinion Supplement (Source: Sample Statistics)

Judge's Duty to Direct/Manage Expert Witness Work

175. **Courts do not manage/monitor expert witness work adequately.** It is recognized by BiH Appellate Courts and confirmed by 42 percent of Perception Survey respondents that first-instance judges do not effectively manage the work of expert witnesses. They sometimes do not give precise instructions to expert witnesses (for example, financial experts being required to review the entire financial documentation of one of the parties), which often results in incomplete expert opinions or opinions of

little value for trial.¹⁰⁰ Further, judges are reluctant or lack training to critically examine expert opinions and assess whether these opinions are coherent and comprehensive, but instead either accept them as is, allow parties to continuously supply comments to opinions, or allow new expertise to validate such opinions. In fact, over 40 percent of adjournments are caused by new requests to supplement or clarify expert witness opinions.

Figure 12. *Adjournments Caused by Reasons Related to Expert Witness Work (Source: Sample Statistics)*

176. **Judges do not use all available tools to increase the efficiency of expert witness work.** Courts rarely sanction expert witnesses for failure to timely submit their opinions, or for absence from hearings. This is confirmed both by Perception Survey results and statistical data (see charts below). In fact, 95 percent of Perception Survey respondents state that judges do not sanction expert witnesses for procedural indiscipline. Also, according to the Sample statistics collected by the World Bank, over 70 percent of recorded breaches of deadlines by expert witnesses go unnoticed by the court. No warning notices are imposed for any of the recorded instance of breaches of deadlines. No warning notices or fines are imposed for any of recorded instance of absence from hearings. Given the hundreds of cases in which expert witnesses appear per year and the many trial deadlines which should be adhered to in each case, no warnings and a negligible number of fines indicate that courts do not monitor or sanction expert witnesses for such breaches. The reason for this seems to be, in part, that judges are reluctant to sanction expert witnesses that they use frequently and depend on.

¹⁰⁰ For example, the EGLE Guide notes that “the instructions must be defined as precisely as possible and as tailored as necessary to resolve the dispute.”

Figure 13. Reaction of the Court to Expert Witness Absences from Hearing
(Source: Sample Statistics)

Figure 14. Reaction of the Court to Breaches of Deadline to Submit an Expert Witness Opinion
(Source: Sample Statistics)

177. **Judges lack knowledge in the fields of expertise common for commercial disputes, and therefore they are not able to efficiently manage expert witness work.** Without sufficient knowledge of issues that typically require expertise in commercial cases, judges are not able to assess proposals for expertise (in terms of whether they are superfluous or not), precisely determine the subject matter and scope of the expertise, give clear instructions to expert witnesses, as well as critically examine the expert opinions. Some experienced judges stated that they lack knowledge in certain fields that usually require engagement of expert witnesses (banking and finance, intellectual property rights, and so forth).

178. **Second-instance courts have identified that courts sometimes engage more than one expert witness for a single type of expertise.** The CEPEJ Guidelines indicate that hiring too many expert witnesses in a case overburdens the trial proceedings and leads to inefficiencies.¹⁰¹ It is usually the case in practice that if two expert witnesses have contradicting opinions, the court asks for validation from a commission of expert witnesses (*supervještačenje*) which is to reconcile findings of the two opposing experts. Even after such third expertise is conducted, courts sometimes call more expert witnesses to analyze the same matter all over again. The CEPEJ Guidelines are clear that the number of expert witnesses should be

¹⁰¹ The CEPEJ Guidelines report that “the number of expert appointed should remain manageable and not become too large, to avoid problems with clarity and simplicity. It should be limited to a certain number that depends on the complexity and expediency of the question under examination. This number should be defined by the court or by law.” For more please see para 28 of the CEPEJ Guidelines.

limited, which limit should be defined by a court or by law.¹⁰² Sample statistics show however that use of more than one expert witness occurs, but not at an alarming rate.

Figure 15. Multiple Expert Opinions in Commercial Cases (Source: Sample Statistics)

Monitoring of Expert Witness Work by Ministries of Justice

179. **It is the experience of more than 80 percent of the Perception Survey respondents that the RS and FBiH Ministries of Justice do not act upon complaints about expert witness work.** Similarly, judges in RS and FBiH reported that expert witness wrongdoing is seldom sanctioned by the competent Ministries.

Recommendations and Next Steps

Improving the Expert Witness Licensing Process

180. **BiH policy makers could consider amending the LEW RS and LEW FBiH to introduce regular calls for appointment of expert witnesses.** This would allow update of the list of available experts and ensure that the supply of expert witnesses is sufficient and in line with market availability. Appointing new expert witnesses would alleviate shortages, particularly shortages of new experts in niche fields of commerce (IT, telecom, and so forth), and ensure that some expert witnesses are not more frequently used than others.

181. **It is recommended to link the expert witness appointment process in RS with the identified need of courts for additional experts (as is the case in FBiH).** Under the LEW RS, the Ministry of Justice could be bound by the information on the needs of courts for expertise in their regions. This mechanism would connect the needs for expert witnesses as determined by courts with the supply of experts as allowed by the Ministry of Justice. It is the courts rather than the Ministry that are aware of which expertise is needed most in their locality and at what time. Potentially, appellate courts could be the ones to make decisions on the needs and on whether a call into the profession should be published, and they could keep a register of the expressed needs of first-instance courts within their territory.¹⁰³ This approach is also in line with the CEPEJ Guidelines.¹⁰⁴

¹⁰² The CEPEJ Guidelines para 28.

¹⁰³ Please also see the EGLE Guide para 3.21 which indicates that “[t]he judge should ensure that there is an adequate number of Experts in each field and should try to avoid appointing the same expert again while excluding others who have the same qualifications.”

¹⁰⁴ Please see the Part 3.2.1 of the CEPEJ Guidelines, please also see the EGLE guide para 3.12.

182. **The LEW FBiH could be amended to introduce clear requirements on who can become an expert witness, such as requirements on specific degrees and/or professional experience required for the appointment of expert witnesses (as is the case in RS).** This would limit discretionary appointments of experts in FBiH and filter out those who do not have necessary education/experience required for their field.

183. **It might be beneficial to amend the LEW FBiH and LEW RS to introduce and clearly regulate rights and duties of expert witness trainees, interns, and associates.** The CEPEJ Guidelines advise that an expert witness should have staff that can not only do the preparatory work but also draft the expert witness opinion under supervision of the expert witness.¹⁰⁵ This would increase efficiency of expert witness work in several ways:

- a. With more manpower, there would be fewer trial delays. This is particularly important for the overburdened, most frequently used expert witnesses that produce high quality reports.
- b. Associates would be exposed to practice and able to learn from more experienced expert witnesses. This would, in the long term, help develop a high-quality expert witness cadre. Associates, should they later become independent expert witnesses themselves, would have both the expertise and experience needed for the profession and already be recognized by judges as suitable experts for taking on engagements.

Improving the Quality of Expert Witness Work and Efficiency of Trial

184. **Both in RS and FBiH, consideration might be given to introducing required format and minimum content for expert opinions by law.** As suggested both by the CEPEJ Guidelines and the EGLE Guide, an expert opinion should fulfill certain criteria in terms of its structure and content.¹⁰⁶ The opinion should be expressed in a clear and concise way and be divided in subsections in a specific order, in order to make it easier for the judge to analyze reports from different sources. It must be absolutely clear from the expert report which matters are factual and what assumptions the expert has made in the assessment. To achieve this, both courts and expert witnesses would benefit from clear guidelines on the content and format in which expert witness reports should be drafted. The EGLE Guide elaborates on the structure of the written expert witness report and can be used as a basis for the development of local standards in the LEWs.¹⁰⁷

185. **It is advisable that both the LEW FBiH and LEW RS be amended to introduce mandatory entry-level training on trial processes before admission into the profession (and not following admission, as is currently the case in FBiH).**¹⁰⁸ Entry-level training on trial processes before admission into the profession would improve overall quality and efficiency of the work of expert witnesses and would enable them to conduct the expertise under a proper and correct procedure, as it is required by the CEPEJ Guidelines.¹⁰⁹ Each expert witness would benefit from taking training on procedural rules, trial

¹⁰⁵ The CEPEJ Guidelines page 55.

¹⁰⁶ The CEPEJ Guidelines, para. 73 and the EGLE Guide, paras 5.4. and 5.5.

¹⁰⁷ The EGLE Guide, paras 5.5. and 5.6.

¹⁰⁸ For example, the EGLE Guide in Section III provides detailed information on quality insurance for expert witnesses. To be accredited as an expert witness one should particularly have the following skills: (i) knowledge and competence in the field of expertise; (ii) practical knowledge and competence; (iii) ethics and professional attitude; and (iv) efficiency. The EGLE Guide goes on to explain the quality assurance system and national certification bodies which would deal with the transparency, the admissions, the training, and the quality of experts.

¹⁰⁹ The CEPEJ Guidelines, para. 89.

requirements and processes, and drafting of expert witness opinions. Mock trials could be organized, and the role of expert witnesses explained and showcased to the new expert witnesses. Judges and senior experts would be best positioned participate in the delivery of such training. Adequate training would give all expert witnesses knowledge of trial requirements and enable them to compete on equal footing for engagements before courts. This would decrease the frequent engagement of the same expert witnesses time and time again and improve efficiency of the trials. Moreover, training would improve the overall quality of the work of expert witnesses.

Box 10 – Mandatory Entry-Level Training – Example of Croatia

In **Croatia**, a candidate for becoming an expert witness has to undergo a mandatory entry-level training to be licensed. This training is organized in the form of mentorship and cannot last longer than one year. Over this period, the candidate is assigned a mentor (an experienced expert witness in the same field) under whose supervision he/she has to produce at least five expert opinions. Once this condition is met, the association of experts for the specific field produces a report on the candidate's work and gives an opinion on the candidate's competence and expertise (the opinion must contain references to every case in which the candidate was engaged). Based on this opinion, court presidents decide whether the candidate should obtain the expert witness license.

186. **In FBiH, expert witnesses could be instructed to continuously update their knowledge on: (i) the expertise they provide; and (ii) trial requirements (as is the case in RS); in both entities, it would be beneficial to strictly monitor experts' fulfillment of their obligation to undergo continuous training.**¹¹⁰

The CEPEJ Guidelines state that an expert witness "should keep up his knowledge not only concerning his expertise but also the principles guiding the expert's activity."¹¹¹ Seminars/training may be organized on a biannual or other regular basis, and it would be optimal if training attendance would be set as a precondition for renewal of expert witness' licenses.¹¹²

187. **Judges would benefit from attending trainings on some of the most common expertise used in trial.** Judges should have a general understanding of the expertise they usually order in trial. For example, basic classes on reading financial statements or calculation of the default interest rate would be useful for commercial judges. This would give the judges an advantage in reviewing and identifying real issues in expert witness opinions. This would also improve the quality of trials and minimize courts' reliance on expert witness opinions. Coordination of future actions with existing capacity development initiatives/training activities with the HJPC could be considered to ensure resource optimization.

188. **Trainings for judges and expert witnesses could be institutionalized and conducted by the RS and FBiH Training Centers.** Both the RS and FBiH Training Centers have expressed their willingness to organize trainings not only for judges, but also for other trial participants (for example, expert witnesses, bankruptcy trustees), so rules governing the competence of the two institutions in both entities could be

¹¹⁰ According to the EGLE Guide, "these organizations will have to regularly ascertain, for example every five years, that the registered Expert still satisfies the criteria which allowed him to register, and check that he has fulfilled his obligation of continuous training both in his core profession as well as in his work as an Expert and in his judicial knowledge in terms of proceedings."

¹¹¹ The CEPEJ Guidelines, para. 87.

¹¹² The EGLE Guide in para 3.14 states that it should be "regularly ascertained, for example every five years, that the registered Expert still satisfies the criteria which allowed him to register, and check that he has fulfilled his obligation of continuous training both in his core profession as well as in his work as an Expert and in his judicial knowledge in terms of proceedings."

amended to allow this. Training centers are best positioned, in cooperation with the RS and FBiH Expert Commissions/Ministries of Justice, to set a basic curriculum for training modules and identify and mobilize experts to hold trainings.¹¹³ The Distance Learning System which has been deployed in both Training Centers could be used to increase efficiency of trainings.¹¹⁴ To monitor training activities, attendance could be recorded and both expert witnesses and judges could receive attendance credits. Optimally, obtaining a certain number of credits would be a prerequisite for license renewal in the case of expert witnesses, while judges' scores would be taken into consideration in their overall evaluation. In the case of expert witnesses, the RS and FBiH Expert Commissions could keep track of training attendance, while in case of judges, this could be done by court presidents and the HJPC.

Strengthening Accountability of Expert Witnesses

189. **Courts could do more to manage the work of expert witnesses.** Tools for the adequate management of expert witness work are in place under the CPL FBiH and CPL RS. Yet, it seems that courts are not using the tools available to them. Some simple trial management techniques and tools can be used to improve the efficiency of trials, strengthen the accountability of expert witnesses, and assist and support experts in their work (as recommended in the CEPEJ Guidelines¹¹⁵). It would be highly beneficial if judges would:

- a. **Review proposals for expertise to assess whether the expertise is truly necessary.** For instance, if the defendant merely objects to a claim but fails to provide evidence, courts of all instances could work to apply the burden of proof rules rather than support a party's request to seek superfluous expertise.
- b. **Determine the subject matter and scope of the expertise necessary in each case.** Parties are the ones who request an expert witness, but the judge determines the scope and subject matter of the expertise. Clear instructions would significantly contribute to more efficient work by expert witnesses. This is confirmed by international standards in this field. The EGLE Guide states that: "[t]he instructions must be defined as precisely as possible and as tailored as necessary to resolve the dispute [...]. As often as possible, the instructions should be set as a (series of) question(s)."
- c. **Set the exact date for the submission of the expert opinion, taking into account scheduled trial activities.**¹¹⁶ It is advisable for the judges to specify the date by which the expert witness opinion should be produced, leaving sufficient time to review the opinion before sharing it with the parties (at least eight days before the hearing), and, if needed, request clarification/supplements to the opinion prior to sharing the opinion with the parties.
- d. **Monitor adherence to deadlines and require justifications for delays.** Court staff (associates and judges) could be tasked with reviewing the case files before the scheduled hearings to keep track of relevant activities of expert witnesses such as:

¹¹³ Please see the EGLE guide para 7.26.

¹¹⁴ The technological platform is already in place. The software supports both synchronous or asynchronous distance learning. Distance learning ensures time and location flexibility in organizing and conducting trainings while reducing financial costs. Although it is marked as a strategic goal of both Training Centers, distance learning software has hardly been used in practice. More proactivity in adopting modern education methodologies is recommended.

¹¹⁵ The CEPEJ Guidelines para 109.

¹¹⁶ The EGLE Guide, para 4.14.

- i. whether the expert witness notified the court of possible delays in developing his/her opinion;¹¹⁷
 - ii. whether the expert witness submitted a statement of reasons for which he/she was unable to complete the work, together with a brief overview of the actions undertaken, as well as a new deadline for the new opinion to be submitted;¹¹⁸
 - iii. whether, in the case of a more complex expertise where the initial deadline set by the court is rather long, the expert witness submits to the court monthly reports on the performed work, and so forth. These prereports would also allow the parties enough time to phrase their observations before the final report is drafted.¹¹⁹
- e. **Sanction expert witnesses for failure to submit their expert opinion on time.**
- f. **Refuse superfluous comments on the expert witness' opinion from the parties or unfounded requests for the opinion to be supplemented.** Instead, it would be beneficial for judges to critically examine the opinion first. After reviewing the opinion, the judge can, if needed, ask for clarifications before or at the main hearing (through focused and clear questions to the expert witness). If the judge determines that the opinion is structurally flawed, he/she could order that the opinion be supplemented.
- g. **Request the expert witness to clarify/supplement an incoherent/incomplete expert opinion prior to engaging a new expert witness.** It would be advisable to avoid appointing a new expert witness before hearing the expert witness who produced the opinion and instead request that the submitted opinion be supplemented/clarified. Only if the expert witness does not supplement and/or clarify the opinion, should the court appoint a new expert witness (and report the unprofessional conduct of the previous expert witness to the competent authorities). This approach would be in line with the CEPEJ Guidelines, which state that "the court or the parties must [...] insist upon the completion of the expert opinion. This is especially the case if the expert prepares an expert opinion which is incomplete, unclear, ambiguous, and objectively incorrect, not up to date, without any scientific evidence, or if he or she fails to fulfil the instructions to produce an expert opinion or proves not to be competent."¹²⁰
- h. **Report expert witness wrongdoing to the Ministry of Justice and/or Expert Commission.** In case of delays in producing an expert opinion and/or submission of an unclear or incomplete expert opinion, or other unprofessional or unethical behavior of the expert witness, it is recommended that the judge inform the Ministry of Justice and/or the Expert Commission of said behavior and request sanctions against the expert witness.
- i. **Give feedback to expert witnesses on their work and the quality of their opinion.**

¹¹⁷ According to the EGLE Guide, "the Expert should be able to apply to the judge for an extension of his instructions where (i) in the course of the mission, he notices that the time frame will not be sufficient and/or (ii) when in the course of the investigations, due to technical reasons, additional investigative steps are needed or further technical questions should be examined."

¹¹⁸ As stated in the EGLE Guide, "The expert also has the duty to conduct the assessment and prepare the expert opinion in a reasonable amount of time, at least by the specified deadline. He/she is obliged to inform the court of reasons for an expert opinion not being delivered on the date due. He/she must then also tell the court how long the preparation of the expert opinion will eventually take."

¹¹⁹ The EGLE Guide, paras. 4.3 and 4.9.

¹²⁰ The CEPEJ Guidelines, para. 121.

Box 11 – Feedback to Expert Witnesses – Comparative Examples

In **Norway**, for example, judges exchange experiences with experts informally. In **France**, a bad evaluation from a judge can lead to an expert being removed from the list of expert witnesses or not having their license renewed. In **Switzerland**, it is common for the judge to give personal feedback to the expert. Examples of a formal system include **Austria**, where judges' evaluation of experts (particularly on quality and timeliness of expert witness work) plays an important role when experts' licenses are being renewed. The **Netherlands** also has a formal system of evaluation. When the case is closed, the judge is asked to fill out a form for the evaluation of the expert.

190. **To further improve transparency of expert witness work, quantifiable data on engagement of expert witnesses in trials could be recorded in the CMS** (number of engaged experts, adherence to set deadlines, justification for breaches, imposed sanctions, and so forth) and could be used to produce statistical reports on expert witness work.

191. **Courts and parties could be given more power to monitor and sanction the work of expert witnesses.** The RS/FBiH Ministries of Justice are the authorities that decide on revocation of expert witness licenses. Yet, they have no capacity to review expert witness work and decide on expert witness competence. The CEPEJ Guidelines note that *“certain countries have found it useful to appoint judges who are specifically in charge of expertise-related matters, including matters relating to the selection of the experts, the failure of the experts to deliver and expert opinion meeting good quality standards, etc.”*¹²¹ So courts could be vested with the power to conduct proceedings against an expert witness and even revoke licenses. Parties would benefit from clear rights under the LEW to report wrongdoings of expert witnesses to all relevant authorities, the Ministries of Justice, Expert Commissions, and courts. Provisions in the CPLs and/or LEWs could be more specific so as to provide a clear right of damage claim action and criminal action for parties in cases of expert witness malpractice.

192. **It would be useful to task the RS Expert Commission with periodic assessments of expert witness work (as is the case in FBiH); both in RS and FBiH, periodic reports on expert witness work could be produced.** The Expert Commissions could periodically collect opinions on the work of expert witnesses (from courts,¹²² Bar Associations, Chambers of Commerce, and so forth), remarks and objections to the work of expert witnesses and details on training and sanctions imposed. This information could be used to produce regular reports on conducted training/specializations, observations and sanctions imposed on expert witnesses, remarks by parties, courts and/or professional associations. This would be in line with internationally recognized standards for the engagement of expert witnesses. The CEPEJ Guidelines are clear on the need to regularly monitor the status of expert witnesses to ensure that their expertise is maintained.¹²³

¹²¹ The CEPEJ Guidelines para 61.

¹²² As stated in the EGLE Guide, the expert witness quality assurance system should “provide for a system of feedback from the courts to the Judicial Experts as proposed by a Working Group on Quality Assurance. Thus, the judge deciding the case could provide a brief appraisal of the Expert’s work. In this appraisal, the judge should comment on his impression of the Expert’s knowledge, skills, ethics and professional conduct, as well as efficiency. After having been notified of this appraisal the Expert should have the opportunity to provide comments and explanations.”

¹²³ Please see CEPEJ Guidelines, para 52.

Phased Approach to Expert Witness Work Reform

193. **Given the number of individual activities needed to be completed to reform the expert witness work, existing challenges could be addressed through a series of concerted actions.** Short-term: Organizing recurrent trainings for expert witnesses and judges would enhance the quality of expert witness work. Maintaining records on the work of expert witnesses could help authorities establish a baseline to measure improvements and monitor progress of the reforms/actions taken to improve the role and engagement of expert witnesses. Medium- to long-term: Policymakers could consider improving the expert witness licensing process through mandatory entry-level trainings, establishing clear requirements for entry-level into the profession, improved examination techniques, and so forth. This would allow authorities to verify the competence of candidates in a structured manner and improve the caliber of expert witnesses who enter the profession. Also, consideration can be given to introducing expert witness staff and defining their role in and out of trial. Long-term: consideration might be given to amending relevant procedural laws and laws on expert witnesses to strengthen accountability of experts and enhance supervision. This would further incentivize experts to perform their work in accordance with the rules of science and profession. Functional coordination among the various authorities and stakeholders that hold expert witnesses accountable, for example courts, expert commissions, Ministries of Justice, parties, and so forth, would raise the standard of accountability.

Bankruptcy Trustees

Legal Framework and Trial Requirements

194. In BiH, the status of bankruptcy trustees is governed by bankruptcy laws passed at the entity level – **2016 RS Bankruptcy Law (RS BL)** and **FBiH Law on Bankruptcy Proceedings (FBiH LBP)**. The 2016 RS BL was drafted under the umbrella of the Debt Resolution and Business Exit Project in BiH (2015-2022) implemented by the International Finance Corporation (IFC). As reported by the IFC team that supported the drafting process, the RS BL yielded key results in the first two and a half years of its implementation – it shortened the average duration of bankruptcy proceedings from 51 to 12 months, that is, for **425 percent** (companies with assets that initiated bankruptcy proceedings under RS BL), and from 33 to 11 months, that is, for **300 percent** (all companies, with and without assets, that initiated bankruptcy proceedings under the RS BL), increased the number of solved cases **for 203 percent**, average amount of realized assets **for 10 percent**, and preserved a substantial number of jobs as a result of successful restructuring proceedings (prebankruptcy settlements). Effects of the RS BL on the efficiency of bankruptcy cases are systematically monitored. In FBiH, as reported by the FBiH Ministry of Justice, a draft Law on Bankruptcy Proceedings that will replace the existing LBP is currently in parliamentary procedure, awaiting adoption. The draft law was modelled after the RS BL.

Licensing of Bankruptcy Trustees

195. **Both RS and FBiH bankruptcy rules govern licensing requirements for bankruptcy trustees.** Bankruptcy trustee candidates are obliged to pass a qualification exam.¹²⁴ In both entities, the Commissions in charge of conducting professional examination of bankruptcy trustees are appointed by the Ministries of Justice (Commission(s)). Candidates take the exam in bankruptcy law, fundamentals of civil and commercial law (unless the candidate passed the bar exam), and fundamentals of accounting and finance (unless the candidate is a certified public accountant).¹²⁵ Further, to be licensed as a trustee, a person must hold a university degree (in FBiH)/university degree in law or economics or technical sciences (in RS), and have at least five years of professional work experience.¹²⁶ In RS, the list of appointed trustees is kept by the Ministry of Justice and is renewed every four years.¹²⁷

Specialization of Bankruptcy Trustees

196. **Both in RS and FBiH, trustees are obliged to continuously update their knowledge.** Bankruptcy trustees are specialized through trainings organized by the Ministries of Justice. These trainings are mandatory (in FBiH, they have to be attended at least two times a year) and are conducted by the Commissions.¹²⁸ If the bankruptcy trustee does not attend the training organized by the Ministry of Justice, he/she is obliged to submit to the Ministry evidence (certificate) of participation in another form

¹²⁴ Articles 66 and 70 of the BL RS, Article 23 of the FBiH LBP.

¹²⁵ Article 10 of the Rulebook on Professional Examination of Bankruptcy Trustees of RS and Article 3 of the Rulebook on Professional Examination of Bankruptcy Trustees of RS.

¹²⁶ Article 66 of the BL RS, Article 2 of the Rulebook on Conditions and Professional Examination of Bankruptcy Trustees of FBiH.

¹²⁷ Article 67 of the BL RS.

¹²⁸ Article 25 of the Rulebook on Conditions and Professional Examination of Bankruptcy Trustees of FBiH, Article 19 of the Rulebook on Professional Examination of Bankruptcy Trustees of RS.

of professional development organized in cooperation with the Ministry, on at least one of the topics related to the work of the bankruptcy trustees (bankruptcy law, fundamentals of civil and commercial law, fundamentals of accounting and finance). In FBiH, such alternative professional development program may be organized by the Center for Education of Judges and Prosecutors, Association of Judges, or any other registered association or University. In FBiH, failure to undergo professional training leads to dismissal of the trustee. Rules in RS do not stipulate this sanction explicitly.¹²⁹

Efficiency of Bankruptcy Trustees' Work in Trials

197. **Unlike the FBiH LBP, the RS LB limits the number of cases one trustee can manage at the time.** As a general rule, one bankruptcy trustee can be engaged in one bankruptcy case at a time. Exceptionally, one bankruptcy trustee can simultaneously manage two bankruptcy proceedings. Only in small-claim bankruptcy proceedings (up to BAM 100,000) can a bankruptcy trustee manage more than two cases at the time. Commercial courts are obliged to keep track of pending bankruptcy proceedings, appointed bankruptcy trustees, and the number of cases they manage.¹³⁰ The FBiH LBP contains no limitation on the number of cases one bankruptcy trustee can manage at a time.

198. **Bankruptcy trustees are supervised by the court; they can be sanctioned in case of wrongdoing.** In RS, a bankruptcy judge can, at any time, request a report on the status of the bankruptcy proceedings from the bankruptcy trustee. If the bankruptcy trustee fails to provide the requested report or violates other duties, the court can sanction the bankruptcy trustee, either by imposing a fine for misdemeanor, or by dismissing the trustee when deemed justified. In FBiH, if the bankruptcy trustee fails to meet his/her duties, the judge can, after a previous warning, impose a fine in the amount of BAM 500 to BAM 1,700. If there is an important reason justifying dismissal, the trustee can be dismissed. In both entities, dismissal of the appointed bankruptcy trustee can also occur by request of at least five members of the creditors' assembly.¹³¹

199. **Removal from the list of bankruptcy trustees.** If a trustee is dismissed twice by a final and binding decision of the court, he/she will be removed from the list of registered trustees. A bankruptcy trustee who is convicted of organized crime, corruption, economic crime, a criminal offense that makes him/her unworthy to act as a bankruptcy trustee, or is being prosecuted for these crimes, will be removed from the list of registered trustees. Bankruptcy trustees who turn 70 years old will be removed from the list of registered trustees.¹³²

Relevant Findings

200. **According to the 2019 Doing Business Report, BiH ranks 37th in resolving insolvency cases; after North Macedonia (30th), BiH has the highest ranking in the Western Balkans.** With 38.9 cents on the dollar recovery rate, 40 months to close the case, costs in the amount of 9 percent of estate value, and 15 out of 16 Strength of insolvency framework index, BiH scores 67.83 in resolving insolvency, which is significantly higher than the regional average (55.58).

¹²⁹ See Article 24 of the Rulebook on Professional Examination of Bankruptcy Trustees of RS and Articles 38 and 39 of the Rulebook on Conditions and Professional Examination of Bankruptcy Trustees of FBiH.

¹³⁰ Article 71 of the BL RS.

¹³¹ See Articles 27 and 28 of the LBP FBiH and Articles 75 and 76 of the BL RS.

¹³² Article 67 of the BL RS.

The New RS BL and Efficiency of Bankruptcy Cases

201. **The new RS BL improved the overall efficiency of bankruptcy cases.** Generally, bankruptcy cases are handled as priority cases, the acting court is competent to decide on all cases arising from or related to the bankruptcy case, the liquidation of assets is governed in more detail, the bankruptcy estate can be registered as a legal entity, and so forth. All these changes have already led to a more efficient handling of bankruptcy cases.

202. **The RS BL created a favorable framework to increase bankruptcy trustees' efficiency in trials.** The list of bankruptcy trustees was recently updated. Appointed trustees are attending four to five trainings per year that are organized in cooperation with the IFC. These trainings are mandatory, and the Ministry of Justice keeps attendance records. Trainings are held by bankruptcy judges, professors of bankruptcy law, representatives of the Chamber of Commerce, social insurance funds, accountants, auditors, and so forth. In trials, bankruptcy judges are obliged to regularly monitor the work of bankruptcy trustees and react to any wrongdoing.

Draft FBiH Law on Bankruptcy Proceedings

203. **The Draft Law on Bankruptcy Proceedings is currently before the FBiH Parliament; among other things, its solutions aim to increase efficiency of bankruptcy trustees.** The focus of the draft law is to revitalize a failing firm, but the draft law also introduces significant changes on the work of bankruptcy trustees, modelled on the RS BL.

Inefficiency of Bankruptcy Case Processing

204. **The inefficient processing of bankruptcy cases can be partially attributed to bankruptcy trustees and bankruptcy judges; these reasons, however, are not seen as key obstacles to expeditious processing of these cases.** As reported by experienced bankruptcy judges and court presidents, bankruptcy cases are lengthy due to circumstances that usually cannot be attributed to either judges or bankruptcy trustees.

Box 12 – Objective Causes of Inefficiency in Bankruptcy Cases

Objective circumstances, such as the **state of the economy** which has no financing to reinvest into reviving failing companies, cause inefficiencies and slow down the process. Usually in bankruptcy auctions, there are no buyers for the property of bankrupt companies, so financing cannot be raised to pay creditors and workers. Even if the property is sold, such property is usually under mortgage of the tax authorities.

205. **The 2019 Doing Business Report states that the sale of immovable property causes most delays in bankruptcy cases.** Relevant time indicators show that 3.3 years is typically needed to close a bankruptcy case, which is substantially higher than the regional average (2.3).

206. **Parallel court proceedings also prolong the duration of bankruptcy cases.** It is not rare for participants of bankruptcy cases to initiate parallel court proceedings to protect their rights, or to cause delays in bankruptcy case processing. For instance, in connection with a bankruptcy case initiated before the Commercial Court in Istočno Sarajevo in 2006, claims were filed to determine ownership rights over more than 300 apartments. The bankruptcy case is contingent upon the decisions in these cases and cannot be closed before these cases are solved.

Unprofessional Work of Bankruptcy Trustees

207. **Unprofessional or otherwise inadequate work of bankruptcy trustees is seen as one of the causes of bankruptcy cases inefficiency.** In practice, bankruptcy trustees lack necessary education and experience to manage complex bankruptcy cases. In F BiH, this results in frequent engagement of three or four of the most experienced trustees in all bankruptcy cases. This results in inevitable delays. Bankruptcy trustees are often not specialized for company management. For example, it happens that appointed trustees are agricultural engineers and do not have a business degree. Also, more than 55 percent of Perception Survey participants stated that bankruptcy trustees lack knowledge to manage firms in bankruptcy.

208. **In F BiH, one bankruptcy trustee is a trustee for too many companies, which causes both efficiency and integrity issues.** Judges have noticed that some trustees manage as many as 10 companies which they do not find to be an adequate practice. Such practice causes delays because a trustee cannot devote enough time to each company it manages. Also, integrity of the selection process is then an issue as repeated appointments of same individuals create a perception of undue influence in this process.

Court Management of Bankruptcy Trustees' Work

209. **Bankruptcy judges do not manage the work of bankruptcy trustees in an adequate manner and lack specialization/training in managing bankruptcy cases.** Bankruptcy cases are rather complex and require continuous commitment of judges to those cases. Instead of managing the case (and the work of trustees) by scheduling and supervising trial activities, instructing the trustee, and requesting regular status reports, judges are often inert and leave it to the trustees to manage (or not manage) the case. Judges are not sufficiently specialized in bankruptcy law since they usually gain prior experience in general civil cases (or only one type of civil law cases) and are subsequently assigned to review bankruptcy cases without any prior specialization or trainings. Because of this they often allow for a case to be led in substance by the bankruptcy trustee who then informally becomes a decisionmaker. Lack of specialization represents an issue both at the level of first-instance courts (bankruptcy case) and second-instance courts (appeals arising from/related to the bankruptcy case). Poor management of bankruptcy cases was also perceived as an issue by more than 60 percent of Perception Survey respondents. Trainings for bankruptcy judges are seldom organized and could be improved.

Monitoring of Bankruptcy Trustees' Work

210. **The F BiH Ministry of Justice does not monitor bankruptcy trustees' work, nor imposes sanctions on trustees who conduct their work in an unprofessional and/or unethical manner.** So far, the Ministry of Justice has been rather inert when it comes to work of bankruptcy trustees (for example, in one case, a trustee who was facing criminal charges for the offense committed in relation to another bankruptcy case was not suspended by the Ministry, nor did the Ministry react to this situation).

Recommendations and Next Steps

Introducing Trainings/Specializations to Improve the Quality of Bankruptcy Trustees' Work and Efficiency of Trial

211. **Bankruptcy trustees would benefit from attending trainings in bankruptcy law and company management (including all fields that are relevant for running a business).** Bankruptcy trustees, due to their importance in bankruptcy proceedings and ability to prevent disputes arising from those proceedings, need to be well trained for this role (in terms of necessary education, professional experience, and ethics). Modelled on RS practices, bankruptcy trustees could be regularly trained in the field of bankruptcy law and bankruptcy proceedings, as well as in other fields of law, economy, and company/business management (if they do not have sufficient professional experience in this field). Those trainings could be held by bankruptcy judges, professors of bankruptcy law, representatives of the Chamber of Commerce, social insurance funds, accountants, auditors, and so forth. Lack of trustees' knowledge in these fields was also identified by Perception Survey respondents as problematic.

Figure 16. *Trainings for Bankruptcy Trustees (Source: Perception Survey)*

212. **Trainings and seminars for judges in managing bankruptcy cases should be improved** Bankruptcy judges would benefit from improved training in management of bankruptcy trustees' work and bankruptcy cases in general (focusing on, for example, business management, finance, and economics). As the RS BL is already in its third year of implementation and the FBiH draft law is still in procedure, joint seminars of RS and FBiH bankruptcy judges could be organized to share experiences with implementation of the RS BL. In this manner, FBiH judges would be better prepared for the entry-level into force of the new Law on Bankruptcy Proceedings. These seminars could be an opportunity to design tools to closely monitor the work of bankruptcy trustees (regular status reports, predetermined timeline of activities, and so forth) and keep bankruptcy cases on track.

213. **Trainings for judges and trustees could be institutionalized and conducted by the RS and FBiH Training Centers.** Both the RS and FBiH Training Centers have expressed their willingness to organize trainings not only for judges, but also for other trial participants (for example, expert witnesses, post officers, bankruptcy trustees), so rules governing the competence of the two institutions in both entities could be amended to allow this. Training centers are best positioned, in cooperation with the RS and FBiH Expert Commissions/Ministries of Justice, to set a basic curriculum for training modules and identify and engage experts to hold trainings. The Distance Learning System could be used for organization of trainings. To monitor training activities, attendance could be recorded and both trustees and judges could receive attendance credits. Optimally, failure to obtain a certain number of credits would be a reason for

revocation of a bankruptcy trustee's license, while judges' scores would be taken into consideration in their overall evaluation. In case of bankruptcy trustees, the RS and F BiH Commissions could keep track of training attendance, while in case of judges, this could be done by court presidents and the HJPC.

Amendments to the RS and F BiH Bankruptcy Laws to Refine the Licensing/Appointment of Bankruptcy Trustees

214. **Any new amendments to RS BL and F BiH draft Law on Bankruptcy Proceedings would likely be premature at this stage.** Since the RS BL was only adopted in 2016 and its effects are being closely monitored in cooperation with IFC, and the F BiH draft law is in parliamentary procedure, proposing any new changes to legal frameworks would be premature. Namely, the effects of the new legislative framework in RS are still being monitored and conclusions on impact are to be made. In F BiH the draft law is at the stage of adoption. Taking into consideration complexity and time needed for new legislative change it is probable that at this moment costs of introducing new mechanisms and revisiting current drafts would outweigh possible benefits.

215. **However, some directions for improving efficiency of bankruptcy trustees were identified and can be taken into consideration either long term or short term though pilots/soft law rules:**

- a. **Additional requirements on professional experience in business management could be introduced** because without this experience it is challenging to direct the case towards restructuring (prebankruptcy settlement) and revitalize the firm (which is the main goal of bankruptcy cases).
- b. **Calls for appointment of bankruptcy trustees on a regular basis/on request of courts could be introduced.** To better connect the need for bankruptcy trustees with needs of the courts, it can be considered to i) introduce call for appointment of bankruptcy trustees on proposal of court/courts in case of identified need for bankruptcy trustees, and/or 2) regular calls to profession (for example, biannually or annually). This would open up the 'profession' of bankruptcy trustees and prevent shortages.
- c. **Bankruptcy trustees could be tasked with keeping a record of all cases that arise from/are in connection with the bankruptcy case.** This solution would keep the bankruptcy judge informed of all related proceedings and possibly provide insight into abusive behavior of parties initiating those proceedings as dilatory tactics. Further, it would enable the judge to coordinate processing of these related cases as a matter of priority to avoid delays.
- d. **Courts and parties could be given more power to monitor and sanction the work of bankruptcy trustees.** The Ministries of Justice are the authorities that decide on revocation of bankruptcy trustees' licenses. Yet, courts are better placed to monitor the work of bankruptcy trustees' work and decide on their competence. So (i) courts could be vested with powers to conduct proceedings against a trustee and even revoke licenses, (ii) parties would benefit from clear rights under the RS BL and F BiH LBP to report wrongdoings of bankruptcy trustees to all relevant authorities, the Ministries of Justice and courts, and (iii) provisions in these acts could be more specific to provide a clear right of damage claim action and criminal action for parties in cases of bankruptcy trustees malpractice.

Improved Monitoring of Bankruptcy Trustees' Work/Bankruptcy Judges

216. **Both Commissions for conducting professional examination/trainings of bankruptcy trustees could be tasked with keeping records of conducted trainings/specializations of bankruptcy trustees and other remarks/observations on their work.** Commissions could periodically obtain information on bankruptcy trustees' work/trainings/remarks/imposed sanctions, and so forth from courts and use this information to produce regular reports for the Ministries of Justice. This would enhance transparency and keep the Ministries, which decide on the revocation of bankruptcy trustees' licenses, up to date with the quality of bankruptcy trustees' work.

217. **Court presidents could regularly monitor the work of bankruptcy judges through CMS.** Through random review of cases, court presidents could monitor judges' active engagement in managing bankruptcy cases. This can be done through examining periods of bankruptcy case inactivity and the reasons for such inactivity.

218. **Enhanced and coordinated monitoring of bankruptcy trustees and bankruptcy judges** would increase transparency and visibility of their work, which would, in turn, reduce risks of undue influence and corruption.

Court Fees

Legal Framework

219. **The system of court fees across BiH is not uniform.** Due to the complex governance structure of BiH, each of the jurisdictions within the country (RS and the 10 cantons) have their own rules on court fees. Rules on court fees are different in terms of their amount and structure, the collection process, and statute of limitations rules.

220. **The table below provides a comparative overview of court fees in a typical commercial case in BiH (RS, Canton Sarajevo, Canton Una Sana) and compares it with fees charged in Serbia and Croatia.** Value of the fee is determined based on the value of the claim. Fees are shown in bold.

Table 1 – Comparative Overview of Court Fees in the Region Based on the Value of the Matter in Dispute (VMD)¹³³

	RS	Canton Una Sana	Canton Sarajevo	Serbia	Croatia
Claim / Counter-claim	To BAM 1,500 – BAM 50	To BAM 1,000 – 5% of VMD	To BAM 500 – BAM 20	To BAM 160 – BAM 65	To BAM 800 – BAM 26
Value of the claim – amount of fee	BAM 1,500 – BAM 3,000 – BAM 100	To BAM 5,000 – 4% of VMD	BAM 500 – BAM 1,000 – 5% of VMD	BAM 160 – BAM 1,650 – BAM 65 + 6% of VMD	BAM 800 – BAM 1,600 – BAM 55
	BAM 3,000 – BAM 10,000 – BAM 200	Over BAM 5,000 – 3% of VMD, but cannot exceed BAM 10,000	BAM 1,000 – BAM 5,000 – 4% of VMD	BAM 1,650 – BAM 16,450 – BAM 250 + 2% of VMD	BAM 1,600 – BAM 2,400 – BAM 80
	BAM 10,000 – BAM 50,000 – BAM 500		Over BAM 5,000 – 3% of VMD, but cannot exceed BAM 10,000	BAM 16,450 – BAM 16,550 – BAM 900 + 1% of VMD	BAM 2,400 – BAM 3,200 – BAM 105
	BAM 50,000 – BAM 100,000 – BAM 1,000			BAM 16,550 – BAM 164,500 – BAM 900 + 1% of VMD	BAM 3,200 – BAM 4,000 – BAM 130
	Over BAM 100,000 – 1% of VMD, but cannot exceed BAM 10,000			Over BAM 164,500 – BAM 4,100 + 0.5% of VMD, but cannot exceed BAM 6,420	Over BAM 4,000 – BAM 150 + 1% of VMD above BAM 4,000, but cannot exceed BAM 1,300
Appeal / Revision	2x fee for claim / counter-claim	2x fee for claim / counter-claim	2x fee for claim / counter-claim	Appeal 1x fee Revision 2x fee for claim / counter-claim	2x fee for claim / counter-claim
First-instance judgment	1x fee for claim / counter-claim	1x fee for claim / counter-claim	1x fee for claim / counter-claim	1x fee for claim / counter-claim	1x fee for claim / counter-claim

221. The table shows that court fees in BiH **differ across entities/cantons.**

¹³³ Please note that the values stipulated by the Serbian and Croatian Laws on Court Fees were converted to BAM for easier comparison and are approximate. Also note that the information in the table is provided for a typical commercial case (court fees are different, for example, when the court issues a default judgment).

222. **The structure of court fees also varies across different entities/cantons.** In some jurisdictions, the court fee due in first-instance cases are comprised of two elements – one for filing the claim, and one for issuing the judgment.¹³⁴ In other jurisdictions, in addition to these two there is also a fee for filing a response to the claim and this fee is paid by the defendant.¹³⁵

223. **In all BiH jurisdictions, the court will proceed with the case regardless of whether the fee was paid in due time (or not at all).** Rules in Canton Sarajevo envisaged that the claim would be dismissed and deemed not submitted if the fee was not paid in advance; however, the BiH Constitutional Court found that this rule was a violation of the parties' right to access to court and this rule was repealed.¹³⁶ However, in most EU jurisdictions court fees need to be paid in advance and the court will not proceed with examination of the case if the fee is not paid.¹³⁷ In this way, EU judicial systems protect against frivolous claims.

224. **In some BiH jurisdictions parties face sanctions in case of failure to timely pay the fee.** In five jurisdictions, there is a 50 percent penalty for the party which fails to pay the fee within the period set by the court.¹³⁸ In some jurisdictions there is a register of unpaid court fees.¹³⁹ Failure to pay the fee causes negative consequences for that party. For instance, in Tuzla, once unpaid court fees are entered in the register, the party that failed to pay the court fee will not be able to exercise its rights before administrative authorities of Tuzla Canton until the fee is duly paid.

225. **Rules on the statute of limitations for payment of court fees are not harmonized across different jurisdictions.** While some acts stipulate a two-year statute of limitations,¹⁴⁰ others prescribe a three-year¹⁴¹ or a five-year¹⁴² statute of limitations. The moment from which the statute of limitations starts running also varies in different jurisdictions – from the moment the fee became due, from the moment the judgment is final and binding, or from the end of the year in which the fee became due.

Relevant Findings

No Uniform Rules on Court Fees in BiH

226. **Court fees are subject to continuous negotiations between governments at all levels; however, they reflect a complex state organization, an issue which is not likely to change soon.** Court fees are regulated at the level of cantons and not at the level of entities or the state level. In order to harmonize court fees across FBiH, both in terms of their amount and process for collection, it would be necessary to engage cantonal governments. As reported by the FBiH Ministry of Justice, efforts to do this have not yielded positive results so far.

¹³⁴ Sarajevo, Tuzla, Central Bosnia, West Herzegovina, Canton 10, Posavina, and BD.

¹³⁵ RS, Zenica Dobož, Una Sana, Herzegovina – Neretva, Bosnia – Podrinje, and the Court of BiH.

¹³⁶ The former Law on Court Fees of Canton Sarajevo stipulated that, in case of filing a motion without paying the fee upfront or within the additional deadline set by the court, the motion was dismissed. The BiH Constitutional Court in case No. U/12 made the decision that this provision was not in accordance with Article II/3.e of the BiH Constitution and Article 6 paragraph 1 of the ECHR, as violating the right of access to court.

¹³⁷ For example, in Denmark, Germany, Latvia, Estonia, and Slovenia.

¹³⁸ RS, BD, Posavina, Una-Sana, and the Court of BiH.

¹³⁹ Tuzla and Sarajevo.

¹⁴⁰ For example, Una Sana.

¹⁴¹ For example, BD.

¹⁴² For example, Tuzla.

227. **The fact that each jurisdiction in BiH has a separate set of rules on court fees means that litigation in some jurisdictions is cheaper than in others.** This puts in jeopardy the principle of equal access to justice, affects public perception, and reduces predictability for the parties in trials. It also increases the risk of forum shopping (practice of litigants having their legal case heard in the court with a more favorable fee system) while the lack of clarity with regard to court fees also affects citizens' perception and further hinders their access to information and to courts.

228. **Lack of uniformity of fees, different consequences in situations when fees are not paid, and different statute of limitation rules for collection, all make it impossible to precisely identify the impact fees have on overall party behavior in BiH.** Parties' motivation to frivolously litigate differ across cantons and RS given that in some cantons/RS fees are lower than in others, in some cantons fees may not be collected at all (although they may be set high), while in some cantons statutes of limitation are too short to make efforts to collect fees meaningful. Further given no uniformity or clarity on the fee levels and collection efforts, it is not clear to what degree parties are aware of the actual situation in each canton/RS and to what degree their behavior or motivation to frivolously litigate is guided by the actual state of affairs.

Amount, Structure and Collection of Court Fees in BiH

229. **Some claim that court fees are too high and disincentivize companies from going to court.** According to the business community, court fees are high. This particularly disincentivizes SMEs to go to court. For instance, for a BAM 10,000 dispute, the court fee is BAM 500. Companies must also hire and pay the costs of an attorney. Some lawyers claim that parties are also burdened by bank fees that accompany each payment of a court fee.

230. **Once the case is in court, court fees do not seem to impact procedural rules or delay trial activities in that particular case.** Interviewed judges have reported that court fees do not delay trial activities. In case fees are not paid on a voluntary basis, the court will order their collection via tax authorities¹⁴³ or notify the Public Attorney's Office so that enforcement proceedings are initiated.¹⁴⁴ So, payment of the fee is a separate and parallel process to the trial itself, and does not influence the case itself.

231. **Nevertheless, in practice judges/judicial associates are the ones carrying the burden of calculating the court fees and monitoring the collection process.** This can have twofold consequences for the efficiency of courts. Either judges can get overburdened with managing numerous fees and lack time to handle cases on merits, or they can neglect the process and not take specific actions toward the collection of the fee (in which case there is a risk that the statute of limitations will expire and the fee will not be collected at all).

Statute of Limitation Rules in BiH

232. **Short statutes of limitations in some cantons increase the risk that fees will ultimately not be paid.** In some cantons, the statute of limitations is two years. For instance, as reported by the Municipal Court in Mostar, the cantonal Law on Collection of Court Fees envisages a two-year statute of limitations

¹⁴³ For example in RS and BD.

¹⁴⁴ For example. in Una Sana, Central Bosnia, Sarajevo.

for the collection of court fees and there is no provision stipulating that a warning or any other court action will toll the statute. The two-year deadline is short and it often happens that the court fee cannot be collected once the case is sent back to the first instance court for retrial.

Recommendations and Next Steps

233. **BiH policy makers could consider unifying the system of court fees (amount, calculation, collection, statute of limitations, and so forth).** This would equalize access to justice across the country and increase predictability for court users. The court fees calculator would then have to be redesigned to reflect the regulatory change.

234. **Consideration could be given to introducing a single court fee that would be payable at the outset of the procedure.** A single court fee for reviewing a case in one instance is a rule in some European countries.¹⁴⁵

235. **Rules on court fees could be amended to deter evasion of court fees.** The statute of limitations period for the collection of court fees could be extended and could start running from the date the judgment is final and binding. Further, the rules could provide that any action by the court or any other authority in charge of the court fee collection process tolls the statute. Rules in all jurisdictions could introduce a register of unpaid court fees, as is the case in Tuzla, and stipulate consequences for the party that fails to pay the fee (50 percent fine in case of failure to pay, inability to exercise other rights, and so forth).

236. **Supervision of the court fee collection process could be reassigned from judges/judicial associates to administrative staff in courts.** Once the value of the matter in dispute is determined, judges should not have to deal with calculating the court fee or monitoring whether the fee was paid or not. This could be done by court administrative assistants. Another possibility is to set up a register of court fees and task the registrar with supervision of the collection process.

237. **A focused analysis that would address court fees would be beneficial to design further recommendations for improvement of the court fee system; the analysis should optimally go beyond issues relevant to procedural efficiency.** Analysis done so far has shown that:

- i) court fees and their collection do not impact, or have minimal impact on, the efficiency of procedural rules and the conduct of individual trial activities;
- ii) the system for court fees, including their amount, collection, statutes of limitations, and so forth, in BiH is not coherent nor fully transparent;
- iii) parties' decision to frivolously litigate in different jurisdictions is motivated by different rules, it is not clear how aware parties are of relevant rules given lack of transparency;
- iv) the system for court fees in BiH is extremely fragmented, as the collection process is split among a number of institutions (courts, cantons, parties, tax authorities, and others).

Such an incoherent and unclear system threatens to create perverse incentives for all parties involved and may lead to, among other things, insufficient or misbalanced budgets for court operation, or impact access to justice and adequate court organization. Thus, **it is advisable to conduct a focused analysis on court fees in FBiH and RS. The analysis should go beyond procedural rules, and instead focus on all relevant**

¹⁴⁵ Austria, Denmark, Estonia, Germany, Latvia, and Slovenia. For more information, please see *Small Claims: Where Does BiH Stand? A comparative analysis*, p. 33.

aspects (budget, court operation, and so forth), taking into account financial and technical feasibility of different options for reform.

Internal Court Processes

Legal Framework

Cooperation between Higher and Lower Instance Courts/Judges

238. The RS and BiH Rulebooks on Internal Court Processes envisage mechanisms for cooperation between higher- and lower-instance courts/judges in order to exchange their experiences and share good practices, as well as harmonize case law:

- a. **Biannual meetings of court presidents.** These meetings are held to exchange experiences and improve efficiency of the judicial administration, and discuss matters such as compliance with deadlines, case backlogs, and other issues important for the efficient work of courts.
- b. **Joint panels of highest courts' presidents.** These panels are organized to exchange experiences and improve efficiency of the judicial administration. To harmonize jurisprudence, highest courts' presidents organize meetings of their court departments at least twice a year.¹⁴⁶
- c. **General sessions of court judges.** Court presidents organize quarterly meetings of all judges and judicial associates to discuss matters relevant for the work of the court, including efficiency of the court, possibilities for improving efficiency, and professional training of judges and other employees. Based on these meetings, court presidents order measures for improvement of efficiency.¹⁴⁷
- d. **Interpretative opinions of court departments.** Sessions of court departments are held at least quarterly. Interpretative opinions adopted by the court are binding on judges of that court but are only instructive for the lower-instance courts. The president of the lower court and presidents of the lower court's departments may initiate a session of the higher court departments at any time.¹⁴⁸
- e. **Controversial legal issues.** Any first-instance court can, *ex officio* or upon motion of the party, submit a request to the Supreme Court to resolve a controversial legal issue. The request should contain a brief statement of reasons, parties' positions, and court's interpretation of the controversial legal issue.¹⁴⁹
- f. **General legal opinions.** The FBiH and RS Supreme Courts adopt general legal opinions on matters relevant for the uniform application of laws in FBiH/RS at their general sessions held together with second-instance court judges. In RS, the Higher Commercial Court, as the only appellate court in commercial matters, is competent to adopt general legal opinions in this field.¹⁵⁰

¹⁴⁶Article 9 of the Rulebook on Internal Court Processes of BiH and Article 9 of the Rulebook on Internal Court Processes of RS.

¹⁴⁷Article 12 of the Rulebook on Internal Court Processes of BiH and Article 12 of the Rulebook on Internal Court Processes of RS.

¹⁴⁸Sessions of court departments are mandatory when there is a disagreement between individual judges or panels on application of the law. Please see Articles 18 and 19 of the Rulebook on Internal Court Processes of BiH and Articles 18 and 19 of the Rulebook on Internal Court Processes of RS.

¹⁴⁹See Articles 61a and 61b of the CPL FBiH and Articles 61a and 61b of the CPL RS.

¹⁵⁰See Article 35 of the Law on Courts of FBiH, Article 34 of the Law on Courts of RS and Rulebook on General Session of RS Supreme Court.

Activities on cooperation between Higher and Lower courts are also conducted under different projects coordinated by the HJPC.

Case Law Databases

239. **The Supreme Courts of FBiH and RS organize a case law department for the collection of case law and its systematization according to predetermined criteria.** This department can also collect and review decisions of other courts and inform judges on case law developments. Also, presidents of court departments should keep track of legislative amendments and case law of higher-instance courts, and update judges on those amendments/developments. Presidents of court departments should monitor whether case law of individual judges or panels is consistent.¹⁵¹

Reassignment of Cases

240. **Reassignment of cases is left to the discretion of the court president.** Court presidents can, *ex officio* or by proposal of a judge, reassign cases from one judge to another if special circumstances justify such reassignment (absence of the judge, excessive caseload, or other legal/factual reasons).¹⁵² The reassignment procedure is not further specified.

Relevant Findings

Cooperation between Higher and Lower Instance Courts

241. **There are mechanisms in place that enable cooperation between lower and higher-level courts, but their implementation is poor.** For instance, Supreme Court judges often cannot act upon a request to resolve a controversial legal matter because the request is inadequate/incomplete/poorly drafted. Further, Supreme Courts are rarely asked to interpret laws. In FBiH, the last general legal opinion adopted by the FBiH Supreme Court was years ago.

242. **The procedure to adopt interpretative opinions on request of lower-instance courts is lengthy and complex, and those opinions are not valued in the quota.** Judges do not have proper incentives to issue interpretative opinions as they are not valued in the quota.

243. **However, new mechanisms for cooperation have been developed by courts in practice, and there are some new initiatives to further enhance cooperation between courts:**

- a. **Pilot cases.** The 'pilot case' initiative was first implemented by the Municipal Court in Sarajevo, Cantonal Court in Sarajevo, and the FBiH Supreme Court. Later, this initiative was implemented in the Commercial Court and High Commercial Court in Banja Luka, and there are initiatives to introduce it in 18 other courts across the country and have it coordinated by the HJPC. Pilot cases are cases that are, in terms of their legal and factual backgrounds, similar to a number of other unresolved cases. Some of the pilot cases are transferred to higher courts (on appeal/revision) and handled as priority. Decision of a higher court in one pilot case facilitates the decision-making and provides guidance for resolution of all such

¹⁵¹ Articles 16 and 17 of the Rulebook on Internal Court Processes of BiH and Articles 16 and 17 of the Rulebook on Internal Court Processes of RS.

¹⁵² Article 52 of the Rulebook on Internal Court Processes of BiH and Article 52 of the Rulebook on Internal Court Processes of RS.

cases at lower levels. This mechanism was developed in practice to assist lower-level courts in case processing.

- b. **Cooperation in bankruptcy cases.** The Municipal Court in Tuzla developed a close cooperation with the Cantonal Court in Tuzla – if an appeal is filed in a case involving a firm in bankruptcy, this case will be handled by the Cantonal Court as a matter of priority because a bankruptcy case cannot be closed until all proceedings against the firm in bankruptcy are finalised. The HJPC has instructed other courts to follow this practice as well.
- c. **Showcasing examples of good/bad practices.** The RS High Commercial Court President has started an innovative practice of showcasing examples of bad practices which cause inefficiencies at first instance. The President gathers practices which cause inefficiencies at first-instance courts and communicates them to first-instance court judges along with advice for improvements.

Case Law Databases

244. **The available HJPC case law database is modest and does not have an appropriate search engine.** Judges lose a lot of time searching for guidance on how to process cases and make adequate decisions. Usually they use general search engines (such as *Google*) rather than the HJPC database to support their decision-making processes. There are no offices for jurisprudence nor assistance from the offices of the second-instance court for making available already existing case law. HJPC database of cases should include more cases. Categorization of cases in the database is inadequate and commercial judges often have to go through a “forest” of civil law judgments to get to relevant commercial cases.

245. **The RS and FBiH Supreme Courts are in the process of setting up their case law databases.** The FBiH Supreme Court plans on developing a case law database to be used by all courts. The case law department of the court will be in charge of collecting judgments and populating the database. By the end of this year, three FBiH Supreme Court departments (civil, criminal, and administrative) will prepare a list of parameters/search words that will be used to categorize cases in the database. As a mechanism to categorize upcoming decisions, a questionnaire will be filled out at deliberation sessions to gather all relevant information on a case (case number, disposition of the judgment, legal concept/matter, and so forth). Access to the database will be free of charge. The RS Supreme Court established its caselaw department only in February 2018 and its case law database is still in the development stage. The caselaw database will allow users to access anonymized judgments through key words, legal concept/matter, ruling, and so forth. Currently, judges of the Supreme Court have an internal database with adequate categorization of their judgments. However, due to technical issues, this internal database cannot be accessed by other courts or the public.

Reassignment of Cases

246. **Reassignment of cases leads to serious inefficiencies and is sometimes not sufficiently transparent.** The process of reassigning cases is not well organized. In case of reassignment, some cases wait for months and even years to be assigned to a new judge. New judges are not assigned to old backlogged cases but often receive their own new cases. Sometimes, reassignment happens without a court order to reassign although such orders are mandated by law. For some reassignments months pass and case activities are postponed indefinitely.

Recommendations and Next Steps

Improving Cooperation between Courts

247. **To enhance transparency and contribute to the harmonization of jurisprudence in courts, the RS and BiH Rulebooks on Internal Court Processes could be amended to introduce the following:**

- a. Regular (for example, biannual/annual) **meetings of court presidents at first instance** to address issues related to court efficiency and discuss possible methods for improvement;
- b. Regular (for example, biannual/annual) **meetings of court presidents at second instance** (RS and FBiH) to address issues related to court efficiency and discuss possible methods for improvement;
- c. Regular (for example, biannual/annual) **meetings of commercial department presidents** to address issues related to case management (service of process, scheduling of hearings, postponement/adjournment of hearings, gathering of evidence, expert witness management, bankruptcy trustees management, and so forth), adherence to deadlines, and other relevant aspects of commercial case processing;
- d. These meetings should be held **i) at the same level (at first/second instance), and ii) at different levels (between first-instance and second-instance courts);**
- e. Videoconferencing can be used to minimize the costs of these and other internal meetings;
- f. Appellate courts are obliged to record and produce periodic (for example, biannual/annual) reviews of **bad practice examples that cause most inefficiencies in first-instance case processing**. Showcasing good / bad examples of case management could be included into judicial trainings and implemented to raise awareness of issues that need to be addressed and efficiently resolved;
- g. Second-instance courts are obliged to **share with first-instance courts minutes of meetings held at second instance** (at least meetings of court departments and general meetings of all judges) to keep them updated on higher courts legal standpoints;
- h. Court presidents are obliged to **deliver to the HJPC reports on all meetings/sessions held in line with provisions of the Rulebook on Internal Court Processes, along with the minutes of those meetings**. This would enhance transparency and ensure that courts are complying with their obligation to convene regular sessions and discuss matters relevant for the work of the courts.

Improving the HJPC Case Law Database

248. **The analysis conducted under this Report identified that a good case law database is critical for increasing procedural efficiency, especially of first-instance courts.** Without proper access to appellate courts' standpoints, first-instance courts often take superfluous procedural actions to "meet" due process standards and avoid their judgments being overturned on appeal. Also, they lose time researching how to deal with new legal issues and approach specific matters. All judges have confirmed that a good case law database would significantly help the decision-making process and expedite adjudication.

249. **It is highly recommended that future actions focus on improvement of the HJPC case law database; the database could encompass all decisions rendered by appellate courts.** Although the RS and FBiH Supreme Courts are in the process of developing their own databases, it would be optimal to have a single database that would be populated by decisions of all relevant BiH courts. For this reason, consideration might be given to improving the HJPC case law database – among other things, the database could include second-instance judgments, decisions in the database could be better categorized, the

search engine could be improved, the anonymization process could be made more efficient, access to the database could be simpler, and so forth. The Perception Survey confirmed that improvements are warranted as only 3 percent of respondents believe that it is not necessary to improve the HJPC database. Further, over half of respondents believe that the HJPC database should be populated with more case law.

Figure 17. *Improvement of the HJPC Case Law Database (Source: Perception Survey)*

Improving Rules on the Assignment/Reassignment of Cases

250. **It would be beneficial for rules on assignment/reassignment of cases to be improved to enhance transparency and eradicate perceptions of court bias.** Software and procedures for the random allocation of cases could be improved to meet the following criteria: (a) statistical soundness; (b) procedural, cryptographical and computational security; (c) complete auditability; (d) open-source programming; (e) user friendliness and transparency; and (f) flexibility and adaptability for the needs and requirements of multiple application areas.¹⁵³

251. **It would be more efficient for court presidents to have less power in deciding on assignment/reassignment of cases** and if they would, based on the Rulebook on Internal Court Processes, report to the HJPC all reassignments which are not done for predefined reasons (for example, reassignment of cases for a judge who has left the court). It is recommended that any reassignment of a case which lasts longer than a month be reported to the HJPC and supported with adequate justifications. This would reduce the time needed for a new judge to be selected and, in turn, the frequency of postponements caused by case reassignments. Further, parties could be entitled to address the HJPC if a case reassignment happens without an order of the court president or without justified reasons, while the HJPC could follow up with the court president on such reports and provide an explanation to the parties involved. Overall, reassignment of cases could be monitored by HJPC more closely. This would enhance transparency, reduce risks of undue influence in the process, and increase the public's trust in the judiciary.

¹⁵³ Source: Marcondes, Peixoto and Stern, *Assessing randomness in case assignment: the case study of the Brazilian Supreme Court*, April 19, 2018.

Case Management System

252. **Case management system (CMS) is uniform for all BiH courts.** CMS was developed as part of the Information and Communication Technology Strategy for the BiH judiciary. Development of the initial version of the CMS for BiH courts and prosecutors' offices was funded by the United States Agency for International Development and was supported by the HJPC. After pilot testing, the software was installed in all BiH courts to secure, among other things, real-time, random assignment of cases to judges, easy screen-based review of all case information, real-time information about every new document/case entered in the system, fast search for any piece of information, monitoring of data and reporting, and so forth.

253. **CMS is governed by the Rulebook on Case Management System in BiH Courts (CMS Rulebook) enacted by the HJPC in 2016.** The Rulebook regulates the usage of CMS by all BiH courts and parties. It stipulates the rights and obligations of different persons in the system (judges, judicial associates, CMS administrators, and so forth), and governs in detail actions such as case filing, registration of documents in the system, assignment and reassignment of cases, archiving, and so forth. It further governs online access to cases by parties, their legal representatives and attorneys using access codes.

Use of CMS in Practice - Relevant Findings

Inefficient Use of Existing CMS Functionalities

254. **CMS is a powerful tool for case management, but its usage is far from optimal.** In its current form, CMS offers a number of functionalities that can be used to identify procedural inefficiencies and improve case processing. The major issue, as reported by the HJPC, appears to be that CMS users (judges/court presidents/other court staff) do not use the system properly (for example, they do not register all the data in the system, system parameters are often not set properly, data available is not regularly used for case management monitoring, and so forth). Judges, on the other hand, reported that registration of activities in the CMS is a burdensome and time-consuming task which does not add value to case management, but only takes away time from the actual processing of cases.

255. **CMS records a number of court processes; however, comprehensive reports on procedural inefficiencies are not produced or regularly used.** From the time the lawsuit is lodged until the verdict, CMS records milestone activities, so it can be used to provide information on existing (in)efficiencies, detect key bottlenecks, and improve processes. CMS statistics show that at each point issues and delays often occur (lawsuit is not forwarded for reply for months, hearings are not scheduled). However, some of the statistics available at CMS seem to not be fully accurate as not all activities are properly registered in the system; also, available data is often not systematically made use of.

256. **Court staff is not adequately trained for the usage of CMS.** As previously mentioned, some CMS reports cannot be created, or are created but show inaccurate data, because judges are not properly using CMS or do not enter all the information in the system. For example, judges are not entering in the CMS all information on postponed/adjourned hearings and, according to the HJPC, renders current information in the CMS of little to no value for analysis of case processing.

Need for Improvement of Existing CMS Functionalities

257. **CMS flags pending tasks but inadequately.** Some procedural tasks are simple and could be quickly completed (such as forwarding the lawsuit or appeal for reply, allowing access to files, and so forth). Once such tasks are due, the judge receives a notification from the CMS, but there is no follow-up information to note that the task was completed or not. For judges who have a large workload, these tasks if not completed when received go into the backlog. Later they become a “*needle in the haystack*” of activities pending and are delayed for months. It does happen that an appeal is not forwarded to the appellate court for six months or more. Sometimes, the issue is resolved only when a party in the case sends an urgent message to the court president inquiring about the status of their case.

258. **CMS functionalities could be improved to better track different trial events and capture inefficiencies.** As noted in the Section on Service of Process, CMS functionalities could be improved to better monitor reasons for failed delivery; also, once e-tracking of service of process is enabled, tracking programs could be interconnected with CMS to better monitor service of process. As listed in the Section on Hearings and Adjournments, CMS functionalities could be improved to keep track of reasons for postponement/adjournment of hearings, attorney’s scheduled hearings, and *evidencija*.

259. **CMS users report that the system for the assignment/reassignment of cases in CMS is not user friendly.** Judges reported that CMS often has to be reset in order to assign new cases to judges or reassign cases to new judges. It was further reported by some courts that CMS does not automatically register important changes in internal organization,¹⁵⁴ which causes additional issues and delays in assignment of cases. It seems that sometimes the problem is that court administration fails to update certain assignment parameters in CMS, which results in an incorrect ratio of case assignments between judges.

Recommendations and Next Steps

260. **CMS could be improved to recurrently flag pending tasks, be more user friendly, and include new functionalities.** A dashboard that can be individually customized by users could be introduced to allow judges to keep track of all ongoing processes. Regular reminders would keep judges alert of all pending tasks and could contribute to better management of cases (for example, share expert opinions with the parties before a hearing). CMS could introduce special folders for cases that are solved but not enforced, ‘dormant’ cases, and other cases in which periods of inactivity exceed a certain time. New functionalities could be included such as: selection of specific reasons for failed delivery; selection of specific reasons for cancelling a hearing or for an adjournment; interconnection between postal e-tracking of service of process and CMS; attorneys’ hearings; *evidencija*; reassignment of cases, and so forth (see also the Section on Hearings and Adjournments and the Section on Service of Process).

261. **CMS could be used to create regular (for example, quarterly) reports on existing procedural (in)efficiencies and these reports could be used to better monitor case management in courts.** CMS reports could provide information such as the time needed for different procedural steps, number and reasons for postponements/adjournments of hearings, duration of *evidencija*, number of witnesses examined and expert witnesses engaged per trial, or reasons for failed service of process. These reports could identify delays, while court presidents could review them and ask for reasons for such delay. They

¹⁵⁴ For instance, when one of the reporting judges became president of the department, this was not registered by the system in terms of change of the quota for that judge; consequently, cases were still assigned to that judge as if she was the reporting judge - the quota for reporting judges being twice as high as the quota for the president of the department.

could be used as a baseline to track progress in procedural efficiency of case processing and monitor judges' efficiency.

262. **The Rulebooks on Internal Court Processes could be amended to include an obligation for court staff to prepare, and court presidents to regularly review, relevant CMS reports.** Computerized tracking of all relevant trial activities – the instigation to conclusion – would enhance transparency and reduce the risk of corruption and undue influence. This would make it much easier for all interested and authorized persons to keep track of all actions, detect errors and delays, and alert relevant authorities thereof.

263. **CMS could introduce a knowledge management database of higher courts' interpretative opinions, minutes of meetings held in courts, conclusions reached at conferences, annual (or other regular) reports on the work of courts, statistical reports produced based on CMS data, and so forth, so they are always available for reference rather than only on demand.** This way, first instance judges could have easier access to guidance of higher-level courts on matters relevant to case processing. This would contribute to the harmonization of jurisprudence and would enhance transparency.

Box 13 – Attention to Standstill Time due to Inactivity of the Parties and Courts – Comparative Examples

Austria (Linz District Court) – each case with no new entry-level in the electronic registry for more than three months is automatically added to a checklist. This list is handed out monthly to the head of court and to the judges and their staff for controlling.

Finland (Turku Regional Administrative Court) – every step in the proceedings of each case is registered in the case management system. All waiting times can be monitored and analyzed. Statistics are produced monthly and sent by email to all the judicial staff.

Lithuania (Regional Administrative Court Vilnius) – cases that are inactive for more than three months are brought to the attention of the head of court.

Norway (Frostatting Lagmannsrett Court of Appeal) – the length of proceedings is monitored and evaluated on a routine basis, at least every three months.

Denmark (Esbjerg District Court) – court statistics are used internally by each court's manager for evaluation and monitoring of case processing and the court's productivity.

Albania (Tirana District Court) – data on the length of proceedings or the postponements of hearing are available on the court's web site.¹⁵⁵

264. **Judges, court presidents, and administrative staff in courts would benefit from recurrent trainings in usage of CMS.** Provisions of the CMS Rulebook on internal court trainings in CMS usage need to be implemented in practice. Trainings could be focused on most frequent user mistakes recognized by the system, data entry, use and analysis of CMS data, and preparation of statistical reports based on entered data that would help identify key procedural inefficiencies at the court level, which could then be addressed at internal court meetings/annual conferences. Trainings could be twofold: (i) IT trainings on the use of CMS, as noted here; but also (ii) case management trainings (trainings for judges on *soft skills*)

¹⁵⁵ Source: https://www.euromed-justice.eu/en/system/files/20090706165605_Coe.CompendiumofBstpracticesontimemanagementofjudicialproceeding.doc.pdf.

which would also showcase and explain all the possibilities CMS offers for easier case management and for easier monitoring of case processing - see also recommendations under the Section on Hearings and Adjournments).

265. **A user experience survey could be regularly administered to examine whether and how CMS could be improved to further automatize processes and improve user-friendliness.** Although it does appear that inadequate use of existing functionalities by courts is currently one of the major issues (which could be addressed only through regular and focused trainings and enhanced control), users' experiences and proposals should not be neglected. A questionnaire could be circulated to all CMS users, such as courts/parties/attorneys, to collect feedback on system accessibility, presentation, and content, which could help moving forward with the design/development of CMS.

Conclusion

266. **BiH is ranked 89th among 190 economies in ease of doing business according to the latest World Bank annual ratings; in enforcing contracts, BiH courts stand in 75th place.** How efficiently can a company enforce its contractual rights matters for a number of reasons, best depicted in the following terms? *“Efficient contract enforcement is essential to economic development and sustained growth. Economic and social progress cannot be achieved without respect for the rule of law and effective protection of rights, both of which require a well-functioning judiciary that resolves cases in a reasonable time and is predictable and accessible to the public. Economies with a more efficient judiciary, in which courts can effectively enforce contractual obligations, have more developed credit markets and a higher level of development overall. A stronger judiciary is also associated with more rapid growth of small firms. Overall, enhancing the efficiency of the judicial system can improve the business climate, foster innovation, attract foreign direct investment and secure tax revenues.”*¹⁵⁶ The rank of BiH in the area of enforcing contracts dropped by four places compared to 2018. BiH’s score remains among the lowest in the Western Balkans and below the Europe and Central Asia average.

267. **As BiH prepares for accession to the EU, it is important to ensure that all aspects of its justice system are aligned with relevant EU benchmarks.** This involves, among other things, increasing the efficiency of courts and improving quality of justice, which can be accomplished, in part, by ensuring that commercial dispute resolution is effective. Chapter 23 of the EU accession process particularly emphasizes the importance of an effective and well-functioning judiciary in all fields, the stability of democratic institutions and the rule of law. These objectives can be achieved through, among other things, better case management systems, higher levels of accountability of courts and trial participants, trainings for judges and other court staff, control of frivolous adjournments, and so forth. According to the latest BiH Progress Report, there is some level of preparation for the implementation of *acquis* in this field; however, concerted actions are required to reach EU standards.

268. **Statistics obtained from the HJPC confirm that in some RS/FBiH courts, the average duration of commercial cases is very high compared both to the statutory deadlines and the European average.** The reason for this is twofold: (i) **organizational issues** such as large case backlogs, lack of commercial judges, frequent use of sick leave caused by the existing compensation plan for judges, frequent reassignment of cases due to frequent transfers of judges to second-instance courts, and judges being overburdened with work and not able to schedule trial activities within statutory deadlines (for example, in CCS, the judges are only now processing appeals from 2010 and 2011); and (ii) **procedural issues**, such as inadequate usage of existing tools for efficient management of cases, irresponsible or abusive behavior of parties and other trial participants that goes unnoticed by the court, lack of specialized knowledge needed to handle complex commercial cases, court fees policies which create a risk of meritless motions and vexatious litigation, and so forth (for example, HJPC statistics show that in some BiH courts, hearings are scheduled months or even years apart). Long duration of cases coupled with large case backlogs renders the court system ineffective, reduces trust in the judiciary, and hampers economic growth.

269. **Procedural reforms are a welcome effort and they can yield positive results if conducted in sequence and combination with adequate organizational reforms.** In an environment where organizational issues overarch other problems, procedural reform, if used in silos, would simplify and

¹⁵⁶ Why it matters in Enforcing Contracts, available at: <http://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts/why-matters>.

accelerate commercial case processing at first-instance courts, but would lead to creation of even greater bottlenecks at second-instance courts. To avoid this, existing case backlogs would first need to be reduced to manageable numbers, and mechanisms would need to be put in place to prevent the recreation of such backlogs at the level of both first- and second-instance courts. Only then can improvements in trial processes be sustainable and beneficial in the long run.

270. **Overall, the BiH rules applicable to, or otherwise relevant for, commercial case processing lay down adequate tools to avoid undue delays in trials.** The training of judges and other trial participants for responsible usage of existing mechanisms and tools would yield positive results in practice and lead to an increase in procedural efficiency. Trainings could be designed and implemented with the aim of i) developing skills of post officers and court couriers to conduct service of process in line with civil procedure standards, ii) improving knowledge in niche fields of commercial law, case management, and usage of CMS for judges, iii) ensuring expert witness and bankruptcy trustees work in line with trial requirements, iv) knowledge-sharing between judges and courts to exchange experiences and good practice examples, and v) ensuring more responsible work of administrative staff in courts. In both the medium and long term, legislative changes in all these aspects would further improve the procedural justice in BiH.

Table 2 – Recommendations Overview

Description:	Activity & Authority Responsible for Implementation:	Timeline ¹⁵⁷	Resistance Level
1. Service of Process			
<p>Amendments to Civil Procedure Rules to Improve Service of Process</p> <p><u>Amend civil procedure rules to improve domestic service of process</u></p> <ul style="list-style-type: none"> allow electronic service of process in commercial cases, introduce a simplified procedure of delivery once parties are duly informed of proceedings, fine parties for failure to notify competent authorities of change of address. <p><u>Amend civil procedure rules to improve international service of process</u></p> <ul style="list-style-type: none"> dismiss the claim in case of failure by plaintiff to lay down payment for the defendant's local Agent, introduce direct international service of process, task plaintiffs with translation of the lawsuit that is to be served abroad. <p>Adoption of Uniform Rules for Court Couriers</p> <p>Amend and make mandatory the Rulebook for Court Couriers to increase efficiency of court couriers (for example, work in shifts, clear sanctions for unsuccessful deliveries).</p>	<p>Ministries of Justice (RS and FBiH)</p> <ul style="list-style-type: none"> Develop draft amendments to CPL RS/CPL FBiH to improve service of process rules. Organize meeting between postal operator representatives and judges for further amendments and ensuring that rules meet ground realities on service of process. <p>HJPC in cooperation with courts</p> <ul style="list-style-type: none"> Amend and adopt the Rulebook for Court Couriers. Alternatively, the Rulebook on Internal Court Processes could be amended to introduce rules on court couriers. 	<p>Long term</p> <p>Medium Term</p>	<p>Medium</p> <p>Medium</p>
<p>Amendments to Postal Rules to Improve Service of Process</p> <p><u>Amend Guidelines for Service of Process via Public Postal Operators</u></p> <p>Guidelines could be more aligned with civil procedure rules and more practice oriented; they could be amended to address issues that arise recurrently in practice (for ex with "addressee did not collect the letter" notices).</p> <p><u>Introduce and impose disciplinary measures /good performance incentives for post officers</u></p>	<p>BiH Agency for Postal Traffic</p> <ul style="list-style-type: none"> Amend Guidelines for Service of Process to align them with civil procedure rules and solve issues that arise recurrently in practice. <p>Public Postal Operators</p>	<p>Medium to Long term</p>	<p>Medium</p> <p>Medium</p>

¹⁵⁷ Proposed sequencing will be subject to periodic reviews based on additional stakeholders' consultations during implementation of proposed recommendations.

Internal acts of public postal operators could envisage specific rules on disciplinary measures against post officers for inadequate service of process, as well as target/performance bonuses; supervision could be enhanced particularly once full e-tracking of delivery is enabled.	<ul style="list-style-type: none"> Introduce and impose disciplinary measures against post officers for inadequate service of process/positive performance bonuses and enhance supervision. 	Medium term	
<u>Service level agreement between courts and postal operators</u> Service level between courts and postal operators could be reached to govern penalties for postal operators in case of insufficient delivery (courts' right to liquidated damages, repeated delivery free of charge, fee refund) and performance/target bonuses in case of high rates of successful deliveries.	Public Postal Operators and Courts (in cooperation with HJPC) <ul style="list-style-type: none"> Conclude a service level agreement on service of process. 	Long term	Medium
<u>Amend the BiH Law on Postal Operators, RS and FBiH Laws on Postal Services to abolish exclusivity of Post Office over service of process</u> This could be done both with respect to the right of public postal operators to deliver: (i) court/administrative letters; and (ii) letters which weigh up to 1000g (thus including nearly all court letters), as well as with respect to the price threshold for providing courier services.	Ministries of Communication and Transport (RS, FBiH, BiH) <ul style="list-style-type: none"> Draft amendments to Postal Laws to abolish exclusivity of Post Office. 	Long term	High
Digitalize Service of Process <u>Enable e-tracking of delivery of court documents</u> E-book for service of process could be developed to keep track of delivery of court letters. Delivery notes could be barcoded and barcode numbers linked to the case number to efficiently track delivery status and success rates. E-book could be connected to CMS.	Public Postal Operators in cooperation with HJPC <ul style="list-style-type: none"> Digitalize postal delivery of court documents and connect it to CMS. 	Long term	Medium
Introducing Training to Improve Service of Process and Efficiency of Trials <u>Training for Post Officers/Court Couriers</u> Training could be focused on implementation of civil procedure rules on service of process in practice. <u>Training for Judges/Judicial Associates and Other Court Staff</u> Training could focus on existing procedures/channels for international service of process. <u>Training for RS and FBiH Ministries of Justice</u> Training could focus on existing procedures/channels for international service of process.	RS and FBiH Training Centers in Cooperation with Courts / BiH Ministry of Justice and Post Offices <ul style="list-style-type: none"> Design and implement training for post officers/court couriers; Design and implement trainings for judges / judicial associates / RS and FBiH Ministries of Justice in international service of process. 	Short term	Low

<p>Increase Efficiency of International Service of Process</p> <p><u>Accelerate processes of concluding international agreements on legal assistance</u> Processes of entering into bilateral agreements between BiH and Qatar, Kuwait, Saudi Arabia, and Ukraine could be accelerated.</p> <p><u>Assign international legal assistance to one judicial associate per court</u> Assigning one judicial associate per court who would be in charge of the international legal assistance in that court (international service of process included) could be considered.</p>	<p>BiH Ministry of Justice</p> <ul style="list-style-type: none"> Accelerate conclusion of international agreements on legal assistance. <p>Courts (Court presidents) in cooperation with the RS and FBiH Ministries of Justice Assign international legal assistance to one judicial associate per court.</p>	Long term	Medium
<p>Monitor Service of Process in Courts</p> <p><u>Court presidents to monitor service of process efficiency</u> Court presidents could control via CMS whether judges apply provisions on the service of process as prescribed, as it enables them to see whether the service of process was duly conducted (and if not, for what reason).</p> <p><u>Regular internal analyses of the service of process</u> Courts could organize general sessions and analyse service of process in court cases; recurrent issues could be addressed to Post Office.</p>	<p>Court presidents</p> <ul style="list-style-type: none"> Monitor service of process efficiency via CMS. Convene general sessions to discuss service of process issues and address recurrent issues to Post Office. 	Short term	Low
<p>2. Hearings and Adjournments</p>			
<p>Amendments to Civil Procedure Rules to Increase Procedural Efficiency</p> <p><u>Introduce specific rules on commercial cases in CPL FBiH</u> Modelled on the CPL RS, shorter deadlines could be introduced in the CPL FBiH to increase efficiency of commercial case processing.</p> <p><u>Amend civil procedure rules to accelerate commercial case processing:</u></p> <ul style="list-style-type: none"> Hear witnesses through conference calls; Set a period during which a missing proof can be obtained; Govern in more detail the postponement/adjournment of hearings based on the Guidelines for Civil Case Processing and practical experiences; 	<p>RS and FBiH Ministries of Justice</p> <ul style="list-style-type: none"> Draft Amendments to the CPL RS/CPL FBiH to improve case processing rules. 	Long term	Medium to high

<ul style="list-style-type: none"> Amend rules on bringing witnesses, representation at the main hearing, presenting facts and evidence, and prioritizing evidence. 			
Amendments to the FBiH Law on Registration of Business Entities <u>Liquidate 'dormant' companies</u> The FBiH Law on Registration of Business Entities could govern in more detail the process of ex officio liquidation of companies, modelled on its RS counterpart. A conference could be held to introduce FBiH judges to the process and share practical experiences of RS judges.	FBiH Ministry of Justice Draft Amendments to the FBiH Law on Registration of Business Entities to enable <i>ex officio</i> liquidation in FBiH.	Long term	Medium
Trainings for Judges <u>Set up trainings in case management to develop judges' soft skills</u> It would be optimal for these trainings to focus on developing soft skills such as: encouraging parties to reach amicable settlement of disputes; enhancing procedural discipline of the parties through better handling of parties' procedural requests/proposals (evidence proposals; requests for postponement/adjournment of hearings, and so forth); cooperation with parties to achieve early identification of the issues by exchange of information and evidence, which may enable parties to better respond to procedural timetables and court actions; use of CMS to improve case management; and <u>improve capacity of court users to use all available functionalities of CMS for the efficient case management and for efficient monitoring of case processing.</u> <u>Set up trainings in selected commercial law fields</u> Trainings could focus on intellectual property issues, company corporate governance, stock market and securities/joint stock company rules.	RS and FBiH Training Centres in cooperation with the HJPC <ul style="list-style-type: none"> Design and implement trainings for judges in case management; Design and implement training for judges in specific fields of commercial law, including intellectual property issues, company corporate governance, stock market and securities/joint stock company rules. 	Short term	Low
CMS Improvement <u>Introduce new functionalities in CMS to better track case processing:</u> <ul style="list-style-type: none"> keep track of scheduled hearings of attorneys; keep track of postponements/adjournments of hearings and reasons for postponements/adjournments; monitor time casefiles that are under review (<i>evidencija</i>) and reasons; track most important moments in the judicial process. 	HJPC Introduce new/upgrade existing CMS functionalities to improve case management; ensure that functionalities are user friendly in consultations with the court users.	Medium term	Low
Develop Decisional Practice to Improve Efficiency <u>Support first-instance judges in dismissing superfluous requests/proposals by parties</u>	Higher Courts <ul style="list-style-type: none"> Develop decisional practice of supporting first-instance courts in 	Medium term	Medium

<p>Appellate courts could, through their decisions on appeal, support first-instance courts in dismissing superfluous requests for postponement/adjournment of hearings and evidence proposals.</p> <p><u>Issue periodic reviews of positive and negative practices in case management</u></p> <p>Higher-instance courts could periodically issue a brief review of first-instance judgments highlighting positive and negative practices in case management by first-instance courts.</p> <p><u>Hold conferences to address recurrent issues in case management</u></p> <p>Based on reviewed cases, higher- and lower-level courts could hold annual conferences to discuss recurrent issues in case processing.</p>	<p>refusing superfluous requests for postponement/adjournment, or superfluous evidence proposals.</p> <ul style="list-style-type: none"> Issue periodic reviews of practices in case management. <p>RS/FBiH Associations of Judges, HJPC</p> <ul style="list-style-type: none"> Organize knowledge-sharing and peer-to-peer events in specific fields of commercial law; Organize conferences of higher and lower level courts to address recurrent issues in case management. 	Short term	Low
<p>Amicable Settlement Promotion</p> <p><u>Amend Lawyers' Tariffs</u></p> <p>To incentivize lawyers promoting amicable settlement to their clients, it might be considered to increase statutory settlement fees for lawyers so that they are higher than their regular full fee.</p>	<p>RS/FBiH Bar Associations</p> <ul style="list-style-type: none"> Amend Lawyers' Tariffs to promote the amicable settlement of disputes; 	Medium to Long term	Medium
3. Expert Witnesses			
<p>Amendments to Legal Framework to Increase Efficiency of Expert Witness Work</p> <p><u>Revise the Method of Appointment into the Expert Witness Profession:</u></p> <ul style="list-style-type: none"> Higher Courts could be the ones to decide whether a call into the expert witness profession should be published and could keep a register of the expressed needs of the first-instance courts within their territory; Require biannual or other regular calls into the profession; At the time of renewal, expert witnesses could be obligated to show that they have worked to continuously update their knowledge-base. <p><u>Institutionalize Expert Witness Support Staff</u></p>	<p>RS and FBiH Ministries of Justice</p> <p>Draft amendments to the RS LEW and/or FBiH LEW which would:</p> <ul style="list-style-type: none"> Introduce mandatory training for expert witnesses prior to entry-level into the profession; Introduce the mandatory continuous training of expert witnesses in FBiH; Institutionalize the expert witness trainees, interns, and associates 	Long term	Medium to high

<p>Expert witnesses would benefit from taking on trainees, interns, and associates whose rights and duties are clearly regulated.</p> <p><u>Introduce requisite content and minimum format of expert opinions</u> to increase the practical value of expert opinions for the court and help judges review expert opinions from different sources.</p> <p><u>Vest Courts / Parties with More Authority to Monitor and Sanction the Work of Expert Witnesses</u> Courts could be vested with the power to conduct proceedings against an expert witness and even revoke licenses. Parties would benefit from clear rights to report wrongdoings of expert witnesses to all relevant authorities and rights to claim damages.</p>	<p>and define their rights and duties in and out of trial;</p> <ul style="list-style-type: none"> • Introduce regular calls into the expert witness profession; • Introduce required content and format of expert opinions; • Introduce court competence to conduct proceedings against an expert witness and even revoke licenses; • Set out rights and processes in which parties can report wrongdoing by expert witnesses to all relevant authorities; • Clarify the rights and processes for damage claim lawsuits against expert witnesses; • In FBiH, clearly set out the requirements for becoming an expert witness; • In RS, clarify the right for the Expert Commission to conduct periodic assessments. <p>RS and FBiH Ministries of Justice in coordination with courts</p> <p>Develop guidance on required format and minimum content of the expert opinion</p>	<p>Medium Term</p>	<p>Low</p>
<p>Trainings for Expert Witnesses</p> <p><u>Expert witnesses would benefit from regular trainings in their field of expertise and trial requirements.</u> Competent bodies could keep records of conducted trainings and attendance could be set as a precondition for license renewal.</p>	<p>RS and FBiH Training Centres in cooperation with RS and FBiH Ministries of Justice and HJPC</p> <ul style="list-style-type: none"> • Develop a curriculum and organize trainings for expert witnesses and judges. 	<p>Short term</p>	<p>Low</p>

Trainings for Judges			
<p>Judges would benefit from taking trainings on some of the most common expertise used in trial (e.g. reading the financial statements or calculation of the default interest rate). In this manner, judges would have the necessary capacity to better manage expert witnesses' work (allow expertise only when truly needed, precisely determine the subject matter and scope of expertise, review expert opinions).</p>			
Trial Management Techniques	Courts (Court Presidents)	Short term	Low
<p><u>Use of Trial Management Techniques to Improve Efficiency and Accountability of Expert Witnesses</u>, particularly:</p> <ul style="list-style-type: none"> • Issue clear instructions to experts on subject matter and scope of expertise; • Set out the exact date when by which the expert witness opinion should be received; • Frequent review of case files outside of hearings to make sure all required activities are conducted as scheduled; • Monitor adherence to deadlines by judges and require justifications for breaches; • Schedule hearings to allow enough time for review and comments to expert opinions; • Surrender only parts of the case files relevant for the analysis to expert witnesses; • Sanction expert witnesses for breaches; • Report expert witness wrongdoing to competent authorities. 	<ul style="list-style-type: none"> • Organize court staff to monitor cases out of hearings and signal delays to judges. <p>Higher courts</p> <ul style="list-style-type: none"> • Develop guidance on trial management techniques; • Monitor implementation of trial management techniques when reviewing cases on appeal. 		
4. Bankruptcy Trustees			
Trainings for Trustees/Judges	RS and FBiH Training Centres in cooperation with Ministries of Justice and HJPC	Short term	Low
<p><u>Set up training for trustees</u></p> <p>Modelled on RS practices, bankruptcy trustees in FBiH would benefit from taking trainings in bankruptcy law and company management (including all fields that are relevant for running a business such as social insurance, accounting, finances, and so forth).</p> <p><u>Improved training for judges</u></p> <p>Bankruptcy judges would benefit from additional training in management of bankruptcy trustees' work and bankruptcy cases in general (including business management and economics).</p>	<ul style="list-style-type: none"> • Organize continuous trainings for bankruptcy trustees and judges. 		

<p>Monitoring of Trustees</p> <p><u>Regular reporting on bankruptcy trustees work</u></p> <p>Both Commissions for conducting professional examination/trainings of bankruptcy trustees could be tasked with regular reporting to the Ministries of Justice on conducted trainings of bankruptcy trustees and other remarks/observations on their work.</p> <p><u>Court presidents could monitor efficiency of bankruptcy cases through CMS.</u></p>	<p>RS and FBiH Ministries of Justice (Commissions for Bankruptcy Trustees)</p> <ul style="list-style-type: none"> • Keeping records of bankruptcy trustees' trainings/specializations; • Producing reports on bankruptcy trustees work. <p>Court Presidents</p> <p>Monitor bankruptcy case processing through CMS.</p>	<p>Short to Medium term</p>	<p>Low</p>
<p>Further Improvement of Bankruptcy Trustees Work</p> <p>Long term, policy makers could consider amending the rules to introduce:</p> <ul style="list-style-type: none"> • Additional requirements on professional experience in business management in trustees' licensing process; • Calls for appointment of bankruptcy trustees on a regular basis / on request of courts; • Obligation of bankruptcy trustees to keep record of all cases that arise from / are in connection with the bankruptcy case; • More power for courts and parties to monitor and sanction the work of trustees. 	<p>RS and FBiH Ministries of Justice</p> <ul style="list-style-type: none"> • Develop amendments to RS BL and FBiH Law on bankruptcy proceedings; or • Adopt bylaws to govern the subject issues. 	<p>Long term</p>	<p>Medium</p>
<p>5. Court Fees</p>			
<p><u>Amend regulatory framework to:</u></p> <ul style="list-style-type: none"> • Introduce a single fee per court instance, payable at the outset of the procedure; • Stipulate sanctions for nonpayment of the fee across the country; • Improve statute of limitations rules; • Reassign the supervision of the court fee collection process to administrative staff in courts. <p><u>Unify court fees across the country</u></p> <p>It would be efficient to harmonize rules on court fees, including the amount, collection process, and statute of limitations across BiH.</p> <p><u>Organize a separate analysis on court fees</u></p>	<p>Cantonal/RS/BD/BiH Authorities</p> <ul style="list-style-type: none"> • Develop amendments to the Laws on Court Fees of RS, BD, the 10 Cantons of FBiH, and the Court of BiH or, alternatively, develop a draft Law on Court Fees applicable in the entire country. <p>Ministries of Justice and HJPC</p> <p>Organize a separate analysis on court fees.</p>	<p>Long term</p>	<p>High</p>
		<p>Medium to Long term</p>	<p>Low</p>

Since the system of court fees in BiH is not coherent and is very much fragmented, it is advisable to conduct a separate analysis of the regulatory framework governing court fees in FBiH and RS (with a particular focus on budgeting/finances), so as to identify the main issues related to this aspect of court proceedings, and offer comprehensive solutions.

6. Internal Court Processes

Amendments to RS and BiH Rulebooks on Internal Court Processes to introduce better cooperation between judges/courts on matters relevant for commercial case processing:

- Regular (for example, biannual/annual) meetings of court presidents at first instance;
- Regular (for example, biannual/annual) meetings of court presidents at second instance (RS and FBiH);
- Regular (for example, biannual/annual) meetings of commercial department presidents;
- Duty of appellate courts to record and produce periodic (for example biannual/annual) reviews of examples of good and bad practices that cause most inefficiencies in first instance case processing;
- Duty of second instance courts to share with first instance courts minutes of all meetings held at second instance;
- Duty of Court presidents to deliver to the HJPC reports on all meetings/sessions held in line with provisions of the Rulebook on Internal Court Processes.

Development of Rules/Mechanisms for Assignment/Reassignment of Cases, to ensure transparency and give less power to court presidents to decide on the assignment/reassignment of cases. Optimally, any reassignment of a case which lasts longer than a month should be reported to the HJPC.

Improve case law database

The HJPC case law database could be populated by all decisions rendered by appellate courts and its search engine and decisions categorization could be improved.

RS Ministry of Justice/HJPC

- Develop amendments to the Rulebooks on Internal Court Processes.

Medium term

Medium

Higher instance courts

- Record examples of good and bad practices of first instance courts.

7. CMS

Introduce new CMS functionalities / Upgrade Existing Ones

Flag out pending tasks

CMS could recurrently flag out pending tasks to allow the judge to keep track of all ongoing processes.

Introduce special folders for inactive cases

CMS could introduce special folders for cases that are solved but are not enforced, 'dormant' cases and other cases in which periods of inactivity exceed certain time (for example, six months).

HJPC

- Introduce new CMS functionalities / upgrade existing CMS functionalities;
- Develop amendments to the Rulebooks on Case Management

Medium to Long term

Low

<p><u>Introduce knowledge management databases</u></p> <p>Include new functionalities which would ease monitoring of case management: reasons for postponements, reasons for failed deliveries, duration of <i>evidencija</i>, and so forth.</p> <p><u>Produce reports on procedural inefficiencies.</u> Optimally, court presidents should be tasked with periodically reviewing CMS reports.</p> <p>CMS User Survey</p> <p>Organize a survey among judges to obtain information on other missing CMS functionalities and possibilities for improvement.</p>	<p>System in Courts of BiH to include listed functionalities;</p> <ul style="list-style-type: none"> Organize CMS user survey. <p>RS Ministry of Justice/HJPC</p> <ul style="list-style-type: none"> Develop amendments to the Rulebooks on Internal Court Processes to introduce the obligation of court staff to prepare / court presidents to review CMS reports.
<p>Trainings / Control in usage of CMS</p> <p><u>Regular trainings in usage of CMS</u> based on most frequent user mistakes, manner of input of accurate data, use of CMS for easier case management.</p>	<p>RS and FBiH Training Centres in coordination with HJPC</p> <p>Trainings in CMS usage.</p> <p>Short term</p> <p>Low</p>

Annex 1. Methodology

The Report analyzes key inefficiencies in commercial case processing and designs recommendations for improvement of the BiH commercial justice system. Taking into consideration that i) there is a system of specialized commercial courts in RS, while in FBiH civil courts handle commercial cases, ii) certain types of cases are handled by civil courts in both entities (basic/district courts in RS and municipal/cantonal courts in FBiH) although in their nature they are commercial (for example, labor or administrative disputes), and that iii) the existing CMS does not have a single category for commercial cases but these cases are organized in different categories (claims of legal entities and other), this analysis only considers business-to-business cases (cases between enterprises) as “commercial cases” (primarily to ensure comparability of data).

When mentioning “commercial justice” this Report refers to the availability and affordability of court structures and processes to enterprises; efficiency and effectiveness of these structures; availability and usage of case management tools including electronic case management systems; standardization and automation of court processes; accountability of courts and trial participants; and availability and regulation of alternative dispute resolution methods for commercial matters (focusing primarily on in-court and out-of-court settlement).

The Report sets out findings of a multistage analytical process:

First, to determine which issues cause most inefficiencies in trials, in May 2018, the World Bank team organized small group discussions on select topics with key actors and stakeholders relevant for the processing of commercial cases in BiH. The team conducted discussions on predetermined topics with the HJPC, 7 first and second instance courts (court presidents, commercial judges, court IT personnel, head court clerks), 2 attorneys at bar associations, representatives of two chambers of commerce and the Foreign Investors Council.

Second, based on the information and insights collected, the team conducted a desk review of rules and regulations governing procedural rules to further examine practices recognized as causing the greatest delays in trials, and designed a preliminary proposal of measures to remedy the issues identified. The work included a comprehensive analysis of the regulatory framework and of previous analytical works pertaining to commercial case processing in BiH.

Third, in October 2018, the team organized a second round of discussions with key actors to validate draft recommendations for reducing bottlenecks and adjournments in commercial cases. Meetings were held with representatives of 30 institutions – 13 courts, 6 Ministries, 2 attorney bar associations, 2 chambers of commerce, RS and FBiH Training Centers, the HJPC, the BiH Agency for Postal Traffic, the Foreign Investors Council, and 3 public postal operators. The team also participated at the Jahorina XIII Symposium on Civil Law organized by the RS Association of Judges and supported by the World Bank Group.

Fourth, to underpin the identified procedural inefficiencies and preliminary recommendations, as well as to help design measures for improvement, the team obtained statistical and other data from key stakeholders. The team collected statistical data from the HJPC on the duration of commercial cases as well as on other aspects of commercial case processing. Statistics were collected for the years 2015, 2016, and 2017. Further, a questionnaire designed as an informal Perception Survey on Commercial Case Processing Efficiency (Perception Survey) was circulated to RS and FBiH Bar Associations, RS and FBiH Chambers of Commerce, and the BiH Foreign Investors Council on matters relevant for examining procedural efficiency in commercial cases and potential for reform. The team received 37 responses from commercial law firms, individual commercial lawyers, and businesses (their legal departments). Finally, to analyze expert witness work in practice, the Report relies on statistics obtained under an

Externally Funded Operation¹⁵⁸ analyzing the role of expert witnesses in the court systems of the Western Balkans. Said statistics were collected in two ways. First, through questionnaires developed by the World Bank and filled out by the courts.¹⁵⁹ The data included statistics for the entire court-level on the number of cases where expert witnesses were heard, aggregate remuneration values, number of expert witnesses used, and so forth.¹⁶⁰ Second, through review of a random sample of closed cases in each court. The review of approximately 200 cases (in all legal fields) was performed by the World Bank team to identify issues which could not be captured by relying on any other methodology. It included collection of statistical data on the quality of expert witness work, adjournments for reasons related to expert witnesses, and so forth (the data collected are referred to as "sample statistics").

¹⁵⁸ Launched as a result of the partnership between the Dutch Rule of Law Initiative and the World Bank Group.

¹⁵⁹ Basic Court and District Commercial Court in Banja Luka, Municipal Court in Sarajevo, BD Basic Court, and Municipal Court in Mostar.

¹⁶⁰ Statistics were collected for the years 2015, 2016, and 2017.

Annex 2. Visited Institutions

Visited Institutions
Agency for Postal Traffic of Bosnia and Herzegovina
Appellate Brcko District Court
Attorney Bar Association of Republic of Srpska
Brcko District Basic Court
Cantonal Court in Mostar
Cantonal Court in Sarajevo
Chamber of Commerce of Republika Srpska
Chamber of Commerce of Federation of Bosnia and Herzegovina
Commercial Court in Doboj
Commercial Court in Istocno Sarajevo
District Commercial Court in Banja Luka
Foreign Investors Council of Bosnia and Herzegovina
High Commercial Court in Banja Luka
High Judicial and Prosecutorial Council of Bosnia and Herzegovina
Ministry of Communications and Transport of Bosnia and Herzegovina
Ministry of Communications and Transport of Republika Srpska
Ministry of Communications and Transport of Federation of Bosnia and Herzegovina
Ministry of Justice of Bosnia and Herzegovina
Ministry of Justice of Federation of Bosnia and Herzegovina
Ministry of Justice of Republika Srpska
Mostar Attorney Bar Association
Municipal Court in Mostar
Municipal Court in Sarajevo
Municipal Court in Tuzla
Public Postal Operator of Republika Srpska (JP Poste Srpske)

Public Postal Operators of Federation of Bosnia and Herzegovina (JP BiH Posta and Hrvatska posta Mostar)
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Supreme Court of Federation of Bosnia and Herzegovina

Supreme Court of Republika Srpska

Center for Judicial and Prosecutorial Training of Republika Srpska
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Center for Judicial and Prosecutorial Training of Federation of Bosnia and Herzegovina
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Annex 3. Legislation and Analytical Works

1. Civil Procedure Law of FBiH (Official Gazette of FBiH, No. 53 of 28 October 2003, 19/06, 98/15);
2. Civil Procedure Law of RS (Official Gazette of RS, No. 58 of 17 July 2003, 85/03, 74/05, 63/07, 49/09, 61/13);
3. Law on Postal Operators of BiH (Official Gazette of BiH, No. 33 of 30 May 2005);
4. Law on Postal Services of FBiH (Official Gazette of FBiH, No. 76 of 28 December 2004, 79/15);
5. Law on Postal Services of RS (Official Gazette of RS, No. 30 of 12 April 2010, 38/10);
6. General Conditions for Provision of Postal Services of BiH (Official Gazette of BiH, No. 102 of 13 December 2010);
7. Rulebook on General Conditions for Provision of Postal Services of FBiH (Official Gazette of FBiH, No. 4 of 22 January 2007);
8. Guidelines on Service of Process via Public Postal Operators (Official Gazette of BiH, No. 20 of 13 March 2012);
9. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed at the Hague, the 15th of November 1965 (Hague Service Convention)
10. Law on Expert Witnesses of FBiH (Official Gazette of FBiH, No. 49 of 8 August 2005, 38/08);
11. Rulebook on Expert Witness Qualification Exam of FBiH (Official Gazette of FBiH, No. 48 of 11 July 2007);
12. Rulebook on Expert Witness Training of FBiH (Official Gazette of FBiH, No. 29 of 19 April 2017);
13. Tariff on Fees and Expenses of Expert Witnesses of FBiH (Official Gazette of FBiH, No. 67 of 2 September 2015);
14. Law on Expert Witnesses of RS (Official Gazette of RS, No. 74 of 7 August 2017);
15. Rulebook on Expert Witness Qualification Exam of RS (Official Gazette of RS, No. 64 of 13 July 2018);
16. Rulebook on Expert Witness Specialization of RS (Official Gazette of RS, No. 76 of 15 August 2018);
17. Bankruptcy Law of RS (Official Gazette of RS, No. 16 of 2 March 2016);
18. Rulebook on Professional Examination of Bankruptcy Trustees of RS (Official Gazette of RS, No. 105 of 9 December 2016);
19. Law on Bankruptcy Proceedings of FBiH (Official Gazette of FBiH, No. 29 of 30 June 2003, 32/04, 42/06, 52/18);
20. Rulebook on Conditions and Professional Examination of Bankruptcy Trustees of FBiH (Official Gazette of FBiH, No. 5 of 23 January 2015);
21. Rulebook on Case Management System in Courts of BiH (Official Gazette of BiH, No. 4 of 22 January 2016, 37/16, 84/16, 40/17, 34/18);
22. Law on Court Fees of RS (Official Gazette of RS, No. 73 of 8 August 2008, 49/09, 67/13, 63/14, 66/18);
23. Law on Court Fees of Canton Sarajevo (Official Gazette of Canton Sarajevo, 16No. 36 of 11 September 2014, 23/16);
24. Law on court fees of Canton Una Sana (Official Gazette of Canton Una Sana, Nos. 3/97, 6/98, 4/03, 8/05, 22/07, 23/11, 13/15 and 17/16);
25. Law on court fees of Canton Zenica Doboј (Official Gazette of Canton Zenica Doboј, Nos. 12/09, 4/11, 7/11, 9/13, 1/15, 5/15);
26. Law on court fees of Canton Bosnia – Podrinje (Official Gazette of Canton Bosnia – Podrinje, Nos. 6/10 and 12/15);
27. Law on court fees of Canton Tuzla (Official Gazette of Canton Tuzla, Nos. 5/09, 4/10 and 9/12);

28. Law on court fees of Canton Central Bosnia (Official Gazette of Canton Central Bosnia, No. 4/17 of April 5, 2017);
29. Law on court fees of Canton Herzegovina – Neretva (Official Gazette of Canton Herzegovina – Neretva, Nos. 4/09, 2/13 and 5/15);
30. Law on court fees of Canton West Herzegovina (Official Gazette of Canton West Herzegovina, Nos. 8/08, 10/09, 4/10, 8/12 and 1/16);
31. Law on court fees of Canton Posavina (Official Gazette of Canton Posavina, Nos. 2/09, 7/10, 7/12 and 10/16);
32. Rulebook on Internal Court Procedures of BiH (Official Gazette of BiH, No. 66 of 27 August 2012, 40/14, 54/17, 60/17, 30/18);
33. Rulebook on Internal Court Procedures of RS (Official Gazette of RS, No. 9 of 17 February 2014, 39/16, 71/17, 67/18).
34. Administration of Court Proceedings – Practicum prepared under the EU-funded project “Consolidation and further development of the judicial communication and information system”, available at: <https://advokat-prnjavorac.com/sudska-praksa/Upravljanje-sudskim-postupkom.pdf>;
35. Proactive Role of Court Presidents in Court Management – Study published within the framework of the “Consolidation and the Continued Development of the Judicial Communication and Information System”, available at: https://vstv.pravosudje.ba/vstv/faces/pdfservlet.jsessionid=9754c871f4e2f29af31ef9b68a1172ddda5ec41f8b99651a8a8db9079638b226.e34TbxyRbNiRb40Lc3uPcheKBiH4Pe0?p_id_doc=32472 ;
36. Improving Judicial Efficiency Project, available at: https://www.pravosudje.ba/vstv/faces/pdfservlet?p_id_doc=34741;
37. Commission Staff Working Document, Bosnia and Herzegovina 2018 Report, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2018 Communication on EU Enlargement Policy, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-bosnia-and-herzegovina-report.pdf>;
38. Commission Staff Working Document, Bosnia and Herzegovina 2016 Report, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2016 Communication on EU Enlargement Policy, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_bosnia_and_herzegovina.pdf;
39. HJPC Annual Report, 2017, available at https://www.pravosudje.ba/vstv/faces/pdfservlet?p_id_doc=46562;
40. BiH Justice Sector Reform Strategy 2014-2018, available at: http://www.mpr.gov.ba/organizacija_nadleznosti/planiranja_koordinacija/strateska_planiranja/strategija/13%204%20SRSP%20u%20BiH%20-%20EJ.pdf.

Annex 4. Perception Survey

I. SERVICE OF PROCESS	
1.	According to your experience, how much time is it necessary to deliver a court document to the recipient within the same city (from the moment when the decision was made/order was issued to conduct the delivery until the delivery was duly made)? a. Up to 7 days b. From 7 to 15 days c. More than 15 days
2.	According to your experience, how much time is needed for intercity or inter-entity service of process (from the moment the decision was made/order was issued to serve the document until the delivery was duly made)? a. Up to 7 days b. from 7 to 15 days c. from 15 to 30 days d. more than 30 days
3.	According to your experience, is service of process more efficient when it is performed via Post Office or via court couriers (in terms of the time it takes for the service of process to be done in accordance with civil procedure rules)? a. Delivery via Post Office is more efficient b. Delivery via court couriers is more efficient
4.	Do post officers conduct service of process responsibly and in accordance with the provisions of the Civil Procedure Law (leaving a notice on a delivery attempt, affixing court letters on the door,, etc.)? a. Mostly yes b. Mostly no
5.	Do court couriers conduct service of process responsibly and in accordance with the provisions of the Civil Procedure Law (leaving a notice on a delivery attempt, affixing court letters on the door,, etc.)? c. Mostly yes d. Mostly no
6.	Do the courts apply the rules of the Civil Procedure Law with regard to service of process (to be conducted via notice board located in court premises, inviting parties to collect the decision, appointing a local agent to receive the documents,, etc.)? a. Mostly yes b. Mostly no
7.	Do you consider that the service of process causes significant delays in commercial case processing? a. Yes b. No
II. CASE MANAGEMENT	
1.	Which of the following factors do you consider having the greatest impact on the duration of court proceedings in commercial cases (considering the total duration of one dispute from the initial act to the final decision of a higher instance court)? a. Parties contribute to trial delays by their behavior b. Judges do not manage the procedure efficiently and in accordance with civil procedure rules

-
- c. Poor organization in the court contributes to the long duration of proceedings (e.g. judges are overburdened with cases, there are large case backlogs)
2. Are hearings for commercial cases scheduled within the deadlines prescribed by the Civil Procedure Law?
 - a. Mostly yes
 - b. Mostly no
 3. Do you think that postponements/adjournments of hearings in commercial cases are caused for reasons that can primarily be attributed to the parties or court?
 - a. Judges postpone hearings on their own initiative due to being overburdened with cases, due to other organizational reasons or due to personal reasons (sick leave, absence,, etc.)
 - b. Judges postpone hearings mainly on request of the parties
 4. Are hearings in one case being postponed for the same reason more than once (for example, efforts to reach settlement, inability to obtain certain evidence)?
 - a. Mostly yes
 - b. Mostly no
 5. Do judges ask for special explanations in order to adjourn/postpone hearings, or do they allow it for no reason?
 - a. A justified reason is needed for the hearing to be adjourned/postponed
 - b. A reason is necessary, but it does not have to be justified or supported by evidence
 - c. There is no need for a special explanation for the hearing to be adjourned/postponed
 6. How often do judges postpone taking procedural actions for no particular reason (for example taking the case on *evidencija* without any trial activity being scheduled or conducted)?
 - a. Very often
 - b. Often
 - c. Sometimes
 - d. Never
 7. Do you think that first instance courts allow presentation of superfluous evidence in commercial cases?
 - a. Mostly yes
 - b. Mostly no

III. EXPERT WITNESSES

1. Do the courts effectively manage work of expert witnesses (by determining the subject-matter of expertise, reviewing expert opinions, hearing expert witnesses)?
 - a. Mostly yes
 - b. Mostly no
 2. Do expert witnesses comply with deadlines for submission of the expert opinion?
 - a. Mostly yes
 - b. Mostly no
 3. Do judges sanction expert witnesses for procedural indiscipline (e.g. failure to submit expert opinion timely)?
 - a. Mostly yes
 - b. Mostly no
 4. Are expert witnesses competent enough to conduct expertise in commercial cases?
 - a. Mostly yes
 - b. Mostly no
-

-
5. Does the Ministry of Justice act upon complaints to expert witness work?
- a. Mostly yes
 - b. Mostly no
6. Are there are enough expert witnesses in fields of expertise relevant for commercial cases?
- c. Mostly yes
 - d. Mostly no

IV. BANKRUPTCY TRUSTEES

1. Do bankruptcy trustees have the necessary knowledge/skills to manage companies in bankruptcy?
- a. Mostly yes
 - b. Mostly no
2. In which fields should bankruptcy trustees attend additional training? (you may circle more than one answer)
- a. Business management
 - b. Bankruptcy law and bankruptcy proceedings
 - c. Law
 - d. Economy
 - e. I do not think that additional training for bankruptcy trustees is needed
3. Do bankruptcy judges supervise the work of bankruptcy trustees in an adequate manner?
- a. Mostly yes
 - b. Mostly no

V. CASE MANAGEMENT SYSTEM (CMS)

1. Is all relevant data about the case entered in CMS?
- a. Yes
 - b. No (list which data is advisable to be entered in CMS)
- _____
- _____
- _____
2. Do you think it is necessary to introduce additional functionalities in the existing CMS?
- a. Yes
 - b. No (list which functionalities would be advisable to be introduced in CMS)
- _____
- _____
- _____

VI. CASE LAW DATABASE

1. Do you think it is necessary to improve the case law data base of the HJPC Judicial Documentation Centre and how? (you may circle more than one response)
- a. Yes, by entering second-instance decisions into the case law database

-
- b. Yes, by improving search engine
 - c. Yes, by entering Croatian, Serbian, Montenegrin higher courts' decisions into the case law database
 - d. I do not use the database, but I would use it if access was cheaper or free
 - e. There is no need to improve the database

VII. ADDITIONAL INFORMATION

- a. I filled in the questionnaire mostly on the basis of impressions on efficiency of commercial case processing in the Republika Srpska
- b. I filled in the questionnaire mostly on the basis of impressions on efficiency of commercial case processing in the Federation of Bosnia and Herzegovina
- c. There is no difference in efficiency of commercial case processing in the Federation of Bosnia and Herzegovina and in Republika Srpska

Annex 5. Questionnaire Related to Expert Witness Engagement

ANNEX 1. INSTRUCTIONS RELATED TO THE DATA THAT IS TO BE COLLECTED THROUGH A CLOSED CASE REVIEW

For the purpose of closed case review in the court registration office, the World Bank Team will visit your court on **23 May 2018**.

We kindly ask you to prepare **cases in which a final judgment was issued in 2015, 2016, and 2017 and in which expert witnesses were hired**, for review. The cases should be prepared in a manner described in the table below:

Cases which will be reviewed by sampling			
Cases:	Number of cases to be prepared by year: ¹⁶¹		
	2015	2016	2017
- commercial cases	x	x	x
- criminal cases	x	x	x
- civil cases	x	x	x
- labor disputes	x	x	x

ANNEX 2. QUESTIONNAIRE RELATED TO THE DATA THAT IS TO BE COLLECTED BASED ON THE RECORDS KEPT BY THE COURT

According to the available information, courts have certain data on the work of expert witnesses, primarily based on the records on payments made to expert witnesses. Based on those records it is possible to collect the data on (a) the number of cases in which expert witnesses were engaged and (b) payments to expert witnesses per case. The data on fees paid to expert witnesses include the data on total amount of paid fees i.e. both expert witness fees and costs of expertise.

We kindly ask you to fill in the table below based on the subject records and submit the filled tables by **18 May 2018**.

We emphasize that the data are collected at the annual level for the previous three years – 2015, 2016 and 2017, both for pending and disposed cases. The data are collected as anonymous, that is, expert witnesses should not be identified by their personal names, or business names in case of legal entities. The data is collected with regard both to all expert witnesses and expert witnesses from the following fields of expertise: (a) finance and economics; (b) civil engineering and (c) medicine.

1. Data based on the court records

- 1.1 Data on expert witness engagement in court proceedings: data on the total number of expert witnesses who/that acted before the court in the observed period.

Number of expert witnesses who/that acted before the court				
Year:	Total number of expert witnesses who/that acted before the court:	Total number of expert witnesses in the field of finance and economics who/that acted before the court:	Total number of expert witnesses in the field of civil engineering who/that acted before the court:	Total number of expert witnesses in the field of medicine who/that acted before the court:
2015				
2016				
2017				

¹⁶¹ Individual courts were asked to prepare different number of cases for review.

- 1.2 Data on expert witness engagement in court proceedings: data on the total number of cases in which expert witnesses were engaged and data on the total number of cases in which expert witnesses in the identified fields of expertise were engaged during the observed period.

Engagement of expert witnesses in court proceedings				
Year:	Total number of cases in which expert witnesses were engaged:	Total number of cases in which expert witnesses in the field of finance and economics were engaged:	Total number of cases in which expert witnesses in the field of civil engineering were engaged:	Total number of cases in which expert witnesses in the field of medicine were engaged:
2015				
2016				
2017				

- 1.3 The data on frequency of engagement of the same expert witnesses in court proceedings: the data on ten expert witnesses who/that were most frequently engaged in trial regardless of the field of expertise and the data on ten expert witnesses in the identified fields of expertise who/that were most frequently engaged in trial.

Note: the data will be collected as anonymous, by rank and total number of cases (the first one by number of cases to the tenth one by number of cases).

Ten expert witnesses who/that were most frequently engaged in court proceedings						
	2015		2016		2017	
	Total number of cases	N/L ¹⁶²	Total number of cases	N/L	Total number of cases	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

Ten expert witnesses in the field of finance and economics who/that were most frequently engaged in court proceedings						
	2015		2016		2017	
	Total number of cases	N/L	Total number of cases	N/L	Total number of cases	N/L
1.						
2.						
3.						

¹⁶²

Please specify if the expert witness is a natural person (N) or a legal entity (L).

4.						
5.						
6.						
7.						
8.						
9.						
10.						

Ten experts in the field of civil engineering who/that were most frequently engaged in court proceedings						
	2015		2016		2017	
	Total number of cases	N/L	Total number of cases	N/L	Total number of cases	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

Ten expert witnesses in the field of medicine who/that were most frequently engaged in court proceedings						
	2015		2016		2017	
	Total number of cases	N/L	Total number of cases	N/L	Total number of cases	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

- 1.4 Data on fees paid to expert witnesses – data on the total amount of fees paid to expert witnesses and the data on fees paid to expert witnesses within the identified fields of expertise.

Fees paid to expert witnesses				
Year:	Total amount of fees paid to expert witnesses who acted before the court:	Total amount of fees paid to expert witnesses in the field of finance and economics:	Total amount of fees paid to expert witnesses in the field of civil engineering:	Total amount of fees paid to expert witnesses in the field of medicine:

2015				
2016				
2017				

1.5 Data on highest paid expert witnesses

Note: Data will be collected as anonymous without identifying individual names, but by rank and amount (the first highest paid and the amount of paid fees to the 10th highest paid and the amount of paid fees).

Ten highest paid expert witnesses in all fields of expertise						
	2015		2016		2017	
	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

Ten highest paid expert witnesses / medicine						
	2015		2016		2017	
	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

Ten highest paid expert witnesses / civil engineering						
	2015		2016		2017	
	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L
1.						
2.						
3.						
4.						
5.						
6.						

7.						
8.						
9.						
10.						

Ten highest paid expert witnesses / finance and economics						
	2015		2016		2017	
	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

ATTACHMENT 3: TOPICS FOR DISCUSSION ON PROCEDURAL EFFICIENCY IN BOSNIA AND HERZEGOVINA

We kindly ask you to organize a meeting with commercial judges on the day of visit by the World Bank team **on 23 May 2018**, in order to discuss the topics listed below related to procedural efficiency of the judicial system in Bosnia and Herzegovina.

Discussion topics:

1. Problems in management of court proceedings
2. Causes of delays, postponements and adjournments in commercial cases
3. Postponement of hearings and mechanisms for reducing the number of postponed hearings by case
4. Monitoring of deadlines and key procedural steps in the decision-making process; proposals for improvement
5. Mechanisms for better regulating engagement of expert witnesses, bankruptcy trustees and other participants in proceedings in order to prevent delays; observed problems in practice
6. Impact of court fees on the course and duration of court proceedings and their adjustments to improve procedural efficiency
7. Impact of court management on improvement of procedural efficiency
8. Good practice examples in preventing trial delays and improving efficiency
9. Other factors of inefficiency in court proceedings
10. Overall impression of case processing efficiency in Bosnia and Herzegovina and proposals for improvement

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