



ENCJ NEWSLETTER



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HIGH JUDICIAL AND PROSECUTORIAL COUNCIL OF BOSNIA AND HERZEGOVINA	2
Application of standards of the European Network of Councils for the Judiciary (ENCJ) and external review.....	2
COUNCIL FOR THE JUDICIARY OF FRANCE.....	5
Opinion of the Conseil Supérieur de la Justice on freedom of expression of judges requested by the Minister of Justice.....	5
HIGH SUPERIOR COUNCIL FOR THE JUDICIARY OF ITALY	7
1. Open Justice –Jurisprudence database of merits.....	7
2. Digitalization of justice – On line criminal trial.....	7
3. Office of the Trial	8
4. Changes in the Judicial System.....	8
5. The introduction of psychological and behavioural assessment in the selection process of magistrates.....	10

HIGH JUDICIAL AND PROSECUTORIAL COUNCIL OF BOSNIA AND HERZEGOVINA



Visoko sudsko i tužilačko vijeće Bosne i Hercegovine
Visoko sudbeno i tužilačko vijeće Bosne i Hercegovine
Високи судски и тужилачки савет Босне и Херцеговине
High Judicial and Prosecutorial Council of Bosnia and Herzegovina



Application of standards of the European Network of Councils for the Judiciary (ENCJ) and external review¹

In the context of strengthening the regulatory role and role of a guarantor of independent, accountable and quality judiciary, as well as preparing for the membership in the European Union, in cooperation with the Norwegian Courts Administration and the Council for the Judiciary of the Netherlands, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina has been continuously applying the principles of the European Network of Councils for the Judiciary (ENCJ).

In June 2023 the HJPC BiH was granted the observer status in the ENCJ and even before acquiring that status, participated in the processes of evaluation of independence, accountability and quality of the judiciary that the ENCJ has been conducting continuously. The evaluation results indicated the need for strengthening the public trust and integrity of both the HJPC BiH and overall judiciary. In order to achieve the aforementioned and in accordance with the ENCJ standards, strengthening the accountability of the judiciary proved to be necessary by applying the tools of the external review of the HJPC BiH performance, which was realised at the end of 2023. The subject of the external review were issues that fall under the competence of the HJPC BiH. A committee made of international experts of partner institutions analysed the collected statistical data, normative documents and information from interviews with the relevant stakeholders. In order to ensure complete objectivity and application of the highest European standards, the HJPC BiH made a decision to have the external review carried out in cooperation with partner institutions, the Norwegian Courts Administration and Council for the Judiciary of the Netherlands. For that purpose, the said institutions proposed experts who actively participate in the work and improvement of the work of the judiciary in their home countries.

The external review procedure was carried out according to predetermined methodology harmonised with the ENCJ standards and approved by the HJPC BiH. The experts who made up the review committee interviewed the HJPC BiH members, the HJPC BiH Secretariat management, a number of court presidents and chief prosecutors, representatives of the international community and legislative branch. The external review process was finalised with the preparation of a Report that focused on the key measures that the HJPC BiH should take in order to strengthen the independence and accountability of the work of the judiciary.

The committee's recommendations concerned the ethical standards of the Council members, the selection/appointment procedure, the disciplinary accountability system and governance

¹ [Application of standards of the European Network of Councils for the Judiciary \(ENCJ\) and external review \(pravosudje.ba\)](https://pravosudje.ba)

and management. As was concluded in the Report, important strides were made in areas contributing to independent, impartial and professional judiciary, while it was highlighted that the current competences were a prerequisite for the HJPC BiH to protect the independence of the BiH judiciary. In the context of the HJPC competences and tasks, as well as the composition and election of the members of the Council, the Review Committee believes that the HJPC BiH fully meets the European (EU and Council of Europe) standards concerning an independent, self-regulatory body for the judiciary. Although the Review Committee established a comprehensive responsibility of the HJPC BiH to preserve, manage and develop the BiH judiciary, so as to protect and develop the independence, impartiality and professionalism of the BiH judiciary, a need for the development of a multi-year strategic approach was emphasized with an accent on management and government, including the budget development strategy, court management strategy and ICT strategy. Although there are relatively good relations between judicial stakeholders, the Committee advised the HJPC BiH to keep developing relations with the managers of judicial institutions by intensifying meetings.

Regarding the appointment and promotion process, it was stressed that certain achievements were made, that it was more based on expertise than before, but that certain improvements were needed, so that the process would guarantee the selection of the best candidates. The improvements refer to the need to further harmonise the quality and quota criteria, so that the quota criteria take the complexity of cases into account, thus guaranteeing higher quality in the promotion of judicial office holders. Apart from that, the need to consider introducing psychological testing in appointments was emphasised, with a higher focus on management skills and formalising the opinions of judicial institutions' managers in appointing judicial office holders.

The disciplinary liability system needs to be strengthened by redirecting the focus on essential issues related to integrity and more consistent criteria application in matters of disciplinary liability. The review report, presented to the general public, judicial, executive and legislative branches will serve the HJPC BiH as guidelines for improvement of the areas identified as priority.

What the Report particularly emphasised was that, regarding the competences prescribed by the Law on the HJPC and Amendments to the Law on the HJPC from 2023, the HJPC BiH fully meets the European (EU and Council of Europe) standards concerning the independence and accountability of the self-regulatory bodies for the judiciary.

The HJPC BiH fully accepted the external review Report recommendations, clearly expressing the need for their prompt implementation through the creation of a plan of implementation of short-term and long-term activities.

By conducting the external review process, the HJPC BiH has demonstrated full commitment to European standards and assumed responsibility and readiness to take the necessary steps to improve the judicial system.

The external review should be a regular instrument of self-appraisal of the judiciary in particular matters and makes for a foundation for strengthening the accountability of the work of the Council, as the self-regulatory body of the BiH judiciary.

Article on the HJPC website: [Application of standards of the European Network of Councils for the Judiciary \(ENCJ\) and external review \(pravosudje.ba\)](http://pravosudje.ba)

Opinion of the Conseil Supérieur de la Justice on freedom of expression of judges requested by the Minister of Justice

On 2 May 2023, the Minister of Justice requested an opinion of the Conseil Supérieur de la Magistrature pursuant to Article 65 of the Constitution.

The request was based on the desire to reflect further on the status of the judiciary and the objective of better preserving the image of the justice system. Firstly, it focused on the relationship between magistrates' freedom of expression and the ethical obligation of reserve and discretion, particularly with regard to the use of social networks and forms of expression "at formal hearings or through trade union expression". Secondly, it concerned the exercise of the right to strike by judges.

With regard to the exercise of the right to strike, the Conseil Supérieur de la Magistrature considers that it is not for it to decide this issue, which in its view is a matter for the constitutional, administrative and European courts.

With regard to the freedom of expression of members of the judiciary and how this can be reconciled with the duty to act in a reserved manner, the Council points out that the general principle is that members of the judiciary have freedom of expression, which they must exercise "within the limits of respect for [their] oath and in particular the duties of reserve, impartiality, delicacy, respect for professional secrecy and the image [they] project of justice".

The Council points out that the freedom of expression of members of the judiciary is not enshrined for their benefit alone, but is "a guarantee for every person subject to the law. Judges, who perform their duties independently and are thus one of the pillars of the rule of law, have a duty to do whatever is necessary to preserve the rule of law and the other fundamental values of which they are the guardians".

The Council considers that if restrictions are placed on the freedom of expression of judges, it is "to support other equally fundamental principles", including that of "guaranteeing the authority and impartiality of the judiciary".

The Council concludes that the case-by-case review of restrictions on the freedom of expression of members of the judiciary must take into account the nature of the speech, the duties performed and the public concerned.

The Conseil Supérieur de la Magistrature considers that a member of the judiciary's freedom of expression is all the more important when he or she occupies a high position in the institution's hierarchy, particularly when he or she is the head of a court or tribunal.

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The Conseil Supérieur de la Magistrature considers that a member of the judiciary's freedom of expression is all the more important when he or she occupies a high position in the institution's hierarchy, particularly when he or she is the head of a court or tribunal. It points out that the speeches given at the official opening of the court year are an ideal opportunity to "publicly express the satisfaction and concerns of judges and civil servants, both with regard to the situation in the court where they perform their duties and with regard to the development of the judicial institution, including current reforms and applicable legislation and regulations".

With regard to unions, the Council points out that freedom of trade union expression must be "reconciled with the ethical obligations arising from the status of magistrates, in particular the duty of reserve. Thus, even when exercising their mandate and defending their professional interests, union representatives must ensure that they maintain a certain degree of restraint".

However, the CSM insisted on the fact that the recognition of trade union rights inevitably has the consequence of conferring on unions and their representatives a right to express themselves that is even broader.

The Opinion of the Plenary of December 13, 2023 (in French): [Communiqué du 13 décembre 2023 | Conseil Supérieur de la Magistrature \(conseil-superieur-magistrature.fr\)](#)

Update of situation

1. Open Justice –Jurisprudence database of merits

Among the many items regarding the process of digitalization of justice, started in Italy long ago, and strongly reinforced by the aims set by the NRRP (National Recovery and Resilience Plan), there is the creation of a database of civil decisions, free of charge, fully accessible, and available for citizens.

The database of merits, operating since 14 December 2023, collects judgments, orders, and civil decrees – excluding those related to family relationships, minors, and personal status – adopted by Courts and Courts of Appeal as of 1st January 2016; the user can retrieve data by using words present in the text, keywords or regulatory references, judicial office, subject or date.

The project, gradually intended to grow, is a fundamental part of the digital transition process of the Justice system. This project is also a step towards a major opening of our country to the idea of Open Justice. Access to judicial decisions, therefore, allows citizens to acquire knowledge and awareness of the judicial system, in order to exercise direct control of the judicial power, and at the same time limiting the risks of a distorting media communication of the legal contents of a decision.

2. Digitalization of justice – Online criminal trial

The justice digitalization program is being finalized by the Ministry of Justice, which is the exclusive implementing body. The program foresees two types of interventions, mutually combined: on the one hand (i) the digitalization of 7.750.000 judicial files of the last 20 years relating to civil and criminal proceedings of all the Judicial Offices, on the other hand (ii) the creation of a *data lake* that will support magistrates in the cognitive stage and allow to carry out advanced statistical analyses of the efficiency and effectiveness regarding the judicial system. What must be highlighted is that the adoption of such structured systems could soon enable, in an immediate future, artificial intelligence to have access to data.

As regards to criminal matters, Legislative Decree 150 of 2022 (so-called Cartabia reform) concerning the digitalization interventions of the trial, implementing the provisions of ministerial decree no. 155, which was issued on 5 July 2023, defines and considerably extends the number of documents (103) that can be filed only electronically through the Criminal Records Deposit Portal (“PDP” established under Art. 87, paragraph 6-ter, Legislative Decree 150/2022), with significant savings in time and expense. The effectiveness of the ministerial decree was suspended, pending the implementing decree, which took place on 30 December 2023.

With Legislative Decree 217 of 2023, the regulation on the online criminal trial was published. This regulation contains technical rules regarding filing, communication, and digital notification of acts and documents, as well as the access and the management of IT files in criminal trials. The decree establishes the obligation to use the aforementioned portal within this year. In fact, many documents relating to criminal proceedings can still be filed using traditional methods only until 31 December 2024.

There are many issues regarding the implementation of the digital transition. As a matter of fact, the Council has highlighted the important structural limits of the measures being applied and the difficulties encountered in the computerization process.

3. Office of the Trial

The Ministry of Justice announced a new call for the recruitment of 3.946 staff members. They will be added to the existing ones. The recruitment is scheduled for the end of the first half of 2024.

The stabilization was then authorized, after a public examination and within the limits of hiring process, for the employees of the Office of the Trial who had worked for at least twenty-four months and who were still in service on the *NRRP (National Recovery and Resilience Plan)* expiration date scheduled for June 30, 2026.

4. Changes in the Judicial System

The Government has adopted, by implementing the Delegated Law 77/2022 concerning the reform of the judicial system, the Legislative Decrees Nos. 44 and 45 of 2024, effective from April 20, 2024. These Legislative Decrees intervene in several indispensable sets of rules of the judicial system and are fundamental to the Council's activities. In particular, the measures concern the access to the judiciary, the functions of legitimacy, the procedure and content of the evaluation of professionalism, and the assignment of executive and semi-executive functions, as well as the judges' collocation outside the permanent staff.

Many solutions adopted by the Government are in line with the Council's internal provisions. The Council has expressed its opinion, critical at times, on both legislative texts.

First and foremost, the new legislation reforms the procedure for drafting and approving data organization instruments (charts), assigning to the High Council, among others, the task of drawing up "*standard templates*" which must be used by the executives of the judicial offices when drafting organizational documents. The standardization of templates is also extended to the drafting of operational plans for prosecuting offices.

Regarding the access to the judiciary, the delegated legislature has, in the recent past, already intervened by modifying the requirements. Preparatory courses concerning public examinations allowing access to the judiciary examination are now established. These courses are assigned to the SSM (*School for the Judiciary*), and according to its resources, the School will determine the number of places available for each course, the preference criteria for the selection, as well as the teaching activities. The courses, which are not a prerequisite for the admission to the selection process, will be reserved for graduates who have specific requirements. The introduction of psychological and behavioral assessments is a significant point regarding the selection process (see below).

Concerning the issue of accessing to functions of legitimacy, the criteria have been redefined. In particular, the requirement regarding the actual performance of judicial or prosecutorial functions of first or second instance for at least ten years has been introduced; a choice which enhances professional backgrounds characterized by the accomplishment of a significant period of judicial activity.

Among the novelties related to procedural and substantial aspects in conferring functions to supreme court judges (ruling on points of law), there is the capability of legal analysis which has been enhanced as an assessment standard, as well as a score-based evaluation of the single standards (seniority, aptitudes, merits).

The legislation introduces a complex review regarding the professional evaluation of judges and prosecutors. Starting from the creation of the so-called “**magistrate’s file**” at the CSM. It aims at “*collecting information, acts and documents regarding the professional career of the magistrates. Their analysis is significantly related to the professional evaluation*”. (This file contains all data and opinions drawn up by the heads of the judicial offices, as well as the pending proceedings, the outcomes of requests or judicial decisions, the court hearings’ minutes, etc.).

Within the judicial professional evaluation process of a magistrate, and notably concerning the capability standard, what is particularly important are the “*serious anomalies concerning the outcome, in future instances of the proceedings and ruling*”. What is particularly relevant is “*to hold the hearing by the chairperson or by the responsible of the proceedings, or the qualification to use, to manage and to control the support of collaborators and assistants*”. Other specific indicators of serious anomalies are then provided for by the law.

Furthermore, the activity carried out by the magistrate, for the implementation of annual management plans, is important in order to meet the criterion of assiduous work, related to performance standards determined by the High Council.

Regarding the outcome of the judgment, and according to the Decree, it can be “favorable”, “not favorable” and “negative”. It all depends on how the shortcomings affect the single standards. The favorable appraisal will be further specified according to the capability standard. Thus, it will be “reasonable”, “good”, or “very good”, according to the organizational job skills of the magistrates. In the event of a “non favorable” appraisal, a new evaluation is foreseen after one year. During that period the magistrate is not allowed to perform extrajudicial functions; if there are still shortcomings, but not considered serious and only referring to one single standard, the Council can express a second “not favorable” appraisal and the magistrate can therefore be re-evaluated, once again. The CSM can adopt a set of decisions aimed at monitoring more strictly the professional trend of the magistrate. During this period the salary is not increased, and the magistrate is not allowed to apply for executive and semi-executive positions. He/she cannot apply for supreme court judicial positions.

In the event of a “negative” appraisal, the magistrate undergoes a new professional evaluation after two years. During this period the Council can establish that he/she must attend a professional development training course and limit the possibility to access to executive or specific positions or be authorized to perform extrajudicial functions. If a second “negative” appraisal is expressed by the Council, after this two-year period, the magistrate is removed from office.

Furthermore, in order to carry out a magistrate’s professional evaluation, the local Judicial Council and the High Council for the Judiciary (CSM) can also collect, in addition to random sample decisions, specific measures or categories of measures. In addition to the abovementioned law amendments, lay

members of the local self-government judicial council (especially lawyers) have the right to participate and to vote according to *“the content of reports concerning specific facts affecting the professionalism of the magistrate under evaluation”*.

Regarding the procedure for the assignment of executive and semi-executive functions, a rearrangement takes place, according to the principles of transparency and pursuit of merit, of the criteria for the assignment of executive and semi-executive positions, in compliance with the autonomy of the High Council for the Judiciary, according to the evaluation and comparison of the criteria among the applications received.

In general, what must be observed is that the evaluative judgment of the candidates for executive and semi-executive positions has been structured, in its fundamental aspects, according to the internal regulations of the Council.

Rules concerning the judges' collocation outside of the permanent staff were modified with a second legislative decree (Legislative Decree No. 45/2024). Unless specifically exempted by law, the judges' collocation outside of the permanent staff can be authorized only for positions that correspond to an interest of the administration to which they belong, and for a period not exceeding seven years. This only applies to those who have exercised functions for at least ten years and have returned to the permanent staff at the end of the collocation outside of the permanent staff for a period exceeding five years. Limits are also foreseen concerning a maximum number of judges collocated outside of the permanent staff - reduced compared to the previous regulations, to magistrates whose workplaces have significant indicators of staff shortages and to magistrates involved in handling criminal proceedings for serious crimes in advanced state of investigation, to which his/her removal could seriously affect the time needed for settling disputes.

5. The introduction of psychological and behavioural assessment in the selection process of magistrates

The introduction of a psychological and behavioural assessment in the selection procedure for access to the judiciary, is worth noting. This provision, although present in the final text of the Legislative Decree 44/2024, was only inserted at a later stage. Since it was not included in the draft legislative decree, the Council did not have the opportunity to express its opinion.

In particular, the reform foresees the introduction, during the oral test, of a psychological and behavioural interview aimed at verifying the absence of conditions of unsuitability for the judicial function, giving the last word to the High Council. For these purposes, the selection board will include university professors who hold courses in psychological subject matters. Before carrying out the interview, and in addition to it, candidates will have to take a psychological and behavioural test, identified by the High Council in compliance with the guidelines and the standard psychometric testing.

These changes will be applied to public examinations published after December 31, 2025.

The Council has decided to open a specific file in order to examine the issue and to express its position on the topic. The Committee for International Relations, having the same objective, is working on a comparative study on the topic, considering the importance of enriching framework information at European and international levels.

The precious contribution from the ENCJ, for this reason, will be fundamental by allowing the collection of important information from all the countries that join the Network. The ENCJ represents

indispensable support for proceeding with a reasoned and methodologically correct comparative analysis. This, taking into account the structural differences between legal systems.

Latest developments and incoming reforms

The Minister of Justice, as well as the Prime minister, have several times announced significant reforms (and they are part of the program presented before the general elections of fall 2022), which will include the reform of the High Council of the Judiciary and the separation between the careers of Prosecutors and Judges. Changes may have constitutional relevance, so to require the special procedure and the high parliamentary quorum necessary to reform the fundamental Chart.

As of today, the Government has not officially presented a reform bill on the mentioned topics. Some reform proposals have been presented, mainly by single parliament members or groups, back in February 2023 and are now pending, and are under discussion in the Parliament. These reforms do propose changes in the Constitution and some of these changes, such as the appointment of lay members of the High Council by the Government, can be critical for the independence of the judiciary. Association of Judges and in particular the Italian “Associazione Nazionale Magistrati” have raised their concern, bringing the issue also at the European level. However, at the moment, there is no draft bill or precise governmental proposal, which clarifies the details of the proposed reform.

Very likely, the Government will present a comprehensive reform bill before the European election of June 2024. These reform bills may pose problematic questions, but details are required to express more focused and grounded opinions.