Meeting the EU membership requirements through a better performance management in courts

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Summary

One of the main requirements for the European Union membership is an efficient judicial system which ensures the citizen right to a fair trial within 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. The reform established an independent state-level institution, the High Judicial and Prosecutorial Council of BiH (HJPC) with the sole authority to appoint judges, as well as a broad authority in the court administration that includes overseeing and advising courts on managerial issues. The HJPC appointed all judges in a competitive process and undertook a number of initiatives aimed at improving the efficiency of courts.

Results of these initiatives are at best mixed. Although the cost of the court system increased by 55% from 2005 to 2009, the number of pending cases and the average case disposition time are yet to improve. During the same period, the number of pending core court cases in the first-instance courts surged by 40%, while the number of pending cases in the second-instance courts remained virtually unchanged. According to the European Commission for the Efficiency of Justice (CEPEJ 2008), the court system of Bosnia and Herzegovina is the most expensive in Europe, relative to the per capita GDP, and the slowest in the disposition of cases. This issue is raised by the European Commission as well as the Constitutional Court of Bosnia and Herzegovina, holding the general jurisdiction courts responsible for the violation of the right to a fair trial in a number of cases.

This study finds that the current performance management policy is responsible for failings to efficiently use the resources available and improve the court ability to dispose cases in reasonable time. At the core of the performance management policy is the decades-old case quota system, which mandates the number of cases that should be disposed. The quota system does not differentiate the cases between their complexity or the procedures used to resolve them. In other words, all disposed cases in the same category have equal weight in the performance measurement, regardless of their complexity or whether they were disposed by a judge decision on the merits of a case or if a judge resolved a case using one of the simplified or summary proceedings.

This study empirically assesses a court performance from three perspectives: 1) case clearance rate, showing the ability of a court to dispose the incoming cases; 2) disposition time, showing how long it takes for a court to dispose cases, and 3) cost per case, indicating the efficiency of resources used. The analysis of these indicators clearly shows that the current performance management policy is grossly inadequate and explains why pouring additional resources into the court system has not produced a desired outcome.

The study recommends a comprehensive overhaul of the performance management policy. Judges should spend most of their valuable time adjudicating, while simple and routine cases should be handled by support staff supervised by the judges. In line with this, the performance measure at the judge level should include, to a great extent, the cases resolved by judge's decisions. The performance at the court level should at least include: the clearance rate, disposition time, average performance of a judge and cost efficiency. Finally, the performance indicators should have an important role in the funding policy.

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Introduction

At the core of the ability of a candidate country to meet requirements for the European Union (EU) membership is a well-functioning, independent and efficient judicial system. This is the reason why the EU and the rest of the international community have been so heavily involved in reforming the judiciary of Bosnia and Herzegovina. In 2004, an independent state-level institution, the High Judicial and Prosecutorial Council of BiH (HJPC) was established and given the sole authority to appoint judges, as well as a broad authority over the court administration that includes overseeing and advising courts on managerial issues. Strongly supported by the international community, the HJPC has been leading the judicial reform in the country.

The HJPC appointed all the judges in a competitive process to ensure their competency and independence. Moreover, the salaries of judges were significantly increased to ensure that they are properly motivated and not prone to corruption. In line with these efforts, significant investments were made in information technologies and reconstruction of court buildings aimed at increasing efficiency of courts.

Five years after the start of judicial reform, the results are mixed at best. The operating costs of the court system increased from 82 million KM in the fiscal 2005 to 128 million KM in the fiscal 2009 and are now the highest among all member countries of the Council of Europe in terms of per capita GDP (CEPEJ, 2008). On the other hand, the soaring number of unresolved cases increased even further (453,336 unresolved cases on December 31, 2004; and 602,866 unresolved cases on December 31, 2009[1]). The following figure illustrates these diverging trends.

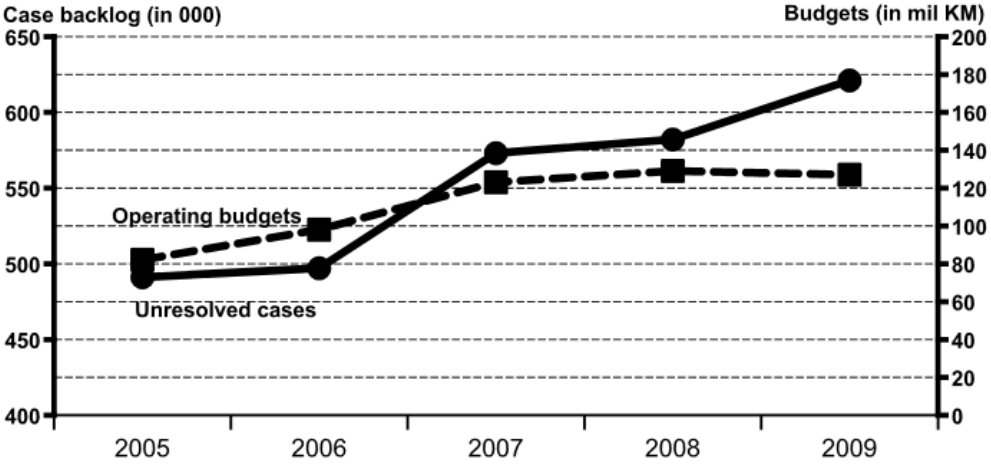


FIGURE 1 Pending cases and budgets
Left axis depicts number of unresolved core cases in first-instance and second-instance courts (in thousands). The right axis shows the operating budgets in millions of KM. The budgets surged by 56%, from 82 million KM to 127 million KM, while number of pending core cases was also on the rise from 453,336 cases to 620,866 cases, an increase by 37%

The large number of pending cases translates into extremely long court proceedings. In other words, citizens and firms must wait unreasonably long, for years and sometimes even decades, until a court decides their case. According to the European Judicial Systems report of the European Commission for the Efficiency of Justice[2] (CEPEJ, 2008), this waiting time in Bosnia and Herzegovina is the longest in entire Europe. For example, it takes on average 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.

A clear conclusion arises that judiciary of Bosnia and Herzegovina cuts both ways: it is in relative terms the best funded judiciary, but its ability to dispose cases within a reasonable timeframe is the worst.

[1] Land registry cases, claims on unpaid utility bills, which are rapidly increasing, and minor offense cases, which are significantly decreasing following a legislative reform that took place in 2006, are not included.

[2] The European Commission for the Efficiency of Justice was established on September 18, 2002 in the Resolution Res (2002) 12 of the Committee of Ministers of Council of Europe

Social costs that this problem generates cannot be overestimated. It denies citizens of Bosnia and Herzegovina the right to a fair trial within reasonable time, which is guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms[3] by domestic legislation regulating court proceedings[4]. This problem has been confirmed in an increasing number of rulings by the Constitutional Court of Bosnia and Herzegovina on excessive delays in court proceedings. Namely, the general jurisdiction courts 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 called on the general jurisdiction courts to pay more attention and comply with the human rights standards set under the Convention for the Protection of Human Rights and Fundamental Freedoms with regards to the reasonable time requirement.

The inefficient court system also negatively affects the state business environment, evident in the 2008-2009 Global Competitiveness Report by the World Economic Forum (GCR, 2008). Bosnia and Herzegovina received the overall score of 3.6 (107th out of 134 countries) and scored even worse in the institutions pillar (3.1), where the efficiency of courts is fundamentally important.

Finally, the efficiency of courts must be addressed to meet requirements for the EU membership. The 2008 European Commission B-H Progress Report reads that "sustained efforts are needed in order to improve efficiency and to ensure the independence and the accountability of the judicial system" (EC, 2008, p.14). Also, the Council of European Union in a decision on the principles, priorities and conditions contained in the Bosnia and Herzegovina 2007 European Partnership (European Council, 2008), made an explicit reference to the improvement in efficiency of the judiciary and reduction of pending court cases.

This paper presents a comprehensive analysis of the efficiency in the first-instance and second-instance courts in Bosnia and Herzegovina. The analysis clearly reveals that a continuation of the current policies leads to a complete paralysis of the judiciary and recommends decisive actions aimed at improving efficiency.

The data on court case flow, number of judges and court budgets are collected for the period of five years, from 2005 to 2009. The efficiency of courts is empirically examined by comparing the ability of courts to handle the incoming cases within a reasonable time and the efficiency of courts to use the resources. Furthermore, the results of the empirical analysis are compared to the official indicator used to assess the performance of courts in order to examine the adequacy of the official performance indicator. The performance comparison is made both within courts over the observed period, and across the B-H judiciary, which is particularly useful in the evaluation of possible policy options to improve the efficiency in this sector.

It should be noted that the major limitation of this study is inherited in the quality of empirical data. Cases within the same category may not be homogeneous. In other words, cases within the same category may differ among courts. Also, there are indications that data received from some courts are inaccurate, i.e. in some courts the number of pending cases at the end of year and then at the beginning of a subsequent year is different. Although these data issues may have made some results, such as the comparison of efficiency between two courts indecisive, they are not significant enough to call into question the validity of the study main conclusions.

[3] The Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty to protect human rights and fundamental freedoms in Europe. All Council of Europe member states are parties to the Convention. Moreover, the Constitution of Bosnia and Herzegovina provides that the rights and freedoms enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have the priority over all other laws in Bosnia and Herzegovina...

[4] Laws on courts, Laws on civil proceedings, Codes on criminal proceedings etc.

Another confining element of the study is its consideration of performance in terms of efficiency only, while the quality is omitted. The reason for this is that the quality is considered to be appropriate whereas the low efficiency is a major issue.

The study is organized as follows. The following section presents the analysis of performance in the first-instance and second-instance courts. The trend in the number of pending cases from 2005 to 2009 is compared to the operating budgets, and the performance indicators are developed and empirically estimated. The third section presents three policy options: 1. pouring additional resources into judiciary without addressing the performance management and 2. actively managing performance and adding resources based on performance indicators and evaluating consequences of each policy in terms of achieving declared objectives. The final section presents conclusions and recommendations.

Performance of Courts in Bosnia and Herzegovina

The court system

The court system of Bosnia and Herzegovina consists of 48 first-instance courts, 16 second instance courts, two supreme courts and one state-level court. All courts have general jurisdiction, meaning they have the authority to hear cases of all kinds - criminal, civil, commercial, administrative, probate, and so forth. First instance courts are the trial courts, whereas the second instance courts - excluding severe criminal cases and all administrative cases, and supreme courts - act mainly as the appellate courts.

TABLE 1 Court system in Bosnia and Herzegovina*

	Federation of BiH	Republika Srpska	District Brcko	Total
First-instance	28 municipal courts	19 basic courts	1 basic court	48
Second-instance	10 cantonal courts	5 district courts	1 appellate court	16
Supreme courts	1 supreme court	1 supreme court		2

*Constitutional courts and the state-level court (the Court of Bosnia and Herzegovina) not shown

Since less than 1% of pending cases reside with supreme courts and the state-level court, this study focuses on the first-instance and second-instance courts.

Cases in the first-instance courts are grouped in the following eight categories:

- Litigious: all categories of civil disputes, apart from commercial cases, involving contracts, real estates, domestic (family) relations, accidents, negligence, unpaid debt, small claims etc.;
- Criminal: cases in which an unlawful act, defined by law, is tried that threaten or injure protected social values; possible penalties for criminal offences are: prison and/or fine, suspended sentences etc. ;
- Minor offence: cases dealing with violations of public order or of regulations on economic and financial operations defined as such by laws or other regulations; possible penalties for minor offences are: fines, suspended sentences, reprimands, and protective measures;
- Non-litigious: inheritance proceedings, non-contentious proceedings for settling relationships between co-owners including dissolution of co-ownership, settlement of boundary lines between neighboring real estates, voluntary sales, establishing that a person does not have legal competence etc.;

- Enforcement: enforcement of claims based on an enforceable judgment and enforcement of uncontested claims;
- Commercial: disputes between companies arising from legal transactions involving goods, services, securities, ownership or other property rights in real estate; disputes related to copyrights, related rights and other rights relating to intellectual property; disputes arising from acts alleged to constitute unfair competition or monopolistic agreements; bankruptcy and liquidation proceedings, as prescribed by law, and all arising disputes;
- Registry: the registration of businesses in the business registry, issuing certificates based on the business registry;
- Land registry: the registration of real estate and rights in real estate in the land register; issuing certificates based on data contained in the land registry.

Cases in the second-instance courts are grouped in the following three categories:

- Civil: deciding on appeals against the first instance judgments in civil cases;
- Criminal: deciding on appeals against the first instance decisions in criminal cases (up to 10 years of imprisonment, fines etc.), deciding in the first instance criminal cases (more than 10 years of imprisonment)
- Administrative: deciding on administrative disputes i.e. judicial review of final decisions of administrative bodies.

Pending cases

The number of pending or unresolved cases in courts is a key indicator of health of the court system. A large number of pending cases relative to the disposed or resolved cases during a year implies long waiting times for new cases to be heard by courts. An increasing number of pending cases implies that courts dispose fewer cases than they receive. The following table depicts the number of pending cases from December 31, 2004 to December 31, 2009.

TABLE 2 Pending cases in the period from December 31, 2004 - December 31, 2009
First-instance courts (Panel A) and second instance courts (Panel B)

*in 2005, minor offence cases were handled by specialized courts
**number of utility cases on January 1, 2005 is an estimate; only enforcement cases, i.e. litigious and commercial utility cases are considered as regular cases

	Dec. 31, 2004	Dec. 31, 2005	Dec. 31, 2006	Dec. 31, 2007	Dec. 31, 2008	Dec. 31, 2009
Panel A: First-instance courts						
Litigious	199.650	207.649	214.490	235.432	251.302	278.110
Non-litigious	51.560	54.941	55.207	50.838	48.399	54.452
Criminal	29.970	24.499	24.527	24.816	26.303	25.231
Enforcement	94.279	115.065	119.836	184.080	180.153	189.195
Commercial	45.589	51.659	48.612	45.901	41.174	41.004
Registry	1.153	4.309	2.354	2.847	2.687	2.212
Total	422.201	458.122	465.026	543.914	550.018	590.204
Minor offence*	0	391.434	380.904	250.648	169.320	162.561
Utility**	601.927	734.638	962.314	1.014.890	1.315.291	1.396.455
Land registry	96.055	92.320	74.666	68.088	61.797	57.467
Total all	1.120.183	1.676.514	1.882.910	1.877.540	2.096.426	2.206.687
Panel B: Second-instance courts						
Civil	23.184	21.391	19.547	19.666	23.004	22.413
Criminal	5.383	3.247	4.974	3.325	2.255	1.942
Administrative	2.568	7.955	7.370	6.090	6.229	6.307
Total	31.135	32.593	31.891	29.081	31.488	30.662

The total number of pending litigious, non-litigious, criminal, enforcement and business registry cases has increased by 40% from 2005 to 2009. The most prominent trend is the steady increase in the number of pending litigious (overall increase of 39%) and enforcement (overall increase of 100%) cases.

In addition to these core court cases, the first-instance courts handle the utility, minor offence and land registry cases. The utility cases are the cases for the unpaid utility bills. There are 1.4 million pending utility cases and their numbers are surging. The HJPC contends that these cases should not be handled by courts. The land registry cases are also handled by non-judicial staff, whereas the minor offence cases include a substantial number of simple cases concerning the enforcement of minor offence penalties, also disposed by the non-judicial staff in courts. The first-instance courts became responsible for the minor offence disputes after the reform of minor offence courts in 2006. The reform significantly improved the procedure to handle minor offence cases and hence drastically reduced the inflow of minor offence cases into courts, which in turn drastically reduced the number of pending minor offence cases.

As of December 31, 2009, the first-instance courts had a total 2.2 million pending cases of which about 1.4 million are the cases for the unpaid utility bills. Also, the second instance-courts had more than 30,000 pending cases. Such a large number of pending cases has accumulated over the years and is still rising. The large number of pending cases has been recognized as an issue by the European Union and the local authorities alike. Significant reduction of pending cases is defined as a strategic objective by the HJPC Strategic Plan (HJPC, 2009) as well as Bosnia and Herzegovina Justice Sector Reform Strategy 2008-2012 (2006).

The European Commission states enhancing judicial accountability and efficiency as one of the main challenges to the accession aspirations of Bosnia and Herzegovina (EC, 2009a). Furthermore, in its recent report on progress of Bosnia and Herzegovina in the process of accession, the European Commission notes that there is a large number of pending cases in courts and urges action to reduce it (EC, 2009b). These remarks are virtually unchanged since the previous progress report (EC, 2008) which points out that the progress in reducing the number of pending cases is negligible.

Resources available to courts

The number of pending cases is the final consequence of court activities. It may be a consequence of the lack of resources (e.g. an insufficient number of judges) and/or inefficient use of resources. Therefore, it is important to examine the resources available to courts.

Courts are entirely financed from the public funds. Each court has its own budget for the fiscal year running form 1st January to 31st December. About 75% of court budgets are spent on personnel (judges and support staff), about 22% on other operating costs and the remaining 3% are used for capital expenditures.

The following table depicts operating budgets (i.e. capital expenditures showed separately) of first-instance and second instance courts from 2005 to 2009.

in KM

	2005	2006	2007	2008	2009
Panel A: First-instance courts					
Personnel	45.163.627	57.194.379	73.867.503	78.698.929	78.892.164
Other operating costs	13.332.421	16.377.389	21.460.016	20.954.621	19.332.170
Operating budget	**58.496.048**	**73.571.768**	**95.327.519**	**99.653.550**	**98.224.334**
Capital expenditures	1.164.621	1.211.463	2.363.969	3.088.673	1.136.419
Panel B: Second-instance courts					
Personnel	18.587.426	19.813.576	21.614.873	23.809.074	23.777.187
Other operating costs	4.876.443	4.707.827	6.355.710	6.140.957	5.609.100
Operating budget	**23.463.869**	**24.521.402**	**27.970.583**	**29.950.031**	**29.386.287**
Capital expenditures	463.148	633.015	725.207	751.579	249.558
Total operating budgets	81.959.917	98.093.170	123.298.102	129.603.581	127.610.621

TABLE 3
Court budgets 2005-2009
First-instance courts (Panel A) and second instance courts (Panel B)

The total operating budgets of courts has increased by 56% from 2005 to 2009. The operating budgets of the first-instance courts surged 68%, while the second-instance courts grew 25% during this period.

An alternative way to look at the resources available to the courts is the number of judges. Since most of court expenditures are the personnel costs, the figures for the judges and the budgets are highly correlated - the coefficient of correlation between those two variables exceeds 90%. There are two categories of judges: professional judges who are appointed for life, and temporary judges, appointed for a two-year period to work on the backlog cases. Also, there are judicial associates in the first instance courts and since 2006, they are authorized to resolve only certain types of cases (i.e. small claims, inheritance cases, enforcement cases etc). Judicial associates are also appointed by the HJPC. The following table depicts the number of judges, temporary judges and judicial associates in courts from 2005 to 2009.

TABLE 4 Holders of judicial function in courts 2005-2009
First-instance courts (Panel A) and second-instance courts (Panel B)

	2005	2006	2007	2008	2009
Panel A: First-instance courts					
Professional judges	403	450	554	550	549
Temporary judges	9	30	35	49	59
Judicial associates	0	22	114	122	119
Total	**411**	**502**	**703**	**721**	**726**
Panel B: Second-instance courts					
Professional judges	160	166	168	168	169
Temporary judges	2	5	11	16	20
Total	**162**	**171**	**179**	**184**	**189**
Total all courts	**573**	**673**	**882**	**905**	**916**

Along with the burgeoning budgets, the total number of judicial function holders (judges and judicial associates) also swelled significantly. In all courts, the total number of judicial function holders rose by 58% - from 573 in 2005 to 916 in 2009. The rate of growth was significantly higher in the first-instance courts (77%) than in the second instance-courts (17%). This can be partly attributed to the merger of the first-instance courts and the minor-offence courts, which took place in 2006. The total number of temporary judges jumped from 11 to 79. The function of the judicial associates was introduced in 2006 and their number also soared from 22 in 2006 to 119 in 2009.

Measurement of court performance

The performance of the courts should be examined from various aspects. CEPEJ (CEPEJ, 2008) employs two basic indicators, the clearance rate and the disposition time, which are discussed below. The National Centre for State Courts (NSCS, 2009) developed the court performance measurement system comprised of ten indicators, named CourTools, which also contains the clearance rate and time to disposition, but also the cost per case, which is used in this study.[5]

Clearance Rate, defined as the number of disposed cases divided by the number of incoming cases. This measure indicates a court ability to handle the incoming cases. It is calculated as: If the clearance rate is 1 or 100% than a court resolves the same number of cases it receives

$$C = \frac{\text{number of disposed cases}}{\text{number of incoming cases}}$$

within a time period. If this ratio is above 1, than a court resolves more cases than it receives and thus reduces its case backlog. On the other hand, the clearance rate below 1 or 100% implies increasing case backlog and should be considered as a red flag.

The average clearance rates by case category for the first-instance and second-instance courts are shown in the Table 5.

TABLE 5 Average clearance rates in courts 2005-2009
First-instance courts (Panel A) and second-instance courts (Panel B)

Clearance rates					
Panel A: First-instance courts					
	2005	2006	2007	2008	2009
Litigious	94,33%	95,13%	84,86%	87,18%	80,86%
Commercial	78,07%	116,16%	114,33%	119,69%	101,49%
Non-litigious	93,94%	99,23%	107,49%	104,51%	89,75%
Criminal	100,97%	100,01%	98,82%	98,23%	100,49%
Enforcement	53,21%	94,48%	72,71%	54,84%	82,17%
Registry	82,04%	110,07%	97,72%	100,61%	103,35%
Panel B: Second-instance courts					
Civil	100,16%	96,92%	99,44%	89,67%	102,12%
Criminal	103,87%	108,41%	110,10%	107,77%	102,20%
Administrative	57,88%	108,17%	119,70%	98,35%	98,85%

The clearance rate for litigious and enforcement cases in the first-instance courts was below 100% in each year from 2005 to 2009. This clearly indicates that the first-instance courts are

[1] Other seven measures proposed by the National Center for State Courts are:

1. Access to Fairness, as rated by court users in exit polls, to determine the court accessibility and fairness, equality, and respect.
2. Court Employee Satisfaction, measuring by the ratings of employees the quality of work environment and relations between staff and management.
3. Age of Active Pending Caseload, measures the number of days between when the caseload has been filed and the time of measurement.
4. Trial Date Certainty, measured as the number of times cases disposed by trial are scheduled for trial.
5. Reliability and Integrity of Case Files, the percentage of files that can be retrieved within the established time standards and meeting the established standards for completeness and accuracy of contents.
6. Collection of Monetary Penalties, defined as payments collected and distributed within established timelines, expressed as a percentage of the total monetary penalties ordered in specific cases.
7. Effective Use of Jurors, is measured by two figures. Juror yield is the number of citizens selected for jury duty who are qualified and report to serve, expressed as a percentage of the total number of prospective jurors available. Juror utilization is the rate at which prospective jurors are used at least once in trial.

The first two of these seven measures assume surveying court users and employees to assess their satisfaction. The third (age of active pending caseload) and fourth (trial data certainty) requires data which is currently not available. The fifth (reliability and integrity of case files) requires access to court case files, which is not available to independent researches. Finally, the last two measures are not applicable in Bosnia and Herzegovina because courts are not responsible for collection of monetary penalties and jurors are not commonly used.

unable to timely dispose these cases, hence they grow over time. On the other hand, the clearance rate of other types of cases is generally about or above 100%. In the second-instance courts, the clearance rate for all types of cases is about 100%.

Time to Disposition, defined as the average time to resolve all pending cases. This measure clearly illustrates the gravity of problems with performance in courts of Bosnia and Herzegovina. According to this measure, based on 2006 data, Bosnia and Herzegovina, was placed last among 48 member countries of the Council of Europe. It is calculated as:

$$T = \frac{\text{number of unresolved cases}}{\text{number of resolved cases during the previous period}}$$

This ratio simply shows how long it would take a court to dispose all pending cases assuming the recent speed in disposing cases. For example, if a court resolved 100 cases during 2008 and has 300 pending cases on December 31, 2008, this measure would indicate that a court needs three years to dispose 300 pending cases.

The following table (Table 6) presents range of disposition times, i.e. the highest and the lowest disposition time between courts, in the first-instance and second-instance courts in the period of five years (2005-2009).

TABLE 6 Range of disposition times in courts 2005-2009
First-instance courts (Panel A) and second-instance courts (Panel B)

in years

Panel A: First-instance courts					
	2005	2006	2007	2008	2009
Max					
Litigious	7,0	3,8	5,2	5,6	7,0
Commercial	10,0	12,9	3,3	2,8	3,1
Non-litigious	3,6	3,7	3,5	2,2	3,1
Criminal	1,7	2,4	1,0	2,6	1,7
Enforcement	5,7	16,9	16,0	30,4	30,1
Registry	1,3	0,4	0,4	0,2	0,2
Min					
Litigious	0,3	0,2	0,1	0,2	0,4
Commercial	0,0	0,0	0,0	0,1	0,0
Non-litigious	0,1	0,1	0,1	0,1	0,1
Criminal	0,0	0,0	0,0	0,0	0,1
Enforcement	0,0	0,1	0,1	0,3	0,2
Registry	0,0	0,0	0,0	0,0	0,0
Panel B: Second-instance courts					
Max					
Civil	1,7	1,8	1,9	1,8	1,9
Criminal	1,2	2,6	1,3	0,3	0,3
Administrative	2,6	10,0	4,8	2,0	2,1
Min					
Civil	0,0	0,0	0,0	0,0	0,0
Criminal	0,0	0,0	0,0	0,0	0,0
Administrative	0,0	0,0	0,0	0,1	0,0

The disposition times presented above show that the ability to dispose cases within reasonable times varies significantly among the first-instance courts. Similarly to the clearance rates, the disposition time for litigious and enforcement cases is particularly problematic. In 2009, the worst disposition time for litigious cases is 7 years and for enforcement cases 30.1 years. Also, the disposition time for commercial and non-litigious cases seems unreasonably high.

The maximum disposition time for the civil and administrative cases in the second-instance courts seems high as well. On the other hand, all criminal cases seem quickly disposed.

Two ratios above show two important aspects of the situation in courts. A persistent low clearance rate or high disposition time indicates potential issues that need to be addressed. It should be emphasized that the clearance rate and the disposition time are not the issues *per se*, but consequences of those issues. Like the number of pending cases, these two measures do not reveal anything about court efficiency. In other words, a highly efficient court may have a low clearance rate because it does not have enough judges given the number of incoming cases. A low clearance rate leads to long disposition times. On the other hand, an inefficient court may have favorable clearance rate and disposition time simply because they are overstaffed. Therefore, those two measures alone may be misleading.

This argument calls for a measure which contrasts court results and resources. Results can be measured as the number of resolved cases, whereas operating budget or the number of judges may serve as a proxy for the resources. This brings us to the third measure, **Cost per Case** which indicates the average cost of processing a case, by the case type.
Cost per Case indicates how much budget funds on average are spent to process a case. It is a straightforward indicator of efficiency, i.e. a court with higher than average cost per case is deemed inefficient. On the other hand, a court incurring less than average cost per case can be considered efficient.

The Cost per Case indicator is estimated based on four years of data (2006-2009). The case flow data is sourced from the HJPC annual reports, while the data on budgets is collected from official government budget reports. The main results of the analysis are presented below, while the detailed methodology is presented in the Appendix.

The review of the Cost per Case indicator reveals that a court efficiency differs significantly. The following graph depicts the difference between the budgets implied by the average cost per case and the actual budgets of the second-instance courts.

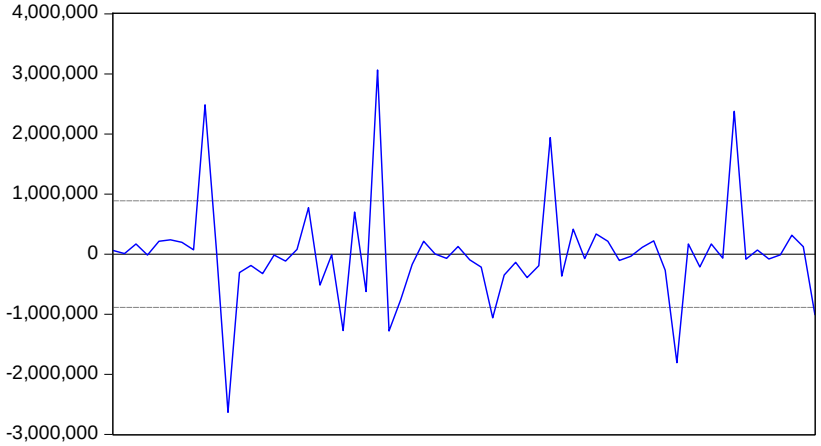
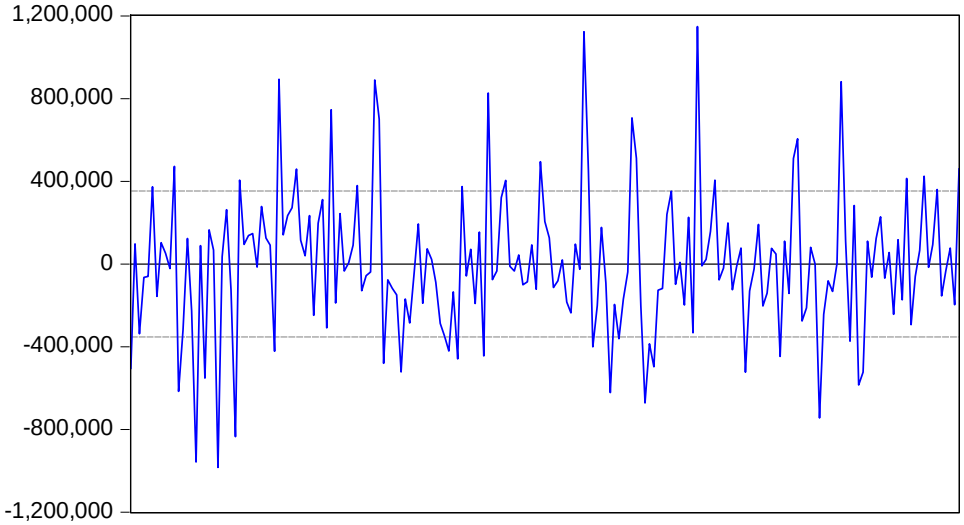


FIGURE 2 Difference between the budgets implied by the average cost per case and the actual budges of the second-instance courts

In order to clarify the methodology deployed, assume that the average cost per case in second-instance courts is 500 KM. A court which resolved 1,000 cases during a year would have the budget implied by the average cost per case 500,000 KM (1,000 cases x 500 KM). If court's actual budget were the same as implied by the average cost per case (i.e. 500,000 KM) if would have zero difference depicted on the above illustration. If court's actual budget were 600,000 KM than the difference would be 100,000 and could be interpreted that the court spent 100,000 KM that cannot be justified by the number of resolved cases. On the other hand, court's actual budget of 400,000 KM would imply the above-average efficiency because the court spent 100,000 KM less than it could justify by the number of resolved cases. The biggest positive difference, which indicates a low level of efficiency, is 3.1 million KM or 47% of the actual operating budget. This means that one of the second-instance courts spends 3.1 million KM more than an average court, i.e. more than it objectively should spend to resolve the same number of cases. The biggest negative difference is 2.6 million KM or 86% of the actual operating budget, meaning that another second-instance court spends 2.6 million KM less than the average. This analysis shows significant differences between the second-instance courts in terms of costs per resolved case, as shown in Figure 2, which is a good starting point for a more in-depth analysis, combined with other two indicators.

The same analysis based of four years of data (2006 - 2009) is conducted for the first-instance courts. The difference between the budgets implied by the Cost per Case and actual budgets of the first-instance courts is presented below.

FIGURE 3 Difference between the budgets implied by the average cost per case and the actual budges of the first-instance courts



The graph clearly illustrates wide fluctuations in the efficiency of the first-instance courts. The largest positive difference is 1.1 million KM or 30% of the actual budget while the largest negative difference is 984,000 KM or 44% of the actual budget. It is the same case as of second-instance courts, the positive difference indicates costs that cannot be justified by the number of resolved cases and the negative difference indicates above the average efficiency.

The current performance management policy

The fundamental part of the current performance management policy is the quota system which is set by the HJPC. The quota system indicates the number of cases each judge should

resolve monthly. If the number of cases resolved is exactly as set by the quota, a judge will receive the mark of 100% for performance. Similarly, if the number of resolved cases is 120% of the quota the performance indicator will read 120%. The performance indicator at the court-level is a simple average of the individual judge performance. It should be underlined that currently the performance indicators are consistently not used for any management purpose. There is no reward for performing above the expectation, or sanction for underperformance. Therefore, it can be easily concluded that the current performance management policy is not fully implemented. It is puzzling that significant resources are invested in the performance measurement which is not consistently used for management purposes.

Another major weakness of the current performance management is that it is not comprehensive. The quota system does not differentiate cases between the complexity or procedures used to resolve them. In other words, all disposed cases in the same category have equal weight in the performance measurement regardless of their complexity or whether they were disposed in a judge decision on merits of a case or if a judge resolved a case by using one of the simplified or summary proceedings such as: issuing a default judgment, issuing a decision on dismissal of a case based on procedural matters, issuing a decision on dismissal of a case due to the statute of limitations etc. Also, the quota system does not recognize the existence of the so called typical cases, i.e. a large number of cases filed against one defendant concerning identical legal and factual background. In such circumstances, complex cases, i.e. cases that take more time and legal expertise to be resolved, get delayed which contributes to the increase of the caseload in courts.

The following table depicts the number of resolved litigious cases in the first-instance courts by a judge decision and other methods.

TABLE 7 Means of resolving litigious cases in first-instance courts

	2005		2006		2007		2008		2009	
Cases disposed by a judge decision	30,079	21%	33,472	25%	37,424	27%	34,817	25%	35,795	27%
Cases disposed by administrative procedures	112,202	79%	101,160	75%	98,945	73%	101,847	75%	98,952	73%
Total number of disposed cases	**142,281**	**100%**	**134,632**	**100%**	**136,369**	**100%**	**136,664**	**100%**	**134,747**	**100%**

The number of cases disposed by a judge decision ranges between 21% and 27%. This clearly indicates that the current performance management policy is seriously flawed. It does not capture the performance in disposing the most important cases and it even provides an initiative to judges to focus on simple cases that can be easily disposed.

The direct consequence of the above weaknesses is that virtually all courts report superior performance although the number of pending cases is increasing and the disposition times are not acceptable. The following table depicts the descriptive statistics of performance indicators from 2006 to 2009.

TABLE 8 Official performance indicators 2006-2009
First-instance courts (Panel A) and second-instance courts (Panel B)

	2006	2007	2008	2009
Panel A: First-instance courts*				
Average	152,4%	162,0%	149,2%	156,1%
Maximum	203,3%	345,0%	334,0%	238,0%
Minimum	102,0%	94,7%	47,0%	111,9%
Standard deviation	25,7%	43,6%	37,1%	27,6%
Courts above 100%	46	46	47	48
Courts below 100%	0	2	1	0
Panel B: Second-instance courts**				
Average	137,3%	138,6%	148,5%	145,2%
Maximum	170,5%	187,1%	192,0%	190,2%
Minimum	107,0%	68,8%	97,4%	88,4%
Standard deviation	18,0%	29,7%	23,8%	24,9%
Courts above 100%	15	14	15	14
Courts below 100%	0	1	1	1

*Performance indicator for MC Sarajevo and BC Modrica in year 2005 not available
** Performance indicator for Apellate court Brcko in years 2006, 2007 and 2009 not available

The maximum performance achieved by the first-instance courts was 203%, 345%, 334% and 238% in 2006, 2007, 2008 and 2009 respectively, while only 2 courts of 48 underperformed in 2007 and only one court underperformed in 2008. Similarly, the maximum performance of a second instance court was in range from 170% to 192%. All courts exceeded performance expectations in 2005 and only 1 of 16 courts underperformed in 2007, 2008 and 2009. Having in mind previously presented conflicting trend of an increasing number of pending cases and operating budgets, the superior performance, according to the current performance management policy, illustrates that the policy is grossly inadequate.

TABLE 9 Comparison of official PI and developed indicators in 2009
First-instance courts (Panel A) and second-instance courts (Panel B)

The weakness of the official performance indicators is illustrated even more clearly when compared to the performance indicators previously discussed. The following table depicts comparison of the indicators for the best and the worst performing courts according to the official performance indicator in 2009.

	Official PI	Cost per Case	Clearance Rate*	Disposition time*
Panel A: First-instance courts				
Highest official PI	238%	16%	66%	1.4
Lowest official PI	112%	14%	86%	1.0
Panel B: Second-instance courts				
Highest official PI	190.0%	-12.0%	1	0.2
Lowest official PI	88.0%	40.0%	1	0

*for litigious and civil cases

The best performing first-instance court in 2009 had the official performance indicator of 238%, while the worst performing court scored 112%. However, the worst performing court had better Cost per Case indicator, i.e. it used fewer resources given the number of disposed cases than the best performing court. Furthermore, the worst performing court had a better clearance rate and disposition time than the best performing court. The difference in official performance indicators made more sense in the case of second-instance courts. Although, there were no significant difference in the clearance rate and the disposition time, the best performing second-instance court had superior the Cost per Case indicator relative to the worst performing second-instance court.

Policy options to improve efficiency of courts

The major objectives of the performance management policy are:

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

The first objective stems from the Convention for the Protection of Human Rights and Fundamental Freedoms, provisions of relevant B-H legislation, requirements for the EU integration as well as the HJPC Strategic Plan and the National Strategy for Judicial Reform. This objective basically states that courts must be provided with sufficient resources required to dispose all cases within a reasonable timeframe. The second objective acknowledges that the resources are limited and courts must use the available financial and human resources efficiently.

The court system is currently not on track to meet any of the above objectives. Most courts are unable to dispose their cases within reasonable time. The extent of this issue is the most prominent in courts located in large urban areas such as Sarajevo and Banja Luka. Since the court system of Bosnia and Herzegovina is the most expensive in Europe in relative terms, the current policy clearly fails to achieve the efficiency objective as well. Also, if the current policy is kept in place, the number of pending cases is going to continue to grow, thus making the failure to meet the first objective even larger.

Therefore, the policy of no change is untenable even in short term, which leaves the policy makers only two options. The first alternative is to pour additional significant resources into the court system in order to meet the objective of disposing all cases within a reasonable time while neglecting the cost efficiency. The second alternative is to comprehensively overhaul the performance management policy and allocate additional resources based on the performance.

The increase in resources policy: keep the current performance management policy unchanged and increase the resources available to courts

This policy has been pursued since 2005. The performance management policy has been kept the same while additional resources have been poured into the court system. The significant increase in resources available to courts failed to significantly reduce the number of pending cases and improve the disposition time. The efficiency actually deteriorated since the number of resolved cases relative to the resources decreased.

The HJPC (HJPC, 2009b) recently adopted a decision to increase the number of judges. The following increase is justified by the current performance management policy:

- first-instance court judges: 21% increase, or 127 of which 24 professional and 103 temporary judges
- second-instance court judges: 34% increase, or 71 of which 20 professional and 51 temporary judges
- the first-instance court judicial associates: 102% increase, or 138 judicial associates.

The temporary judges (total of 103 in first-instance courts and 51 in second-instance courts) are expected to dispose all pending cases within two years, while professional judges are expected to resolve all incoming cases during these two years. Therefore, the objective of disposing all cases within reasonable time is expected to be achieved within two years.
The results of empirical analysis imply that expected outcomes of this policy option are highly questionable. First, it would take years before all judges and judicial associates are appointed and court buildings adjusted to accommodate them.

Second, a decrease in performance after adding new judges has historically offset the positive effect of new judges. In that regard, the HJPC recommendation assume that new judges will perform 100% while currently judges are performing significantly better (at about 150% level), according to the current performance management policy. Since there is no reward for performance, it can be hardly expected that the average performance of current and new judges will be significantly different. It is likely to converge, which implies that the performance of current judges will decrease.

Third, since the current performance management policy does not take into account the complexity of cases or the method of disposition, judges would still have the initiative to work on simple cases or the cases which can be resolved through simplified or summary proceedings, rather than complex cases. Therefore, it is likely that there still would be complex cases that are not disposed within a reasonable time.

Finally, additional increase in staffing will make the court system in Bosnia and Herzegovina, which is now the most expensive in Europe, even more expensive. The HJPC states that temporary judges will be needed for the period of two years only. However, the above arguments imply that the service of temporary judges will be needed for more than two years, since it is very unlikely to expect that pending cases will be eliminated in two years. Due to budget limitations, the full implementation of this strategy is not feasible, which is clear from the stagnating budgets for the fiscal 2009.

The performance oriented policy: significantly improve performance management policy and increase the resources based on performance indicators

This policy option focuses on the overhaul of the performance management policy. The current performance management policy is not aligned with meeting the declared objectives. This is evident from the fact that the court system is inefficient and unable to dispose cases in a reasonable time, yet its performance is outstanding, according to the current performance management system. Even if the efficiency objective is discarded, there is overwhelming evidence that adding the resources alone is not an appropriate solution.

This implies that the first and major step in achieving declared objectives is development and implementation of an appropriate performance management policy which would ensure the efficient use of existing resources.

There is a massive body of academic literature on the performance measurement and management in the public sector, addressing the issue of performance indicators as žtangible' evidence of a public organization performance and strong support for management decisions (e.g. Davies, 2004; Halachmi, 2005; de Lancer Julnes & Holzer, 2001). Performance measurement has been a major part of the public administration reform initiatives in the western countries since 1980s, as one of the public sector practices introduced to the public sector with the sole aim to improve efficiency, make better use of the limited resources and deliver "value for money."

Many authors provide positive evidence of the use of performance measurement. In the UK, for instance, the performance measurement systems have been used for over twenty years and are still regarded as valuable feature of the public sector reforms, with significant acceptance and usage, while at the same time, other elements of the public management reform package are failing to deliver results (Bovaird & Russell, 2007). The appropriately developed and implemented system of performance measurement can bring benefits to public sector managers and employees, elected officials and citizens (Halachmi, 2005). Its beneficial effects are nicely summarized by Hans de Bruijn (2007) as follows:

1. Transparency and accountability;
2. Learning - organizations can identify success and problem areas; benchmarking between institutions can promote exchange of knowledge;
3. Performance-based appraisal - which can be very motivating, because employees get objective feedback on their performance;
4. Positive and negative sanctioning.

Performance management is believed to improve internal efficiency, in terms of using inputs (here: judges, operational costs) to provide outputs (i.e. resolved cases), which leads to rational planning and better resource allocation (Talbot, 2005).

The appropriate use of performance indicators in performance management policy should enhance the delivery of public services and provide the organization with greater accountability in terms of expenditures. In terms of exploiting the advantages of performance measurement practices, it is essential that management organizational and funding decisions include setting targets, time-series and cross-section comparisons, as well as internal comparison, between different units within the organization (e.g. Verbeeten, 2008).

Once the comprehensive performance indicators are available and empirically proved additional resources should be awarded to average or over-performing courts that lack resources given the number of incoming or pending cases, while training and management consulting should be offered to underperforming courts.

If properly implemented this policy would be perfectly aligned with the declared objective of resolving all cases within a reasonable time. The citizen right to a fair trial within reasonable time could be better adhered to. Work on complex cases would be properly motivated while disposing cases by simplified or summary proceedings would still be properly taken into account.

Also, this policy would provide comprehensive and transparent framework for distribution of available funds, which would guarantee efficient use of funds while improving accountability.

The policy would contribute to the development of group of elite judges and court presidents who would have the drive and necessary expertise to increase the productivity in courts. Put simply, they would strive to resolve as many cases as possible in accordance with the improved performance indicators, while the court presidents would need to identify the best organizational measures to support judges in their work. It would be essential that this group is properly awarded. To that end, the HJPC should come up with the set of relevant regulations on career advancement. Eventually, they would set high professional standards which would oblige others in the judicial system to follow by complying with the improved performance measurements. The judges who would not be willing or would not have the capabilities to adjust to the improved professional standards could not be promoted. They would also be required to attend additional training.

Comparison of the policy options

The option to keep the current performance management policy and court resources unchanged is clearly unacceptable because the courts are unable to resolve all cases in a reasonable time and this problem is likely to worsen over time.

The option of pouring resources into the court system within the current performance management policy would theoretically improve court ability to dispose cases in reasonable time, but the overall efficiency would deteriorate as the expenditures of the most expensive court system in Europe are drastically increased. Due to the budget and human resources constraints, it would take at least five years to implement this option to a significant extent and the full implementation cannot be reasonably expected. Therefore, this policy option will partially meet the objective of disposing all cases within reasonable time while completely failing to meet the efficiency objective.

The performance oriented policy would align the performance management policy with the objective of disposing all cases within a reasonable time in the efficient manner. Since it focuses on the better use of existing resources, this option would cost significantly less than the previous option while fully achieving the policy objectives. Although this policy option is clearly superior to alternatives, it would face stiff resistance like any performance change initiatives in public administration. The following table summarizes main features of the two policy options discussed above.

TABLE 10 Comparison of policy options

	Policy option 1: Drastically increase resources	**Policy option 2: Performance related policy**
Ability to dispose all cases in reasonable time	The objective partially achieved	The objective fully achieved
Impact on efficiency	Significantly reduced	Significantly improved
Cost	Significant cost, in excess of 20 million KM annually	Low cost, up to 5 million KM annually
Human resources	Significant number of additional judges and judicial associates	A moderate number of judicial associates
Timeframe for implementation	5 years for partial implementation, full implementation not feasible because of budget limitations	3 years for full implementation
Acceptance from judiciary	High acceptance	High resistance
Acceptance from other branches of government	High resistance because of high costs	High acceptance because of improved performance

Conclusions and Recommendations

This study provides the clear evidence that the current performance management policy is grossly inadequate. A new policy should be developed based on the following principles:

Performance management at the judge-level

1. Cases which are disposed by issuing a judgment should have outsized weight (i.e. 90%) in performance indicator at the judge level while cases disposed by administrative means should have low weight (i.e. 10%);
2. 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;
3. Performance indicator at the judge-level should take into account the case complexity. In other words, complex cases should have higher weight in the performance measurement relative to simple cases;
4. The HJPC should adopt clear rules on classification of cases per level of complexity including the criteria that will be used for monitoring and evaluation of the work done by each judge within certain time frame;
5. The HJPC should pass the regulations on career advancement that will favor those judges who succeed to achieve above average results in terms of disposition of more complex cases;
6. General over-performance should be rewarded if it is necessary to meet the objective of disposing all cases within reasonable time. An example when over-performance will be necessary is a temporary increase in inflow of cases;
7. Training should be used as a tool to improve underperformance;
8. 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.

Performance management at the court-level

1. 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
2. Targets for above indicators should be officially set
3. The HJPC should establish a monitoring mechanism in order to make court presidents accountable for meeting the aforementioned targets. The HJPC will use the mechanism to follow regularly, in a very transparent and objective manner, the court ability to handle its workload as well as to make comparison between similar seized courts in order to be able to determine if a particular court is being sufficiently efficient over a certain period of time. This mechanism could very well be used as an early warning system to prevent the court from accumulating a backlog;
4. Decisions to increase the number of judges and funding decisions should be primarily based on the performance indicators. Additional resources should be made available to efficient courts (i.e. courts with favorable cost-per case and average judge performance indicators) which would be an incentive itself;

5. Assessment of court presidents should be based primarily on performance indicators;
6. The HJPC should enact the guidelines for courts to dispose particular types of cases within a certain number of days, assuming that courts have to adjust their internal organization to be able to comply with the guidelines;
7. To ensure integrity of data, court reports should be reviewed or audited by an independent institution.

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Appendix 1

Methodology for estimating Cost per Case indicator

There are seven major case categories (criminal, civil, commercial, non-litigious, enforcement, land registry and minor offence) in the first-instance courts and three major case categories in second-instance courts (civil, criminal, administrative). Courts have budgets which are not divided per case categories, so there is no trivial way to calculate average cost per case, or to find out how many cases in each category are resolved by judge on average. To circumvent this issue, we utilize the regression.

Define Y_{it} it as amount of public funds spent in court *i* over a period of time *t* (calendar or fiscal year) and X_j as number or resolved cases of type *j* over a period of time *t.* The relationship between public funds spent and number of cases resolved should be described by the following equation:

$$Y_{it} = \alpha + \beta_j X_{ijt} + \varepsilon_{it}$$

Coefficients β_j are to be estimated by the model. They represent the average cost incurred to dispose case *Xj.* Stochastic component ε_{it} represent variations in budget not related to the defined outcomes. It should have desirable statistical properties, which are not discussed in this study because of the limited space.

The Cost per Case indicator is estimated based on four year data (2006-2009). The case flow data is sourced from the HJPC annual reports, while data on budgets is collected from official government budget reports.

Operating budget and number of resolved cases in each year represent one observation. After ignoring three observations with missing data, 61 observations are available. To estimate changes in the Cost per Case indicator over years, dummy variables which take value 1 in a particular year and 0 in other years are added to the equation 3.

The estimate for second-instance courts is presented in the following table.

TABLE 1 Estimate of Cost per Case for second-instance courts

Variable	Coefficient	Std. Error	t-Statistic	Prob.
All cases	497	45	11.1	0.00
Year 2006	-96,105	318,579	-0.3	0.76
Year 2007	69,891	318,428	0.2	0.83
Year 2008	163,828	313,302	0.5	0.60
C	91,230	271,731	0.3	0.74

R-squared	68%	F-statistic	31
Adjusted R-squared	66%	Prob(F-statistic)	0

The above model estimates the correlation between the total number of resolved cases (i.e. civil, criminal and administrative) and operating budgets. The model explains 68% of differences in operating budgets. The estimated average cost per case is 497 KM. It is statistically highly significant with t-Statistics over 11. The dummy variable coefficients are not statistically significant implying that the Cost per Case indicator is not statistically different through years.

In the model with number of resolved civil, criminal and administrative cases as separate variables, the number of resolved civil cases was the only significant variable. This implies that the largest proportion of resources of second-instance courts is spent on civil cases hence there is no significant correlation between operating budgets and number of resolved criminal and administrative cases.
Estimated Cost per Case indicators for first-instance courts are reported in the following table. The model is estimated based on data from 2006 to 2009 (191 observations in total).

TABLE 2 Estimate of Cost per Case for first-instance courts

Variable	Coefficient	Std. Error	t-Statistic	Prob.
Commercial	474	57	8.25	0.00
Criminal	73	20	3.55	0.00
Enforcement	69	21	3.27	0.00
Land registry	189	17	10.79	0.00
Litigious	156	32	4.81	0.00
Minor-offence	11	4	2.76	0.01
Non-litigious	11	40	0.27	0.79
Utility	17	3	6.07	0.00
Year 2006	-386,557	75,915	-5.09	0.00
Year 2007	-66,433	75,842	-0.88	0.38
Year 2008	15,629	73,451	0.21	0.83
C	522,121	64,766	8.06	0.00

R-squared	98%	F-statistic	999
Adjusted R-squared	98%	Prob(F-statistic)	0

The model explains the 98% of difference in the first-instance court budgets. Estimated coefficients of all case categories except the non-litigious category are statistically significant. Negative and significant value of the estimated dummy variable for year 2006 implies that the Cost per Case indicator had the lower value in 2006 than in 2009. The dummy variables for years 2007 and 2008 are not significant.

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A *"Policy Development Fellowship Program"* has been launched by the Open Society Fund BiH in early 2004 with the aim to improve BiH policy research and dialogue and to contribute to the development of a sound policy-making culture based on informative and empirically grounded policy options.
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