



The Final Step in Reforming the Judiciary: Disposition of All Cases in Reasonable Time¹

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A major EU integration requirement

One of the main requirements for the European Union membership is an independent and efficient judicial system, ensuring the right to a fair trial within a reasonable time, in line with the Convention for the Protection of Human Rights and Fundamental Freedoms.

Bosnia and Herzegovina embarked on a comprehensive judicial reform to achieve this objective. While the independence of the judiciary has improved significantly, the ability of courts to dispose cases within a reasonable timeframe is yet to improve.

The most expensive and slowest court system in Europe

In an attempt to improve the court ability to dispose cases within a reasonable timeframe, resources available to courts have been significantly increased. Operating costs of the court system increased from 82 million KM in the fiscal 2005 to 128 million KM in the fiscal 2009 and now they are relatively the highest among all member countries of the Council of Europe, in terms of GDP per capita (CEPEJ, 2008). In other words, the citizens of Bosnia and Herzegovina pay the highest percentage of their income for the judiciary.

On the other hand, citizens and firms in Bosnia and Herzegovina must wait unreasonably long, even for years and in some instances decades, until the courts decide their cases. According to the European Judicial Systems report of the European Commission for the Efficiency of Justice (CEPEJ, 2008), this waiting time in Bosnia and Herzegovina is the longest in Europe.

For example, it takes an average of 135 days for a court in Austria to dispose a civil litigious case, while the average disposition time in Bosnia and Herzegovina is 701 days. This problem has been confirmed by an increasing number of rulings of the Constitutional Court of Bosnia and Herzegovina concerning excessive delays in court proceedings. Namely, courts of general jurisdiction were found responsible for the violation of the right to a fair trial in a number of cases brought before the Constitutional Court. Moreover, it has publicly invited courts of general jurisdiction to pay more attention and comply with the human rights standards set by the **Convention for the Protection of Human Rights and Fundamental Freedoms** with regards to the reasonable time requirement.

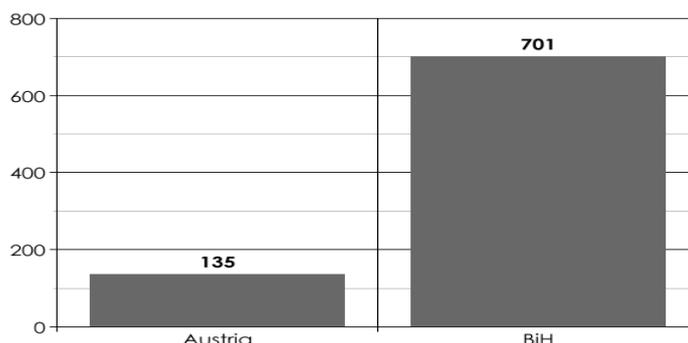
More judges, bigger budgets, but more cases pending

The inability of courts to dispose cases within a reasonable time stems from the number of pending cases which is alarmingly high and on the rise, despite significant increases in resources available to courts. During the past four years, the budgets increased by 56%, from 82 million KM to 128 million KM, while number of pending core cases also increased from 453,336 cases to 620,866 cases, an increase of 37%.

Summary

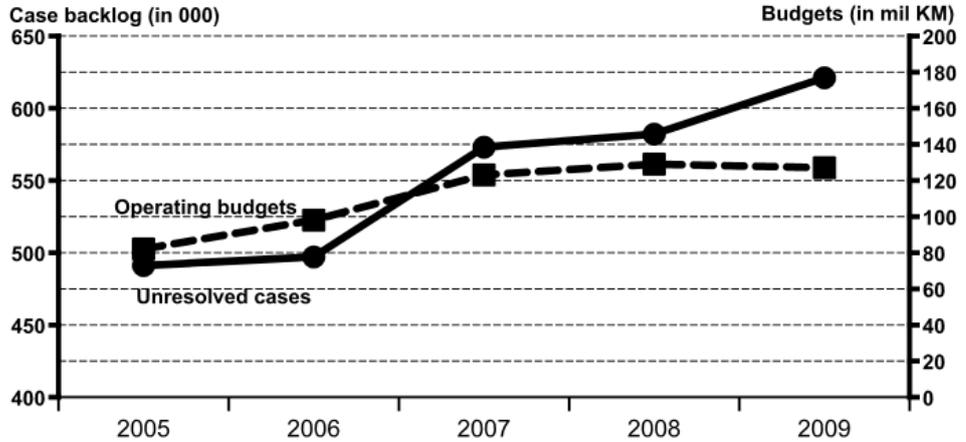
The court system in Bosnia and Herzegovina is the most expensive in Europe, in relative terms. Yet courts in BiH need the longest time to dispose cases. The court operating budgets increased from 82 million KM in 2005 to 128 million KM in 2009 without a noticeable improvement in disposition time. This apparent inability of courts to improve their performance stems from the outdated and partial performance management. A modern and comprehensive performance management policy must be implemented to improve efficiency of courts to a level required to bring disposition times within a reasonable range. The first step is to officially adopt a comprehensive set of performance indicators at the court level, that should at least capture the average judge performance, ability to handle the incoming cases, disposition time and average cost per case. In the second step, performance targets should be officially set. Finally, funding decisions and appointment decisions should be primarily based on performance.

Average time to dispose a civil litigious case in days



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Average time to dispose a civil litigious case:
Austria - 135 days
BiH - 701 days



What causes the problem?

The fact that pouring resources into the court system has not reduced the number of pending cases and made a notable impact on case disposition times implies that performance management in courts is inadequate. An assessment of the current performance management policy clearly confirms this implication:

- The performance of courts is not comprehensively and consistently measured
- There are no clearly defined performance indicators and performance expectations
- The cornerstone of the current performance management policy is a simple quota system which sets the number of cases each judge should resolve each month. The system does not differentiate cases between their complexity, thus providing a perverse initiative for judges to focus on simple, easily disposed cases,

those that in most instances do not require decision making

- The quota system does not have any role in managing the court system

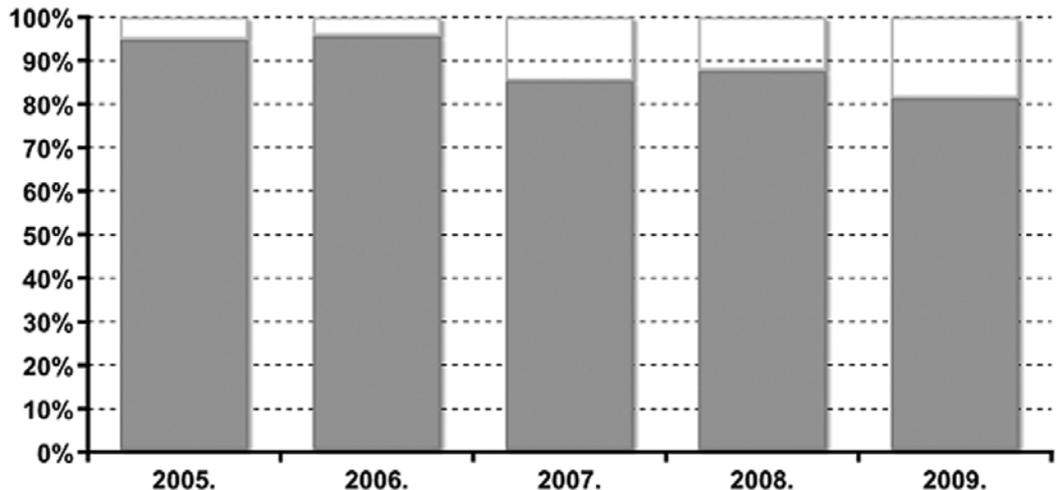
Towards a comprehensive performance management policy

The performance of courts should be examined from various aspects.

The European Commission for the Efficiency of Justice (CEPEJ, 2008) employs two basic indicators: Clearance Rate and Disposition Time.

Clearance Rate indicates an ability of a court to handle the incoming cases. It is defined as the number of disposed cases as a percentage of incoming cases. If the clearance rate is 1 or 100% than a court resolves all received cases within a time period. If this ratio exceeds 100%, than a court solves more cases than it receives and thus reduces its case backlog. On the other

Average Clearance Rate of litigious cases in fist-instance courts: constantly below 100%





hand, a clearance rate below 100% implies an increase in case backlog and should be seen as a red flag. The clearance rate for litigious and enforcement cases in the first-instance courts was below 100% every year from 2005 to 2009.

Time to Disposition indicates the average time in years needed to resolve all pending cases. According to this very measure based on 2006 data, Bosnia and Herzegovina was placed last among 48 member countries of the Council of Europe. This indicator shows that disposing a litigious case, for example, can take 7 years, while disposing a criminal case lasts for a maximum of 1.7 years.

Maximum Time to Disposition in the first-instance courts in 2009:

- **enforcement cases: 30.1 years**
- **litigious cases: 7 years**
- **commercial cases: 3.1 years**
- **non-litigious cases: 3.1 years**
- **criminal cases: 1.7 years**
- **business registry: 0.2 years**

Clearance Rate and Time to Disposition show two important aspects of the situation in courts, but it is important to note that these two indicators do not reveal anything about the efficiency of the use of court resources. Therefore, they are not issues *per se*, but rather consequences of issues. In other words, a court, for example, may have favorable indicators only because it has an excess number of judges and a comparable court may appear problematic because it lacks sufficient resources. Therefore, a measure that compares court results and resources is needed to take into account this dimension of the performance.

Cost per Case is a measure recommended by National Centre for State Courts (NSCS, 2009). Cost per Case simply indicates the cost to process a case. A court incurring a higher than average cost to process a case is deemed inefficient and *vice versa*. Our study shows that court efficiency, as implied in Cost per Case, greatly varies. The most efficient second-instance court annually saves 2.6 million KM, while the most

inefficient one spends 3.1 million KM above the average cost. Similarly, the best-performing first-instance court saves more than 1.1 million annually, while the worst performing court annually spends 1 million KM that cannot be justified by the number of resolved cases.

Recommendations

A comprehensive performance management policy should be implemented to meet the following objectives:

1. All currently pending and incoming cases must be resolved within reasonable timeframe;
2. Court cases should be disposed in an efficient manner (“do more with less”).

A new policy should be developed based on the following principles:

Performance management at the court level

- Performance at the court level should be comprehensively assessed. At minimum, the following performance indicators should be regularly reviewed:
 - Average judge performance
 - Clearance rate
 - Disposition time
 - Cost per Case
- Targets for the above indicators should be officially set;
- Performance should be assessed regularly;
- Decisions to increase the number of judges and funding decisions should be primarily based on performance indicators. Additional resources should be made available to efficient courts (i.e. courts with favorable cost-per case and average judge performance indicators);
- Assessment of the court president performance should be based primarily on performance indicators;
- Timeframes for disposing particular types of cases should be officially adopted;
- To ensure integrity of data and the performance measurement, court reports should be reviewed or audited by an independent institution.



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Performance management at the judge level

- Cases disposed by issuing a judgment should have outsized weight (i.e. 90%) in performance indicator at the judge level, while the cases disposed by administrative means should have low weight (i.e. 10%);
- There should be enough support staff to relieve judges from all administrative duties and work on cases where no judgment is needed or simplified procedures can be applied;
- Performance indicator at the judge level should take into account case complexity. In other words, complex cases should have higher weight in the performance measurement relative to simple cases;
- Generally, exceeding of the performance should be rewarded if it is necessary to meet the objective of disposing all cases within reasonable time. An example when exceeding performance would be a necessity is a temporary increase in inflow of cases;
- Training should be used as a tool to improve underperformance;
- Performance should be expected to improve over time. Therefore, newly appointed judges should be expected to perform at a lower level than their experienced colleagues and their performance should be expected to increase over time.

References

European Commission for the Efficiency of Justice – CEPEJ. (2008). *European judicial systems: Efficiency and quality of justice*. Council of Europe

National Centre for State Courts. (2009). *Court Tools*. (available at <http://www.courttools.org/>)

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