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EXECUTIVE SUMMARY

All sectors of society in Bosnia and Herzegovina exhibit alarming levels of corruption that block democratic processes at the level of government and impair the day-to-day life of citizens. As political corruption grows, the interference of political and private interests prevents the effective functioning of institutions that are responsible for protecting the rule of law, particularly judicial institutions. Institutions seem to bend to the interests or pressures of the ruling political elites, and ultimately reduce the transparency and accountability of their work, showing clear signs of state capture.

While many grand corruption affairs have been uncovered in Bosnia and Herzegovina through investigative journalism, very few have been prosecuted. A lack of transparency in the work of prosecutor's offices and courts across the country further undermines public trust in the criminal justice system. In general, all institutions in the criminal justice system exhibit a lack of readiness to address grand corruption, while frequent political interference in the work of the judiciary points up its close ties to political elites.

In most of the grand corruption cases identified in Bosnia and Herzegovina, defendants have been charged with abuse of office or organised crime. In certain cases, however, defendants have been charged with obstruction of justice, trading in influence or malfeasance in office. While the majority of defendants held official positions in the executive branch of the government or were managers in state-owned enterprises, the number of members of the judiciary prosecuted for grand corruption is worrying. There is a growing practice to use criminal investigations and indictments for political reckoning, investigating or prosecuting suspects or defendants because they are in conflict with their own or opposing political parties or they hold positions to which others aspire. Most grand corruption cases not only undergo lengthy processes but also involve numerous defendants, unjustified postponements of hearings, abuse of procedural rules, and a failure of defendants to appear in court. Judicial processes go beyond the prescribed optimum time frame and often last too long, jeopardising rights to a fair trial and the effectiveness of prosecution. The observed processes reveal that the causes of impunity for grand corruption lie in procedural failures of the judiciary, legislative gaps and the serious negligence of judges and prosecutors in different phases of the criminal process.

The constitutional organisation of the state is yet another aggravating circumstance for democratic law-making and the functioning of the judiciary. Political interests are often disguised as vital national interests, blocking decision-making and law-making processes in the country. In most cases, a willingness to fight corruption is purely declarative since the ruling elites rarely act to strengthen the anti-corruption legislative framework. Moreover, lawmakers rarely show a genuine commitment to implement the recommendations of international bodies on strengthening the rule of law.

Our research shows that legislatures at all levels of government abuse the urgent legislative procedure to adopt tailor-made laws. With an already highly politicised public administration, political elites tend to further their influence over public institutions through the adoption of laws that jeopardise the little independence that institutions do have. Years-long delays in the adoption of important anti-corruption laws, such as laws on conflict of interest or on asset disclosure, have enabled political elites to exert control over public institutions.

The grand corruption cases identified in our research illustrate how corrupt political elites act to establish corrupt mechanisms and networks in all sectors and institutions, enabling them to acquire substantial political power and/or monetary benefit. The criminal justice system in Bosnia and Herzegovina is not yet ready to respond to such cases, which often require complex financial investigation. Our analysis shows that the judiciary has no deterrent or preventive role in the context of corruption, and that judicial processes are often favourable to officials faced with corruption charges. A sense of inequality and impunity prevails in the workings of the judiciary, and the omnipresence of corrupt elites in law-making bodies sustains the situation, completely undermining any efforts to combat corruption.

Due to the systemic nature and worrying levels of corruption within the judiciary itself, it is necessary to reform the justice system to ensure its independence from political elites and enforce a system of integrity within the judiciary. In addition, numerous legislative reforms need to be undertaken to strengthen the rule of law and minimise the opportunity for officials to abuse their functions. Overall, a comprehensive reform of the entire justice system is necessary in Bosnia and Herzegovina to restore trust in the work of the judiciary and mark a starting point in the country's efforts to address state capture.



INTRODUCTION

According to the Corruption Perceptions Index 2019, Bosnia and Herzegovina scored 36, which represents the country's worst score since 2012. This places Bosnia and Herzegovina among the countries that have recorded the sharpest decline, since it now stands at 101st in the global ranking.¹ A years-long transition, a lack of political will and numerous failed reforms have resulted in stalled processes across the country's sectors. Corruption poses one of the most pressing challenges in the country's way forward and often prevents progress in any sector of society. The current situation within the judiciary and the impunity for grand corruption raise grim prospects for the future prosecution of grand corruption and any strengthening of the rule of law in Bosnia and Herzegovina.

In addition to a highly politicised government, both the constitutional organisation of the state and a highly decentralised system of judiciary further aggravate efforts to prosecute corruption. Considering the general view of the international community that all segments of society in Bosnia and Herzegovina exhibit signs of state capture, our report adds a valuable contribution to existing analysis of the prosecution of corruption in the country. The report, which is the result of our research into grand corruption, corruption by high-level officials and tailor-made laws in Bosnia and Herzegovina, is part of a regional project *Ending Impunity for Grand Corruption in the Western Balkans and Turkey*.² While there have been numerous undertakings by civil society, investigative journalists and the international community to observe corruption cases before courts in Bosnia and Herzegovina, our report focuses on grand corruption and tailor-made laws. By analysing the root causes of impunity in grand corruption cases and identifying tailor-made laws, the report examines the readiness and willingness of state authorities to address state capture as one of the pressing challenges on the country's European path. In so doing, our research provides a better understanding of the role of the judiciary in the prosecution of corruption, the importance of its impartiality and independence, and any gaps in the legislative and institutional framework that enable officials to maintain corrupt networks.

Our report assesses the performance of the judiciary in the prosecution of grand corruption by analysing several grand corruption cases and the capacities of judges and prosecutors as demonstrated by their management of these cases. By looking at the procedural aspects of cases, such as the length of proceedings, the scheduling of court hearings, the presentation of evidence, the quality of indictments and so on, the report highlights the strengths and weaknesses of the judiciary in the prosecution of grand corruption cases. While our analysis of grand corruption cases does provide a more comprehensive view of the judiciary's performance, our findings are also supplemented with statistical information on the work of the judiciary that TI BiH has been monitoring for years. In addition, the report compares

¹ "BiH among the countries most declining in anti-corruption fight." TIBiH (web), 23 January 2020.

² "Ending Impunity for Grand Corruption in the Western Balkans and Turkey" www.transparency.org

our findings with other assessments by monitoring missions to Bosnia and Herzegovina that focus on corruption cases before the courts in order to identify relevant practices in the prosecution of corruption more generally.

In addition to focusing on the performance of the judiciary from a legal standpoint, our analysis emphasises the cost of an inefficient judiciary for the state. An overview of the sentencing policy also questions the ability of the judiciary to play a deterrent and preventive role in terms of grand corruption. In light of the presence of corruption in the day-to-day life of citizens in Bosnia and Herzegovina and the overall lack of public trust in the judiciary, the report tackles the issue of accountability, the ethics and integrity of the judiciary, and particularly its role in setting an example. In this regard, our research evaluates the extent to which the holders of judicial office are prone to corruption and personally involved in grand corruption affairs.

The report also links grand corruption cases to tailor-made laws and identifies both failed and successful attempts to pass customised laws. Our research looks at the law-making process and identifies key stakeholders involved in maintaining corrupt networks as well as the sectors that pose high risks of corruption. The analysis shows the deficiencies in legislative processes, which make them less transparent and accountable to citizens and civil society, jeopardising democratic law-making in Bosnia and Herzegovina.

The study closes with some of our most important findings, which complement existing conclusions on the presence of state capture in Bosnia and Herzegovina and identify serious challenges that confront any political willingness to address state capture and strengthen the rule of law. Lastly, our assessment sets out recommendations that state authorities should implement in order to step up the fight against grand corruption and enhance democratic law-making.



BACKGROUND OF THE STUDY

This report is one of the research outputs of the EU-funded project *Ending Impunity for Grand Corruption in the Western Balkans and Turkey*, which aims to reduce corruption and state capture in Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, Serbia and Turkey. The project seeks to improve governance, transparency, and the accountability of the judiciary and democratic law-making. To this end, we look at how state capture is achieved and sustained, highlighting shortcomings in the criminal justice system when handling grand corruption cases, and exposing tailor-made laws created to protect the private interests of a few.

Our research is combined with evidence-based advocacy campaigns to push for change in each country. In addition to a regional report, the project's research outputs include seven national reports and two databases. One database collects corruption cases in the region, specifically grand corruption cases or cases that might represent an entry point for state capture. These cases illustrate red flags and shortcomings in each country's judicial systems when they address political corruption. The second database contains tailor-made laws, which are laws that serve to gain and hold onto privileged benefits and in so doing make state capture legal. It reveals how law-making is used to protect private interests. Neither database is intended to be fully comprehensive. Rather, each database uses a qualitative approach, treating the cases and laws as tools to understand how the judicial system operates and how law-making is influenced.

This project builds on Transparency International's previous work in the Western Balkans and Turkey. In 2014 and 2015, Transparency International conducted in-depth research into anti-corruption efforts in Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, Serbia and Turkey, and found that state capture was a consistent problem across all of the countries. Subsequent research on cases of state capture in specific sectors of each country allowed us to understand better where capture takes place and what its characteristics are. Now, by analysing how each country's judiciary addresses corruption cases that can serve as an entry point to capture and how undue influence in law-making results in tailor-made laws, we can answer the question of what makes state capture possible.

To build on our research, we are now developing recommendations for reforms to combat corruption effectively and reinforce the rule of law in these countries. Our database of corruption cases will be used to strengthen the existing advocacy efforts of TI BiH to achieve justice reform, which includes the adoption of laws on conflict of interest in the judiciary and on the declaration of assets by judicial office-holders. The database will also support previous findings by TI BiH on the poor performance of the judiciary in prosecuting corruption, and bolster TI BiH's advocacy efforts to establish a detailed procedure for the vetting of judicial office-holders.



METHODOLOGY

State capture is a key obstacle to the effectiveness of anti-corruption and rule-of-law reforms in the Western Balkans and Turkey. State capture is understood as efforts undertaken by private or public actors with private interests in order to redirect public policy decisions away from the public interest, using corrupt means and clustering around certain state bodies and functions, ultimately to obtain financial gain for themselves. Based on this understanding, the impunity for corruption and the creation of laws to further the private interests of particular groups or individuals against the public interest are considered key ways to explain the existence and sustainability of state capture.

Our analysis in this report draws on several sources of information: primary data collected on corruption cases and tailor-made laws; previous assessments of corruption, state capture and the rule of law in the region by Transparency International's National Integrity System, the European Commission, the Group of States against Corruption (GRECO) and the United Nations Convention against Corruption (UNCAC); official documents; media articles; and the specialised literature.

Our collection of original data on cases and laws has covered the last 10 to 12 years in order to identify any variations arising from changes in government after elections. The selection of corruption cases followed three criteria. The first was to include any corruption cases that match Transparency International's definition of grand corruption. Transparency International defines grand corruption as offences set out in UNCAC Articles 15-25 when committed as part of a scheme involving a high-level public official and comprising a significant misappropriation of public funds or resources, or severely restricting the exercise of the most basic human rights of a substantial part of the population or of a vulnerable group. However, since such a legal definition presents limitations for the exploration of a complex political phenomenon, we added two further selection criteria: first, cases showing a lack of autonomy, independence and impartiality in the judiciary; and second, cases that serve as an entry point for state capture. The indicators to consider a case as an entry point for state capture include:

- when a member of parliament or official with the power of law or policy-making is involved in such capacity in criminal offences
- when a top-level decision-maker of a regulatory body is involved in such capacity in criminal offences
- when the alleged criminal offences involve a public official, who obtained his/her position through a revolving-door situation
- when the conduct in any of the above three categories serves the interest of a legal person or a narrow group/network of connected persons and not the interest of other participants in a sector, groups of society or the public interest
- cases linked to tailor-made laws.

All three criteria have in common the involvement of at least one public official who has the power to influence or change policies and regulations. In most cases, such public officials have held roles of high responsibility in state-level institutions such as ministries. However, the political reality of the Western Balkans and Turkey is characterised by the power of political parties and party members in certain municipalities, so we have also included corruption cases involving powerful mayors or other local authorities.

Tailor-made laws are defined as legal acts enacted with the purpose of serving only the interests of a natural person, a legal person or a narrow group/network of connected persons and not the interest of other actors in a sector, groups of society or the public interest. Although it may appear to be of general application, a tailor-made law in fact applies to a particular matter and results in circumventing any potential legal remedies that could be provided by ordinary courts. Based on this definition, the following criteria are considered as indicators that laws may potentially be tailor-made: who is behind the law, any irregularities in the making or approval of the law, who has benefited from the law, and who are its victims.

Based on their purpose, we consider three types of tailor-made laws: 1) to control a sector or industry, or protect certain privileges; 2) to remove or appoint unwanted or wanted officials; 3) to reduce checks and balances on institutional power by controlling personnel procedures, reducing the monitoring capacity of agencies or audits, preventing accountability, or weakening scrutiny by media and civil society organisations.

Far from providing a comprehensive picture of the situation, our report offers a qualitative approach that builds on the best efforts of Transparency International's chapters and partners in the region to identify cases and laws and collect detailed information. Some of the difficulties in data collection relate to a lack of transparency in the country's courts and prosecutor's offices, which rarely publish confirmed indictments and final verdicts on their websites. Given that most of the identified grand corruption cases are still ongoing, the data collection process has been further impeded by the reluctance of prosecutor's offices to provide information on open cases. Reduced transparency and accessibility to information has posed challenges in identifying credible sources of information on grand corruption cases. This has not unduly affected our analysis, however, since many of the identified grand corruption cases have been part of TI BiH's monitoring of trials in corruption cases, which we have used to support the information collected from other sources.

Details of the corruption cases and tailor-made laws mentioned in our report can be found in the databases. In addition, our analysis draws on other important high-profile corruption cases and cases involving high-level officials that have been identified in the research process. This is because the specifics of the cases help to illustrate the overall situation within the judiciary and corruption prosecution in Bosnia and Herzegovina. The additional cases in question are: *Goran Salihović, Melisa Kovačević, Fadil Novalić and others ("Respiratori")*, *Kemal Čaušević and others*, *Ismet Hamzić and others ("Kurir")*.



FINDINGS AND DISCUSSION

PERFORMANCE OF THE JUDICIARY

Our research on grand corruption cases in Bosnia and Herzegovina shows that the country's criminal justice system exhibits a low level of readiness for corruption prosecution in general, while prosecution of grand corruption is almost non-existent. That only a few grand corruption cases have reached the courts illustrates the shortcomings in the judiciary's performance. The Expert Report on Rule of Law issues in Bosnia and Herzegovina from 2019, which focuses on the root causes of rule-of-law deficiencies, confirms this finding. The 2019 report concludes that the criminal justice system has demonstrated "operational inefficiency in cases of corruption, complex financial crime and organised crime which results in impunity and lack of trust on the part of the citizens".³ This section analyses some of the key issues related to the judiciary that have been identified through our analysis of the grand corruption cases in Transparency International's database and the other grand corruption cases that form part of our research.

Length of court proceedings

An analysis of the data on grand corruption cases points to the slow progress of court proceedings, which results in excessively lengthy and inefficient trials. According to the Rulebook on the Time Frame for Proceedings in Cases in Courts and Prosecutor's Offices in Bosnia and Herzegovina,⁴ the optimum deadline for an ordinary first instance court proceeding is 120 days for a criminal case, while it is 298 days for corruption cases⁵ and 342 days for cases of organised crime. As Table 1 shows, the optimum deadline was not met in any of the analysed grand corruption cases. Moreover, even in the best-case scenarios, the first instance proceeding went on for double the optimum length (for example, in *Fahrudin Radončić* and others and *Lijanovići II*, the first instance proceeding took approximately two years.) While the 2019 report confirms that criminal trials in general are excessively lengthy, cumbersome and inefficient,⁶ our analysis of the collected cases has found several causes of inefficient management that are specific to grand corruption.

³ "Expert Report on Rule of Law issues in Bosnia and Herzegovina", 5 December 2019, (par 53, pp.11-12)

⁴ Rulebook on the Time Frame for Proceedings in Cases in Courts and Prosecutor's Offices in BiH, "Official Gazette of BiH" No. 5/13, 101/13 and 61/14.

⁵ Annex to the Rulebook on the Time Frame for Proceedings in Cases in Courts and Prosecutor's Offices in BiH. VSTV (web) <https://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=51951>

⁶ "Expert Report on Rule of Law issues in Bosnia and Herzegovina 2019." 5 December 2019, (par. 51, p. 11)

Table 1: Case flow

This table presents the case flow through different steps in the criminal procedure, indicating the time span between phases and the length of proceedings in grand corruption cases.

CASE	INDICTMENT	START OF TRIAL	FIRST INSTANCE DECISION	APPEAL/SECOND INSTANCE DECISION
FAHRUDIN RADONČIĆ AND OTHERS	15 February 2016	30 March 2016	16 May 2018	25 October 2018
LJANOVIĆI II	23 December 2015	May 2016	16 January 2018	September 2019
AMIR ZUKIĆ AND OTHER	13 March 2017	23 May 2017	Trial ongoing	-
DELIMUSTAFIĆ AND OTHERS	12 October 2017	Trial not started	Trial not started	Trial not started
KURIR	19 May 2017	17 October 2017	Trial ongoing	-
KEMAL ČAUŠEVIĆ AND OTHERS	17 February 2017	6 July 2017	Trial ongoing	-

The causes of delays and lengthy proceedings stem both from matters of a technical nature, such as the scheduling of hearings, and from more substantive issues related to the rules of evidence.

First, judges take a lenient approach towards the scheduling of court hearings, resulting in a long time period between hearings. The Organization for Security and Co-operation in Europe (OSCE) has found that this is especially prevalent at the trial stage in high-level corruption cases,⁷ which to a large extent correspond to grand corruption cases in the Transparency International's database. The OSCE Mission's "Trial Monitoring of Corruption Cases in Bosnia and Herzegovina: Second Assessment" has found that the length of first instance proceedings and appeal in high-level corruption cases is, on average, 598 days based on an analysis of 38 cases, which include 3 high-level and 35 medium-level cases.⁸ It is clear from Table 1 that many of the grand corruption cases in the database have been before the courts for three years or longer. They also have several elements in common. Specifically, *Amir Zukić and others*, *Delimustafić and others*, *Kurir*, and *Kemal Čaušević and others* all have numerous defendants and feature many witnesses. In addition, all of the cases involve organised crime or association for the purposes of committing a criminal offense.

The rules of evidence are laid out in the provisions of the four criminal procedure codes (namely, the criminal procedure codes of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska, and Brčko District) that regulate the legality and admissibility of evidence. However, the brevity and uncertainty of the provisions that cover the use of special investigative measures, essential violations of human rights and freedoms, and the inadmissibility of evidence make judicial practice a determining factor in shaping the rules on the legality of evidence. In this regard, judicial practice is neither coherent nor consolidated. Judges often dismiss evidence as illegal without providing a rationale for their decision or striking a balance between

⁷ "Trial Monitoring of Corruption Cases in BiH: Second Assessment." OSCE, 2019, www.osce.org.

⁸ "Trial Monitoring of Corruption Cases in BiH: Second Assessment." p. 66.

the defendant's rights and the effectiveness of criminal justice.⁹ This has become significant in the criminal justice system and points up a need to include comprehensive rules of evidence in the legislative framework. Another issue that affects the efficiency of proceedings is judges' inability to use all of the instruments at their disposal to ensure that defendants appear in court. Defendants are often absent from court hearings without proper justification or examination of their justification, giving the impression that their appearance is optional. While the case of *Alija Delimustafić and others* best illustrates the detrimental effect of such poor judicial practice, the absence of defendants without justification is also apparent in other cases, such as *Kemal Čaušević and others*. In the latter case before the Court of Bosnia and Herzegovina, several consecutive hearings were cancelled in 2019 because of the absence of defendants, legal representatives and even court experts, and the presiding judge openly issued a warning about the defendants' abuse of all legal options to stall court proceedings.¹⁰ While the lead defendant, Kemal Čaušević, was absent from several hearings on the grounds of health issues, the problem also affected the scheduling of any future hearings knowing that the defendant would be absent.¹¹

Securing the presence of all parties to the process is particularly challenging in cases where defendants have fled Bosnia and Herzegovina and the authorities have requested their extradition. For example, in the case of *Alija Delimustafić and others*, one of the defendants, former judge of the Municipal Court in Sarajevo Lejla Fazlagić-Pašić, fled to Croatia before her indictment was issued, because she had been made aware of the ongoing investigation.¹² She has now been in Croatia for over three years, because Croatia's minister of justice has not signed the extradition warrant even though the Constitutional Court of Croatia has confirmed that former judge Fazlagić-Pašić must be extradited to Bosnia and Herzegovina.¹³ In this case, several of the defendants have fled to foreign countries, resulting in multiple postponements of hearings. In addition, judges in some courts have a practice of postponing court hearings for months whether the absence of witnesses is justified or unjustified.

Cost of postponed hearings

⁹ "Trial Monitoring of Corruption Cases in BiH: Second Assessment," p. 62

¹⁰ "Suđenje Kemal Čaušević odgođeno zbog nedolaska drugooptuženog." *Oslobodjenje* (web) 28 March 2019.

¹¹ "Čaušević nije došao na suđenje zbog zdravstvenih razloga." *Faktor* (web) 12 December 2019.

¹² "Jutarnji list: Lejla Fazlagić tvrdila da je u Sarajevu progone i šikaniraju jer je Hrvatica." *Faktor* (web) 27 May 2019. "Tko je žena koja bi mogla biti izručena BiH u zamjenu za Mamića?" *Index.hr* (Web) 23 May 2019.

¹³ "Advokat Lejle Fazlagić-Pašić tvrdi da ispitivanje nije validno i da nema osnova za izručenje." *Klix* (web) 9 January 2018.

¹⁴ "Suđenje Delimustafiću koje nije počelo već koštalo građane više od 330.000 KM." *Detektor* (web) 14 November 2019.

¹⁵ "Suđenje Delimustafiću koje nije počelo već koštalo građane više od 330.000 KM."

Alija Delimustafić, a former interior minister, and over 40 other defendants including a judge of the Municipal Court in Sarajevo, a cantonal prosecutor, eight lawyers, court experts, a public notary, court clerks and civil servants stand charged with illegally registering and reselling the real property of dead persons in Sarajevo, illegally acquiring more than KM10 million (€5.1 million). An indictment was issued in the case of *Alija Delimustafić and others* on 6 October 2017. It was then confirmed on 12 October 2017 and amended twice, in January 2018 and May 2019, because of a plea bargain with some of the defendants.¹⁴ To this day, however, no plea hearing has been held in one of the most complex grand corruption cases in Bosnia and Herzegovina because of continued delays caused by the defendants' inexplicable absence from court. Three years without a trial and more than 16 cancelled court hearings have cost KM334,714 (€171,616) as a result of the accrued costs of the public defender.¹⁵

In addition to generally poor management in the scheduling of court hearings, there has been a significant time lag between the confirmation of an indictment and the beginning of the trial in some of the cases analysed as potential grand corruption cases. In the Bobar Banka case, the defence lawyers of the former director of the Banking Agency of Republika Srpska, Slavica Injac, who is being tried for abuse of office, requested that the case be transferred from the Court of Bosnia and Herzegovina to the District Court of Banja Luka because of the defendant's poor health.¹⁶ In October 2018, the case against Injac was separated from other defendants and transferred to the District Court in Banja Luka by decision of the Court of Bosnia and Herzegovina.¹⁷ It took five months to transfer the indictment from the Court of Bosnia and Herzegovina to the District Court of Banja Luka, and even longer for the Prosecutor's Office of Bosnia and Herzegovina to submit the evidence to the Republic's Prosecutor.¹⁸ Also, once the case was transferred to Banja Luka, Injac did not appear before the court for 13 months because of apparent poor health.¹⁹ Owing to this unjustified situation, her trial did not begin until December 2019.²⁰

¹⁶ "Odgodeno suđenje Slavici Injac." Capital.ba (web), 27 February 2019.

¹⁷ S1 2 K 024348 17 K – Darko Jeremić i ostali. (Web) <http://www.sudbih.gov.ba/predmet/3657/show>

¹⁸ "ZABORAVLJENI SLUČAJ „BOBAR BANKA“: Da li će neko odgovarati za izgubljene milione?" Žurnal (web), 31 July 2019.

¹⁹ "Konačno počelo suđenje Slavici Injac u Banjaluci." BN TV, (web), 5 December 2019.

²⁰ "Počelo suđenje bivšoj direktorki Agencije za bankarstvo RS Slavici Injac." Capital.ba, (Web), 5 December 2019.

²¹ Zakon o krivičnom postupku BiH, čl. 251(2). (web) <https://www.paragraf.ba/propisi/bih/zakon-o-krivicnom-postupku-bosne-i-hercegovine.html>

²² "Trial Monitoring of Corruption Cases in BiH: Second Assessment." 2019.

²³ "Trial Monitoring of Corruption Cases in BiH: Second Assessment." 2019.

²⁴ "Expert Report on Rule of Law issues in Bosnia and Herzegovina." 2019.

Postponements of the main hearing, which are very common in grand corruption cases and corruption cases committed by high officials, pose an obstacle to efficient and timely proceedings. According to the Criminal Procedure Code of Bosnia and Herzegovina, a main hearing that is adjourned for more than 30 days must start over, unless the parties to the case consent to a continuation without retaking any evidence and conducting the examination of witnesses again.²¹ This also applies in cases where there is a change to the composition of the panel of judges, which the OSCE Monitoring Report has identified as one of the main challenges to timely proceedings.²²

While all of the aforementioned issues demonstrate the generally poor management of grand corruption cases, it is especially problematic that there seems to be no significant difference in case management between lower courts and higher courts. There is a certain pattern in the scheduling of court hearings at the Court of Bosnia and Herzegovina, but not in lower courts, where the OSCE Monitoring Report has found that presiding judges fail to assess whether postponements of court hearings are justified, and are reluctant to use all the instruments at their disposal to ensure that defendants appear at hearings.²³

While this issue directly affects the reasonable and efficient management of court proceedings, it is also important to analyse prosecutorial capacities and their impact on grand corruption cases.

Prosecutorial capacity

While prosecutors in Bosnia and Herzegovina have generally exhibited low capacities and a poor readiness to conduct proper, lawful and timely investigations in corruption cases, their failure to prosecute grand corruption cases is also closely related to a lack of integrity and impartiality in prosecutor's offices where members come from the ruling elites. The OSCE Monitoring Report finds that "in cases of high-level corruption unexplainable professional and legal mistakes, negligence, abuse of procedures and questionable court decisions have been observed. Furthermore, there seems to be no accountability for such mistakes."²⁴ The issue of the judiciary's integrity and independence

starts with its common regulatory body, the High Judicial and Prosecutorial Council (HJPC). The HJPC is composed of judges, prosecutors and lawyers, as well as one representative each from the legislative and executive branches, and it decides on the selection of members to the judiciary.²⁵ Because of the composition of the HJPC, judges take part in making decisions on the selection of prosecutors and vice versa. This arrangement has become problematic on many occasions. The selection process for prosecutors and judges begins with the public announcement of a position, followed by interviews and a written examination. The written examination, however, is not part of the selection process in cases of advancement within the judiciary, turning the interview before the selection committee into the key element and opening up the possibility for political or other interests to determine the process.²⁶ In addition, the presence of representatives of the executive and legislative branches on the judiciary's regulatory body creates room for further political influence over the judiciary.

Since 2009, TI BiH has been collecting information on the prosecution of corruption based on official statistical information provided by judicial institutions in the country. According to the last TI BiH monitoring report, there were 225 indictments issued by prosecutor's offices in Bosnia and Herzegovina for corruption offences in 2019, amounting to only 1.9 per cent of all indictments for the year.²⁷ While the statistics point to the poor performance of prosecutor's offices across the country, the performance of the Prosecutor's Office of Bosnia and Herzegovina, which issued only four indictments in corruption cases, is particularly worrisome because of its competence in the prosecution of grand corruption. The official statistical information does not distinguish grand corruption cases from other corruption cases, but the data are still illustrative of the state's limited efforts to prosecute corruption offences.

²⁵ Law on the High Judicial and Prosecutorial Council of BiH. Official Gazette BiH no: 25/04, 93/05, 15/08.

²⁶ Branko Perić, "Pravosuđe u BiH: Stanje i perspektive" (TI BiH, 2020)

²⁷ Izvještaj o monitoringu procesuiranja korupcije pred sudovima i tužilaštvima u Bosni i Hercegovini 2019. TI BiH

²⁸ Investigations resolved differently include all investigations that have not been resolved by a suspension order or the filing of an indictment. For example, they have been resolved by transferral to another prosecutor's office, merging cases, etc.

²⁹ Bosnia and Herzegovina's criminal justice consists of four separate systems, each with its own court and prosecutor's system and its own criminal legislation: state level (Bosnia and Herzegovina), entity levels (Federation of BiH and Republika Srpska) and Brčko District. The Brčko Prosecutor's Office covers the area under the jurisdiction of the Basic Court of Brčko District. See: <https://jt-brckodistriktbih.pravosudje.ba/>

Table 2: Resolved investigations

This table presents the number of resolved investigations in corruption cases at all levels of prosecutor's offices in Bosnia and Herzegovina in 2019, based on official information provided to TI BiH by the High Judicial and Prosecutorial Office of Bosnia and Herzegovina.

PROSECUTION	RESOLVED INVESTIGATION	INVESTIGATION SUSPENSION ORDERS	INVESTIGATIONS RESOLVED DIFFERENTLY ²⁸	SHARE OF INVESTIGATION SUSPENSION ORDERS OUT OF TOTAL NUMBER OF RESOLVED INVESTIGATIONS
Prosecutor's office of BiH	16	10	2	62.5%
Cantonal prosecutor's offices	267	87	21	32.5%
County public prosecutor's offices	94	49	3	52.1%
Brčko Prosecutor's Office²⁹	25	1	4	4%
TOTAL	402	147	30	36.5%

Table 3: Indictments

This table presents the number of indictments issued in 2019 for corruption offences at all levels of prosecutor's offices in Bosnia and Herzegovina, and their share out of the total number of indictments based on official information provided to TI BiH by the High Judicial and Prosecutorial Office of Bosnia and Herzegovina.

PROSECUTION	TOTAL NUMBER OF INDICTMENTS ISSUED FOR CORRUPTION	SHARE OF INDICTMENTS ISSUED FOR CORRUPTION OFFENCES OUT OF THE TOTAL NUMBER OF INDICTMENTS ISSUED
Prosecutor's office of BiH	4	2.3%
Cantonal prosecutor's offices	159	2.1%
County public prosecutor's offices	42	1.2%
Brčko Prosecutor's Office	20	7.6%
TOTAL	225	1.9%

Not only is the number of indictments issued for corruption offences low, but so is the quality of the indictments. According to the 2019 Report on Rule of Law issues in Bosnia and Herzegovina, "in cases of high-level corruption unexplainable professional and legal mistakes, negligence, abuse of procedures and questionable court decisions have been observed."³⁰ Negligence is especially apparent in the quality of the indictments, which are often amended during the criminal process because of flaws related to the description of the criminal behaviour, the interpretation of legal provisions, and the inclusion of little or no evidence to support the criminal intent of the defendant(s). According to the OSCE, the failure of prosecutors to specify or pinpoint the type of criminal offence committed in abuse of office cases, where they do not identify regulations on the public administration, has resulted in a lack of success in prosecuting some high-ranking officials in Bosnia and Herzegovina.³¹ However, this is true not only in abuse of office cases, but also in other cases involving corruption offences.

For example, in the case of *Fahrudin Radončić and others*, the former minister of security for Bosnia and Herzegovina Fahrudin Radončić was charged with obstruction of the administration of justice in relation to the influence that he exerted in the trial of the leader of an important Balkan criminal group, and his acquittal was a result of the prosecution's failure to precisely identify the elements of the criminal offence in question. The presiding judge on the panel in the case, which was heard before the Court of Bosnia and Herzegovina, stated in her verdict that "the Prosecutor's Office of Bosnia and Herzegovina failed to state precisely and clearly which acts were specifically charged against the accused, and the Court did not find from the presented evidence that it was an association to obstruct the administration of justice, receiving an award for trading in influence."³²

³⁰ "Expert Report on Rule of Law issues in Bosnia and Herzegovina." 2019.

³¹ "Trial Monitoring of Corruption Cases in BiH: Second Assessment." 2019.

³² "Fahrudin Radončić oslobođen po svim tačkama optužnice." Al Jazeera Balkans, (web), 16 May 2018.

Prosecutors' lack of accountability for negligence in their work is directly related to their absolute discretion in the conduct of criminal investigations. Specifically, the criminal justice system in Bosnia and Herzegovina gives prosecutors absolute discretion over the decision to pursue a case. Moreover, there is no developed criteria or rules to guide prosecutorial discretion, nor does the law provide for any oversight or second-instance mechanism to monitor prosecutors' decisions or limit their discretion in this regard. Considering that a prosecutor decides freely whether to open an investigation, who will be charged and whether to appeal, prosecutorial discretion is clearly unlimited.³³ This explains the significant proportion of prosecutors' decisions not to initiate an investigation out of the total number of resolved reports on corruption offences. Specifically, 54% of the 1,017 resolved reports on corruption cases in Bosnia and Herzegovina in 2019 were terminated by a prosecutor's decision not to initiate an investigation.³⁴

In the ongoing grand corruption cases and other cases involving high-ranking officials analysed during our research, the prosecution relied on evidence collected through special investigative measures. In many situations, these measures raised significant concerns over the admissibility of the evidence and jeopardised the legality of the prosecution. This is evident in the ongoing grand corruption case of *Amir Zukić and others*, which is one of the most important attempts to prosecute high-ranking officials and directors of state-owned enterprises. Amir Zukić, who was secretary-general of the Party of Democratic Action (SDA) and an MP in the state-level parliament at the time, and Safet Bibić, who was the chief technician at the Clinic for Otorhinolaryngology at the Clinical Centre of the University of Sarajevo, joined by other defendants, stand accused of association for the purpose of committing crimes (specifically, receiving bribes in exchange for trading in influence). The objective of the association was to find people willing to pay bribes to obtain a job in the state-owned enterprise Elektroprivreda Bosnia and Herzegovina. The group then used its influence on Esed Džananović, the executive director of Elektroprivreda Bosnia and Herzegovina, who stands charged with abuse of office, so that the people in question illegally obtained a job at the company, the biggest state-owned enterprise in the country. The result was systemic corruption in the public sector's hiring process.³⁵ TI BiH monitored the hearings in the case before the Municipal Court in Sarajevo from November 2019 to March 2020, when they were suspended because of the Covid-19 pandemic.³⁶ At the observed hearings, the prosecution presented an analysis of wiretapped communications among the defendants, which showed SMS and phone communications that they exchanged, in order to prove their association.³⁷ The defence has already objected to the presented evidence, which was collected through special investigative measures, on the basis that part of the communication lies outside the time frame covered by the offence and is not covered by the authorisation for wiretapping.³⁸ Despite the objections, however, the judge has decided to admit the evidence in question.³⁹

According to the Criminal Procedure Code of the Federation of Bosnia and Herzegovina, the judge may admit the objected evidence into the record

³³ Perić, 2020:26.

³⁴ „Izveštaj o monitoringu procesuiranja korupcije pred sudovima i tužilaštvima u Bosni i Hercegovini 2019.“ 2020.

³⁵ “Report: Trial monitoring of corruption cases.” TI BiH 2020. https://ti-bih.org/wp-content/uploads/2015/06/Izvjestaj-Sudjenja_eng.pdf
See also: Indictment No. T09 0 KTK 0104948 16 from 10 March 2017.

³⁶ The monitored hearings, which took place on 4 November 2019, 2 December 2019, 23 December 2019, 20 January 2020 and 3 February 2020, are available in the TI BiH Report: https://ti-bih.org/wp-content/uploads/2015/06/Izvjestaj-Sudjenja_eng.pdf

³⁷ “Report: Trial monitoring of corruption cases.” TI BiH 2020.

³⁸ “Report: Trial monitoring of corruption cases.” TI BiH 2020.

³⁹ “Report: Trial monitoring of corruption cases.” TI BiH 2020.

40 According to Article 305(7) of the Criminal Procedure Code of FBiH: "The court shall state precisely and completely which facts and for what reasons it considers as proven or unproven, giving in particular an assessment of the credibility of contradictory evidence, for what reasons it did not consider certain motions of the parties, for what reasons it decided not to hear a witness or expert whose testimony was read, for what reasons he was guided in resolving legal issues, and especially in ascertaining whether the criminal offence was committed and whether the accused was criminally responsible and in applying specific provisions of the Criminal Code to the accused and to his act."

41 „Praćenje procesuiranja u predmetima korupcije u BiH: druga ocjena". 2019.

42 „Praćenje sudskih postupaka u predmetima korupcije u BiH: druga ocjena". 2019.

43 Akt broj: 06-09-1-633-3/2017 od 16. novembra 2017, Visoki sudski i tužilački savjet (VSTV BiH).

44 Perić, 2020:26.

45 Analitički izvještaj uz Mišljenje Evropske komisije o zahtjevu Bosne i Hercegovine za članstvo u Evropskoj uniji (2019). (web), www.ec.europa.eu

and decide on its admissibility after the trial is over, providing an explanation in the verdict as to why the motions of the parties in the case were not sustained at trial.⁴⁰ While the practice of judges on the timing of decisions over the admissibility of evidence relates to their case management, it also has significant consequences for the prosecution's performance in a proceeding. If a decision on the admissibility of evidence is made during the trial, the prosecution has time to adapt to the new circumstances and still secure a successful prosecution. In the opposite circumstance, however, it remains unclear whether the evidence will be taken into consideration. This substantially burdens the prosecution's ability to plan its strategy and often leads to impunity in grand corruption cases, especially in light of the legislative gaps on the use of special investigative measures within the criminal codes in Bosnia and Herzegovina. In 2018, the legislatures in Bosnia and Herzegovina passed different amendments to their respective criminal procedure codes to regulate the use of special investigative measures.⁴¹ While the legislature in the Federation of Bosnia and Herzegovina did not pass any amendments in this regard, the amendments passed at other levels of government differ in substance and have not been harmonised.⁴² Despite efforts to address these gaps, the amendments do not provide sufficient certainty on the legality of evidence collected through special investigative measures and they are unclear about authorisation for the use of such measures.

Quantity over quality – severance of charges

Sentencing policy in grand corruption cases

In 2017, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina adopted criteria for the performance appraisal of prosecutors, which provided that the work of prosecutors should be assessed based on the number/norm of individual prosecutorial procedural actions.⁴³ Because the performance of prosecutors was evaluated based on the number of their issued indictments, their performance appraisal was based on the quantity rather than the quality of their indictments. A prosecutor's status and opportunities for advancement were directly dependent on strong statistics. The adoption of the criteria is reflected directly in cases of organised crime and corruption, where the severance of charges in grand corruption cases has become common.⁴⁴

When analysing the sentencing policy in grand corruption cases collected for the database, it is important to emphasise that many of the cases are still in the trial phase and have not yet reached the sentencing phase. To illustrate the poor and unharmonised sentencing policy of courts in Bosnia and Herzegovina, this section will rely on information from verdicts in other high-profile corruption cases that have been analysed during the research process. The EU has noted that the sentencing policy of the judiciary in Bosnia and Herzegovina is deficient, considering the number of suspended prison sentences, the conversion of prison sentences into fines and the frequent application of mitigating circumstances.⁴⁵ Members of the

international community such as the EU and the OSCE have pointed to the need to establish an adequate, harmonised sentencing policy in order to ensure the deterrence and prevention of corruption, particularly grand corruption.⁴⁶ One of the main obstacles to the development of a harmonised judicial practice in the sentencing phase lies in the deficiency of judicial arguments and reasoning in verdicts.

Tabela 4: Presude u predmetima korupcije na visokom nivou

U ovoj tabeli prikazane su presude za djela korupcije na visokom nivou iz baze podataka, a u kojima se stiglo do faze izricanja presude.

CASE	OFFENCE	SENTENCE PRESCRIBED BY LAW	VERDICT
Fahrudin Radončić and others	<ul style="list-style-type: none"> • Association for the commission of an offence • Obstruction of the administration of justice • Giving gifts or other forms of benefit for trading in influence 	3-10 years (Criminal Code of BiH)	Acquittal
Lijanovići II	Organising the commission of crimes in connection with the crime of abuse of office/authority	min. 3 years (Criminal Code of FBiH)	7 years ⁴⁷

Table 4 presents the verdicts in two cases from the research where the sentencing phase has concluded. The table compares each verdict with the prescribed sentence for the offence in question. Considering the nature of grand corruption cases and the fact that the defendants are high-ranking officials, any analysis of the verdicts should also look at asset seizure and other special measures, such as prohibiting the performance of public functions. In the *Lijanovići II* case, the first instance verdict was quashed and the sentence of the lead defendant, Jerko Ivanković Lijanović, was reduced from 10 years to 7 years, together with an order to seize KM652,861.38 (€334,738.15) that had been acquired illegally.⁴⁸ In addition, the verdict prohibited Lijanović from performing ministerial functions for two years, emphasising the fact that Lijanović had committed the corruption offence during his tenure as minister of agriculture, water management and forestry for the Federation of Bosnia and Herzegovina.⁴⁹ Because of the gravity of the sentence, the verdict sets a precedent in the history of corruption prosecution in Bosnia and Herzegovina, but it is also noteworthy that the lead defendant, who was an opponent of the ruling party, lost his position and influence in politics. This is not always the case. Asset seizures and prohibitions on performing public functions are often omitted from sentences against defendants. To ensure asset seizures, it is necessary to enhance prosecutorial capacity and resources to conduct financial investigations and identify illegally acquired assets. Also, judges often fail to include any prohibition on the performance of official functions in their verdicts, missing an opportunity to emphasise the accountability of public officials and the detrimental effect of grand corruption on society. This is of particular importance in the context of Bosnia and Herzegovina, where public officials who are under criminal investigation or face corruption charges continue to perform official functions and stand for office.

⁴⁶ Vidjeti: „Praćenje sudskih postupaka u predmetima korupcije u BiH: druga ocjena”. 2019.

⁴⁷ Prvooptuženi je osuđen na sedam godina kazne zatvora i naređeno da vrati 652.861,38 KM (334.738,15 €) nezakonito stečene imovinske koristi, dok je optuženom Stipi Šakiću određena jedna godina kazne zatvora. “Jerku Ivankoviću Lijanoviću smanjena kazna zatvora na sedam godina.” Klix, (web) 1. oktobar 2019.

⁴⁸ “Jerku Ivankoviću Lijanoviću smanjena kazna zatvora na sedam godina.” Klix, (web) 1. oktobar 2019.

⁴⁹ “Jerku Ivankoviću Lijanoviću smanjena kazna zatvora na sedam godina.” Klix, (web) 1. oktobar 2019.

In this regard, one of the foremost examples is also one of the newest grand corruption cases: the *Respiratori* case. The defendants are Prime Minister of

the Federation of Bosnia and Herzegovina Fadil Novalić, director of the Federal Directorate of Civil Protection Fahrudin Solak, and director of the Agency for Medicinal Products and Medical Devices of Bosnia and Herzegovina Aleksandar Zolak. The three officials stand charged with organised crime, money laundering and abuse of office in relation to the procurement of respirators during the Covid-19 pandemic. In May 2020, the officials underwent questioning as part of an investigation led by the Prosecutor's Office of Bosnia and Herzegovina, after which the Court of Bosnia and Herzegovina issued temporary measures to prohibit the defendants from contacting witnesses in the case.⁵⁰ Considering that one of the witnesses is another member of the Federation of Bosnia and Herzegovina (FBiH) government, the temporary measures put into question the functionality of the FBiH government.⁵¹

As previously mentioned, the extremely low effectiveness of the judiciary in prosecuting grand corruption and the ongoing practice of impunity for high-ranking officials have resulted in a limited understanding of the importance of integrity in public service. In the case of *Amir Zukić and others*, which has been open since March 2017, some of the defendants have received appointments to public service posts or continued performing their official functions. In 2018, one of the defendants, Asim Sarajlić, was elected delegate to the upper house of the Parliament of Bosnia and Herzegovina, where he became a member of the Constitutional and Legal Commission, the Joint Commission for Administrative Affairs, the Joint Commission for Supervision of the Work of the Intelligence and Security Agency of BiH, and the Joint Commission for Defence and Security.⁵² Despite the gravity of the corruption offence, the media coverage of the prosecution and the rank of official involved, the prosecution seems to have had little or no deterrent effect.

In addition to the poor quality and reasoning of sentences, a brief look at the statistical information on the type of verdicts and sentences issued by courts in Bosnia and Herzegovina in corruption cases also suggests that there is a lenient approach to the punishment of corruption.

⁵⁰ "Nove mjere zabrane za Fadila Novalića." BHRT (web), 6 June 2020.

⁵¹ "Nove mjere zabrane za Fadila Novalića." BHRT.

⁵² Parliamentary Assembly of BiH, Delegates, (web) <https://www.parlament.ba/delegate/detail/559>

Table 5: Types of verdicts in corruption cases

This table presents the verdicts in corruption cases, by type, at all levels of prosecutor's offices in Bosnia and Herzegovina in 2019, based on official statistical information provided by the High Judicial and Prosecutorial Council of BiH.

CASE	REJECTED VERDICT	ACQUITTAL	GUILTY VERDICT
Prosecutor's Office of BiH	0	1	1
Cantonal prosecutor's offices	1	46	155
County public prosecutor's offices	1	14	51
Brčko Prosecutor's Office	0	1	17
TOTAL	2	62	224

Table 6: Types of sentences issued in guilty verdicts

This table presents the types of sentences issued in guilty verdicts in corruption cases at all levels of prosecutor's offices in Bosnia and Herzegovina in 2019, based on official statistical information provided by the High Judicial and Prosecutorial Council of BiH.

CASE	MONETARY FINE	SUSPENDED SENTENCE	PRISON SENTENCE
Prosecutor's Office of BiH	0	1	0
Cantonal prosecutor's offices	2	107	46
County public prosecutor's offices	15	24	12
Brčko Prosecutor's Office	0	12	5
TOTAL	17	144	63

While Table 5 does not reveal much about the sentencing policy because of the significant number of guilty verdicts compared to acquittals in 2019, Table 6 illustrates the type of sentences issued in those guilty verdicts. Based on statistical information provided by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, the vast majority of the 224 guilty verdicts issued in corruption cases were suspended sentences (144), while only 63 resulted in prison sentences.

It is evident from the collected and analysed information that there is a need to change sentencing policy in corruption cases in order to ensure that it has a deterrent and preventive effect. According to the 2019 Report on Rule of Law issues in Bosnia and Herzegovina, "the few cases of corruption that were prosecuted and resulted in final convictions, largely relate to petty corruption and even in these cases the sanctions do not have a deterrent effect."⁵³

Corruption in the judiciary

The judiciary's inefficiency in prosecuting corruption has been a major problem. In recent years, however, corruption allegations and charges against members of the judiciary itself have seriously compromised public trust in the judiciary and its integrity. GRECO warns in its Fourth Evaluation Report that there are no legal guarantees of judicial independence or impartiality, and that there is a general perception of the judiciary as highly politicised for two reasons: (1) members of the judiciary have close links to politicians; and (2) high-profile investigations and cases are either lacking or are opened and closed based on political motivations.⁵⁴ While the lack of capacity among judges and prosecutors is an issue that requires training for members of the judiciary and a reform of the system, the judiciary's lack of integrity is a more serious issue in light of its social responsibility. Our research has identified many corruption cases, some of which involve grand corruption, where the defendants are judicial office-holders.

⁵³ "Expert Report on Rule of Law issues in Bosnia and Herzegovina. 2019."

⁵⁴ GRECO Evaluation Report Bosnia and Herzegovina: Corruption prevention in respect of members of parliament, judges and prosecutors. CoE (web), 2016.

Two of the cases analysed during the research, *Alija Delimustafić and others* ("Pravda") and *Ismet Hamzić and others* ("Kurir"), have revealed the presence of organised crime in the judiciary, raising serious concerns over checks on integrity and

ethics among judges and prosecutors. In the *Kurir* case, the lead defendant, lawyer Ismet Hamzić, stands charged with organising a criminal group involving court clerks, which secured 46 illegal judgements in the Municipal Court in Sarajevo from 2013 to 2016. Hamzić gave bribes to the court clerks to manipulate the case management system in order to ensure that the cases he represented were heard by judge Milena Rajić.⁵⁵ Judge Rajić is herself one of the defendants in the *Kurir II* and *Pravda* cases, where she stands accused of issuing verdicts based on forged information and participating in fabricated litigations to deed property to people who had no right to it.⁵⁶ Similarly, in the *Alija Delimustafić and others* case, Alija Delimustafić, the key defendant, stands charged with organising a criminal group that illegally registered and resold the real property of deceased people in the Sarajevo Canton, once again involving court administration. Judge Lejla Fazlagić-Pašić and judge Rajić stand accused of rendering court decisions illegally in these cases. Moreover, in the case of *Alija Delimustafić and others*, one of the defendants is a cantonal prosecutor Džemal Karić, who stands accused of working on the orders of Alija Delimustafić in cases against Delimustafić's brothers Enver, Mirsad and Hajrudin, providing legal advice to the defence of the accused and helping the brothers in two criminal cases to avoid long prison sentences and enable their companies to keep the million-dollar profits gained from the crime.⁵⁷

In addition to the charges brought against judges and prosecutors, it is particularly worrying that the presiding judge on the judicial panel in the *Kurir* case was to a certain extent involved in the decisions that had been rendered illegally by the defendants. After the indictment was confirmed, the defence submitted a motion to remove the presiding judge, Sanela Rondić, on the grounds that she would be biased because she had delivered some of the judgements in which the defendants were implicated.⁵⁸ Even after the illegally rendered judgements were anonymised and showed only the initials of the judges who delivered them, the prosecution admitted that the presiding judge Rondić "might be" one of the judges whose names were anonymised. However, the motion to remove judge Rondić from the panel was rejected.⁵⁹ The circumstances of the case are problematic from multiple standpoints, starting with the presiding judge's conflict of interest, which jeopardises the impartiality of the entire judicial process. The EU has noted that rules on conflicts of interest in the judiciary cover only the members of the High Judicial and Prosecutorial Council (HJPC), whereas other measures to prevent conflicts of interest are provided for only in non-binding guidelines issued by the HJPC and are intended to be enforced by the courts and prosecutor's offices.⁶⁰

⁵⁵ "Kurir: Manipulacije u sudskom sistemu za dodjelu predmeta" Detektor, (web) 17 April 2018.

⁵⁶ "Judge Milena Rajić Removed from Office." CIN (web), 11 March 2020.

⁵⁷ "Tužilac za počastiti." VOA (web) 27 March 2020.

⁵⁸ "Odbijen zahtjev za izuzeće sutkinje Sanele Rondić." Detektor (web) 12 September 2017.

⁵⁹ "Odbijen zahtjev za izuzeće sutkinje Sanele Rondić." Detektor (web) 12 September 2017.

⁶⁰ Analytical Report Accompanying the European Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union (2019).

⁶¹ "Potvrđeno iz Suda: U akciji "Kameleon" uhapšena sutkinja Melisa Kovačević." Faktor (web) 9 March 2020.

⁶² Kantonalno tužilaštvo ZDK, (web) 24 July 2020. <https://kt-zenica.pravosudje.ba/vstv/faces/vijesti.jsp?id=92803>

Our research shows an increase in indictments brought against holders of judicial offices, resulting in cases that receive significant media and public attention. In March 2020, Melisa Kovačević, a judge in the Criminal Section of the Municipal Court in Zenica, was arrested on suspicion of receiving monetary benefit in exchange for securing acquittals or mitigating judgements in many cases, including those where defendants were family members of public officials.⁶¹ In July 2020, the Municipal Court in Kakanj confirmed the indictment against judge Kovačević for abuse of office or authority, committed in connection with the extended criminal offence of accepting gifts and other benefits and trading in influence.⁶²

Corruption is committed not only by lower-court judges and prosecutor's offices, but also by holders of judicial offices in the country's highest judicial institutions, such as the Prosecutor's Office of Bosnia and Herzegovina.

Goran Salihović, a former chief prosecutor for Bosnia and Herzegovina, is currently being prosecuted for abuse of office on the grounds that he misused funds for representation, knowingly acted contrary to the regulations on spending limits in the country and abroad, and later ordered that funds intended for the exhumations of war victims and witness hearings be transferred for travel abroad and representation.⁶³ Considering the very small number of grand corruption cases prosecuted in Bosnia and Herzegovina, the share of cases in which the defendants are judges or prosecutors is especially worrying. Another problematic aspect is the fact that prosecutors who are authorised to conduct investigations and prosecute corruption offences have often faced corruption charges themselves. The circumstances of these cases generate dissatisfaction over the work of the judiciary in fighting corruption, and entrench a growing perception that ongoing prosecutions of high-profile corruption cases are politicised and divorced from protecting and strengthening the rule of law.

Given the important role that holders of judicial office play in preserving ethics, integrity and the rule of law, prominent corruption cases involving judges and prosecutors represent a warning that the system of integrity in the judiciary requires strengthening. In the cases analysed above, many judges and prosecutors have been sanctioned in disciplinary proceedings. For example, the former chief prosecutor for Bosnia and Herzegovina Goran Salihović was suspended from his position and demoted to the position of prosecutor within the Prosecutor's Office of Bosnia and Herzegovina,⁶⁴ and judge Melisa Kovačević was temporarily suspended from office, based on the decision of the first-instance commission of the High Judicial and Prosecutorial Council.⁶⁵ Such disciplinary sanctions, however, are not deterrent or proportional to the offences committed by or charged against the defendants. Rather, they are purely reactive measures in the fight against corruption within the judiciary. As a result, it is necessary to put into place preventive mechanisms to strengthen the integrity and accountability of judicial office-holders, avoiding or minimising the possibility of corruption within the judiciary. To this end, the Expert Report on Rule of Law issues in Bosnia and Herzegovina recommends the introduction of efficient integrity checks for judicial office-holders and a rigorous asset declaration system that would be subject to external monitoring.⁶⁶ Beyond the prosecuted cases of corruption within the judiciary, there are also serious concerns over the growing number of reported cases both of corruption in the judiciary and of high-profile corruption affairs such as those involving members of the High Judicial and Prosecutorial Council (HJPC) of BiH. After the public administration, corruption in the judiciary accounted for the second largest share of reports of corruption received by Transparency International in Bosnia and Herzegovina in 2019.⁶⁷ While the trend is concerning, there are also many unresolved corruption affairs that involve the judiciary. One of them, the Potkivanje corruption affair implicated the president of the High Judicial and Prosecutorial Council of BiH, Milan Tegeltija, who was suspected of trading criminal investigations.⁶⁸ Even though the affair received significant public attention, it resulted in the complete distrust of citizens towards the judiciary, whose members expressed their support for Tegeltija and condemned "pressure" on the judiciary and the HJPC as an institution. The case produced a series of controversial procedures in the HJPC connected to establishing the responsibility of the HJPC president and it compromised the institution and its ability to regulate the judiciary.⁶⁹ The absence of any process to establish Tegeltija's responsibility for breaching the law confirmed the dysfunctionality of the current Law on the HJPC. Ultimately, the HJPC president was not prosecuted and the disciplinary procedures were a complete failure, illustrating how the current Law on the HJPC enables the body to operate devoid of responsibility.

63 "Tužilaštvo BiH potrošilo sredstva za ekshumacije kada se radila Tomašica" Detektor (web) 6. mart 2020. "NEWS Bosnian Ex-Chief Prosecutor Tried for Abuse of Office." BalkanInsight (web) 28 January 2020.

64 "Salihoviću potvrđena mjera smjene s pozicije glavnog tužioca" Detektor (web) 23 October 2017.

65 "Suspendirana dodatna sutkinja Općinskog suda u Zenici" VSTV, (web) 13 March 2020, <https://vsts.pravosudje.ba/vstv/faces/vijesti.jsp?id=89822>

66 Analytical Report Accompanying the European Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union (2019).

67 "Largest number of corruption cases reported against the public administration and judiciary, number of whistleblowers' reports decreased." TI BiH, (web) 27 February 2020.

68 "Afera "Potkivanje": Žurnal objavio video Tegeltije, Aleševića i Pandže." N1 (web), 23 May 2019.

69 Perić, 2020:26.



TAILOR-MADE LAWS

According to the Opinion on Bosnia and Herzegovina's Application for Membership in the European Union, "all levels of government show signs of political capture, directly affecting the daily life of citizens, notably in health, education, employment and public procurement matters."⁷⁰ When performing their official functions, members of the country's political elites often act in their own interest or in the interest of their political party. One of the most important elements of state capture is the practice of political elites to design customised laws to ensure the protection of private interests and entrench a network of corrupt officials and others in the public sector. While there have been few examples of customised laws in Bosnia and Herzegovina, it is important to distinguish the country from other countries where tailor-made laws are more often used. Political elites do not often engage in designing laws suited to their private or political interests, but rather take advantage of legislative gaps that allow them to maintain the status quo. Pieces of legislation that are important to fight effectively against corruption and ensure the accountability of public officials in Bosnia and Herzegovina are deficient (for example, on conflicts of interest and asset declaration, the criminal code, etc). Also, lobbying is not regulated by law in Bosnia and Herzegovina, which means that there are no registered lobbyists. As a result, MPs have no obligation to report contacts with people who, in spite of the fact that they are not registered as lobbyists, lobby for the adoption of specific legislation in the course of the legislative process.⁷¹ In addition, parliaments at all levels have a tendency to use the urgent legislative procedure, which excludes any opportunity for public debate or submission of amendments and adversely affects the quality of legislation.⁷² The overall effect of such a legislative process is reduced transparency and diminished citizen and civil society involvement in law-making.

During our research, only a few tailor-made laws or attempts to introduce tailor-made laws have been identified at different levels of government. They are related to various sectors of socio-economic life or public service as follows:

1. Amendments to the Law on the Civil Service of the Federation of Bosnia and Herzegovina (FBiH)
2. Law on Games of Chance in Republika Srpska
3. Amendments to the Criminal Code of the Federation of Bosnia and Herzegovina (FBiH)
4. Law on Conflicts of Interest in the Institutions of Bosnia and Herzegovina
5. Amendments to the Law on Notaries in Republika Srpska

⁷⁰ Perić, 2020:26.

⁷¹ National Integrity System Assessment Bosnia and Herzegovina 2013, (web) , https://images.transparencycdn.org/images/2013_BiH_NIS_EN.pdf

⁷² Analytical Report Accompanying the European Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union (2019).

As the names of the acts indicate, their purpose was to regulate completely different areas or fields of society. Despite their differences, however, all of the laws caught the attention of the international community in Bosnia and

Herzegovina, and in some cases their constitutionality was challenged. The amendments to the Law on the Civil Service of the Federation of Bosnia and Herzegovina were intended to change the definition and categories of civil servants and expand the categories of employees in the state administration who are politically appointed.⁷³ The objective of the amendments was to ensure that senior and mid-management positions would be nominated and approved by the Government of the Federation of Bosnia and Herzegovina, linking their appointment directly to the political mandate of the government.⁷⁴ If it had been adopted and enforced, the amendments would have politicised the public administration at the level of the entity Federation of Bosnia and Herzegovina, contrary to all EU recommendations. The European Commission's Directorate for Enlargement, together with the Office of the High Representative in Bosnia and Herzegovina and civil society, warned that the amendments would lead to an increase in political appointments and endanger the neutrality, integrity and confidentiality of the state administration.⁷⁵ While the amendments were adopted by both houses of the Parliament of the Federation of Bosnia and Herzegovina, the vice-president of the Federation of Bosnia and Herzegovina requested a constitutional review by the Constitutional Court of the Federation of Bosnia and Herzegovina, which declared the law unconstitutional on two grounds. First, it had been adopted using the urgent parliamentary procedure without any legal justification. Second, it discriminated against those who wanted to work in the civil service and disregarded the qualifications of candidates, leaving senior and mid-management positions in the civil service open only to certain individuals.⁷⁶ Despite the amendments' obvious effect to increase the number of political appointments, the Federation of Bosnia and Herzegovina government submitted them as part of a labour law reform intended to make cuts in the public administration.⁷⁷ If adopted, the amendments would have jeopardised an already politicised and burdened public administration, and made civil service open only to those with political ties.

Our research has also showed how the executive branch uses tailor-made laws to retroactively legalise actions that were contrary to the law when they were taken. For example, in September 2019, amendments to the Law on Notaries in Republika Srpska introduced an oral examination as part of the notary exam only after conducting a public call for notaries in which an oral examination had accounted for 80 per cent of the points for candidates, despite the fact that the Law on Notaries in place at the time did not foresee any such oral examination as part of the notary exam.⁷⁸ The purpose of the amendments was to legalise the public call that had introduced the oral examination,⁷⁹ and to minimise the damage done to the system of notary offices in Republika Srpska because the notaries selected in the public call had already certified a number of legal documents.⁸⁰ The amendments were adopted using the urgent parliamentary procedure after a decision by the County Court in Banja Luka had declared that the public call for notaries in some municipalities was contrary to the law.⁸² Considering the importance of public notaries in the legal profession and in the everyday life of citizens, the effect of the public call and the amendments has been detrimental to the validity of legal documents certified by public notaries who were appointed contrary to the law.

While the aforementioned laws were tailor-made to maintain a network of people in public service who were close to the ruling political elites, our research

73 "Zakon o državnoj službi u Federaciji Bosne i Hercegovine neustavan," Al Jazeera Balkans, (web) 23 December 2016.

74 "Zakon o državnoj službi u Federaciji Bosne i Hercegovine neustavan," Al Jazeera Balkans,

75 "Zakon o državnoj službi u FBiH: Politizacija uprave ili rezanje javne potrošnje?" Klix, (web) 14 October 2015.

76 Judgement No: U-13/16. http://www.ustavisudfbih.ba/bs/open_page_nw.php?l=bs&pid=442

77 "Zakon o državnoj službi u FBiH: Politizacija uprave ili rezanje javne potrošnje?" Klix.

78 Zakon o izmjenama i dopunama Zakona o notarima Republike Srpske, Službeni glasnik Republike Srpske broj: 68/17.

79 "Sramotan konkurs Vlade RS: Imenovani podobni notari čije ovjere ne važe!" Fokus (web), 4 March 2020.

80 "Imenovanjem podobnih notara prekršili Ustav pa ignorisali odluku suda!" Capital.ba (web) 4 March 2020.

81 "Narodna skupština u prvom dijelu Šeste redovne sjednice usvojila sedam zakona", Narodna skupština RS, (web) 19 September 2019.

82 "Vlada Srpske prekršila Ustav pri zapošljavanju notara" BN TV, (web), 7 March 2020.

has also identified examples of laws that were designed for the private interests of certain legal persons. The Law on Games of Chance in Republika Srpska defined games of chance as an activity of public interest for the entity Republika Srpska, and opened the possibility for the Government of Republika Srpska to permit the state-owned enterprise Lutrija RS to publish an international tender for a partnership to organise electronic lottery games. The tender was won by a Swiss company Casino Austria VLT and the two companies became the exclusive providers of the electronic lottery.⁸³ The law had a very negative effect since the Government of Republika Srpska revoked the licences for games of chance held by all private lottery providers and job losses resulted.⁸⁴ There have been no challenges to the law, which was adopted in March 2019.

According to our research, high-ranking officials prosecuted for corruption use members of their network who have been placed by them in public institutions in order to exercise undue influence over decision-making and law-making in Bosnia and Herzegovina. This is especially worrying when there is an attempt to amend criminal legislation to further weaken prosecutorial capacities in the fight against corruption. In 2018, Elzina Pirić, who was formerly a close associate of Mirsad Kukić, one of the defendants in the case of *Amir Zukić and others*,⁸⁵ initiated amendments to the Criminal Code of the Federation of Bosnia and Herzegovina with the goal to amend the definition of the criminal offence of "accepting an award or other benefit for trading in influence", for which the defendants in the case stood charged.⁸⁶ According to existing law, the offence can be committed when an official uses his/her position in the institutions of the Federation of Bosnia and Herzegovina to enable the performance of an activity that must not be performed or prevent an activity that must be performed. According to the proposed amendments, the words "award" and "benefit" would be substituted with the word "bribe", so that trading in influence without a bribe would not be a criminal offence.⁸⁷ Considering the political ties and interests of the parties in the case, it was clear from the beginning that the amendments sought to decriminalise the offence for which Amir Zukić, Mirsad Kukić and other high-ranking officials stood charged. Elzina Pirić, who initiated the amendments, had been a member of the SDA (Stranka demokratske akcije) political party with Mirsad Kukić until he left to found his own political party PDA (Pokret demokratske akcije).⁸⁸ In response, the OSCE Mission to Bosnia and Herzegovina sent out an official statement after the House of Representatives of the Federation of Bosnia and Herzegovina had adopted the amendments, warning that they would have a direct impact on the criminal investigations being conducted against politicians in the Federation of Bosnia and Herzegovina if they were also adopted in the upper house of the Federation of Bosnia and Herzegovina Parliament.⁸⁹ Ultimately, the amendments were not adopted. However, their passage in the lower house of the Federation of Bosnia and Herzegovina Parliament raised concerns over the intent of lawmakers to reduce efforts to combat corruption. Also, from a procedural standpoint, the amendments were initiated using the urgent legislative procedure, which was also used in the previously mentioned tailor-made laws.

In its Fourth Evaluation Report, GRECO recommends that Bosnia and Herzegovina should completely review and articulate the country's advisory, supervisory and enforcement regime on conflicts of interest in order to ensure the regime's independence and timeliness and make it effective through a system

83 "Sve na crno: Državno kockanje novcem građana Srpske." *Capital.ba* (web), 6. December 2019.

84 "Posljedice novog zakona o igrama na sreću u RS sve katastrofalnije." *Dnevni Avaz* (web) 15 July 2019.

85 "Predstavnički dom FBiH usvojio izmjene zakona: Ukida se krivično djelo za koje su optuženi Sarajlić, Kukić i Zukić!" *Index.ba* (web) 20 June 2018.

86 Prijedlog Zakon o izmjeni i dopuni Krivičnog zakona FBiH. 26. juli 2018, https://parlamentfbih.gov.ba/dom_naroda/v2/userfiles/file/Materijal%20u%20proceduri_018/Prijedlog_izm_dop_Kriv-zakona_Elzina_Piric.pdf

87 M. Imamović, "Izmjene Krivičnog zakona FBiH: Uporednopravna rješenja i komparativni osvrt." *Frontal.ba* (web) <https://www.frontal.ba/blogovi/blog/61222/izmjene-krivcnog-zakona-fbih-uporednopravna-rjesenja-i-komparativni-osvrt>

88 "Ambasada SAD o Krivičnom zakonu FBiH: Jačati, a ne slabiti pravosudne institucije u BiH." *NAP* (web), 20 June 2018.

89 "Izmjene Krivičnog zakona FBiH: Predložene izmjene ne doprinose jačanju borbe protiv korupcije" *Paragraf*, (web), 22 June 2018.

of appropriate sanctions.⁹⁰ The system in place to prevent conflicts of interest has been almost completely ineffective since 2013 as a result of amendments made to the Law on Conflicts of Interest in the Institutions of Bosnia and Herzegovina. The amendments in question transferred competence over decisions on conflicts of interest from the Central Electoral Commission to a newly formed Special Parliamentary Commission for Deciding on Conflict of Interest,⁹¹ whose independence and impartiality were completely eliminated as a consequence of inadequate provisions on the new commission's composition, the qualifications of its members and its modus operandi. Specifically, the amendments provide that the special parliamentary commission consists of three members from the House of Representatives, three members from the House of Peoples (with a minimum of one-third of these members coming from the opposition), and three members from the Agency for the Prevention and Fight Against Corruption, but they do not set any requirements on members' qualifications.⁹² The new commission delivers decisions by qualified majority (which requires at least two commission members from all three constituent peoples, totalling six votes).⁹³ Decision-making by a qualified majority that requires national consensus can turn decisions on conflicts of interest into questions of vital national interest. In addition, the amendments provide that all rules regulating the workings of the commission must be approved by both houses of the Parliamentary Assembly of Bosnia and Herzegovina, putting the commission under the direct control of MPs and their political parties.⁹⁴

The amendments have two very important consequences. One relates to the enforcement of the Law on Conflicts of Interest itself, while the other relates to cases of conflict of interest at lower levels of government. First, the amendments put the new commission under the significant influence and control of political parties and their members, who are able to control which cases get a final decision and which can be blocked completely. For example, Dragan Čović, president of the political party HDZ BiH (Hrvatska Demokratska Zajednica BiH) and a former member of the presidency of Bosnia and Herzegovina, stood accused of conflict of interest on the grounds that the association Hrvatski Narodni Sabor (HNS), which he managed, received public funds during his tenure as a member of the presidency.⁹⁵ Although the accusation was reported to the commission in 2018, no meeting addressed the subject because commission members who were fellow HDZ BiH members never appeared at the commission's meetings.⁹⁶ This case illustrates the effect of the qualified majority requirement and how MPs who are commission members can block the body's work if it suits their political party or its members. The second effect of the amendments relates to the Law on Conflicts of Interest in the Federation of Bosnia and Herzegovina (FBiH), which still provides that the Central Electoral Commission (CEC) is responsible for deciding on conflicts of interest.⁹⁷ Specifically, since the amendments abolished the CEC's competence in the area, the Law on Conflicts of Interest in FBiH has not been amended, resulting in a situation where no institution at the FBiH level is responsible for enforcement of the law. The current Law on Conflicts of Interest of FBiH authorises the CEC to decide on reported cases of conflict of interest in FBiH, which is contrary to the CEC's competences as defined by state legislation.

In the context of corruption prosecution and tailor-made laws, it is worth mentioning the Law on the High Judicial and Prosecutorial Council of BiH (HJPC), which regulates the functioning of the common regulatory body in the judiciary

90 GRECO Evaluation Report Bosnia and Herzegovina: Corruption prevention in respect of members of parliament, judges and prosecutors (2016).

91 "Izveštaj o monitoringu unapređenja zakonskog okvira i implementacije zakona o sukobu interesa u Bosni i Hercegovini za 2012." TIBIH, April 2013.

92 "Izveštaj o monitoringu unapređenja zakonskog okvira i implementacije zakona o sukobu interesa u Bosni i Hercegovini za 2012." TIBIH.

93 "Izveštaj o monitoringu unapređenja zakonskog okvira i implementacije zakona o sukobu interesa u Bosni i Hercegovini za 2012." TIBIH.

94 Zakon o sukobu interesa u institucijama vlasti BiH.

95 "Više od godinu država utvrđuje da li je Dragan Čović u sukobu interesa." Klix, (web), 6 June 2019.

96 "Više od godinu država utvrđuje da li je Dragan Čović u sukobu interesa." Klix.

97 Zakon o sukobu interesa u organima vlasti u FBiH. "Službene novine Federacije BiH", broj 70/08

and other related issues, such as disciplinary responsibility and proceedings against members of the judiciary.⁹⁸ The law has many weaknesses regarding the accountability and work of HJPC members. There is no effective accountability mechanism for HJPC members, nor are there any provisions on their obligations which would ensure liability in the case of non-performance of duties. Also, the provisions on the accountability of HJPC members are very vague, leaving room for both broad, creative interpretations and narrow, manipulative ones. "Over the last years, the HJPC has itself become part of the problem. Serious miscarriages of justice have become apparent due to a lack of leadership capacity, allegations of politicisation and conflicts of interest, inefficient organisation, insufficient outreach and transparency, and, finally, its failure to implement reforms."¹⁰⁰ Also, HJPC members who are the subject of criminal investigation or are being prosecuted can continue performing their duties, and their mandate automatically stops only in the case of a final guilty verdict.¹⁰¹ Moreover, the decision to dismiss a member of the HJPC requires a two-thirds majority, unlike the appointment of judges and prosecutors, where a simple majority suffices.¹⁰² Nor is the law clear about who is responsible for ensuring the accountability of HJPC members, which is highly problematic in view of the HJPC's broad decision-making powers over the entire judiciary. Such broad decision-making powers and ineffective accountability mechanisms in the Law on the HJPC make the law one of the key pieces of legislation contributing to state capture in Bosnia and Herzegovina. The analysis of tailor-made laws identified during the research process shows that lawmakers tend to regulate only certain sectors of society and that political elites are willing to go so far as to amend criminal legislation to secure impunity for their actions. The common procedural feature of these acts is that they have all been introduced using the urgent legislative procedure, excluding the opportunity for public debate, the engagement of civil society and the submission of amendments. Thus, the urgent legislative procedure diminishes the transparency of the legislative branch and reduces the opportunity to prevent the adoption of customised laws. Looking at the analysis of the identified tailor-made laws, one might conclude that no rule governing the sector or group in question places it under political control. In most cases, however, the laws directly address political elites and the functioning of public institutions, making officials and civil servants with political ties into direct beneficiaries of the laws. As the analysis shows, the law-making process has rarely been initiated for the benefit or the private interests of small groups or legal persons, except for the Law on Games of Chance in Republika Srpska. Nevertheless, it is important to recognise that some of the legislative attempts to adopt tailor-made laws have failed, especially after constitutional review. Given the importance of judicial review of laws that pose a threat to the rule of law, it is necessary to strengthen and use judicial oversight over law-making.

In addition to posing a threat to the rule of law, the laws violate obligations under international conventions to which Bosnia and Herzegovina is a signatory. If the Criminal Code of the Federation of Bosnia and Herzegovina had been amended, the new definition of trading in influence would have been contrary to the UN Convention against Corruption (UNCAC). Similarly, the UNCAC Country Review Report of Bosnia and Herzegovina from 2019 has called on the authorities "to strengthen the legal framework and supervision over the conflict of interest, including harmonising the legislation on conflicts of interest at all levels, and ensure the necessary independence and impartiality of the Commission."¹⁰³ In addition to breaching international obligations, both the failed and successful attempts to adopt tailor-made laws raise valid concerns over the genuineness of the state's commitment to fight against corruption.

⁹⁸ Zakon o VSTV BiH. https://www.pravosudje.ba/vstv/faces/kategorijeijesti.jspx?_afz=141&modul=1172&kat=1178

⁹⁹ Perić, 2020:26.

¹⁰⁰ "Expert Report on Rule of Law issues in Bosnia and Herzegovina." 2019

¹⁰¹ Perić, 2020:26. See also: Law on the High Judicial and Prosecutorial Council of BiH, art. 6(1)(d).

¹⁰² Perić, 2020:26.

¹⁰³ Country Review Report of Bosnia and Herzegovina. UNODC, (web), 2019. www.unodc.org

CONCLUSION

In recent years, Bosnia and Herzegovina has been shaken by serious grand corruption affairs, most of which have received purely media coverage and not reached court. While there is a generally held view that corruption in the country is a pressing challenge for democracy, the rule of law and the country's path towards the European Union, our research reveals that few effective attempts have been made to combat corruption. Our report shows all the deficiencies in the legislative and institutional framework for the prosecution of grand corruption, as well as the effects of systemic corruption on law-making in Bosnia and Herzegovina.

Just by looking at the number of indictments issued for corruption offences and the number of identified grand corruption cases, one can infer that grand corruption is not being prosecuted in Bosnia and Herzegovina. Most of the large-scale corruption affairs either terminate during the investigation phase or turn into years-long court processes, undermining the significance of timely and effective prosecution. Our research has also identified some of the key reasons for such a grim picture of grand corruption prosecution in Bosnia and Herzegovina. They can be categorised as follows: (1) a complex and decentralised justice system; (2) a lack of integrity in the judiciary; (3) a lack of capacity among prosecutors and judges; and (4) legislative gaps.

As a country with a highly decentralised criminal justice system where the lowest and highest courts both have jurisdiction over corruption offences, Bosnia and Herzegovina faces serious systemic challenges in the prosecution of corruption. According to the EU, "there are frequent conflicts of jurisdiction leading to transfers of cases between levels of government," which eventually slow down the process.¹⁰⁴ Moreover, owing to the constitutional organisation of the state and the lack of a supreme court at the state level, courts have not developed a common judicial practice in corruption cases, resulting in contradictory reasonings and interpretations of relevant laws. This issue calls for sectoral reform and the amendment of the relevant laws regulating the work of the judiciary.

There are almost no effective mechanisms to ensure integrity among the judiciary, leaving it vulnerable to political influence and pressure. Our analysis, which has identified a notable number of grand corruption and high-profile corruption cases involving members of the judiciary, demonstrates that the lack of independence and integrity in the judiciary of Bosnia and Herzegovina has recently evolved into a problem of corruption within the judiciary itself. While the growing number of members of the judiciary prosecuted in corruption cases points to some prosecutorial effort to fight corruption in the judiciary, it also signals the need for a more effective system of integrity checks to regulate the judiciary. The general perception is that members of the judiciary are under the influence or control of the ruling political elites, which is apparent from the attitude towards the judiciary expressed publicly by leaders of the ruling political parties (HDZ, SNSD and SDA).¹⁰⁵

¹⁰⁴ Analytical Report Accompanying the European Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union (2019).

¹⁰⁵ Perić, 2020:26.

One of the most important issues for the effective prosecution of the few grand corruption cases that do reach the courtroom is the length of court proceedings, which is a consequence of the lack of capacity among judges and prosecutors. In general, the length of court proceedings in Bosnia and Herzegovina is excessive. However, in criminal cases involving organised crime and corruption, investigations can drag on for years, sometimes even up to a decade. The organisation of the criminal justice system effectively gives control over criminal investigations to law enforcement agencies, relegating prosecutors to play only a formal part in the process without any proper role in planning investigations or prosecutions.¹⁰⁶ The lack of a proper strategy and plan for investigations has a detrimental effect that is most serious in grand corruption cases, especially financial, economic and public procurement-related offences, where the EU has recommended strengthening investigative capacities and resources.¹⁰⁷ The overview of the grand corruption cases identified in our research has highlighted the procedural mistakes and challenges of both judges and prosecutors. Judges do not show a tendency to spend time on hearings rationally, while the major procedural issues on the prosecution side relate to the presentation of evidence and the drafting of indictments. Essentially, case management in grand corruption cases is poor at all courts in the judicial system, indicating the low readiness of judges to ensure a timely process. Beyond the demonstrated flaws in their work, there is also poor cooperation between prosecutor's offices at different levels of government, as well as between prosecutors and judges.

Finally, it is important to recognise the impact of legislative gaps and deficiencies in the prosecution of grand corruption. Bosnia and Herzegovina is at an early stage of harmonising its relevant anti-corruption laws with European and international standards. Moreover, laws at different levels of government also need to be harmonised in order to ensure uniform national practice and law. Important grand corruption cases have resulted in impunity because of legal uncertainty over the use and legality of special investigative measures. Despite this deficiency and the importance of special investigative measures in uncovering organised crime and grand corruption, there have been no efforts to regulate this area of criminal procedure properly.

While several missions focus on monitoring corruption cases in Bosnia and Herzegovina, our report is unique in addressing grand corruption and tailor-made laws as key elements of state capture. It adds a new dimension to our understanding of how corrupt political elites tend to maintain the status quo by weakening the judiciary and strengthening their organised networks through the adoption of customised laws. Our research has also shown that legislatures in Bosnia and Herzegovina at all levels of government exhibit a low level of transparency when it comes to the adoption of laws that pose risks of corruption. Specifically, all tailor-made laws identified in our research have been adopted using the urgent legislative procedure, excluding public debate and any possibility of making amendments. The tailor-made laws have served to protect or expand the interests of ruling political elites, politicise the public administration or weaken capacities to fight corruption. According to our research, no sector is especially vulnerable to the risks of corruption. Nevertheless, a distinctive common feature of the identified tailor-made laws is their institutional character. The objective of most of the tailor-made laws is control over public institutions and the public administration. This illustrates the

¹⁰⁶ Perić, 2020:26.

¹⁰⁷ Analytical Report Accompanying the European Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union (2019).

nature of state capture in Bosnia and Herzegovina. Unlike in other countries where tailor-made laws are adopted for private or business interests, political parties are the main participants in state capture in Bosnia and Herzegovina. Ruling political elites use their position to propose laws that would enable them to control institutions or maintain the status quo. Rarely is the adoption of tailor-made laws in Bosnia and Herzegovina challenged effectively by opposition political parties. More often, pressure from civil society and the international community plays an important role in raising awareness of the true effects of these laws among the citizens and ruling elites.

Grand corruption cases have a direct effect on the functioning and performance of other branches of government, especially because officials facing corruption charges are reluctant to resign their official functions. Criminal investigations and prosecutions in court do not prevent defendants in grand corruption cases from continuing to perform their official functions. In many of the analysed cases (for example, *Fahrudin Radončić and others*, *Amir Zukić and others*, *Goran Salihović*, etc.), the defendants continued with their official functions in public institutions. This exposes them to potential victims and witnesses of their alleged offences, jeopardising the entire criminal process. From the standpoint of the rule of law, the continued performance of their official duties demonstrates the alarming power of political elites over public institutions and the ongoing processes within them. This is particularly worrying in cases where defendants are elected MPs and have a vote in the country's law-making processes. The most extreme examples have identified attempts by political elites in the legislature to amend the definitions of a corruption offence in the criminal code when members of the ruling political party stand charged with the offence in question.¹⁰⁸

Considering all the legislative deficiencies, lack of capacities and limited cooperation between the relevant institutions, it can be inferred that there is no enabling atmosphere for the judiciary to prosecute corruption. Our analysis indicates that the judiciary in Bosnia and Herzegovina lacks the capacity to tackle grand corruption effectively, and in certain cases fails to use existing resources and knowledge to ensure successful prosecution. Owing to the many inexplicable mistakes and cases of negligence, as well as allegations of corruption within the judiciary, there is growing evidence of political interference in the judiciary. On the other side, lawmakers demonstrate no willingness to strengthen the anti-corruption legislative framework, and in many cases make use of a non-transparent legislative procedure to protect the interests of political elites or other groups. Based on the findings of our report, our overall impression is that there are increasing efforts to further the politicisation of the government and weaken the independence of the judiciary, effectively strengthening the current state capture in Bosnia and Herzegovina.

➡ RECOMMENDATIONS

Relying on the results of the research, our report sets out recommendations to address impunity in grand corruption cases and the practice of undemocratic law-making. Based on the issues and challenges identified in grand corruption prosecution and democratic law-making, we propose the following recommendations:

➡ Adopt relevant legislation on the integrity and independence of the judiciary with appropriate implementation mechanisms:

- 1) Amend the Law on the High Judicial and Prosecutorial Council (HJPC) to address the conflicts of interest of all holders of judicial office, ensure implementation, and establish a rigorous and credible system of checks on the asset declarations of judicial office-holders.
- 2) Consider establishing a vetting procedure for all judicial office-holders.
- 3) Address the shortcomings in legislation covering the disciplinary proceedings against judicial office-holders, particularly by introducing proportional, appropriate and deterrent sanctions, and ensure effective implementation.

➡ Enhance the capacities of the judiciary to undertake grand corruption prosecution:

- 1) Amend the criteria for the performance appraisal and appointment of judicial office-holders.
- 2) Amend the criteria for the performance appraisal of prosecutors, enhancing the quality aspect of their work and reducing the quantity aspect.
- 3) Ensure stronger cooperation between the law enforcement agencies that are responsible for conducting investigations into corruption and the prosecutor's offices.
- 4) Increase the role of the prosecutor in planning and conducting criminal investigations in grand corruption cases.
- 5) Ensure better case management by judges and adherence to the optimum time frame defined for corruption cases.
- 6) Enhance the capacities of prosecutors in drafting indictments, through training and monitoring of their work.
- 7) Enhance the capacities of judges in drafting verdicts.

➡ Strengthen the criminal legislation framework:

- 1) Incorporate rules of evidence in criminal legislation, specifying the use and forms of special investigative

procedures to be followed in criminal investigation.

- 2) Precisely define the legality of evidence and the role of illegally obtained evidence in criminal procedure.
- 3) Implement precise provisions on the conditions and time frame for the use of temporary prohibition measures in the criminal process.
- 4) Incorporate clear rules on the application of prohibition measures for public officials sentenced for grand corruption.
- 5) Amend criminal legislation in the sections on sentencing, ensuring that sanctions are proportional to criminal offences.

➡ Adopt relevant anti-corruption laws and amend any that have serious gaps and deficiencies:

- 1) Amend conflict of interest legislation at the state level regarding the composition and rules of procedure for the special parliamentary commission so as to ensure its independence from political influence.
- 2) Amend conflict of interest legislation at the Federation of Bosnia and Herzegovina level and harmonise it with state legislation in relation to the competence of the Central Electoral Commission and the competence of an independent body responsible for enforcement of the law.
- 3) Develop and adopt comprehensive legislation on the confiscation of the proceeds of crime at all levels of government in Bosnia and Herzegovina.
- 4) Ensure effective enforcement of legislation on asset seizure and confiscation.

➡ Improve the transparency of the judiciary and the legislative branch:

- 1) Improve the digital transparency of judicial institutions by publishing indictments and verdicts on their websites.
- 2) Provide a database of final verdicts in grand corruption cases and ensure accessibility to citizens and civil society.
- 3) Precisely define the use of the urgent legislative procedure, minimising its use by legislatures at all levels of government in Bosnia and Herzegovina.
- 4) Improve the transparency of the work of the courts by ensuring the public's presence in the courtroom.
- 5) Adopt a law on lobbying at all levels of government in Bosnia and Herzegovina.

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