



Strasbourg, 28 January 2021

CDL-REF(2021)001

Opinion No. 1015 / 2021

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

BOSNIA AND HERZEGOVINA

DRAFT LAW (*)

**ON AMENDMENTS
TO THE LAW ON THE HIGH JUDICIAL
AND
PROSECUTORIAL COUNCIL**

() Translation provided by the Authorities*

Pursuant to Article IV.4.a) of the Constitution of Bosnia and Herzegovina, the Parliamentary Assembly of BiH on the ___ session of the House of Representatives held on _____ 2020 and on the ___ session of the House of Peoples held on _____ 2020.godine, adopted this

LAW

ON AMENDMENTS

TO THE LAW ON THE HIGH JUDICIAL AND PROSECUTORIAL COUNCIL OF BOSNIA AND HERZEGOVINA

Article 1

In the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina (Official Gazette of BiH, No. 25/04, 93/05, 48/07, and 15/08) in Article 4 paragraph (5) after the words "deputy chief prosecutors" a comma and the following words shall be added: "as well as Council members coming from the ranks of judges and prosecutors".

After paragraph (5) a new paragraph (6) is added to read:

"(6) Expressions used in one grammatical gender in this Law, without discrimination, shall pertain to both men and women."

Previous paragraph (6) shall become paragraph (7).

Article 2

In Article 5, after paragraph (2) a new paragraph (3) shall be added to read:

"(3) During the mandate and one year after the end of the mandate, HJPC Members may not apply or be elected to vacant positions in the judiciary, including the Constitutional Court of the Federation of Bosnia and Herzegovina and the Constitutional Court of Republika Srpska, and may not apply for vacant positions of senior civil servants in the Office of Disciplinary Counsel or the HJPC Secretariat."

Article 3

In Article 6, paragraph (1) subparagraphs (d) and (e) shall be amended to read:

"(d) in case of a conflict of interest referred to in Article 10a, paragraph (1) subparagraph (a);

(e) by passing a decision to dismiss referred to in Article 6a of this Law."

Item (f) shall be deleted, and item (g) shall become item (f). In paragraph (2) words: "paragraph 1, items (d), (e) and (f) of this Article on the day when the HJPC removes him from duty", shall be replaced by words: "item (d), mandate shall end by applying for a vacant position."

Paragraph (3) shall be deleted, and paragraph (4) shall become paragraph (3).

Article 4

After Article 6 of the Law, a new Article 6a shall be added to read:

**“Article 6a
(Removal of Members of the Council)**

(1) A member of the Council shall be removed from the Council if one of the following situations occurs:

- a) If he/she is not performing duty in accordance with the Law and HJPC Rules of Procedure;
- b) in a case of incompatibility of functions;
- c) If he/she commits any misconduct that seriously undermines reputation of the Council;
- d) absence from the duty of a member of the Council for a period longer than three months continually, or longer than six months continually if the absence is caused by sickness;

(2) A procedure to remove a member of the Council shall be initiated upon a motion or ex officio.

(3) Any judge, prosecutor or a member of the Council, who has information on the existence of grounds referred to in paragraph (1) of this Article, may file a motion to initiate the removal procedure.

(4) Motion to initiate the removal procedure shall be filed with the Council.

(5) Once it receives the motion, or once it finds, ex officio, that it is necessary to initiate the procedure of establishing the facts regarding circumstances referred to in paragraph (1) of this Law, the Council shall establish a special commission of five Council members. The task of the Commission shall be to establish the relevant facts and propose a decision to the Council.

(6) The Commission referred to in paragraph (5) of this Article shall include at least one HJPC Member from the ranks of judges and at least one HJPC Member from the ranks of prosecutors.

(7) The establishment of the commission and removal procedure shall be regulated in more detail by the Rules of Procedure.

(8) The Council shall decide on removal by a two-thirds majority vote of Council members present and voting.

(9) Decision referred to in paragraph (8) of this Article shall contain a reasoning.”

Article 5

After Article 10 of the Law, a new Article 10a shall be added to read:

**“Article 10a
(Conflict of Interest)**

(1) A conflict of interest for a member of the Council exists:

- a) when a Council member or his or her blood relative in direct line of descent, a relative in the lateral line of descent up to third degree, a relative-in-law to second degree and the child of the spouse, a spouse or a common-law partner, adoptive parent and adopted child or any other person with whom a member of the Council shares a joint household, applies for a vacant position in the judiciary including Constitutional Court of the Federation of Bosnia and Herzegovina and the Constitutional Court of Republika Srpska or a vacant position of a senior civil servant in the Office of Disciplinary Counsel or the HJPC Secretariat;
- b) In other situation in which a Council Member has a private interest which influences or may influence the legal, transparent, objective and impartial performance of official duty

or in which private interest is detrimental or may be detrimental to the public interest or public trust.

(2) Mandate of a Council member who is found to be in the conflict of interest referred to in paragraph (1) subparagraph a) of this Article shall be terminated.

(3) Conflict of interest referred to in paragraph (1) subparagraph b) of this Article shall be regulated in more detail by the Book of Rules of the Council.”

Article 6

In Article 14 paragraph (2) words: “and those voting” and “pursuant to provisions of Article 11 (4)” shall be deleted.

Article 3 shall be amended to read as follows:

“(3) In the voting procedure, Council members may not abstain.”

Paragraph (4) shall be deleted.

Article 7

In Article 17, item (22) after the word "setting", words: “procedure and” shall be added.

After item (29) a new item (30) is added to read:

“(30) through the Integrity Unit collects, verifies and publishes declarations of assets and interests of judges and prosecutors;

Previous item (30) shall become item (31).

Article 8

In Article 44, paragraph (1) shall be amended to read as follows:

(1) The Council’s decision to appoint a candidate to a judicial or prosecutorial post shall be in the form of a Decision that shall contain justification regarding the application of criteria referred to in Article 43 of the Law and such Decision shall be published on the Council's website.

After paragraph (3), new paragraphs (4), (5) and (6) shall be added to read:

“(4) Decision on appointment constitutes a final administrative act of an institution of Bosnia and Herzegovina under Article 4 of the Law on Administrative Disputes of Bosnia and Herzegovina (Official Gazette of BiH, No. 19/02, 88/07, 83/08 and 74/10), and an administrative dispute may be initiated against it, by filing a lawsuit before the Court of Bosnia and Herzegovina.

(5) The lawsuit referred to in paragraph (4) of this Article shall be filed within 8 days from the day when the Decision on Appointment is published on the Council’s website. The Court of Bosnia and Herzegovina shall decide on disputes, referred to in this paragraph, in an urgent procedure.

(6) In case an administrative dispute is initiated, as referred to in paragraph (4) of this Article, the newly appointed judge or a prosecutor’s assumption of office shall be delayed until the completion of court proceedings”

Article 9

Article 54 shall be amended to read as follows:

**“Article 54
(Liability for Disciplinary Offences)**

(1) A judge, a prosecutor, a reserve judge, or a lay judge, including a court president and a chief prosecutor and a deputy chief prosecutor, as well as a member of the Council, shall be held liable for any disciplinary offence stipulated by the law, which they commit either intentionally or negligently.

(2) Appointment to another court or prosecutors' office shall not preclude disciplinary liability of a judge or a prosecutor for any offence committed while in previous judicial office. Cessation of a mandate to a managerial position shall not preclude disciplinary liability for an offence committed during that mandate.

(3) Criminal or minor offence liability shall not preclude the disciplinary liability of a judge or a prosecutor for the same offence that was a matter for criminal or minor offence proceedings if such an offence is also a disciplinary offence.

(4) The removal procedure in line with Article 6a of this Law, shall not preclude disciplinary liability of a Council member, if the offence that was the subject matter for the dismissal procedure is, at the same time, a disciplinary offence.

Article 10

Article 56 shall be amended to read as follows:

**Article 56
(Disciplinary Offences of Judges)**

(1) Disciplinary offences of judges shall be as follows:

- a) disclosure of confidential information obtained in the course of performing judicial duties;
- b) use of judicial office to obtain a benefit for oneself or another;
- c) not disqualifying himself or herself from a case when a conflict of interest exists;
- d) an undue delay in writing of a decision or in taking a procedural action;
- e) violation of the right to a trial within a reasonable time;
- f) enabling a person not authorised by law to perform judicial functions;
- g) interfering with the work of a judge or a prosecutor with the intention to obstruct or prevent their activities, or to influence their work;
- h) a final conviction for a criminal offence;
- i) making any comment on a court decision, proceeding or a case while a case is pending before court;
- j) failure to comply with a book of rules, a decision, an order or another act of the Council for unjustified reasons;
- k) providing or presenting to the Council false, misleading or insufficient information;
- l) failure to provide the Council with any information he or she is required to provide under this Law;
- m) violating provisions of this Law on reporting;
- n) violating provisions of this Law on monitoring of compliance with the reporting obligations set out in this Law;
- o) failure to fulfil any mandatory training obligation;
- p) engaging in an activity that is incompatible with judicial office;
- r) violating any restriction related to generating income from fees for additional activities;
- s) performance is assessed as “unsatisfactory”.

t) disregard for working hours and absence from duty contrary to the provisions of this Law; u) violation of a principle of the Code of Ethics for Judges, such that compromises the reputation and integrity of the judiciary, and is not prescribed by this Article as a separate offence.

(2) In addition to the offences referred to in paragraph (1) of this Article, a court president shall also be held liable for the following disciplinary offences:

- a) the management and administration of a court contrary to law;
- b) violating a regulation or decision on the assignment of cases, directly or by failing to carry out supervision;
- c) failure to file a disciplinary complaint against a judge of the same court despite having information on the judge's misconduct;
- d) failure to provide to the Council any information he or she is required to provide as court president under this Law;
- e) performance is assessed as "unsatisfactory".

Article 11

Article 57 shall be amended to read as follows:

“Article 57 (Disciplinary Offences of Prosecutors)

- c) (1) Disciplinary offences of prosecutors are:
- d)
- e) a) disclosure of confidential information obtained while performing prosecutorial duties;
- f) b) use of prosecutorial office to obtain a benefit for oneself or another;
- g) c) not disqualifying himself or herself from a case when a conflict of interest exists;
- h) d) undue delays in conducting actions concerning the performance of prosecutorial duties;
- i) e) violation of the right to trial within a reasonable time;
- j) f) enabling persons not authorised by law to perform prosecutorial functions;
- k) g) interfering with the work of a judge or a prosecutor with the intention to obstruct or prevent their activities, or to influence their work;
- l) h) a final conviction for a criminal offence;
- m) i) making any comment on a court decision, proceeding or a case while the case is ongoing before court;
- n) j) failure to comply with a book of rules, a decision, an order or another act of the Council for unjustified reasons;
- o) k) providing or presenting to the Council false, misleading or insufficient information;
- p) l) failure to provide the Council with any information he or she is required to provide under this Law;
- q) m) violating provisions of this Law on reporting;
- r) n) violating provisions of this Law on monitoring of compliance with the reporting obligations set out in this Law;
- s) o) failure to fulfil any mandatory training obligation;
- t) p) failure to carry out a statutory instruction by a supervising prosecutor unless carrying out of such an instruction would constitute a violation of law;
- u) r) engaging in an activity that is incompatible with the office of prosecutor;
- v) s) violating any restriction related to generating income from a fee for additional activity;
- w) t) performance is assessed as "unsatisfactory".
- x) u) disregard for working hours and absence from duty contrary to the provisions of this Law;
- y) v) violation of a principle of the Code of Ethics for Prosecutors, such that compromises the reputation and integrity of the judiciary, and is not prescribed by this Article as a separate offence.

(2) In addition to the offences referred to in paragraph (1) of this Article, a chief prosecutor shall also be held liable for the following disciplinary offences:

- a) the management and prosecutorial administration of a prosecutors office's operations contrary to law;
- b) violating regulations and decisions on the assignment of cases, directly or by failing to carry out supervision;
- c) failure to file a disciplinary complaint against a prosecutor of the same prosecutor's office, despite having information on the misconduct;
- d) failure to provide to the Council any information he or she is required to provide as chief prosecutor under this Law;
- e) performance is assessed as "unsatisfactory".

Article 12

Article 72 shall be amended to read as follows:

"Article 72 (Statute of Limitation for the Initiation of Disciplinary Proceedings)

(1) Disciplinary proceedings against a judge or a prosecutor may not be initiated:

- a) upon the expiry of two years from the date of filing the complaint, or from the date the Office of the Disciplinary Counsel learnt of the offence,
- b) upon the expiry of five years from the date of commission of the alleged offence, or in case of a criminal offence, upon the expiry of one year following the date when a decision in the criminal proceedings became final.

(2) Statute of limitations for initiating disciplinary proceedings for disciplinary offences of a lasting nature shall commence at the time when the unlawful status ends.

Article 13

Article 82 shall be amended to read as follows:

"Article 82 (Prohibition Against Holding Incompatible Offices)

(1) A judge or a prosecutor shall not engage in any duty or activity, paid or unpaid, that is incompatible with or could be seen to interfere with the fair and impartial exercise of judicial or prosecutorial office or that would affect the independence or dignity of judicial or prosecutorial office, cast doubt upon his or her ability to act impartially, or demean judicial or prosecutorial office.

(2) A judge or a prosecutor shall not be a member of or perform any duty in a political party organ, or an association or foundation connected to a political party, and shall refrain from participating in political party activities of a public nature.

(3) A judge or a prosecutor shall not be a member of and, upon gaining knowledge, must immediately resign from any organisation that practices discrimination on any basis, in line with the Law on Prevention of Discrimination (Official Gazette of BiH, 59/09 and 66/16), shall nor arrange to use the facilities of such organisations.

(4) A judge or a prosecutor shall not be an attorney, notary, a member of an executive or supervisory board of a public or private company or another legal person or entrepreneurship. Exceptionally, a judge or a prosecutor may be a member of a managing authority of an institution responsible for judicial training.

(5) A judge or a prosecutor shall not hold any other public office, other than in the judicial bodies, as stipulated by law.

Article 14

Article 83 shall be amended to read as follows:

“Article 83 (Additional Activities)

(1) A judge or a prosecutor may, outside working hours, engage in an academic, scholarly, scientific, professional, cultural or another activity that is compatible with judicial or prosecutorial office and do not fall under the prohibitions listed above, and may be receive remuneration for such activities.

(2) During working hours, a judge or a prosecutor shall be permitted to:

- a) work as a trainer in the Judicial and Prosecutorial Training Centre, but not more than ten working days a year;
- b) participate in the work of professional bodies or in gatherings formed or organised for the purpose of drafting legislation or discussing issues and preparing or presenting materials with relevance to the judiciary;
- c) perform duties in judicial bodies to which he or she is appointed;
- d) participate in the work of professional associations of judges and prosecutors up to five working days a year.

(3) A judge or a prosecutor may perform activities referred to in paragraph (2) subparagraph b) of this Article upon obtaining an approval of the court president or chief prosecutor, and shall not be entitled to any remuneration.

(4) A judge or a prosecutor shall immediately inform the Council of an additional activity he or she performs during or outside working hours.”

Article 15

Article 84 shall be amended to read as follows:

“Article 84 (Income from Additional Activities)

(1) Net remuneration for additional activities of a judge or a prosecutor may not exceed annually, in total, 40% of his or her annual net salary as a judge or a prosecutor.

(2) The limitation referred to in paragraph (1) of this Article shall not apply to income from property, income from copyrights and related rights or industrial property rights, and similar income that cannot be considered as income from additional activities.

(3) The limitation referred to in paragraph (1) of this Article shall not apply to income a judge or a prosecutor earns during unpaid leave.”

Article 16

Article 85 shall be amended to read as follows:

**“Article 85
(Referral to the Council)**

- (1) A judge or a prosecutor may request the Council to provide an opinion on whether his or her activity is compatible with his or her function and the provisions of this Law.
- (2) A court president or a chief prosecutor may also seek an opinion from the Council if he or she believes that a judge or a prosecutor performs or intends to perform an activity incompatible with his or her office. The court president and chief prosecutor shall notify the judge or prosecutor concerned about the request for opinion.
- (3) In addition to providing opinions in response to specific requests, the Council may issue ex officio opinions regarding compatibility of judicial or prosecutorial office with the activities they perform and upon receiving notification referred to in Article 83 paragraph (4) of this Law.
- (4) The Council's opinion on the compatibility of offices shall be binding. The procedure for issuing opinions referred to in this Article shall be regulated in more detail by the Rules of Procedure.
- (5) The Council may, through its documents, provide general guidelines for the application of Articles 82 and 83 of this Law.”

Article 17

Article 86 shall be amended to read as follows:

**“Article 86
(Declaration of Assets and Interests)**

- (1) Judges and prosecutors shall submit to the Council their entry and annual declaration of assets and interests, including the manner and time of acquiring such assets and their acquisition value, income, interests, liabilities, expenditures and guarantees for themselves, their spouse or civil-law partner and parents, children and any other persons with whom a member of the Council shares a joint household (hereinafter: the Declaration).
- (2) A declaration referred to in paragraph (1) of this Article shall contain the following data:
 - a) Name and surname, date of birth, place and address of temporary/permanent residence, marital status/kinship with the declarant, employment status, function and place of work;
 - b) Information on income from performing of the judicial or prosecutorial office, and from the core activity for the spouse and children living in the same household;
 - c) Information on income from other paid activities;
 - d) Information on ownership of real estates, including the manner and time of their acquisition, and acquisition value;
 - e) Information on ownership of vehicle, including the manner and time of its acquisition, and acquisition value;
 - f) Information on ownership of other movables the individual value of which exceeds BAM 5,000 including the manner and time of acquisition;
 - g) Information on deposits in banks or other financial institutions, including e-currencies and cash the value of which exceeds BAM 5,000;
 - h) Information on life insurance policy;
 - i) Information on gifts and donations received in connection to performance of office the value of which exceeds BAM 25;
 - j) Information on gifts and donations received as a private person if their individual value is above BAM 500 each or 1,000 BAM/per year in total;
 - k) Information on investments, including shares and other securities;
 - l) Data on other expenses the individual value of which exceeds BAM 5,000.
 - m) Data on liabilities.

(3) Declaration referred to in paragraph (1) of this Article shall also contain the data referred to in Article 86a paragraph (2) that will not be made available to the public.

(4) In their declaration, a judge or a prosecutor shall also provide detailed information on any additional unpaid activity that is otherwise relevant for the performance of their duties.

(5) In their declaration, a judge or a prosecutor shall also provide the name and surname, type of kinship, function or activity of their relatives working in the judiciary, the bar, public attorney or notary offices. Relatives shall include relatives in the direct line of descent, relatives in the lateral line of descent up to a third degree, relatives-in-law to a second degree and the child of the spouse, a spouse or a common-law partner, adoptive parents and adopted children.

(6) Declaration for the previous year shall be submitted on the form the contents of which shall be determined by the Council, within the deadline determined by the Council but no later than 30 April of the current year. Judicial office holders shall attach to their declaration a copy of their annual tax return, and any other tax returns and documents relevant to the information submitted in the declaration.

(7) The declaration shall reflect the changes that occurred during the reporting period relative to the previously submitted declaration.

(8) A judge or a prosecutor, who is appointed to a judicial office for the first time, shall submit his/her entry declaration within 30 days from the day of assuming the office.

(9) A judge or a prosecutor whose mandate has expired shall submit his/her declarations pursuant to this Law for the first year after the expiry of their mandate.

(10) If the persons referred to in paragraph (1) of this Article refuse to provide to a judge or a prosecutor information necessary for submitting a declaration, the judge or a prosecutor shall state so in the declaration.

(11) In a case a judge or a prosecutor holds cash the amount of which exceeds KM 5.000 outside banks, he/she cannot use it to explain the funding of his/her expenditures."

Article 18

After Article 86, new Articles 86a to 86i shall be added to read:

"Article 86a (Transparency)

(1) Declaration referred to in Article 86 of this Law shall be published on the HJPC website with the purpose to strengthen integrity, transparency and public trust in the judiciary, and to prevent conflict of interest and other impermissible influence on the performance of judicial duties.

(2) Notwithstanding paragraph (1) of this Article, the following data from the declaration shall not be available to the public:

- a) first name of minor persons listed in the declaration, except for the first letter of their first name,
- b) personal identity number and residence address of the judge or prosecutor or other persons listed in the declaration;
- c) the name and number of street where the property listed in the declaration is located;
- d) bank account numbers and other financial ID numbers;
- e) the individual amount of cash owned by a judge or a prosecutor and the individual amount of money owned by other household members;
- f) Registration plate numbers of vehicles.

(3) Annual income tax return, and other attachments that judges or prosecutors submit with their reports, shall not be available to the public.

(4) The total amount of savings, which is the sum of the balances in all bank accounts and the cash reserves of a judge or a prosecutor and other household members shall be made available to the public.

(5) First and last names of the relatives of judges or prosecutors referred to in Article 86 paragraph (4) of this Law shall be published on the HJPC website.

(6) After the expiry of a period of one year from the end of a mandate of a judge or prosecutor, data from the declaration shall no longer be available to the public.

Article 86b (Verification and Analysis of Data)

(1) The HJPC shall be regularly checking the accuracy, completeness and truthfulness of reported data and shall analyse the data from the declaration of assets and interests with the aim to identify any incompatible activities or potential conflict of interest.

(2) Verification of timely submission of a declaration, as well as accuracy and completeness of information provided in the declaration shall be done via:

- a) formal check, to determine whether a declaration has been submitted in a timely manner and fully completed.
- b) regular check, to determine if there is proportionality between the data concerning the financial inflows and outflows declared by a judge or prosecutor.
- c) additional check, to verify the accuracy of data in the declaration, by comparing them with the subsequently collected information in accordance with this Law.

(3) Financial inflows comprise of all income that increases judge's or prosecutor's financial assets during the declaration period, including, bank and similar savings balance at end of previous declaration period, income from core and additional activities, cash gifts and donations, taken loans and other income, such as income from real property, copyrights, investments etc.

(4) Financial outflows comprise of all expenses that decrease judge's or prosecutor's financial assets during the declaration period, including expenses for real estate, vehicles, movable property, loan repayment, lending, investments, insurance costs, subsistence expenditures, savings and other expenses, such as alimony, education, medical treatments and similar expenses.

(5) For the purpose of verification of declarations, the HJPC shall adopt and regularly revise the risk criteria which are confidential. A risk criterion is a circumstance or a set of circumstances based on which declarations of assets and interests are prioritized for regular checks, a schedule of checks is prepared and an additional check is conducted.

(6) HJPC shall request from a judge or a prosecutor additional information or explanation concerning the data from his or her declaration, in order to determine its accuracy and completeness.

(7) Declaration verification procedure shall be closed for public.

Article 86c (Additional check)

(1) Additional check, which may include the entire declaration or some of its parts, shall be carried out:

- a) when the regular check of a declaration shows disproportion in data on financial inflow and financial outflow;
- b) when the risk criteria require so;

- c) when a declaration of assets and interests is selected randomly by a software application;
 - d) in other cases provided for under the Law;
 - e) If the declaration does not contain all data on persons referred to in Article 86 paragraph (1) of this Law.
 - z)
- (2) Additional check of a declaration may also be carried out based on a motivated complaint of a natural or legal person referring to incorrect information in the declaration.
- (3) Additional check referred to in paragraph (1) subparagraph c) of this Article shall be carried out on at least 10% of submitted declarations in a calendar year.
- (4) For an additional check, information may be collected from:
- a) public records: registry books, tax records, court records, land books, cadastres, registers of business entities, associations and foundations, registers of securities, registers of intellectual property rights, registers of motor vehicles, civilian aircrafts, boats and other vessels etc.;
 - b) other records, such as the records on companies' debts, on value of real estates or cars, bank records, etc.
 - aa)
- (5) When the data referred to in paragraph (4) of this Article cannot be accessed through direct search of electronic records or when information needs to be obtained from natural persons, the HJPC shall send a letter requesting the data. The relevant institutions and other legal and natural persons shall submit the requested information to the HJPC within the deadline specified in the request.
- (6) Resources required for accessing commercial records shall be ensured from the HJPC budget.
- (7) Institutions regulated by the legislation on banks shall confirm to the Council upon its request whether account balances declared for a certain date correspond with the actual account balance on such date, and whether there are any undeclared accounts or other financial products held at this institution for persons covered by the declaration.
- (8) The procedure of an additional check of a declaration may identify the following irregularities:
- a) missing data in the declaration;
 - b) false data in the declaration;**
 - c) concealing assets, liabilities, income or expenses;
 - d) disproportion between financial inflow and financial outflow that a judge or prosecutor is unable to explain;
 - e) concealing an activity which is incompatible with the judicial or prosecutorial office;
 - f. concealing information indicating to a possible conflict of interest of a judge or prosecutor.

Article 86d **(Result of a check)**

- (1) Verification process shall end by information on conducted control, which shall contain the information about the type and scope of the check, collected information from records of other legal persons and other sources of information that were consulted during the check, availability of data for the check, cooperation of the judge or prosecutor in the verification process, outcome of the verification process with reasoning, and other data relevant for completing the verification process.
- (2) The judge or prosecutor shall be informed of the outcome of the declaration verification process, and the information referred to in paragraph (1) of this Article shall be delivered to the judge or prosecutor.

(3) If the verification process detects any of the irregularities referred to Article 86c of this Law, they shall be reported to the Office of the Disciplinary Counsel and all the information that arose from the verification shall be submitted to them for further action.

(4) The Council shall forward the information on the completed verification, together with data from the declaration and the data collected during the verification process, to the relevant authority when necessary, so that such authority may take any measures from within its competence.

Article 86e (Register of Declarations)

(1) The Council shall establish records, i.e. a Register of Declarations on Assets and Interests).

(2) Declarations of judges and prosecutors whose mandate has terminated shall be expunged from the Register ten years after termination of their mandate. Expungement is suspended during any ongoing use of the declarations and attached documents by the Council or any other authority for an official procedure.

Article 86f (Integrity Unit)

(1) The Council shall set up an Integrity Unit within the Secretariat of the High Judicial and Prosecutorial Council. The Integrity Unit shall enforce the provisions of this Law regulating the procedure related to declarations of assets and interests, and shall carry out other tasks set out in the Rulebook on Internal Organisation and Systematisation of Positions in the Secretariat.

bb)

(2) For the purpose of monitoring the work of the Integrity Unit related to collecting, checking and publishing declarations, the HJPC shall hire experts with an advisory role.

cc)

dd)

Article 86g (Book of Rules on Reporting)

The Council shall establish a separate Rulebook to regulate further details of the form of the declaration, as well as any accompanying attachments, deadlines, procedure for submitting declarations, exemptions from accessing data, operational aspects of the work of the Integrity Unit within the Secretariat, including the advisory role of experts, the establishment and keeping of records, i.e. the Register of Declarations, as well as the procedure and timeline for verification of declarations.

Article 86h (Minor offences related to declarations of assets and interests)

(1) An official person responsible within a public body who fails to cooperate with the Integrity Unit or fails to provide to the body authorised to verify the declaration requested information, shall be punished by a fine in the amount from KM 2,000 to KM 10,000.

(2) If the manager of the public body fails to assign a specific official person for cooperating with the Integrity Unit or the body authorised to verify the declaration, the manager shall be responsible under these provisions.

(3) A natural person who fails to cooperate with the Integrity Unit or the body authorised to verify the declaration or fails to provide to the body the requested information in accordance with the statutory procedure, shall be punished by a fine in the amount from KM 2,000 to KM 10,000. For

this minor offence a legal person shall be punished by a fine in the amount from KM 5,000 to KM 20,000.

(4) The HJPC shall file a request to initiate minor offence proceedings for minor offences referred to in this Article, in accordance with the Minor Offences Law (Official Gazette BiH, No. 41/07, 18/12, 36/14, 81/15 and 65/20).

Article 86i
(Application to the Members of the Council)

Provisions of this Chapter on declarations of assets and interests shall equally apply to all HJPC members.“

Article 19
(Adoption of Bylaws)

Within 45 days from the day when this Law enters into force, the HJPC shall either pass new or harmonise the existing regulations as referred to in Articles 6a, 10a, 85, 86b, 86f and 86g of this Law.

Article 20
(Deadline for filing first declaration)

Judges and prosecutors holding the office at the time when this Law enters into force shall submit their declaration of assets and interests pursuant to this Law, within 30 days from the day when the regulation referred to in Article 86g of this Law is passed.

Article 21
(Adoption of a New Law)

Within one year from the date when this Law enters into force, the Parliamentary Assembly of Bosnia and Herzegovina shall adopt the Law on High Judicial and Prosecutorial Council aligned with the EU standards, as required under the European Commission's Opinion on the Application of Bosnia and Herzegovina for membership in the European Union.

Article 22

This Law shall enter into force on the eight day from its publication in the “Official Gazette of BiH”, and shall apply 90 days after its entry into force.

PA BiH, number _____ /20
_____ 2020
S a r a j e v o

SPEAKER OF
The House of Representatives of the
Parliamentary Assembly of Bosnia and
Herzegovina

SPEAKER OF
The House of Peoples of the Parliamentary
Assembly of Bosnia and Herzegovina

EXPLANATORY NOTE

I. CONSTITUTIONAL BASIS FOR ADOPTION

Constitutional grounds for the enactment of this Law are found in Article IV. 4. a) of the Constitution of Bosnia and Herzegovina, whereby the Parliamentary Assembly of Bosnia and Herzegovina is competent to enact laws necessary for the execution of decisions of the Presidency or for performing the functions of the Assembly under the Constitution of Bosnia and Herzegovina.

II. REASONS FOR ADOPTING THE LAW

The HJPC Law was last amended in 2008. The practice has since shown the necessity for amendments to a number of provisions that had become obsolete or require serious reform. The legislative framework is incomplete and does not sufficiently guarantee the independence, autonomy, accountability and efficiency of the judiciary. The process of drafting amendments to the HJPC Law started in the period between 2010 and 2012, but was never brought to an end, due to various obstacles. Due to these same obstacles, the Draft HJPC Law that the BiH Ministry of Justice forwarded in 2014 to the Venice Commission of the Council of Europe was never aligned with the the recommendations of this organisation. Following the Stabilisation and Association Agreement between the EU and BiH (SAA) coming into force in 2015 and after submission of 'Bosnia and Herzegovina' application for EU membership in 2016, in the course of consideration of this application by the European Commission, the HJPC was subject to various Peer Review Expert Mission missions by legal experts, i.e. Peers, that included the evaluation of the HJPC Rules of Procedure, policies for appointments and performance appraisals, disciplinary powers, combating corruption and organised crime, asset declarations and judicial training of judges and prosecutors. The European Commission has supported all the recommendations arising from these direct peer review missions, many of which recommended amendments to improve the HJPC Law. Based on previously referenced recommendations, the HJPC drafted a document called "Initiative to Amend the HJPC Law", and submitted in July 2018 to the BiH Ministry of Justice during the session of the Structured Dialogue on Justice between the EU and BiH. The European Commission at the time requested urgent action regarding the drafting of amendments to the HJPC Law. The same request was repeated also on 29 May 2019 in the European Commission's Opinion on the BiH application for EU membership, with "Improve the functioning of the judiciary by adopting new legislation on the High Judicial and Prosecutorial Council and of the Courts of Bosnia and Herzegovina in line with European standards" set forth as one of the 14 Key Priorities that the country must deliver on its path to the next accession stage to EU membership.

In 2019, the BiH Ministry of Justice formed a Working Group to draft amendments to the HJPC Law. At its kick-off meeting in January 2020, the Working Group decided to rely on the abovementioned Legislative Initiative of the HJPC as the baseline document in its work on future amendments to the HJPC Law. However, the process of drafting comprehensive amendments to the HJPC Law will definitely require quite some time. Furthermore, due to serious weakening of integrity in the judiciary in the past period (see Experts' Report on Rule of Law Issues in BiH, known also as the Priebe Report), the need for targeted improvements to the legislative framework became evident, as was the need to table certain amendments to this Law, offering emergency fixes, particularly with regard to strengthening the integrity of judicial office holders. In addition, there is a whole range of provisions in the Law unrelated to integrity; however, recent practice has shown that these are indeed an obstacle to the efficient functioning of the judiciary and the HJPC itself. Such provisions must also urgently be included in a set of amendments to the HJPC Law. Drafting procedure for comprehensive amendments to the HJPC Law in the framework of the Working Group of the Ministry of Justice, on the one hand, and this Draft Law for drafting an urgent and limited scope of amendments, on the other, are not mutually exclusive. The Draft Law regulates matters that need to be addressed urgently to improve the integrity and enable more efficient and transparent functioning of the judiciary and the HJPC. A resolution to these issues could not wait for completion of a draft on comprehensive set of amendments by

the Working Group of the BiH Ministry of Justice and its subsequent adoption by the Council of Ministers and the BiH Parliamentary Assembly. Thus, fundamental issues regulated in the Draft Law and requiring urgent adoption include the following: conflict of interest of the HJPC members, asset declarations of judges and prosecutors, including the HJPC members and verification of these declarations, establishment of an Integrity Unit within the HJPC Secretariat, remedy against appointment decisions and certain amendments concerning disciplinary offences and disciplinary proceedings conducted against judges and prosecutors.

III. UNDERLYING PRINCIPLES OF THE DRAFT

The Draft echoes the principles of integrity of judicial office holders, transparency in work, the principle of two instances in decision-making and accountability of judicial office holders.

- **Integrity of judicial office holders** is a standard that a judicial office holder should adhere to during tenure to meet the high demands of the judicial office; it is a broad term encompassing multiple qualities expected of each judicial office holder (independence, impartiality, professionalism, accountability, expertise, proper conduct ...). The principle of integrity of an individual judicial office holder will be ensured in particular by complying with the regulations on the prevention of conflicts of interest, as well as through the annual submission of financial statements and their public disclosure.

-**transparency in work** is instrumental to establishing control mechanisms and strengthening citizens' trust in the judiciary. Transparency is especially important in terms of the work of the HJPC due to the high degree of independence and broad powers of this body; hence the principle of publicity in the work of this body emerges as one of the essential mechanisms of control and accountability assurance. Judicial institutions should build trust in their relations with public by promoting the principles of transparency and accountability in their day to day work.

- **Two instances in decision-making**, as the right to an effective remedy is fundamental for respect and protection of individual rights, and the introduction of judicial review of the Council decisions (on appointment of judges and prosecutors) is in line with the principles of the rule of law. Decisions of the Council should also be subject to general regulations applicable to public institutions, such as the Administrative Procedure Code and the Administrative Disputes Code, which provides for judicial protection by instituting an administrative dispute before a court.

-**Accountability of judicial office holders** - Independence of judicial office holders is not a privilege granted in their own interest, but in the interest of the rule of law and those seeking and expecting impartial justice. It encompasses a range of rights but obligations alike.

The general rule is that an ill-performing judicial office holder may be subject to disciplinary liability, before a body conducting disciplinary procedure in accordance with the principles underlying the fairness of procedures for proceedings and the legality of disciplinary sanctions. In this regard, the European Network of Councils for the Judiciary notes in its recommendations that "*the judiciary can gain the trust of a society that it serves only with accountability*".

Explanation of individual proposed solutions:

Article 1 of the Draft regulates that the provisions of the HJPC Law concerning judges and prosecutors shall also apply to the Council members who are judges and prosecutors themselves. Given that the currently applicable Law deemed necessary to specify that references to judges and prosecutors should be construed to include court presidents and chief prosecutors and their deputies, it is then also necessary to specify that the same references apply to Council members alike.

Article 2 of the **Draft Law** lays down that the members of the Council during their term of their office and one year after the expiry of the term of office cannot apply or be elected to vacant posts in the judiciary, including the positions in Constitutional Courts or the Office of Disciplinary

Counsel. This provision allows for a reasonable period during which the members of the Council who are judicial office holders cannot apply to vacant posts, with the aim to reduce risk of conflict of interest and the use of one's position in the Council for winning a promotion.

Articles 3 and 4 of the Draft Law regulate instances of termination of the mandate of the members of the Council and instances of their dismissal. Current Law has only one Article on termination of the mandate of the Council members. Articles 3 and 4 of the Draft Law now distinguish instances of termination of the mandate of members to cases that occur by *operation of law* (amended Article 6) and those where a dismissal requires a motion by the Council (new Article 6a). Also, Article 6a. provides for the procedure for dismissal of a Council member.

Article 5 of the Draft Law defines situations that actually represent a conflict of interest for members of the Council, particularly in cases where a member of the Council or his relative applies to a vacant post in the judiciary or in other situations where a member of the Council has a private interest that could affect the lawful and impartial performance of duties. Current law does not provide for particular cases that actually amount to conflict of interests of the Council members. Further, if a member of the Council fails to eliminate the conflict of interest, it is foreseen that such failure constitutes a ground for dismissal.

Article 6 of the Draft Law regulates that a member of the Council may not abstain from voting. The practice has shown that the Council members often abstain, which should not be the case, as all members should perform their duties and have their view on issues discussed before the Council.

Article 7 of the Draft Law is included as a new provision after receiving the Opinion from the HJPC. It was assessed justified to amend the current Article 17 which prescribes the HJPC competences. With this provision, the catalogue of HJPC competencies shall include the competence to "collect, verify and publish the declarations of assets and interests of judges and prosecutors", which is elaborated under this Draft Law.

Furthermore, it is undisputed that this Legislative Initiative needs to include those issues requiring an urgent intervention to clear the way for prescribing the procedure for performance evaluation of judicial office holders. Therefore, in Article 17 item (22) is supplemented by adding words "procedure and", thereby establishing the competence of the Council for "setting the procedure and the performance evaluations of judges and prosecutors", especially taking into account the Court of BiH Judgment No.: S1 3 U 032644 19 dated 19 May 2020. This amendment to Article 17, item (22) will provide an explicit legal basis for the Council to prescribe the procedure for performance evaluation of all judicial office holders, including deadlines for conducting the procedure, deciding objections against performance appraisals, procedure and authority for supervising performance evaluation and verification of performance evaluations for the purpose of determining the competence of candidates in the procedure of appointment to vacant positions for judicial office holders.

Article 8 of the Draft Law provides for the remedy regarding decisions of the Council on appointments, which are considered an administrative act that can be challenged in an administrative dispute before the Court of BiH. The current HJPC Law does not provide a legal remedy against decisions of the Council on appointment, although these acts should also be subject to control regarding their legality. This was also pointed out by the Venice Commission in its Opinion from 2014, and also by the European Commission in the Analytical Report accompanying its 2019 Opinion on BiH's application for EU membership. Decisions of the Council should also be subject to general regulations applicable to public institutions, such as the Administrative Procedure Code and the Administrative Disputes Code, which provides for judicial protection by instituting an administrative dispute before a court.

Urgency of the proceedings is foreseen because if an administrative dispute is initiated, assumption of office by the newly appointed judge or prosecutor to that position shall be delayed until court proceedings are finalised. Delaying the assumption of office by the newly appointed

judge or prosecutor is foreseen to avoid problems that could arise if the appointed person swears an oath and assumes office before the dispute is concluded.

Article 9 of the Draft Law prescribes liability for disciplinary offences for judges, prosecutors and Council members. The European Network of Councils for the Judiciary gave the following recommendations: "The judiciary can gain the trust of the society it serves only by responsibility" (Recommendations and Principles from 2012 to 2016, updated in 2017, Recommendation No. 79 on Accountability). Furthermore, not all members of the Council are judges and prosecutors, such as those who are lawyers or the executive or legislative officials - they too should be accountable for the work they perform as public officials.

Article 10 of the Draft Law provides for the updated and amended list of disciplinary offences for judges and court presidents, in particular as regards violations of provisions on asset declarations under this Law and violation of the right to a trial within a reasonable time. Consultative Council of European Judges (CCJE) noted in its Opinion No. 21 (2018) under 30 that "disciplinary proceedings are another important regulatory mechanism to fight corruption". In the Council of Europe Recommendation CM/Rec (2010)12 on judges: "Independence, efficiency and accountability", emphasises the importance of disciplinary measures in the context of ethics (Item No. 72): "Judges in their performance should be guided by the ethical principles of professional conduct. These principles do not contain only duties that could be sanctioned by disciplinary measures but also give guidance to judges as to their conduct". Specifically on asset declarations, the Venice Commission of the Council of Europe demands more serious disciplinary consequences (CDL-AD (2015)042, under Item No. 39): "In the opinion of the Venice Commission, the obligation to disclose assets and revenue need to be linked to a sanction that is sufficiently serious to serve as a deterrent. Although asset declarations may be subject to exceptions in terms of a minor or unintentional omission, in principle, non-declaring assets in itself is a violation of sufficient gravity to lead to dismissal." Further, the Western Balkans Recommendation on Disclosure of Finances and Interests by Public Officials (2014), in the section on Sanctions (a lit. G) states the following: "Each Member state shall provide effective, proportionate and dissuasive criminal or noncriminal sanctions and measures, including penalties involving deprivation of liberty and monetary sanctions, in respect of the following offences: late filing, non-filing, incomplete declaration, false information, and illicit enrichment." Finally, the Council of Europe's Group of States against Corruption (GRECO) recommended "appropriate sanctions for non-compliance with rules or false reporting" for the judiciary in BiH (Eval IV Rep (2015) 2E, rec. xiii). Although minor offence and criminal sanctions are standard for violations in disclosure and filing across the Western Balkans and beyond, limited scope to disciplinary sanctions alone in Bosnia and Herzegovina is clearly a more lenient and moderate measure. In France, failure to submit information or filing false information or concealing information on assets is punishable by a fine of up to EUR 45,000 or prison sentence up to 3 years. In addition, the court may impose a ban on exercising civil rights, as well as a ban on holding office (Code 2018-907). In Greece, those violating the obligation of disclosure of assets may face as many as 10 years in prison and one million Euros in fines (Code 3213/2003).

Article 11 of the Draft Law contains an amended list of disciplinary offences for prosecutors and chief prosecutors. The rationale applied to Article 9 of the Draft Law equally applies here. In addition, the Opinion of the Consultative Council of European Prosecutors (CCPE) No. 13 (2018) requires that prosecutors "are subject, where appropriate, to disciplinary proceedings which must be based on a law, in the event of serious breaches of duty (negligence, breach of the duty of secrecy, anti-corruption rules, etc.), for clear and determined reasons".

Article 12 of the Draft Law provides for amendments to the duration of the statutory limitation for the commencement of disciplinary proceedings in order to improve the efficiency of the procedure. Disciplinary proceedings cannot be initiated against a judge or prosecutor after expiry of two years following the date of the complaint received or the expiration of five years from the date when the alleged offence was committed, and in the case of criminal offence, on expiration of two years from the final and binding decision in criminal procedure.

Article 13 of the Draft Law specifies and improves provisions prohibiting judges and prosecutors from performing incompatible duties. This Article refers to the Council of Europe Recommendation CM/Rec (2010)12 on independence of judges and other issues (under No. 29): “Judges should be aware that their membership in certain non-professional organisations may infringe their independence or impartiality. Each member state should determine which activities are incompatible with judges’ independence and impartiality. For instance, the following activities are considered as being incompatible with judicial office: electoral mandate, profession of lawyer, bailiff or notary, ecclesiastic or military functions or plurality of judicial functions, etc. Having regard to the necessity of avoiding actual or perceived conflicts of interest, member states may consider making information about additional activities publicly available, for instance, in the form of registers of interest. Furthermore, in order to ensure that judges have the time to perform their primary function, that is, to adjudicate, the number of their mandates on various commissions should be restricted and there should be limitations to situations in which the law provides for judges to sit on a commission, council, etc.”

In addition, reference should be made to the “Resolution on Judicial Ethics” of the European Court of Human Rights (2008), which states the following: “In the exercise of their judicial functions, judges shall be independent of all external authority or influence. They shall refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence.”

As for paragraph (3) of Article 82 of the HJPC Law, the Bangalore Principles of Judicial Conduct (2002) read as follows: “5.1. A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (“irrelevant grounds”). 5.2. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.”

Article 14 of the Draft Law prescribes what additional activities a judge and prosecutor may perform outside working hours. This Article specifies the permitted activities in accordance with the international standards listed in Article 12 of the Draft Law (new Article 82 of the HJPC Law). The exception from paragraph (1) represents the standard in laws on public services across Europe; it safeguards freedom of public officials guaranteed under the constitution, particularly in terms of performing academic, scientific and cultural activities. Limiting activities during working hours referred to in paragraph (2), prohibition of receiving double fees referred to in paragraph (3), as well as mandatory internal notification from paragraph (4) are also found in practice across Europe. The obligation of internal notification allows the supervisory body to monitor the extent to which these activities are in line with legal provisions. New Article 83 of the HJPC Law should be read in conjunction with the limitations of the new Article 84 of the HJPC Law when it comes to receiving compensation, so that this provision can be proven effective.

Article 15 of the Draft Law introduces a limit on income generated in additional activities of judges and prosecutors. It is necessary to limit the income from external activities, since high external income may have a potential impact on the independence of judges and can distract the judge from performing his main tasks. The exception in paragraph (2) is justified, since this income is realised without putting efforts over a more significant time period and is disclosed in asset declaration.

Article 16 of the Draft Law lays down instances where a judge or prosecutor may seek the opinion of the Council on whether his external activities are compatible with the duty he performs. Consultative Council of European Judges (Opinion no. 3 under No. 29) “encourages the establishment within the judiciary of one or more bodies or persons having a consultative and advisory role and available to judges whenever they have some uncertainty as to whether a given activity in the private sphere is compatible with their status of judge. The presence of such bodies or persons could encourage discussion within the judiciary on the content and significance of ethical rules. Take for example only two possibilities, whereby such bodies or persons could be

either under the auspices of the Supreme Court or the Association of Judges. They should in any event be separate from and pursue different objectives to existing bodies responsible for imposing disciplinary sanctions.” Similarly, Recommendation of the Council of Europe CM/Rec (2010)12 states under No. 74: “Judges should be able to seek advice on ethics from a body within the judiciary.” Recommendations in the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (2010), among other, include (Item No. 2.1): “The judiciary should consider establishing a judicial ethics advisory committee of sitting and/or retired judges to advise its members on the propriety of their contemplated or proposed future conduct”. Furthermore, the Venice Commission of the Council of Europe notes (CDL-AD (2013) 035, under item No. 16): “In the implementation of a code of ethics, the possibility for judges to seek advice from a body within their organisation(s) should be included.”

Article 17 of the Draft Law amends Article 86 of the HJPC Law and introduces the obligation of judges and prosecutors to declare, that is, file reports on their assets and interests.

Asset declaration is one of the concrete measures for which the Venice Commission of the Council of Europe requires to be “put in place to combat corruption in the judiciary” (CDL-AD (2016) 00790, under No. 88). In earlier version of the HJPC Law, the Venice Commission criticised that “the provision falls short of requiring a judge to declare all of his or her assets. It should be noted that full asset disclosure has proved a valuable weapon in combating corruption in other countries.” (CDL-AD (2014) 008, No. 120). Thus, Article 86, paragraphs 1 through 4 aim to show a comprehensive picture on finances and private interests of judges and prosecutors. Paragraph (6) of this Article allows the submission of asset declarations; instead of the obligation to re-submit all previously reported items every year, the obligation is to report only new transactions.

Paragraphs (7) and (8) prescribe the time limits for judges and prosecutors to submit their reports. A combination of entry, annual and exit declaration is a standard pace in the Western Balkans and other countries.

Paragraph (10) stipulates that if a judge or prosecutor holds cash amounts exceeding BAM 5,000 outside banks, he or she cannot use it to justify funding of his or her expenditures. This is a less stringent regulation than the one considered and proposed by experts for BiH. That actual proposal went as far as to forbid judges and prosecutors from holding more than BAM 5,000 in cash in any case whatsoever. After thorough discussions, a provision was made that addresses the very essence of the problem – it is not forbidden to keep cash above a certain amount; instead, it is prescribed that this amount cannot be used to justify financing of costs that would otherwise go beyond being covered by reported income. Cash poses one of the greatest risks threatening to jeopardise the efficiency of the asset declaration system required by the Venice Commission of the Council of Europe and other international organisations. An example from the European Union can be used as an illustration; namely, Latvia had a constant problem of public officials reporting large amounts of cash savings. It was obvious that at least some of them reported non-existent amounts of cash so that they could account for subsequent enrichment (from illegal sources). A similar problem existed with citizens trying to swindle the tax system in general. In 2011, Latvia adopted a law on asset declaration and unreported income of natural persons. The law required all residents, as well as public officials who had cash savings above the set thresholds, to ensure that excess of these amounts was deposited with credit institutions.

Similarly, Article 4/1 of the Albanian Asset Declaration Law provides as follows: “The subjects of this law filling asset declarations for the first time in accordance with Article 5/1 cannot possess or indicate in their declaration any cash outside the banking system exceeding the amount of 1.5 million Lek [~ USD 14,000]. Subjects who declare assets in accordance with Article 5/1 of this Law must deposit cash above the amount stipulated in paragraph (1) of this Article, before submitting asset declaration to the competent authority.”

EU Member States have general limits for cash transactions such as those in Greece (€ 300), France (€ 1,000) or Spain (€ 2,500). These limits, among other, prevent tax evasions and (other)

unlawful financial flows. Although certain general limits for Bosnia and Herzegovina would go beyond the framework of the current reform of the judiciary and are likely to face political resistance, it is important to foresee a similar effective mechanism in the context of asset declaration. In that sense, Article 86, paragraph 9 of the HJPC Law is comparably less “invasive” to the referenced Albanian provisions or a general cash limit, given that those filing reports are given discretion to decide whether they wish to deposit to bank account or keep it as cash, while preventing abuse at the same time.

Article 18 of the Draft Law introduces new Articles **86a through 86i** regulating ways to ensure transparency in asset declaration, review and analysis of data, the register of reports, establishment of the Integrity Unit, the adoption of rulebook on reporting and regulating violations related to asset declaration.

New Article 86a. regulates the transparency of asset declaration. Asset declarations are publicly available across the Balkan countries and beyond. Public availability of reports – including their online availability – is further in line and with jurisprudence of the European Court of Human Rights (inter alia, its decision of 25 October 2005 in *Wypych v. Poland*, No. 2428/05), supporting “Internet access to [asset] declarations [...]. Without such access, the obligation would have no practical importance or genuine incidence on the degree to which the public is informed ...”.

Noteworthy, the European Court of Justice ruled in favour of public access when it comes to income of European MPs (Case T-471/08). Further, the Western Balkans Recommendation on Disclosure of Finances and Interests by Public Officials (2014) under No. H.1 reads: “As monitoring by the public at large is one of the most effective tools, income and asset declarations should be available online. Ideally, declarations submitted online are published in real time. A useful public database of declarations requires in particular electronic and free access, and data in searchable, machine-readable format.” Further, the Legislative Toolkit on Conflict of Interest (2015), authored by the Council of Europe, recommends in its Article 15, paragraph (2) that “Declarations are published online and are freely accessible”

As to the exceptions referred to in paragraph (2), the Western Balkan Recommendation on Disclosure of Finances and Interests by Public Officials (2014) under No. I.2 states the following: “Personal information may be excluded from publication in order to protect the privacy and security of the public official. This concerns in particular the location of properties, number plates of vehicles, identification numbers of current accounts, savings accounts, safety deposit boxes or credit cards.” In this sense, in the case of disclosure, the amount of cash can be considered a security risk. However, as long as the full amount of all savings is only disclosed (bank account balance plus cash), no outsider would not know if the applicant has any cash at disposal, and if so, what is the actual amount of cash here.

Paragraph (3) is understood, considering that the documents submitted in attachment are not an integral part of declarations. However, clarification in paragraph (3) would clear ambiguity regarding a tax secret or other aspects of safeguards.

It should be noted that in other countries declarations are also available to the public without a time limit. In this regard, paragraph (6) is rather modest and minimally invasive approach.

Articles 86b and 86c regulates the procedure regarding the manner in which the Council reviews and analyses data from declarations.

Systematic verification of asset declarations is a standard feature of the system of asset declarations across the Western Balkans and beyond. To this end, the Council of Europe’s Group of States against Corruption (GRECO) recommended for the judiciary in BiH “developing an effective system for reviewing annual financial statements, including adequate human and material resources, [i] cooperation channels with relevant authorities” (Eval IV Rep (2015) 2E, rec. xiii). In this regard, it may also be relevant to cite the European Court of Human Rights, which notes that “this [examination] serves the purpose of providing a safeguard against abuse or attempts by councillors to evade the obligation concerning their financial situation. Comparison of declarations with income-tax returns enables the authorities to establish the exactitude and honesty of information submitted by local politicians.” (*Wypych v. Poland*, No. 2428/05). The

Court notes that there is a similarity between asset declarations and tax returns, whereby audits in principle would be possible at any time against anyone (“the Court notes that a tax audit can also be conducted in respect of any taxpayer”, *ibid*).

Scrutiny of asset declarations focuses on covert conflicts of interest as well as inexplicable wealth in accordance with international standards. In the words of the Western Balkan Recommendation on Disclosure of Finances and Interests by Public Officials (2014) under A: “Declarations on finances and interests serve as a tool for preventing and detecting conflicts of interests and illicit enrichment among public officials.” The European Court of Human Rights has confirmed twofold purpose of asset declarations. The Court noted that declarations “give the public an opportunity to be convinced that this [decision-making] process is not burdened with undue pressure or inappropriate lobbying, or even outright corruption.” Similarly, the Venice Commission of the Council of Europe defines asset declarations as standard “of fighting corruption because it can highlight any conflict of interest and possibly lead to scrutiny of any unusual income” (CDL-AD (2016) 00790, under No. 90).

Competencies provided for in **Article 86c** to collect additional information from declarants and third parties, are standard features present across the entire Western Balkans and beyond. According to the Recommendation for the Western Balkan on Disclosure of Finances and Interests by Public Officials (2014) under E.6: “For the accuracy of submitted information, the oversight body needs to cross-check the data with a wide range of state databases. The oversight body should also have access to publicly or voluntarily available private data, and should have the option of (external) inspections of assets in individual cases.”

Noteworthy, there are examples of countries where asset verification bodies have (direct) access to bank data, without the need for an intermediary role of a judge or prosecutor (Bulgaria and Greece being commendable examples in the European Union, while in France the competent authority to collect asset declarations has access to data from the Financial Intelligence Unit, according to Article L.561-31 of the French Monetary and Financial Code). Finally, it should be recalled that the Venice Commission of the Council of Europe also supports that the bodies in charge of oversight of asset declarations have direct access to “generalised data on financial situation and on important transactions as well as to information on assets of judges from tax authorities, State registers and financial institutions” (CDL-AD (2019) 024, Item 29).

It should be noted that EU Directive 2011/16 abolished banking secrecy and that the new EU Directive 2014/107/EU “as regards mandatory automatic exchange of information in the field of taxation” provides for automated annual data exchange for all foreign bank account holders, which includes account balance or asset value. Exchange of data does not take into account the fact whether or not bank accounts are duly declared for tax purposes. If banking data can be automatically exchanged across borders, the same can be done even more so in-country between the banks themselves and domestic government bodies. Additionally, the European Union is currently working to ensure that national records of bank accounts become obligatory in 2018. Overall, the OECD has rightly stated already in 2011 that: “an era of secrecy in banking has come to an end”.

Article 86d prescribes the obligation of the Council to provide information on the outcome of checks to the judge or prosecutor, and in case of observed irregularities, to submit the information to the Office of Disciplinary Counsel, but also to other competent bodies which will, if deemed necessary, take the required actions and measures.

Article 86e sets forth that the Council shall establish a register of declarations. Asset declarations are essential documents whenever a disciplinary or criminal investigation is initiated against the declarant or family member, regardless of whether or not the reporting is accepted as a starting point in the investigation. Therefore, declarations should be kept in the archives for as long as they could prove relevant in a criminal investigation. The statute of limitations is prescribed by the Criminal Code. It should be borne in mind that even shorter periods may be suspended or interrupted for a significantly longer period of time. The Western Balkans

Recommendations on Disclosure of Finances and Interests by Public Officials (2014) state the following (under item I.4): “Declarations need to be archived for a sufficient period of time after the obligated person has concluded his or her functions in order to allow for post-employment reviews and investigations within statute of limitations of relevant offences.” In comparative terms, 5-year period is too short. Records related to asset declarations are kept indefinitely, for example, in Albania, Kosovo* and Romania. In Latvia, this period is 30 years, while in Poland and Slovenia records are kept for ten years.

Article 86f. prescribes the establishment of the Integrity Unit within the Council’s Secretariat. In order to restore trust in the integrity of judicial office holders, it is necessary to strengthen the established verification system for asset declarations in accordance with these amendments by establishing, in paragraph (1) of this Article, the Integrity Unit as a professional, functional and independent body within the Council Secretariat. Attempts to establish a body that would perform checks through a Council’s Rulebook on Submission of Financial Statements were first opposed in 2019 by the Personal Data Protection Agency (the Agency), which, acting on the complaint by judges of the Court of BiH, banned the enforcement of the Rulebook. The HJPC was subsequently forced to suspend application of this Rulebook.

Given that the already mentioned Experts’ Report on Rule of Law Issues in BiH (the Priebe Report) stated that storing of financial statements so far under the current HJPC Law is pointless without the possibility of any verification, this Article entrusts the verification of asset declarations to a special structure within the Council’s Secretariat, with an explicit legal basis.

Specifically, European standards stress that “effective prevention of corruption in the judicial system depends to an important extent on the political will in the respective country to truly and sincerely provide the institutional, infrastructural and other organisational safeguards for an independent, transparent, and impartial judiciary.” (Opinion No. 21 (2018) of the Consultative Council of European Judges - CCJE). In this regard, it should be noted that the Opinion explicitly mentions “high judicial councils or other self-governing bodies” in the section on “Organisational framework” for such safeguards. Thus, the Integrity Unit that would support the work of the HJPC in this part also fits into the logic of the CCJE’s recommendations.

Finally, as the Priebe report states, along with enhanced transparency through the publication of asset declarations, such oversight of checks by the Integrity Unit would reduce concerns about potential abuse and manipulation in this process.

Article 86 g. prescribes that the Council would adopt a Rulebook on asset declarations which will further regulate issues related to the form for asset declarations, the work of the Integrity Unit, keeping records ...

Article 86h. regulates minor offences in relation to submission of asset declarations. Statutes of limitations are rather short for minor offences (Article 22 of the Minor Offence Code). However, most of the offences under Article 86h. should be detected almost immediately. Also, sanctions provided for in Article 86h. are relatively mild. For example, obstructing the work of a supervisory authority in France by failing to provide it with the necessary information is punishable by up to one year in prison or a fine of up to EUR 15,000, under Section 26 (2) of the Code 2018-907. Another good example from the European Union is the Bulgarian Anti-Corruption Law of 2018. Its Article 175, under paragraph (1) prescribes sanctions for “any person who fails to cooperate or submit any information or documents required by the Commission within the set time limits, including in electronic form”.

Article 86i. prescribes that asset declaration provision equally applies to members of the Council. The provision was added to clarify that the members of the Council are not excluded from mandatory asset declaration. This obligation is extended to members of the Council who are not judges and prosecutors, such as, members appointed by the Council of Ministers or the Parliamentary Assembly of BiH (House of Representatives) or the Bar. The European Network of Judicial Councils states the following in its recommendations: “The judiciary can gain the trust

of the society it serves only through accountability” (Recommendations and principles from 2012 to 2016, updated in 2017, Recommendation No. 79 on Accountability).

Article 19 of the Draft Law stipulates that the Council will adopt bylaws within 45 days from the day of enactment.

Article 20 of the Draft Law prescribes the deadline for submitting the first declaration.

Article 21 sets forth that the Parliamentary Assembly of BiH will pass the new HJPC Law within one year from the date of adoption of this Law. The EU’s Opinion clearly gives preference to the adoption of the new HJPC Law harmonised with the EU standards.

Article 22 of the Draft Law regulates that this Law is to enter into force 90 days after its publication in the Official Gazette, thus ensuring additional time required for the establishment of the Integrity Unit.

IV. CONFORMITY WITH THE EU LEGISLATION

The matter regulated by the proposed solutions under the Law is not regulated by legally binding EU acts. Recommendations of various bodies were consulted in the preparation of the proposed provisions. As foreseen in Article 19 of the Draft Law, the new law on the HJPC, which is being prepared by the Working Group, will be adopted within one year from the day of adoption of this law. The EU’s Opinion clearly gives preference to the adoption of the new HJPC Law that will be in line with the EU standards.

V. CONSULTATIONS

Drafting process for comprehensive amendments to the HJPC Law surely requires a lot of time, as evident from the previous work of the Working Group on Amendments to the HJPC Law, formed by the BiH Ministry of Justice in 2019. However, due to serious weakening of integrity in the judiciary in the past period as pinpointed in the Experts’ Report on Rule of Law Issues in BiH (the Priebe Report), the need for targeted improvements to the legislative framework became evident, as was the need to table certain amendments to this Law, offering emergency fixes, particularly with regard to strengthening the integrity of judicial office holders in accordance with the recommendations of:

- Judicial experts and Peer Review Recommendations,
 - 2014 Opinion of the Venice Commission,
 - Analytical Report accompanying the 2019 Opinion on the BiH’s application for membership in the EU,
 - Recommendations of the European Network of Councils for the Judiciary,
 - Opinion of the Consultative Council of European Prosecutors and the Consultative Council of European Judges,
 - the Council of Europe Recommendation CM/Rec (2010)12,
 - GRECO recommendations,
 - Resolution on Judicial Ethics of the European Court of Human Rights,
 - Western Balkans Recommendations on Disclosure of Finances and Interests by Public Officials.
- In preparation of the proposed provisions, all recommendations of the mentioned bodies were consulted.

Opinions on the Draft Law were obtained from the Entity ministries of justice and the Brčko District Judicial Commission. **The FBiH Ministry of Justice** had no objections to the Draft Law, and the objections and suggestions of the Republika Srpska Ministry of Justice and the Brčko District Judicial Commission were for the most part accepted and incorporated into the text of the Draft.

Remarks of the **Republika Srpska Ministry of Justice** regarding Articles 4, 9, 11 and 16 are justified and have been integrated in the Draft Law. In line with the remark on Article 86b, a new Article 86c has been incorporated in the Draft in order to properly address this issue, thus shifting the numbering of articles compared to the previous text. Also, the provision establishing the Integrity Unit was specified, and the initiation of minor offence proceedings was specified for minor offences prescribed.

The Brčko District Judicial Commission contested the provisions of Article 2 and 5 of the Draft, emphasising that it is "*unclear whether the ban applies only to constitutional courts of the Entities or also to the Constitutional Court of BiH*". In line with this remark, these provisions were made more specific. A suggestion regarding Article 7 of the Draft was also upheld. Accordingly, Article 7 was supplemented by paragraph (5), as well as the remark on Article 11. In accordance with the remark regarding Article 86 of the Law, paragraph (3) of this provision was supplemented and further specified. Remarks concerning the length of maintaining the records on asset declarations was not accepted, as justified in rationale provided for Article 86e., while the Opinion reads "*a contentious issue as to whether the proposed sanctions may be imposed on those referred to in this Article*". This provision has been revisited, and as a result, the number of those who can be subject to minor offence sanction reduced compared to the previous proposal. Thus, this remark was partially accepted.

In accordance with the Rules for Consultations in the Drafting of Legal Regulations (Official Gazette of BiH, 81/06 and 80/14), public consultations were conducted and the remark related to the Article prescribing "*Adoption of secondary legislation*" was accepted and incorporated in this provision.

Necessary opinions regarding the Draft Law were obtained, and justified suggestions were accepted and incorporated into the text of the Proposal.

Opinion of the HJPC - Considering that all the proposed provisions were previously agreed at meetings attended by the representatives of the HJPC, the large number of remarks made in their Opinion is not justified. The Opinion contains too broad a proposal for prescribing a special procedure for reviewing the final HJPC decisions made in the procedure of appointing judicial office holders (Article 44). In order to avoid delays in the appointment procedure, in accordance with the remarks from the HJPC Opinion, the proposed provision was supplemented with prescribing a deadline for filing a complaint and it is envisaged that in these disputes the Court of Bosnia and Herzegovina shall decide in an urgent procedure.

The proposal to prescribe a single amount for compensation for additional activities of a judge or prosecutor in Article 84 of the Law or to link it to the average, i.e. the highest salary in the judiciary was assessed as unjustified. Given that the salaries of judicial office holders in BiH are prescribed in four different laws, it was assessed as justified to link the amount of fees for additional activities of judges to the annual net salary of that judge or prosecutor. Remarks regarding Articles 9 and 10 of the Draft Law was not accepted because "improper performance of judicial or prosecutorial functions" as a disciplinary offense is abstract without specifying the term "improper", and even without this, we believe that the envisaged disciplinary offenses are complete.

[The remark related to Article 86b, paragraph (6), and the proposal to delete points (i) to m) in Article 86, paragraph (2), as well as the proposal to relieve judicial office holders from submitting additional documents to substantiate the allegations in the declaration (Article 86, paragraph (5)) was assessed as unjustified. Remark related to Article 86, paragraph (8) and Article 86a, paragraph (6) was accepted as justified and one-year deadline is included.

Proposal to extend the deadlines for adopting bylaws was assessed as unjustified, taking into account that Article 22 of the Draft Law prescribes its application after the expiry of 90 days from the day of entering into effect.

In accordance with the HJPC Opinion, Article 7 of the Draft Law was included as a new provision after receiving the HJPC Opinion, as it was deemed justified to supplement the current Article 17, which enumerates the HJPC competencies. In the catalogue of the Council's competences, this provision also prescribes the competence "to collect, verify and publish declarations of assets and interests of judges and prosecutors", which is elaborated in this Draft thus eliminating obstacles to prescribing the procedure for performance evaluation of judicial office holders.

In accordance with the Opinion received from the **Office for Legislation** corrections were made to Articles 3, 4 and 6. Also due to introduction of new Article 7 in the Draft Law, Articles 7, 11, 16 and 21, changed their numbering to 8, 12, 17 and 22.

The suggestion to delete the disciplinary offence - the performance evaluation "unsatisfactory performance of function" - for the heads of institutions - court presidents and chief prosecutor, in Articles 56 and 57 of the Law, was not accepted given that this offence is prescribed identically for judges and prosecutors. Namely, court presidents and chief prosecutors are evaluated for their management of institutions in accordance with a special criterion.

Also not justified is the suggestion that special disciplinary measures be prescribed for Council members (remark regarding Article 54), because this Draft Law amended Article 4, paragraph (5), which stipulates that the provisions in this Law relating to judges and prosecutors, court presidents and chief prosecutors and deputy chief prosecutors would also apply to Council members. Article 86i stipulates that provisions of the chapter on declarations of assets and interests apply equally to all members of the Council.

In accordance with the Opinion of the **BiH Ministry of Human Rights and Refugees**, Article 4 of the Law was amended, i.e. a new paragraph (6) was included in accordance with their recommendation.

The suggestion of the **Personal Data Protection Agency** regarding Article 86, paragraph (2), item a) was accepted, as well as their suggestion regarding the content of declaration referred to in Articles 86 and 86a. Accordingly, a new paragraph (3) was incorporated in Article 86, because the Agency has justifiably noted that the data referred to in Article 86a. paragraph (2) also form an integral part of the declaration, although they are not published, i.e. not disclosed to the public in accordance with the cited paragraph (2) of Article 86a. Also, the remark regarding paragraph (3) of Article 86a was accepted, and the error observed in paragraph (5) of the Article was corrected. The title of Chapter VIII was not changed, as it appears to include several parts (declarations, establishment of a unit, minor offences), and the Working Group of the Ministry of Justice is working on a new HJPC Law. Also, the deadline for these activities is set forth in Article 21 of the Law.

In its Opinion, the **Directorate for European Integration** points out (in paragraph 7 on page 2) "*Further analysis of the *acquis communautaire* showed that the matter regulated by the Draft Law is not regulated by secondary sources of European Union law.*"

Furthermore, the Directorate refers to the European Commission's 2020 Country Report, which emphasized that "In 2021, Bosnia and Herzegovina should in particular:

- *adopt the new HJPC Law and the new Law on the Courts of Bosnia and Herzegovina, in line with European standards;*
- *urgently establish a credible and rigorous system for verification of assets of judges and prosecutors, and members of the High Judicial and Prosecutorial Council* ".

Accordingly, "*the Directorate supports the efforts of the proponent in meeting the recommendations from the above documents and points out that the proposed solutions represent a step forward in meeting certain recommendations, but points out that there are many issues that need to be specified in more details in order to reach further alignment with the *acquis*.*" Therefore the Directorate noted only partial alignment.

The recommendations stemming from the acts referred to in the Opinion by the Directorate are an obligation for the processor to ensure further alignment in preparing the new HJPC Law.

VI. REVISION OF EXISTING REGULATIONS

The enactment and application of this Law does not require amendments to other laws.

VII. FUNDING

No additional funds are needed in the Budget of Bosnia and Herzegovina for the implementation of this Law, as confirmed by Form No. 2a on Fiscal Impact Assessment.