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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**BOSNIA AND HERZEGOVINA**

**REVISED DRAFT LAW**  
**ON COURTS OF BOSNIA AND HERZEGOVINA AND**  
**EXPLANATORY NOTE TO THE DRAFT LAW**

**DRAFT**

Pursuant to Article IV 4 a) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly of Bosnia and Herzegovina, at its \_\_\_\_\_ session of the House of Representatives, held on \_\_\_\_\_ 2022, and the \_\_\_\_ session of the House of Peoples, held on \_\_\_\_\_2022, adopted the following

**LAW  
ON COURTS OF BOSNIA AND HERZEGOVINA****a****Article 1  
(Subject matter)**

This Law shall regulate the continued existence of the Court of Bosnia and Herzegovina, the establishment of the High Court of Bosnia and Herzegovina, as a second instance court, the organization of courts, jurisdiction, internal organization, transparency of work, financing and other matters relevant to the organization and functioning of courts at state level.

**Article 2  
(Judicial Authority at the level of Bosnia and Herzegovina)**

- (1) Judicial authority at the level of Bosnia and Herzegovina shall be exercised by the Court of Bosnia and Herzegovina (hereinafter: the Court) and the High Court of Bosnia and Herzegovina (hereinafter: High Court).
- (2) The Court shall have jurisdiction to adjudicate in the first instance and the High Court shall adjudicate in the second instance and decide on other matters as prescribed under this Law.
- (3) The Court and the High Court (hereinafter: the courts) shall be established and abolished by law.

**Article 3  
(Seat and Seal)**

- (1) The seat of the Court shall be in Sarajevo, while the seat of the High Court shall be in Mostar.
- (2) The Courts shall have their seals in accordance with the Law on Seals of the Institutions of Bosnia and Herzegovina (Official Gazette of BiH, 12/98, 14/03 and 62/11).
- (3) The court's name, coat of arms and flag of Bosnia and Herzegovina shall be displayed on the building housing the courts.

**Article 4  
(Gender equality)**

Expressions used in this Law in one grammatical gender for the sake of clarity, shall pertain to both masculine and feminine gender without discrimination”.

## **PART TWO – BASIC PRINCIPLES THAT GOVERN THE WORK OF THE COURTS**

### **Article 5**

#### **(Composition and Number of Judges)**

(1) The total number of judges in each court shall be determined by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (hereinafter: the High Judicial and Prosecutorial Council).

(2) The composition of the Courts reflects proportional national representation according to the 1991 census.

### **Article 6**

#### **(Independence)**

(1) Judges shall independently perform their duties and take decisions in accordance with law and their personal interpretation of facts, while respecting human rights and the equality of arms, preserving their own personal authority and dignity of the court without any restrictions, free from undue influence, pressure, direct or indirect threats from any bodies, including bodies within the judicial system.

(2) Any form of influence on judicial decisions, as well as on the course and outcome of court proceedings shall be prohibited, especially any form of coercion towards judges, abuse of public authority and personal influence or any inappropriate behaviour that may jeopardise the independence of the judiciary.

### **Article 7**

#### **(Accountability)**

In the cases assigned to them, judges shall be required to safeguard the rights and freedoms of all persons equally, respecting their dignity during court proceedings, so as to ensure a fair trial for the parties, within a reasonable time.

### **Article 8**

#### **(Immunity)**

(1) Judges shall enjoy immunity in accordance with this Law.

(2) Judges cannot be held accountable for the expressed opinion or vote when making a judicial decision, unless a judge violates the law which constitutes a criminal offence.

(3) Bosnia and Herzegovina shall be accountable for damages suffered by the party to the proceedings, caused by a judge in the exercise of judicial duties.

### **Article 9**

#### **(Protection of rights)**

The Courts shall protect the rights and freedoms as guaranteed by the Constitution and laws of Bosnia and Herzegovina, and in their work shall ensure fair trial, uniform application of the laws, as well as the equality of all citizens before the law.

### **Article 10**

#### **(Review of court decisions)**

A decision of the Court may be reviewed, modified and revoked only by the High Court according to legal remedies in a procedure prescribed by the law.

**Article 11**  
**(Transparency)**

- (1) The work of the Courts shall be public.
- (2) Transparency of the work of the Courts shall be ensured through public hearings before the Courts, publication of the composition of the court, providing information to the public during court proceedings under the conditions provided for under the law and through publication of court decisions and other information of interest to the public.
- (3) The principle of transparency of work and exclusion of public are provided by procedural laws which the court applies.

**Article 12**  
**(Official Languages)**

- (1) Bosnian, Serbian and Croatian languages, as well as Latin and Cyrillic scripts shall be used in proceedings before the Courts and when the Courts address the parties.
- (2) The courts shall conduct proceedings and render decisions in the language and the script used by the judge in the proceedings or the language as decided by the presiding judge of the panel.
- (3) At the request of the party, the Court may ensure interpretation at the hearing or a translation of the court decision into the language used by the party in the proceedings, specifically - in criminal proceedings at court's expense, and in other proceedings at the expense of the party.

**Article 13**  
**(Judicial Robes)**

- (1) Judges shall wear robes during the public part of a trial and when publicly announcing decisions.
- (2) The High Judicial and Prosecutorial Council shall prescribe the design of judicial robes by a separate rulebook.
- (3) The High Judicial and Prosecutorial Council prescribes the forms and appearance of official identification, and they are issued by the Ministry of Justice of Bosnia and Herzegovina (hereinafter: the Ministry of Justice).

**Article 14**  
**(Signs of Affiliation)**

- (1) In the execution of their official and judicial duties, judges shall not display any signs or contents of religious, political, ethnic or other affiliation and must not take any actions that include a prayer or religious gestures or expressions.
- (2) Court President shall regulate in a separate rulebook the rules of conduct and dress code for staff members and parties in accordance with paragraph (1) of this Article.

**Article 15**  
**(Cooperation and Legal Aid)**

- (1) The Court, High Court and other courts in Bosnia and Herzegovina shall cooperate mutually and with other authorities in Bosnia and Herzegovina and with foreign courts in accordance with procedural laws.

(2) In cases falling within their jurisdiction, the Courts shall provide legal assistance to other courts in Bosnia and Herzegovina and abroad in accordance with the law and international agreement or in accordance with the principle of reciprocity.

(3) All institutions, organisations, organs and bodies of authority and legal persons exercising public powers shall duly provide the courts, at their request, with requested files, documents and other data necessary for the conduct of certain court proceedings.

## PART THREE - JURISDICTION OF THE COURTS

### CHAPTER I – Jurisdiction of the Court

#### Article 16 (Criminal Jurisdiction)

(1) The Court shall have jurisdiction in the first instance to adjudicate criminal offences as defined under the Criminal Code of Bosnia and Herzegovina and other laws adopted by the Parliamentary Assembly of Bosnia and Herzegovina.

(2) The court is further competent for criminal acts established by the laws of the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District when those criminal acts threaten the sovereignty, territorial integrity, political independence, state security and international subjectivity of Bosnia and Herzegovina;

(3) The Court shall also have jurisdiction for criminal offences in the field of terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, cybercrime and organised crime as regulated by laws of the Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District of Bosnia and Herzegovina:

- a) when these criminal offences are committed partly or totally in the territory of two entities, one or two entities and Brčko District, or outside the territory of Bosnia and Herzegovina; or
- b) when these criminal offences are committed partly or totally by unlawful activities committed by joint actions of criminal groups in the territory of two entities, one or two entities and Brčko District, or outside the territory of Bosnia and Herzegovina; or
- c) if the commission of those criminal offences resulted in a large-scale damage to the institutions of Bosnia and Herzegovina; or
- d) If such criminal offences are in contravention of the international obligations of Bosnia and Herzegovina.

(4) The Court shall also have the jurisdiction to:

- a) decide on issues concerning the implementation of international and inter-entity criminal regulations, including relations with Interpol and other international police bodies, such as the transfer of a convicted person, extradition and handover of a person that another state or an international court or tribunal request from any body in the territory of Bosnia and Herzegovina;

b) decide on the renewal of criminal proceedings concluded by a legally binding decision of the Court in accordance with the Criminal Procedure Code of Bosnia and Herzegovina.

**Article 17**  
**(Civil Jurisdiction)**

The Court shall have jurisdiction to:

- a) resolve property-related disputes between Bosnia and Herzegovina and the entities, between Bosnia and Herzegovina and the Brčko District, between the entities, between the entities and the Brčko District and between the institutions of Bosnia and Herzegovina that exercise public authority;
- b) resolve property-related disputes stemming from damages caused as a result of exercise of public duties of administrative bodies of Bosnia and Herzegovina, other institutions of Bosnia and Herzegovina or officials of such bodies and institutions, unless regulated otherwise by another law;
- c) conduct enforcement proceedings and proceedings for collection of claims, unless regulated otherwise by another law;
- d) resolve other disputes that fall under the jurisdiction of the Court according to the laws of Bosnia and Herzegovina or an international agreement.

**Article 18**  
**(Administrative Jurisdiction)**

The Court shall have jurisdiction to:

- a) decide on complaints against final administrative acts, including administrative silence, filed by institutions of Bosnia and Herzegovina and its bodies, public agencies, public corporations, institutions of the Brčko District and other organisation as provided by the law of Bosnia and Herzegovina, issued while exercising public authority;
- b) assess the legality of final administrative acts issued pursuant to the laws of Bosnia and Herzegovina, in the discharge of public duties of the authorities of Bosnia and Herzegovina referred to under item a) of this Article, for which the law does not provide judicial protection apart from the administrative dispute;
- c) decide on requests for protection of freedoms and rights guaranteed by the Constitution of Bosnia and Herzegovina, if these are violated by a final individual act or action of an official of the institution of Bosnia and Herzegovina and its bodies, institutions of the Brčko District and other organisations established by the laws of Bosnia and Herzegovina, adopted in the exercise of public authority;
- d) decide on reopening of proceedings;
- e) resolves other disputes if the jurisdiction of the Court is established under the laws of Bosnia and Herzegovina or an international agreement.

**CHAPTER II – Jurisdiction of the High Court**

**Article 19**  
**(Subject Matter Jurisdiction)**

(1) The High Court shall have jurisdiction to decide on:

- a) regular legal remedies against decisions of the Court;
- b) legal remedies against decisions of its own panels, if so regulated under the law;
- c) extraordinary legal remedies against final and binding decisions of the Court, when prescribed by Law.

(2) The High Court shall also have jurisdiction to:

- a) decide on appeals against decisions of the Central Election Commission of Bosnia and in conflict of interest proceedings;
- b) resolve conflicts of jurisdiction between courts from different entities, between courts of the entities and the Brčko District, and between the Court and any other court. Such decisions cannot be appealed;
- c) decide on motions for the transfer of jurisdiction from the Court to another court in the entity or Brčko District, in cases where the Court cannot proceed as a result of actual or legal grounds;
- d) decide on the motion for the transfer of jurisdiction from the courts of Brčko District to courts having the subject matter jurisdiction of entities or the Court, in cases where courts of the Brčko District cannot proceed as a result of actual or legal grounds;

- e) decide on the motion for the transfer of jurisdiction from the courts of one entity to the court of another entity or the Court or the courts of the Brčko District, in cases where the courts cannot proceed as a result of actual or legal grounds;
- f) resolve all other cases as provided under a law of Bosnia and Herzegovina or an international agreement.

#### **Article 20**

##### **(Initiating Constitutional Review of Legislation)**

Courts may initiate the procedure for constitutional review of legislation before the Constitutional Court of Bosnia and Herzegovina.

### **PART FOUR - INTERNAL ORGANISATION OF COURTS**

#### **CHAPTER I - Management of courts and work in sessions**

#### **Article 21**

##### **(Court Presidents)**

- (1) The Court and the High Court shall have court presidents.
- (2) The President of the Court is a judge, who in addition to his/her judicial duties performs the following:
  - a) represents the court before state bodies and organisations.
  - b) assigns judges to different departments and panels, unless this Law prescribes differently.
  - c) appoints a replacement for the judge in case of recusal, as decided at the court's general session;
  - d) sets the date for the general and extended session,
  - e) convenes and manages the work of the general and extended sessions of the court;
  - f) prepares and executes the budget of the court;
  - g) organizes the work of the court and manages court staff;
  - h) issues regulations in accordance with this Law and internal acts in accordance with the rules of procedure of that court;
  - j) other tasks necessary to improve the work organization of the court.
- (3) At the general session of the court, the President proposes the work plan, which is prepared at the beginning of each calendar year.
- (4) The court president can transfer some of his/her competencies to a judge, registrar or general secretary of that court.
- (5) The court president shall appoint the judge to deputize for him/her while absent.

#### **Article 22**

##### **(General Plenum)**

- (1) The general plenum of the court shall consist of the president and all judges of the respective court.
- (2) The general plenum, in accordance with the principle of judicial autonomy, shall decide on all matters relevant for the functioning of the court, except those that this Law expressly places under the authority of the president or other person or body of that court.

(3) The general plenum shall be convened by the President of that Court and must be convened when requested by a court department or at least five judges.

(4) The general plenum shall be chaired by the respective court's president, and in cases when it is deciding on the recusal of the court president, the general plenum will select the deputy chair.

(5) At the general plenum, the Court shall:

- a) adopt the rules of procedure for the court;
- a) adopt the annual work plan;
- c) decide on other important issues.

(6) Decisions in general plenum shall require presence of at least two thirds of judges and decisions shall be adopted by majority vote. A judge may not abstain from voting, but may enter a dissenting opinion.

(7) The manner of work of the general plenum shall be regulated by the rules of procedure.

### **Article 23** **(Extended Plenum of the High Court)**

(1) The High Court may hold an extended plenum of the court, comprising the president and judges of the High Court, the President of the Court and the Heads of Court Departments.

(2) Sessions of the extended plenum shall discuss the current issues of judicial practice, analyse the need for professional training of judges, legal officers, senior legal officers and advisers, and perform other tasks defined by law.

(3) Decisions in extended plenum shall require presence of at least two thirds of judges and decisions shall be adopted by majority vote of the judges present.

(4) The work of the extended plenum shall be regulated by the rules of procedure, endorsed by a majority vote in the extended plenum, following the proposal of the President of the High Court.

### **Article 24** **(Collegium of the court president)**

(1) When needed, and at least once every three months, the court president shall convene a collegium, comprising the president, heads of divisions, registrar and, as necessary, other staff members as designated by the president of the respective court.

(2) The Collegium shall consider all matters related to the tasks falling within the scope of that Court, and in particular:

- a) whether the court is up to date with its caseload and results in terms of work program for the previous period;
- b) the status of each judicial portfolio in each of the divisions;
- c) handling of priority cases;
- d) way of improving work, professional training of judges and other employees;
- e) work reports, and other matters important for the work of the court, set out in the rules of procedure.

(3) Based on the analysis and results of the session, the court president can adopt measures to ensure the court works better and is more current with its caselaw.



## **CHAPTER II - Court Divisions and Sections**

### **Article 25**

#### **(Court Divisions)**

(1) The Court and the High Court shall may establish court divisions to decide on matters falling under the same legal field, such as:

- a) Criminal Division;
- b) Civil Division;
- c) Administrative Division.

(2) An enforcement division may also be established in the Court, for the purpose of implementing the Law on Enforcement Procedure before the Court of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 18/03).

(3) Divisions shall be managed by the Head of Division, appointed and dismissed by the President of that Court.

### **Article 26**

#### **(Sessions of Court Divisions)**

(1) The Head of Division shall convene and manage the session of the court division.

(2) Sessions of court divisions shall consider issues of interest to the performance and the improvement of work methodology of the division, as well as harmonising practice on legal and other issues of the Division.

(3) The court president and any of the judges of a division, may initiate a session of the court division to discuss proper application of law and to take legal views.

### **Article 27**

#### **(Departments)**

(1) All courts may establish departments within Divisions.

(2) Establishment of departments shall be regulated by the court's rules of procedure.

### **Article 28**

#### **(Work Methodology)**

(1) Courts shall sit in panels of judges, unless the law stipulates that a matter may be handled by an individual judge.

(2) Unless prescribed otherwise by another law, regular and extraordinary legal remedies filed against decisions of the Court shall be decided by the High Court sitting in a panel of three judges.

### **Article 29**

#### **(Rules of Procedure)**

(1) Rules of Procedure shall define the rules of functioning of that court in accordance with the principle of judicial autonomy, and in particular the rules for the general session and the president, court divisions, departments and services of that court when handling matters within their competence.

(2) The rules of Procedure referred to in paragraph (1) of this Article shall be adopted by the general plenum), at the proposal of the president of that court, with the consent of the High Judicial and Prosecutorial Council.

## CHAPTER III – Court Administration and Staff Members

### Article 30

#### (Court administration)

Court administration in the Court and the High Court consists of the Office of the Court President, Office of the Registrar and the Secretariat.

### Article 31

#### (Cabinet of the Court President)

The Cabinet of the Court President performs tasks to support the President of that court, in particular tasks such as protocol, public relations, international cooperation and other tasks in accordance with this Law ~~and the rulebook on internal organization and systematization of jobs for that court (hereinafter: the Rulebook on Internal Organization)~~. and by the rules of procedure.

### Article 32

#### (Office of the Registrar)

(1) The Office of the Registrar is an organizational unit of the court administration responsible for providing legal and professional support to judges when handling cases falling under the jurisdiction of that court.

(2) The Registrar, in cooperation with the Court President, manages the Office of the Registrar and performs tasks in accordance with the ~~Rulebook on Internal Organization~~ rules of procedures.

(3) The Registrar shall be appointed by the Court President, following the competitive procedure.

(4) A law graduate with the bar exam of the VII degree, i.e. 240 ECTS points per Bologna cycle of study can be appointed as the Court's Registrar, if they have at least six years of experience in ~~complex legal work after the bar exam and relevant managerial experience.~~

### Article 33

#### (Secretariat)

(1) Secretariat is an organizational unit of the court administration responsible for performing legal, administrative, material, financial and technical tasks necessary for the functioning of that court.

(2) The Secretary General, under the supervision of the Court President, shall manage the Secretariat and perform tasks in accordance with the Rulebook on Internal Organization of that court.

(3) The Secretary General shall be appointed by the Court President, following the competitive procedure.

(4) A law graduate with the bar exam of the VII degree, i.e. 240 ECTS points per the Bologna cycle of study and minimum five years of relevant work experience and relevant experience in organizational work after passing the bar exam, may be appointed as the Secretary General.

### Article 34

#### (Staff Members)

(1) Staff members in both courts, within the meaning of this Law, in addition to the Registrar and Secretary General, shall include professional court staff, administrative and support staff.

(2) Staff members shall be appointed by the Court President, following competition procedure.

(3) The number of staff members, job classification, job description, powers and responsibilities, required qualifications and other employment conditions in each court shall be specifically defined under the Rulebook on Internal Organisation.

### **Article 35**

#### **(Professional Court Staff)**

(1) Professional Court Staff shall consist of Legal Associates, Legal Advisors/assistants and Legal Advisors.

(2) Professional court staff shall assist judges in their work, analyse legal issues, prepare cases for trial, draft decisions and perform other tasks, either independently or under supervision and instruction of a judge, necessary for legal, timely and efficient functioning of the court division or departments, in accordance with the Law and the Rulebook on Internal Organization.

### **Article 36**

#### **(Administrative and support staff)**

(1) Administrative staff shall perform legal, administrative, IT and material and financial tasks, while the support staff shall perform technical and other supporting tasks important for the work of court.

(2) Regulations on the rights and obligations of employees in the administrative bodies of Bosnia and Herzegovina shall also apply to administrative and support staff in courts.

### **Article 37**

#### **(Evaluations)**

Performance of the Registrar, Secretary General and staff members in each court shall be evaluated by the Court President once a year.

### **Article 38**

#### **(Accountability)**

Staff members of courts shall be accountable for violations of official duties in accordance with the employment regulations applied to employees and civil servants in the institutions of Bosnia and Herzegovina.

### **Article 39**

#### **(Salaries)**

(1) Salaries and remuneration and certain material rights of the Registrar, the Secretary General and professional court staff shall be determined under the Law on Salaries and Remunerations in Judicial and Prosecutorial Institutions of Bosnia and Herzegovina (Official Gazette of BiH, 90/05, 32/07 and 77/20).

(2) Salaries and remuneration of administrative and support staff shall be determined under the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina (Official Gazette of BiH, 50/08, 35/09, 75/09, 32/12, 42/12, 50/12, 32/13, 87/13, 75/15, 88/15, 16/16, 94/16, 72/17, 25/18, 32/20 and 65/20).

**Article 40****(Criteria for Determining the Number of Employees)**

(1) The High Judicial and Prosecutorial Council of Bosnia and Herzegovina shall establish the criteria for determining the total number of employees in each court, necessary for timely and efficient performance.

(2) Rulebook on Internal Organization and Job Classification shall be adopted by the president of the respective court, in accordance with the criteria from paragraph 1 of this Article.

**Article 41****(Personnel Records)**

Personnel records shall be maintained for staff members of the courts, in **accordance with the Instruction on contents and manner of record-keeping for the personal files of staff members issued by the president of the respective court.**

**Article 42****(Court Trainees)**

(1) A law graduate of the VII degree, i.e. 240 ECTS points per Bologna cycle of study may be hired as a court trainee for practical training if they meet general requirements set out in the Labour Law for the Institutions of Bosnia and Herzegovina (Official Gazette of BiH, 26/04, 7/05, 48/05, 50/08, 60/10, 32/13 and 93/17).

(2) Legal trainee shall be gradually assigned all kinds of duties to allow him/her to gain practical experience.

(3) Legal trainees shall be hired for a fixed term until they meet the requirements for taking the bar exam, but no longer than two years, in the way prescribed in the Decision on the conditions and method of recruiting trainees with higher education to institutions of Bosnia and Herzegovina (Official Gazette of BiH, 52/05, 102/09 and 9/15).

(4) The courts may recruit a law graduate of the VII degree, i.e. 240 ECTS points per Bologna study cycle without establishing an employment, for the purpose of professional training for independent work, in accordance with provisions of Decision from paragraph (3) of this Article, related to volunteers.

(5) The number of court trainees, as well as the recruitment requirements for each court shall be established in the Rulebook on Internal Organization. Selection of trainees shall be made based on public vacancy published by the president of the respective court.

**CHAPTER IV - CONFIDENTIAL DATA PROTECTION****Article 43****(Confidentiality)**

Judges and staff members of the court shall be required to preserve confidentiality of everything they learn during their work about the parties to proceedings or the legal and factual circumstances of their cases and shall be required to keep the confidentiality of the information not available to the public.

**Article 44****(Official secret)**

(1) Judges and staff members of the court shall be required to keep official secret, regardless of the way it became known to them.

(2) Official secret shall be understood to mean in particular:

- a) all information designated as an official secret by law or other regulation

- b) all information designated as an official secret by general acts of state bodies, legal persons and other institutions;
- c) information and documents specifically designated as official secret by state authorities, legal persons and other institutions, and
- d) information and documents designated as official secret by the court president or authorized court official.

(3) The obligation to keep an official secret shall continue even after the termination of work in the court.

(4) Court President or another person authorized by him/her may release a judge or another employee of the court, or a court interpreter or expert, from the obligation to keep official secret, if there exist justified reasons for doing so in an individual case.

(5) The decision to release the Court President from the obligation to keep an official secret shall be made by the President of the High Court. The decision to release the President of the High Court shall be made by the General Plenum of that Court.

## **PART FIVE - JURISDICTION OF THE MINISTRY OF JUSTICE OF BOSNIA AND HERZEGOVINA**

### **Article 45**

#### **(Jurisdiction of the Ministry of Justice)**

(1) In terms of court administration, the Ministry of Justice shall have the following jurisdiction:

- a) preparation of draft laws and other regulations ~~to prescribe the establishment, jurisdiction and proceedings before the Courts;~~
- b) to monitor the implementation of this Law and other regulations relating to organisation ~~and operation~~ and work of the Courts;
- d) to collect statistics and other information about the work of the Courts;
- e) to monitor the performance of tasks of court administration;
- f) ~~to cooperate with the president in resolving the complaints received by the Ministry, relating to court administration;~~
- h) other activities provided by this Law.

(2) The Courts shall be required to submit to the Ministry of Justice all the information they require for the exercise of jurisdiction under paragraph (1) of this Article.

(3) The Courts shall submit annual reports on their activities for the previous year to the Ministry of Justice, by 31 March of the current year.

(4) The Ministry of Justice shall perform its duties in a way that ensures the independence of the Courts and must not in any way influence the work of the Courts in connection with individual cases.

### **Article 46**

#### **(Supervision of Court Administration)**

(1) Supervision over proper performance of court administration shall be exercised by authorised administrative inspectors of the Ministry of Justice.

(2) In the exercise of duties relating to court administration, the Ministry of Justice shall cooperate and submit all information to the High Judicial and Prosecutorial Council.

**Article 47**  
**(Court Police)**

The Court Police of Bosnia and Herzegovina shall provide assistance to the Courts and shall enforce other orders of the Courts in accordance with the Law on Court Police of Bosnia and Herzegovina (Official Gazette of BiH, 3/03, 21/03 and 18/13) and bylaws adopted on the basis of that Law.

**Article 48**  
**(Complaints against judges)**

(1) A complaint against a judge or a court president, filed by a natural or legal person with the Ministry of Justice, shall be forwarded to the High Judicial and Prosecutorial Council for its further action, without any delay.

~~(2) A copy of the complaint shall be forwarded to the court president, and if the complaint is against the Court President it shall be forwarded to the President of the Appellate Court, or if it is against the President of the High Court, it shall be forwarded to the General Plenum of that Court.~~

**PART SIX - FINANCING THE WORK OF THE COURTS**

**Article 49**  
**(Operating Funds)**

(1) Bosnia and Herzegovina shall provide financial and any other support to ensure smooth and efficient functioning of the Courts.

(2) The Courts shall have their own budgets, which form part of the Budget of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

**Article 50**  
**(Budget)**

(1) Before the each budget year, the Presidents of the Courts shall submit budget proposals to the High Judicial and Prosecutorial Council to obtain its opinion.

(2) In accordance with the opinion of the High Judicial and Prosecutorial Council, the Courts may adjust the budget proposal, and shall deliver their final proposal to the Ministry Finance and Treasury of Bosnia and Herzegovina along with the opinion of the High Judicial and Prosecutorial Council.

(3) The Presidents of the Courts shall be entitled to attend and argue their proposals at sessions of the Parliamentary Assembly of Bosnia and Herzegovina and relevant committees of the Parliamentary Assembly of Bosnia and Herzegovina whenever discussion is held or decisions taken regarding the issues of budget for their respective court.

(4) Presidents of the Courts shall be in charge of preparing and executing the budget of the respective Court.

(5) At the end of each budget year, the Presidents of the Courts shall report to the Parliamentary Assembly of Bosnia and Herzegovina on the execution of the budget of the respective Court.

**PART SEVEN – TRANSITIONAL PROVISIONS**

**Article 51**  
**(Continuity of the work of the Court)**

(1) The Court shall continue its uninterrupted performance.

(2) The President of the Court, judges and employees of the Court shall retain all rights acquired before the entry into force of this Law.

(3) The President or a judge of the Court shall have the right to participate in the procedure for electing judges of the High Court and, if appointed, they shall retain the status in accordance with the previous position until the date specified in the Decision on the commencement of the work of the High Court.

(4) The Appellate Division of the Court shall cease to operate on the day specified in the Decision on the commencement of work of the High Court.

(4) In agreement with the President of the Court, the President of the High Court may take over employees, with their consent, to perform the same or similar positions to those they held in the Court.

#### **Article 52**

##### **(Ensuring Conditions for the Commencement of Work of the High Court)**

(1) The Ministry of Finance and Treasury of Bosnia and Herzegovina and the Ministry of Justice of Bosnia and Herzegovina shall ensure the necessary material and financial conditions for the commencement of the work of the High Court no later than six months from the date of entry into force of this Law.

(2) After ensuring the material and financial conditions and staffing, the High Judicial and Prosecutorial Council shall issue a Decision on the commencement of the work of the High Court, which shall also include a provision on the fulfilment of the conditions for the commencement of work.

(3) The Decision from paragraph (2) of this Article shall be published in the Official Gazette of Bosnia and Herzegovina.

#### **Article 53**

##### **(Selection of Judges to the High Court)**

(1) The High Judicial and Prosecutorial Council shall issue a decision determining the required number of judges for the High Court, within 60 days from the date of entry into force of this Law.

(2) Within 60 days from the issuance of the Decision on the Required Number of Judges, the High Judicial and Prosecutorial Council shall carry out the selection and appointment procedure for the President and within additional two months carry out the selection and appointment of judges for the High Court.

(3) Selection of the President and judges of the High Court shall be carried out according to the vacancy procedure prescribed by the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina under the same conditions that apply to the appointment of the President and judges of the Court.

(5) The term of office of judges and the President of the High Court shall be regulated by the provisions of the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina governing the term of office of judges and the President of the Court.

(5) The President of the High Court shall commence his/her work on the effective date of the Decision on the Commencement of the High Court.

#### **Article 54**

##### **(Salaries and Remunerations in the High Court)**

(1) In determining salaries, remuneration and other earnings of the president, judges and professional staff in the High Court, the Ministry of Justice shall submit into the procedure a draft Law on Amendments to the Law on Salaries and Other Remunerations in Judicial and Prosecutorial Institutions at the level of Bosnia and Herzegovina.

(2) Pending the effective amendments to the Law from paragraph (1) of this Article, the conditions for the President, judges and professional staff in the High Court shall be the same as for the President, judges and professional staff in the Court.

**Article 55**  
**(Evaluation)**

(1) The performance of judges and presidents of the Courts shall be evaluated at least once every three years in accordance with the criteria and procedure established by the High Judicial and Prosecutorial Council.

~~(2) Newly elected judges for the first three years of work shall be evaluated once a year, and after that period, the evaluation shall be carried out in accordance with paragraph (1) of this Article.~~

(3) The criteria from paragraph (1) of this Article shall be available to judicial office holders.

(4) The performance evaluation for judges shall be done by the President of that Court, the performance evaluation of the President of the Court shall be done by the President of the High Court.

(5) The President of the High Court shall be evaluated by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina.

**Article 56**  
**(Regulating Internal Organisation and Job Classification at Courts)**

(1) The High Judicial and Prosecutorial Council shall establish the criteria for determining the total number of employees in the High Court, within 30 days from the day of issuance of the Decision on the Required Number of Judges in the that Court.

(2) Within 30 days from taking the office, based on the criteria referred to in paragraph (1) of this Article, the President of the High Court shall adopt the Rulebook on Internal Organisation and Job Classification. The President of the Court shall amend the current or adopt a new Rulebook.

**Article 57**  
**(Disposal of Cases)**

(1) Cases that fall under the jurisdiction of the High Court received by the Appellate Division of the Court, shall be taken over by the High Court.

(2) The handover of cases referred to in paragraph (1) of this Article shall be done by Presidents of the Courts, within 30 days from the date when the President of the High Court takes the office.

(3) The President of the High Court shall, without delay, ensure the smooth disposal of cases in accordance with this and other laws.

(4) Judge of the Court who is appointed a judge of the High Court cannot adjudicate in cases he/she was seized of in the first instance.

**PART EIGHT – FINAL PROVISIONS**

**Article 58**  
**(Amendments to Other Laws)**

(1) Within 90 days from the date of entry into force of this Law, the Ministry of Justice shall submit into the adoption procedure the draft Law on Amendments to the Law on the High Judicial and Prosecutorial



Council of Bosnia and Herzegovina, to prescribe the conditions for the appointment and mandate of the President and judges of the High Court.

(2) Within 90 days from the date of entry into force of this Law, the Ministry of Justice shall submit into the adoption procedure the draft of the Law on Amendments to the Law on Salaries and Other Remunerations in Judicial and Prosecutorial Institutions at the level of Bosnia and Herzegovina, to determine salaries, remunerations and other earnings for judges and professional staff of the High Court.

**Article 59**  
**(Bylaws)**

Bylaws needed for the implementation of this Law shall be adopted by competent institutions or the existing ones shall be harmonised with this Law within the time limits specified herein, and until then, the existing acts shall apply provided they are not in conflict with this Law.

**Article 60**  
**(Termination of Other Laws)**

(1) With the Decision on the Commencement of the High Court enters into force, the Law on the Court of Bosnia and Herzegovina - Revised Text (Official Gazette of BiH, 49/09, 74/09 and 97/09) shall be terminated.

(2) Exceptionally from the provision of paragraph (1) of this article, the provisions of Art. 9.. 10.. 13.. 16, 20 and 23 of the Law on the Court of Bosnia and Herzegovina - The revised text ("Official Gazette of BiH", no. 49/09, 74/09 and 97/09) are valid until the adoption of the Decision on the commencement of the work of the High Court of Bosnia and Herzegovina.

**Article 61**  
**(Entry into force)**

This Law shall enter into force on the eighth day from being published in the "Official Gazette of BiH".

PA BiH, number \_\_\_\_\_ /22  
\_\_\_\_\_ 2022

S a r a j e v o

**SPEAKER**

**House of Representatives**  
**Parliamentary Assembly of BiH**

**SPEAKER**

**House of Peoples**  
**Parliamentary Assembly of BiH**

## EXPLANATORY NOTE

### (3) I - CONSTITUTIONAL BASIS FOR ADOPTING THE LAW

The constitutional basis for adopting this Law is contained in Article III 1. g) of the Constitution of Bosnia and Herzegovina, according to which the international and inter-entity criminal law enforcement, including relations with Interpol falls under the responsibility of the Institutions of Bosnia and Herzegovina, and in Article IV 4. a) of the Constitution of Bosnia and Herzegovina according to which the Parliamentary Assembly of Bosnia and Herzegovina is competent to enact laws necessary to implement the decisions of the Presidency or carry out the responsibilities of the Assembly of Bosnia and Herzegovina under the Constitution of Bosnia and Herzegovina.

### II - REASONS FOR THE ENACTING THE LAW

It is the obligation of the state of Bosnia and Herzegovina to provide citizens with legal security and certainty, which is an integral element of the principle of the rule of law in a democratic society. Proceeding from the need to ensure judicial protection at the level of BiH, which is in accordance with the safeguards enshrined in the ECHR, the High Representative adopted the Law on the Court of BiH, drafted by the Venice Commission of the Council of Europe. After that, the BiH Parliamentary Assembly adopted the aforementioned Law in the identical text, which was later amended and supplemented.

Thus, the establishment of the Court of Bosnia and Herzegovina enabled the provision of judicial protection in matters that fall under the jurisdiction of the state of Bosnia and Herzegovina, which according to the Constitution of Bosnia and Herzegovina is a prerequisite for the rule of law in Bosnia and Herzegovina. The Court has its subject-matter jurisdiction in criminal law as well, the basis of which is Article III paragraph 1 point g. of the Constitution of BiH, which stipulates that the competence of BiH institutions is to enforce international and inter-entity regulations, including relations with Interpol. The provisions of the Law regulate the matters of subject-matter jurisdiction and composition of the Court. The term subject-matter jurisdiction means the authority of the Court to decide on a certain type of cases or to undertake certain types of procedural actions or to perform other tasks prescribed by law. Accordingly, the Court has jurisdiction over criminal offenses set out in the Criminal Code of BiH and other laws of BiH. In addition to the aforementioned legal provisions of the Law on the Court of Bosnia and Herzegovina, it is also prescribed that the Court is competent **to decide on appeals, that is, legal remedies against decisions made in the first instance.**

As for the appeals, there is a **two-instance rule** set out in the Criminal Procedure Code of Bosnia and Herzegovina, according to which an **appeal filed against a judgement is reviewed by the appellate panel of the Court and decides on it in a session of the Panel or on the basis of a hearing** (Art. 305.). Therefore, an appeal filed against the judgement of the Court of Bosnia and Herzegovina is reviewed by the same Court (appellate panel) and decided on, which contradicts the established definition that: "As the most important legal remedy, appeal against a first-instance judgement is defined as a regular, devolutive, suspensive and complete legal remedy available to the parties and other persons authorized by law, which asks the higher court, due to certain deficiencies, to modify, reverse entirely or partially the first instance judgement and to replace it with the judgement of the higher court."

Therefore, the right to appeal in criminal proceedings is a legal, constitutional, conventional and one of the basic human rights. The entire procedure following regular legal remedies, including the trial before the second-instance court, is primarily an appeal procedure, examination of its merits and deciding the appeal. For this reason, the right to appeal in criminal proceedings is safeguarded in national and international criminal law and represents the central right of the subjects of the appeal to challenge all irregular and unlawful judgements rendered by the first-instance courts.

It is not disputed that the right to appeal is a statutory right at the level of the state of Bosnia and Herzegovina because Article 292 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH) expressly prescribes the right to appeal and the deadline for filing an appeal against judgements made in the first instance. However, Article 2, paragraph 3, item a of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right to an effective appeal, and Article 14, paragraph 5 of the ICCPR provides the right to appeal to any person found guilty of a criminal offense, in a way that such persons have the right to have their guilt and conviction reviewed by a higher court in accordance with the law. Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides the right to an effective legal remedy before the domestic state body if the rights recognized in this Convention are violated, so that the effectiveness must be institutional, real, corrective and material. Article 2 of Protocol 7 to the ECHR guarantees the right to appeal in criminal cases so that anyone convicted of a criminal offense has the right to have their appeal **decided by a higher court in accordance with the law**. Article 47 of the Charter of Fundamental Rights in the European Union prescribes the right to an effective remedy and a fair trial.

In two cases (AP 1785/06 dated 30 March 2007 and AP 767/04 dated 17 November 2005) the Constitutional Court of Bosnia and Herzegovina considered the above-mentioned issue, i.e. whether the conduct of first-instance and second-instance proceedings at the same court (the Court of Bosnia and Herzegovina) constitutes a violation of the rights guaranteed by the ECHR and the Constitution, and consistent with the case-law of the ECHR, it rejected the appellant's allegations as unfounded and concluded that there was no violation of the standard relating to the right to a fair trial from Article II/3e of the Constitution of BiH and Article 6 of the ECHR.

In accordance with the criminal procedure codes of the entities and the Brčko District of BiH, the purpose and procedural goal of the appeal is primarily to prevent the first-instance judgement to become final and binding, and that after removing all the defects in the challenged judgement pointed out by the subjects of the appeal, the second-instance court can issue a new, more favorable judgement for them . **Therefore, the second-instance court makes a decision on all factual or legal issues contested on one or more grounds of appeal.**

**Therefore, both domestic and international legal acts justify the right to have one's appeal decided by a higher court in accordance with the law, that is, by another, independent and impartial court.**

The remedies available to claimants must be sufficiently certain not only in theory but also in practice, and if they are not, they will lack the necessary availability and effectiveness. That is, examining one matter before two court instances, by two independent courts, provides much more guarantees for the regularity and legality of the procedure, and also for the complete protection of the rights and interests of the parties to the proceedings.

It is indisputable that the current review of court decisions by the Appellate Division of the Court of Bosnia and Herzegovina does not contradict Article 2 of Protocol 7 ECHR or Article 14 paragraph 5 of the ICCPR. However, given that the judges of the Court of BiH are appointed by the HJPC BiH to the Court of BiH, and not to any of the Divisions within that Court, and that, in accordance with legal powers, the assignment of judges to Division, including to the Appellate Division, is done by the President of the Court of BiH, while neither the HJPC Law nor the Law on the Court of BiH provide additional criteria for assignment of judges to the Appellate Division, and that there is not a single provision in these laws that guarantees the permanence of the appointment of judges in the Appellate Division of the Court of Bosnia and Herzegovina, such manner of assigning judges to the Appellate Division of the Court of Bosnia and Herzegovina does not provide sufficient guarantees regarding their internal independence, i.e. the independence of each judge in the decision-making process compared to other judges and the president of the court. The existing method of assigning judges to the Appellate Division of the Court of BiH also undermines the public perception of the

actual internal independence of the judges in that Division. All the above reasons go in favour of priority of and justification for the establishment of a separate High Court of BiH (second instance), which would be organizationally and functionally separate from the Court of BiH, being the court of first instance, to decide on appeals against all decisions made in the first instance by the Criminal and Administrative Divisions of the Court of BiH.

**Regarding the institutional reform of the appellate system in the Court of Bosnia and Herzegovina, at all meetings of the Structured Dialogue on Justice between the EU and Bosnia and Herzegovina, the European Commission demanded that:**

*"a way be found to strengthen the objectivity of the parameters established in Article 7.2 of the Law on the Court of Bosnia and Herzegovina, in order to eliminate the possibility of abuse or inappropriate application of this Article..... taking into account relevant conclusions from the opinion of the Venice Commission".*

TAIEX seminars, opinions of the Venice Commission, proposals by the representatives of institutions that participated in preparing the Draft Law have offered the most favorable solution for Article 7, paragraph 2 of the Law on the Court of BiH, which was assessed as the most acceptable and correct, and it removed *"Too broad discretionary assessment that is given to the court and that endangers legal certainty, the rule of law and the basic values of a democratic society (verdict of the European Court of Human Rights, Strelac et al. vs. Germany)"*.

### III - COMPLIANCE WITH THE EU LEGISLATION

European standards require that every person, when their civil rights and obligations are being decided on, has the right to a fair trial and a public hearing within a reasonable time before an independent and impartial court established by law, including the right to a legal remedy. All international acts, as well as the legislation of other countries, indicate that it is necessary to ensure the right of appeal to every person, i.e., that the first-instance judgements should be reviewed by an independent court in accordance with the law. It is the practice in most countries that the second-instance court decides on all factual or legal issues contested as one or more grounds of appeal, but that the domestic law should regulate the organization of the judiciary.

Therefore, the "right to an effective legal remedy before a domestic state body" derived from international legal acts obliges all member states to individually regulate this area in a way that corresponds to its constitutional system, state set-up, etc. Therefore, the matters regulated by this Draft Law is not regulated by any of the legally binding EU documents.

### IV - IMPLEMENTING MECHANISMS AND ENSURING COMPLIANCE

The implementation of this Law is ensured through the existence of the Court of Bosnia and Herzegovina, the Prosecutor's Office of Bosnia and Herzegovina, as well as the High Court of Bosnia and Herzegovina, which is established by this Law. Therefore, this Law establishes a court whose jurisdiction will primarily be to decide on appeals filed against decisions, that is, judgements of the Court of Bosnia and Herzegovina.

### V – EXPLANATION OF CERTAIN SOLUTIONS

#### e) Part one - General provisions Art. 1 -4.

Pursuant to the Uniform Rules for Drafting Legal Regulations in BiH Institutions, **Article 1** of a Draft Law should use the wording for the subject matter to state "the basic content of the regulation that applies to the entire content of the legal regulation." That is, this Article confirms the continuity of the Court of BiH, but also the establishment of a new High Court as a second instance court, and determines other issues that are elaborated and regulated by this by regulation.

At its 91st plenary session, held on 15-16 June 2012, the Venice Commission adopted the Opinion on Legal Security and Independence of the Judiciary in Bosnia and Herzegovina and emphasized the

need to establish a separate court, as a second-instance court for reviewing decisions adopted by the Court of BiH, which would be independent and would create a greater degree of trust in the fairness of its judgements and generally in the justice system. The Opinion encouraged the process that had already been started at the time on preparing the draft law and pointed to the need to consider the introduction of a single Law on Courts of BiH, instead of two separate laws for the Court of BiH and the second-instance/appellate court. In accordance with the aforementioned, as well as later opinions and recommendations, Article 2 of the Draft Law at the BiH level defines the establishment of two judicial instances, namely the Court of BiH as a first instance court and the High Court of BiH as a second instance court. The purpose of the Draft Law is to establish the High Court of BiH, which will act as a second-instance court at the state level and receive appeals against the decisions of the first-instance Court of BiH and also decide on other matters listed in this Draft Law.

The seat of the High Court is prescribed in **Article 3**.

Obligation to formulate **Article 4** of the Draft stems from the Uniform Rules for Drafting Legal Regulations (Article 44), part two - Basic principles for the work of courts, Art.

5-15.

Given that this is an organizational law, and in accordance with the laws on courts in the entities and the Brčko District, these provisions contain general principles that govern the judiciary, i.e. they define the general principles applicable to the judiciary, which are not already defined and prescribed in the HJPC Law.

Article 17, item 25 of the HJPC Law stipulates that the HJPC shall "determines the number of judges, prosecutors and deputy chief prosecutors for courts and prosecutor's offices", and the same Law establishes a "network", i.e. a list of all courts in BiH. However, the Law does not provide for the High/Second Instance Court of BiH, which is being established by this Draft Law. This is exactly why **Article 5** makes a reference to that general principle according to which the HJPC will determine the number of judges for these Courts.

As for the independence of the judiciary, at the European level this principle is guaranteed under Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights of the European Union, related to a democratic regime and respect for the principle of separation of powers. That is the basic guarantee of the rule of law, democracy and respect for human rights. Article 6 of the Draft Law specifies two basic forms of judicial independence: institutional and individual, i.e. the ability of the judiciary to act without pressure from other branches of government - executive and legislative and to make decisions without external influences, i.e. the independence of individual judges when performing their professional duties. The independent decision-making by a judge as an individual must be free so that he/she can make decisions in cases without any external influence, and paragraph (2) of this Article strengthens this freedom by prohibiting others from violating this important principle.

**Article 7** of the Draft deals with the accountability of judges, however, this accountability implies their duty to be efficient and diligent in processing the case assigned to them, as the issue of personal accountability due to *ill intent and gross negligence* is punishable in disciplinary proceedings and regulated in the HJPC Law.

**Article 8** of the Draft stipulates "immunity" so that "*assessment of facts or weighing of evidence by judges when making decisions in cases must not lead to civil or disciplinary liability*". Pursuant to paragraph (3) of this Article, Bosnia and Herzegovina is responsible for the damage caused by a judge in the exercise of his judicial function. This is because the imposition of liability for damages on judges could have a negative impact on the work of the judiciary as a whole, and could limit the judges' discretion regarding interpretation and application of law (Opinion of the Venice Commission - 95th plenary session, 14-15 June, 2013).

The general principle of the protection of rights is emphasized in Article 6 of the Draft, which includes the right to a fair trial as well as the equality of all citizens before the law.

The principle according to which "a court decision can be reviewed only by a competent court", is explained in **Article 10**, in a way that the decisions of the Court of BiH are subject to review only by the High Court of BiH, which is being established specifically to enable the review of the decisions of the Court of BiH by another independent court.

**Article 11** deals with the principle of transparency (the work of the Courts is public). Exceptions from public court hearings are prescribed under procedural laws in BiH (Criminal Procedure Code of BiH, Civil Procedure Code before the Court of BiH, Law on Administrative Disputes... and Article 6 of the European Convention on Human Rights) and courts apply those pieces of legislation to decide whether exclusion of public is founded or not, when conducting the proceedings.

**Articles 12 and 13** of the Draft Law regulate formal issues such as official ID cards, design of and when to wear judicial robe.

**Article 14** deals with display of signs of affiliation by judges, i.e. it limits this right due to the exercise of public office and to reflect the impartiality of judges, and is therefore applicable to judges only during the performance of their official judicial duties.

**Article 15** of the Draft Law does not intend to regulate the procedure for judicial cooperation, instead it only states the general rule that courts must cooperate.

#### Part three of the Draft Law - Jurisdiction - Art. 16-20.

Chapter I regulates the jurisdiction of the Court of BiH as a court of first instance, through Art. 16, 17 and 18.

#### **Article 16 prescribes criminal jurisdiction:**

**Article 16, paragraph (1)** gives the Court of BiH its first-instance jurisdiction over criminal offenses established by the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina, and requires no special explanation.

However, there were certain dilemmas with the wording of paragraph (2) Article 15, which prescribes the criminal jurisdiction of the Court of BiH.

*Namely, back in 2013, the Venice Commission published an Opinion on the then Draft Law on Courts of BiH<sup>1</sup>, and concluded that such an important provision regulating criminal jurisdiction - especially its paragraph 2) must be specified in a way to leave no room for dual interpretation. In numerous attempts to specify the aforementioned provision, on 20 July 2017, at the meeting of the Structured Dialogue on Justice between the EU and Bosnia and Herzegovina, a proposal for paragraph 2) was offered by the experts of the European Commission, based on the EU acquis - Article 83 of the Treaty on the Functioning of the EU (TFEU)<sup>2</sup>.*

*Namely, this Law, as is the case with the aforementioned norm of the EU acquis, is of an organizational, not a substantive legal nature. For this reason, the proposal by the EU experts took the position that the norm should refer to "areas/fields" of criminal offenses, like the TFEU, instead of listing criminal offenses exhaustively. This is especially because criminal offences, e.g. corruption, as such, cannot be found in entity criminal codes because they are not defined as "corruption" but as abuse of position, receiving or giving bribe, etc., just like we do not have such offences defined as*

<sup>1</sup> (See paragraph 88, item 7 at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)015-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)015-e))

<sup>2</sup> Official Croatian translation of Article 83 TFEU is available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A12016ME%2FTXT>

"corruption" in all EU member states, but the different criminal offences from that category are grouped in areas that are regarded as corruption in a broader sense. Bearing this in mind, the Court and the Prosecutor's Office of BiH would have significant difficulties when deciding which offense would have elements of corruption, even though there is a recent HJPC instruction on the categorization of corrupt criminal offenses, but which is a mere guidance for easier filing and monitoring of cases in the TCMS .

This also applies to all other criminal offences that are not exhaustively listed as "offences", but the areas of "terrorism", "organized crime", etc. Also, if only criminal offenses were to be listed and not areas, it would mean that any new criminal offense introduced in the future from a certain area into the criminal laws of the entity and Brčko District would automatically be excluded from the scope of this paragraph of the Law on Courts of BiH, i.e. this Law would need to be amended.

Precisely for these reasons and Article 83 of the TFEU uses the term "areas" when it states that "in view of the development of criminality, the Council may adopt a decision determining other **areas** of criminality that meet the criteria defined in this paragraph."

While fully understanding the rules of legal drafting that may not suggest reference to "areas" in this case, knowing that this term is foreign to the legal drafting practice in BiH, it is clear that only by using this term a complex legal system with four jurisdictions such as the case of BiH can function effectively when it comes to the object of protection of this norm, which is the state of Bosnia and Herzegovina. Finally, in the very process of EU approximation, Bosnia and Herzegovina will have to opt for terminology, which, although perhaps new in practice, enables the effective application of EU laws in its territory.

**In accordance with everything mentioned above, the term "criminal offenses in the area" was used (instead of stating the substantive names of the offenses in the first part of paragraph 2).**

The TFEU is also explicitly clear when it states that these are offenses in the "area of particularly serious crime with cross-border elements arising from the nature or effect of such criminal offenses or from the special need for their joint suppression. However, the TFEU itself is organizational in nature and leaves it up to the member states to define, each in their own way, the degree of "seriousness" of the criminal offense, so it was assessed as **good to leave the norm set as broadly as this, since the term "serious form of criminal offenses" will not be more specifically defined.**

In the same way, the concept of "**large-scale damage**" was introduced, because it is unjustified to leave the possibility for the Court of Bosnia and Herzegovina to process any damage whatsoever, especially a trivial one. If the scale of damage is not to be defined in this regulation (and there have been such attempts to introduce a threshold during discussions within the framework of the Structured Dialogue), then it is better to leave it to the Court to sieve through its practice what is the level of "large-scale" damage that would be sufficient to establish jurisdiction in the case.

Finally, in accordance with the above Opinion of the Venice Commission<sup>3</sup>, as done in the Draft, the execution of criminal offences from certain areas was separated into those executed by individual and criminal groups.

**Thus, Article 16, paragraph (2) establishes the jurisdiction of the Court of BiH for criminal offenses under the jurisdiction of entities or cantons or Brčko District based on the fact that:**

- The criminal offense was committed on, or...by an individual,
- criminal offense committed on, or...by criminal groups,
- the commission of a criminal offense resulted in large-scale damage to BiH,
- criminal offense is in violation of international obligations.

Article 16, paragraph (3) item a) prescribes the jurisdiction of the Court of BiH in the area of international and inter-entity cooperation, and no additional explanation is necessary. (The Venice Commission recommends that it remain as it is).

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<sup>3</sup> Para 42

Furthermore, the same paragraph (3) item b) prescribes the jurisdiction of the Court of BiH to, in accordance with Chapter XXIV - extraordinary legal remedy, conduct a renewed criminal proceedings in a case concluded by a final decision of the Court in the manner set out in the Criminal Procedure Code of BiH (the Venice Commission recommended that a reference to this Code should be included in the provision).

**Articles 17 and 18** regulate civil and administrative jurisdiction. Although, according to the current Law on the Court of BiH, the Administrative Department adjudicated in both civil and administrative disputes, this Draft regulates these two jurisdictions separately.

It is unnecessary to further explain **the jurisdiction prescribed by these Articles**, but due to the comments by the Venice Commission from its 2013 Opinion regarding item b) of Article 17, please note that these are lawsuits for compensation for damages resulting from, for example labor relations (unjustified dismissal of an employee, unjustified suspension from the workplace,...), unjustified detention or arrest... therefore, these are damages that occurred *during the performance* of duties by official persons.

Chapter II of the Draft regulates the jurisdiction of the High Court of BiH, being the court of second instance, in Articles 19 and 20.

According to the Draft Law, the High Court of BiH has the jurisdiction to decide on legal remedies against the decisions of the Court of BiH, namely as regular legal remedies, item a), as provided for by laws (e.g. appeal), but also as extraordinary legal remedies, item c), as provided for by laws. Item b) of Article 19, paragraph (1) stipulates that the High Court of BiH is competent to decide on "*legal remedies against the decisions of its panels, unless otherwise specified by law*" (e.g. Article 317a. Article 317a (1) An appeal is allowed against the judgment of the panel of the Appellate Division in case of... Appeals against second-instance verdicts are decided by a third-instance panel composed of three judges.) Other shortcomings of this provision noted by the Venice Commission have been eliminated.

Part four of the Draft Law – Internal organization of courts

CHAPTER I - Management of courts and work in sessions- Art. 21- 24

This part of the Draft defines very clearly, in accordance with current practice and needs, the powers and responsibilities of court presidents, general plenums, extended plenums of the High Court and collegiums. These provisions are based on good practice in application of entity laws on courts.

CHAPTER II - Court Divisions and Departments Articles 25-29.

Since the establishment of the Court of BiH, the internal organizational structure through the establishment of court departments has proven to be justified, and this Draft Law follows the same practice in that direction. Given that the Administrative Department handled cases from the "civil" area, **Article 25** paragraph (1) item b) of the Draft provides for a separate civil department, and paragraph (2) of this Article leaves the possibility, in case of need, to establish an "enforcement department". In accordance with the current practice, the manner of work for sessions of court divisions is regulated by **Article 26**, although the current Law on the Court of BiH specifies Departments within Divisions, after an analysis it was found to be justified to leave the possibility for the establishment of departments in Divisions if the need arises, in the manner provided for in **Article 27** of the Draft.

Chapter III - Court administration and staff members- regulated by Articles 30-42.

Article 30 of the Draft prescribes what constitutes court administration, and Articles 31, 32 and 33 prescribe the specific competences of court administration bodies. The content of these provisions has been specified in accordance with the previous good practice of these bodies of court administration.



Articles 34-42 regulate professional court staff, administrative and support staff. Appreciating that the rights, duties, general conditions for employment,... for all these categories are prescribed by special laws (Law on Labor in the Institutions of BiH, Law on Civil Service in the Institutions of BiH, Law on Salaries and Remunerations in the Institutions of BiH, Law on Salaries and other earnings in judicial and prosecutorial institutions at the level of BiH,...), thus these provisions indicate to the regulation that applies to a specific category. The total number of employees in each court, which is required for the timely and efficient performance of work, is determined in accordance with the "criteria", which, in accordance with its jurisdiction, are determined by the HJPC BiH, as provided for in **Article 40 of the Draft**.

#### CHAPTER IV - CONFIDENTIAL DATA PROTECTION

**Article 43 of the Draft prescribes the confidentiality duty of both judges and court staff regarding the knowledge they gain about the participants in the proceedings as well as the legal and factual circumstances of their cases, which they came to know in the course of their official work, and Article 44 prescribes the duty to keep official secret regardless of the way in which they found out about it, and that the obligation continues even after the termination of work in the court.**

#### PART FIVE - JURISDICTION OF THE MINISTRY OF JUSTICE OF BOSNIA AND HERZEGOVINA, Articles 45 -48.

The role of the Ministry of Justice of Bosnia and Herzegovina, according to the Opinion of the Venice Commission, has been limited and specified in Article 45 of the Draft to carrying out activities that can improve the work of courts, as well as mutual cooperation and communication.

**Article 46** derives from the rights and obligations of the authorized inspector, vested in him by the Law on Administration, to supervise the proper performance of administrative duties, including court administration.

The Law on the Judicial Police of Bosnia and Herzegovina established a judicial police that provides assistance to the Court of Bosnia and Herzegovina and enforces other orders of that Court in accordance with the aforementioned law, but since this Draft also establishes the High Court of Bosnia and Herzegovina, Article 47 was necessary.

Acknowledging that it is not rare for the Ministry of Justice to receive a complaint against a judge or court president, and appreciating the competence of the HJPC BiH, i.e. that the Office of the Disciplinary Counsel is the only one authorized to act on complaints, this is specified in Article 48 of the Draft.

#### Part six - Financing the work of the courts

Article 50 of the Draft Law specifies the steps that the courts need to take, from the submission of the budget proposal to the submission of the report on the execution of the budget. This Article is fully harmonized with the method of approving funds for other institutions that are financed from the BiH Budget.

#### Part seven - Transitional provisions - Art. 51-57

The individual independence of a judge has several aspects, and the Venice Commission considers certainty of their term of office and financial security to be particularly important - "a judge's mandate must be adequately secured by law, and ideally, it should end with retirement". Precisely for this reason, **Article 51**, paras (1) and (2) of the Draft stipulate that the established Court of BiH will work continuously and that the Court President and judges retain all rights acquired before the entry into force of this law.

Furthermore, the individual independence of a judge has other aspects, and the Venice Commission considers the appointment and promotion of judges to be important, and accordingly, Article 51 paragraph (3) leaves the possibility for the president or judges of the Court of Bosnia and Herzegovina to participate in the procedure for electing judges of the High Court of Bosnia and

Herzegovina, providing also that each individual, if appointed, retains the status in accordance with the previous position at the Court of BiH until the start of the work of the High Court.

As stated in paragraph (1), the Court of Bosnia and Herzegovina continues to work uninterrupted, but appreciating the reasons for the adoption of this Law, and as stipulated in paragraph (4) of Article 51, the Appellate Division of the Court ceases to operate with the beginning of the work of the High Court of BiH, which had exercised second-instance jurisdiction in that Court.

As paragraph (2) of Article 51 guarantees the permanence of the office of the president and judges of the Court of Bosnia and Herzegovina, this paragraph also guarantees the permanence of the employment of other staff, and paragraph (4) leaves the possibility that the President of the High Court can reach an agreement with the President of the Court to take over employees with their consent, to perform the same or similar positions they held at the Court. **Article 52** of

the Draft stipulates the obligation of competent ministries to ensure within the stipulated time

the necessary material and financial conditions for the commencement of the work of the High Court, after which, in accordance with paragraph (2) of the Article, the High Judicial and Prosecutorial Council will issue a Decision on the commencement of the work of the High Court, an integral part of which will be the provision on the fulfillment of the conditions for the commencement of work.

Appreciating the competences of the High Judicial and Prosecutorial Council, **Article 53**

of the Draft leaves a deadline for the HJPC to make a decision on the required number of judges in the High Court, to carry out the procedure for electing and appointing the president in an additional deadline, and to elect and appoint High Court judges within additional deadline. Given that the Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina prescribes the conditions necessary for individual functions in the judiciary, with the indication of each established court in BiH, paragraph (3) of this Article stipulates (due to a gap in the HJPC Law) that the election of both the president and the judges in the High Court is carried out according to the procedure and under the conditions related to the appointment of the president and judges of the Court of Bosnia and Herzegovina, including provisions related to the mandate (paragraph 4).

Pending the amendments to the Law on Salaries and Other Remunerations in Judicial and Prosecutorial Institutions at the level of Bosnia and Herzegovina, which will specify the salaries and remunerations for the president, judges and professional staff in the High Court, the same conditions that apply to the president, judges and professional staff in the Court of Bosnia and Herzegovina will apply as provided for in Article 54 of the Draft Law.

The Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina in Article 17, item (22) prescribes the competence of the HJPC to "determine the criteria for evaluating the performance of judges and prosecutors". Laws on courts in the entities and Brčko District stipulate that the performance of judges are evaluated by the president of that court, the performance of the court president is evaluated by the president of the higher court. The current Law on the Court of Bosnia and Herzegovina does not provide for the possibility of evaluating the judges of that court. In accordance with the above, Article 55 has been incorporated into this Draft, which prescribes the method of evaluating judges and presidents in the two courts that are the subject matter of this Draft Law. In its earlier opinion, the Venice Commission pointed out that "This provision seems problematic since it designates the court president as the central figure in the process of evaluating judges. This can not only lead to a conflict of interests, but also to abuse, because the independence of individual judges is limited." In this context, it is noted that the frequency of evaluation is prescribed by law, and the consequences of that evaluation are important during promotion, i.e. in the competition procedure for a certain different position compared to the one in which the judge is and at which he was evaluated. Furthermore, the HJPC is authorized to determine the evaluation

criteria that are available to judicial office holders, and the evaluator is obliged to justify the evaluation in accordance with the given criteria.

Also, in accordance with its competences, the HJPC will, within the deadline set in **Article 56** of the Draft establish the criteria for determining the total number of employees in that court, and paragraph (2) of this Article introduces an obligation on the President of the High Court to issue a rulebook on the internal organization and systematization of jobs in that court, and the President of the Court will, if necessary, harmonize the existing one or adopt a new regulation.

Article 57 of the Draft Law stipulates the obligation to take over cases that fall under the jurisdiction of the High Court that have been received by the Appellate Division of the Court, and paragraph (2) of this Article leaves a deadline for the Presidents of the Courts to hand over the cases. In accordance with paragraph (3), the President of the High Court is obliged to ensure the processing of cases he/she takes over from the Appellate Division of the Court of Bosnia and Herzegovina.

Part eight - Final provisions - Art. 58-61.

This part sets the deadline for the preparation of the necessary amendments to laws, adoption of by-laws, determines the deadline for the termination of the Law on the Court of Bosnia and Herzegovina, as well as the entry into force of this law