



# Improving Commercial Justice in Bosnia and Herzegovina in the Face of COVID-19 Crisis – Phase II Analysis: *Medium to Long-Term Strategies*

April 2021



# Bosnia and Herzegovina

## Improving Commercial Justice in Bosnia and Herzegovina in the Face of COVID-19 Crisis - Phase II Analysis:

### *Medium to Long-Term Strategies*

April, 2021

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## Acronyms and Abbreviations

APA	Administrative Procedure Act
BD	Brcko District
BiH	Bosnia and Herzegovina
CC	Cantonal Court
CEPEJ	European Commission for the Efficiency of Justice
CEST	Judicial and Prosecutorial Training Center
CMS	Case Management System
COE	Council of Europe
CPL	Civil Procedure Law
CrPL	Criminal Procedure Law
DCC	District Commercial Court
DGRA	Digital Government Readiness Assessment
ECtHR	European Court of Human Rights
eID card	Electronic identification card
eIDAS	Regulation (EU) No. 910/2014 of the European Parliament and of the Council on Electronic Identification and Trust Services for Electronic Transactions in the European Internal Market
EJTN	European Judicial Training Network
ERV	Austrian <i>Elektronischer Rechtsverkehr</i>
EU	European Union
FBiH	Federation of Bosnia and Herzegovina
HBW	Home-based work
HCC	High Commercial Court
HJPC	High Judicial and Prosecutorial Council
ICC	International Chamber of Commerce
ICT	Information and communications technology
IDDEEA	BiH Agency for Identification Documents, Records and Data Exchange

ITA BIH	Indirect Taxation Authority of BiH
L	Liquidation cases
LED	Law on the Electronic Document
LES	Law on the Electronic Signature
LMS	Learning Management System
MC	Municipal Court
Mals	Commercial small claim cases
Mals Kom	Commercial small utility claim cases
MoJ	Ministry of Justice
MNRVOID	RS Ministry of Scientific and Technological Development, Higher Education and Information Society
Project	Bosnia and Herzegovina Commercial Justice Technical Assistance Project financed by the UK Good Governance and Investment Climate Reform Trust Fund
Ps	Ordinary commercial disputes over 5,000 BAM
Pž	Commercial appeal cases
RS	Republika Srpska
SME	Small and medium-sized enterprises
SPC	Single Point of Contact
St	Bankruptcy cases
UK	United Kingdom
WB	World Bank
WPL	Worker Protection Law

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## About This Report

This Report is produced as part of the Bosnia and Herzegovina (BiH) Commercial Justice Technical Assistance Project financed by the United Kingdom (UK) Good Governance and Investment Climate Reform Trust Fund. The project supports BiH justice institutions in implementing reforms that will improve efficiency and access to commercial justice in BiH. The Project is part of a broader World Bank initiative to raise awareness of reform opportunities and inform policy dialogue on the efficiency, quality, and access to justice across countries in the Western Balkans, with a view to improving the performance of justice systems in these countries.

In 2019, the project yielded a set of recommendations for fast-tracking small claims, reducing caseload imbalances, building the capacity of judges, improving procedural efficiency, and increasing legal literacy among firms in BiH. The project also supported BiH authorities in implementing some of the proposed reforms. The recent COVID-19 crisis, however, posed unprecedented challenges to the planned implementation efforts and gave rise to new and urgent priorities for the BiH judiciary. In light of these new circumstances and needs, the project's objectives were adjusted to include assisting BiH authorities in boosting the resilience and securing the continuity of commercial justice services in times of emergency through additional analytics and advisory support.

In designing tools to mitigate the negative consequences of the crisis, the project adopts a two-phased approach. The Phase I deliverable, *Improving Commercial Justice in BiH in the Face of COVID-19 Crisis – Phase I Analysis: Crisis Impact Assessment and Options for Rapid Improvements*, proposed a rapid response to the crisis. The present Phase II Analysis offers medium and long-term solutions that would help BiH judiciary to improve its functioning beyond the current crisis while building preparedness mechanisms to address future emergency situations and challenges.

The target audience of this report are BiH policy makers and justice institutions, notably Ministries of Justice, the High Judicial and Prosecutorial Council (HJPC) and the courts, as well as business associations. Nevertheless, in light of its numerous proposals for legislative action, the report will be of interest to the broader BiH legal community and will hopefully serve as a basis for strategic and technical-level discussions on how to modernize justice in BiH to meet the challenges of the 21<sup>st</sup> century.

## Acknowledgments

This Report was prepared under the leadership of Mr. Roberto O. Panzardi (Project Task Team Leader and Senior Public Sector Specialist) and Ms. Zuhra Osmanovic-Pasic (Project Task Team Leader and a Governance Specialist). The key contributors to the report are the World Bank experts comprising Ms. Svetozara Petkova (Lead Author), Ms. Olga Sipka (Legal Expert), Ms. Tatjana Sofijanic (Legal Expert), Mr. Esmin Berhamovic (Data Specialist), Ms. Branka Babovic (Legal Expert) and Ms. Sonja Prostran (Legal Expert).

The World Bank team wishes to thank the British Embassy for the funding provided under the UK Good Governance and Investment Climate Reform Trust Fund and the BiH HJPC for providing statistics and supporting the Project's efforts made to date. The World Bank also sincerely thanks judges, lawyers and members of the Chambers of Commerce in BiH who participated in the electronic surveys distributed by the team thus enriching the team's understanding of discussed policy options.

## Executive Summary

1. **Purpose and structure of the report:** This report is produced under the BiH Commercial Justice Technical Assistance Project financed by the UK Good Governance and Investment Climate Reform Trust Fund and implemented by the World Bank. The report aims to evaluate the impact of the COVID-19 pandemic on commercial justice in BiH and propose responses that would help address the consequences of the current crisis and strengthen capacities to manage future emergencies and crises. The project already produced a Phase I Analysis proposing a rapid response to the crisis. The present Phase II Analysis builds on the first one to offer medium and long-term solutions that would help the BiH judiciary improve its functioning beyond the current crisis by building preparedness mechanisms to address future emergencies and crises. The report explores four themes: (i) the effect of the crisis on caseload; (ii) substantive legal issues that are expected to arise more frequently as a result of the crisis; (iii) possibilities for speeding up case processing by procedural reforms introducing fast-tracks for certain case types, namely a documentary and an online track; and (iv) enabling procedural actions in electronic form and e-justice. Based on the analysis, the report offers wide-reaching recommendations aimed at reducing BiH judiciary's reliance on physical interactions between the court and the parties by employing e-justice solutions.

2. **Effect of the crisis on caseload – findings:** In 2020, the crisis decreased the number of both resolved and incoming commercial cases at first-instance courts in BiH. As a result, backlog remained unchanged. Second-instance courts did better and took advantage of the lower numbers of incoming cases to reduce their overall backlog. However, some courts and some case types raise concerns. Despite the overall slowdown, the number of incoming commercial utility cases at the largest Sarajevo Municipal Court (MC) increased while the number of resolved ones decreased thus adding to an existing backlog. It is likely that if businesses are having trouble paying their utility bills, they face difficulty with other payments as well. This, in turn, means that 2021 – in line with experiences in other countries - may see an influx of new cases in other case types as well, and if resolution remains low due to physical distancing measures, backlog may increase exponentially. Pending bankruptcies at Sarajevo MC are also increasing. Given that bankruptcies are complex, last long and involve many hearings with numerous participants, if the physical distancing measures continue, the processing of such cases may be further frustrated.

3. **Effect of the crisis on caseload – recommendations:** The report recommends three types of measures to prevent and mitigate the negative consequences of the crisis on caseload: (i) preventive measures; (ii) backlog reduction measures focused on the Sarajevo MC; and (iii) measures to speed up case processing. To reduce the continued influx of small commercial utility claims at Sarajevo MC, business associations or the judiciary could initiate and facilitate discussions between utility companies, businesses and courts in order to identify the underlying reasons for the increased defaults in payment of utility bills and possible preventive measures, including programs for debt restructuring. To reverse the trend of increasing backlog at Sarajevo MC, especially at its Small Claims Department, the judiciary should take backlog reduction measures, such as the transfer of some pending cases to other courts, introducing longer working hours and work in shifts, and engaging temporary staff. Other strategies to speed up case processing entail preparing the court system to effectively address substantive legal issues raised by the pandemic (Chapter II); fast-tracking some types of cases (Chapter III); and digitization of court processes (Chapter IV).

4. **Substantive legal issues posed by the crisis – findings:** The pandemic posed a host of substantive legal challenges. The first group of challenges relate to massive contractual defaults calling for the application of various legal concepts that could excuse non-performance, such as force majeure, change of circumstances, frustration of purpose, etc. It is critical to ensure the uniform and swift application of these concepts by the businesses and, in case of dispute, by the courts. Secondly,

the pandemic is raising a multitude of labor issues such as how to deploy home-based work, mandatory leave, and reorganization of work hours. Statistical data indicates neither an increase nor a sizeable decrease in incoming labor cases in 2020. Interviews with lawyers suggest that client queries on labor issues have increased and, depending on how the crisis develops, there might be a surge of litigation in 2021. Thirdly, constitutional challenges against the measures imposed by the government to limit the spread of the virus and help certain businesses may also prove problematic. Some have questioned the proportionality and necessity of the measures or criticized the recovery packages as discriminatory. If any of these rules are found unconstitutional, this could bring forth a surge of new lawsuits seeking compensation for damages. Finally, the pandemic is likely to bring forth business closures, through either liquidation or bankruptcy proceedings. Courts should be prepared to deal with those quickly and efficiently.

5. **Substantive legal issues posed by the crisis – recommendations:** The report recommends four sets of measures to address the legal challenges posed by the crisis: (i) preventive measures; (ii) measures aimed at insuring uniform and swift resolution of substantive legal issues once they are brought to court; (iii) measures aimed at improving the processing of liquidation and bankruptcy cases; and (iv) training of judges and relevant staff. In order to prevent crisis-induced disputes from going to court, the chambers of commerce should provide a variety of services to businesses, including developing sample force majeure and similar clauses to protect businesses against unanticipated events occurring in the future, and facilitating mediation, conciliation and other consensual solutions aimed at re-negotiating agreements that the COVID-19 crisis has rendered obsolete or excessively burdensome for the parties. Furthermore, to further high-quality and consistent resolution of legal disputes, the justice system should undertake a range of activities, such as issuing interpretative opinions on complex legal matters, disseminating caselaw and good practice examples, organizing joint panels of higher and lower instance courts, and speeding up the appeal of important cases on a pilot basis to ensure that first-instance courts act in line with the views of higher ones. To improve the processing of liquidation cases in the Federation of BiH (FBiH), a new law on liquidation procedures should be adopted in this entity. To speed up bankruptcy cases, dependence on physical hearings should be reduced and online bankruptcy hearings should be allowed. Finally, in 2021, judges and relevant staff should be offered training in the areas where substantive legal challenges linked to the crisis are likely to arise and e-learning training modules should be introduced for newly appointed commercial judges.

6. **Fast-tracking of civil and commercial cases – findings:** The BiH justice system is highly dependent on physical court hearings; therefore, the crisis severely frustrated case processing and led to a significant reduction in resolved cases. The report explores speeding up the processing of some case types by introducing two fast-tracks: (i) documentary track; and (ii) audiovisual (online) track. In BiH, the documentary examination of cases is allowed only exceptionally, when the defendant has failed to respond to the claim, while online hearings in civil and commercial cases are not allowed at all. This is not in line with contemporary trends in civil and commercial litigation. International examples and the surveys of judges and lawyers demonstrate that the time might be right for modernizing civil procedure in BiH in line with international benchmarks.

7. **Fast-tracking of civil and commercial cases – recommendations:** The Civil Procedure Laws (CPLs) of BiH should reduce the time and costs for resolving certain case types by introducing (i) a documentary track – small claims could by default be examined based on documents unless the judge assesses that a hearing is necessary or a party requests to be heard; cases with a value exceeding the threshold for a small claim could be examined without a hearing if both parties agree; (ii) an online (audiovisual) track – as a rule, preliminary hearings in commercial cases where one of the parties resides in another town could be held by means of a videoconference; a party may propose that a hearing be held via a videoconference and if the other party does not object, the judge may conduct

a hearing if he/she deems appropriate; the rules on the location from which to conduct/connect to the online hearing, on the verification of the parties' identities, and on the electronic platform to be used should be sufficiently broad to give judges the discretion to adapt to the circumstances of the case. Online hearings should also be allowed in bankruptcy cases, especially in situations which necessitate physical distancing between participants.

8. **E-justice – findings:** The BiH judiciary has a sophisticated case management system (CMS) and adequate information and communication technologies (ICT) equipment. Although judges and court users are not used to communicating by electronic means, they are ready to do so if allowed by the law and enabled by the CMS. For this to happen, BiH needs to have a clear legal framework on e-identification and electronic trust services based on which it could build the supporting infrastructure of e-signature providers and a supervisory framework to control the activities of such providers. Unfortunately, the current legal framework in BiH is outdated. The country strives to align its legislation with EU legislation, but the laws in force are not compatible with it. Furthermore, the legal framework is highly fragmented, comprising numerous laws at each of BiH's government levels. The territorial scope of these laws is unclear, and they leave open the question of whether electronic signatures issued in one entity would be recognized in the other entity. The procedural laws are also outdated and either do not allow for procedural actions in electronic form, or require them to be done by using a qualified electronic signature, even though only one provider of such signatures has been certified in BiH and only recently. The highly fragmented regulatory and supervisory frameworks lead to a situation where most legal professionals do not have a good understanding of this field of law.

9. **E-justice – recommendations:** The report makes four sets of recommendations: (i) on upgrading the CMS; (ii) on improving the regulatory framework on e-services and e-identification and building the required infrastructure, (iii) on improving the procedural rules that govern the admissible forms of electronic identification in communicating with the court; (iv) on related trainings; and (v) on conducting a Digital Government Readiness Assessment (DGRA) to assess the country's readiness for digital transformation. The CMS should be upgraded to become an interactive tool which enables procedural actions in electronic form. The legislative framework on e-identification and e-services should be brought in conformity with EU law and be codified. Ideally, there should be a single country-wide law on this matter. Should this not be possible in the BiH governance setting, the laws at different levels should be harmonized and all forms of e-identification should be mutually recognized. BiH should also build its infrastructure for e-services and e-identification, comprising trust service providers and a clear supervisory framework. Procedural laws, too, should be amended to allow procedural actions in electronic form. Judges should receive practical training on operating the CMS, once upgraded, as well as on the rules of e-identification. Finally, a DGRA at country and sectoral level needs to be conducted to assess BiH's readiness for digital transformation.

10. **Substantive reforms such as these are never easy and will require modernizing not only the technology, but also the regulations and mindsets of participants in these processes.** Transitioning to e-justice in the country's fragmented governance structure will require amending key pieces of legislation such as the Civil Procedure Laws. A concerted countrywide approach will be critical for ensuring consistency in the legislation and putting in place uniform procedures throughout the country. The COVID-19 crisis has also created an opportune time for changing the mindsets of judges and litigants, by pushing them to operate outside of their comfort zones. Judges, lawyers, and businesses all started using e-communication exponentially and recognized the need for online hearings in civil and commercial cases. This may be a momentous point in transitioning to e-justice in BiH.

## Introduction

11. **The World Bank Bosnia and Herzegovina (BiH) Commercial Justice Technical Assistance Project supports BiH justice institutions to implement reforms aimed at improving the efficiency of and access to commercial justice.** Financed by the UK Good Governance and Investment Climate Reform Trust Fund, the Project is part of a broader World Bank initiative to raise awareness of reform opportunities and inform policy dialogue on the efficiency, quality, and access to justice across the Western Balkans, with a view to improving the performance of judiciaries in the region.

12. **In 2019, the Project yielded a set of recommendations for improving commercial justice in BiH through fast-tracking small claims,<sup>1</sup> reducing caseload imbalances,<sup>2</sup> building the capacity of judges, improving procedural efficiency,<sup>3</sup> and increasing legal literacy among firms.** Some of the recommendations have gained traction. A caselaw database of several high-level courts<sup>4</sup> which is being developed under the auspices of the HJPC will include descriptors of commercial cases. This will facilitate the tracking of commercial cases, in line with the project's recommendations on the need to ensure access to caselaw with a view to its harmonization. Furthermore, the HJPC's Standing Committee on Effectiveness of Judiciary accepted the recommendation to add a feature to the Court Management System (CMS) providing the reasons of postponing or cancelling hearings and allowing the generation of reports thereof. The recommendation to broaden the definition of authentic title to encompass all types of utility claims in FBiH has also progressed with the draft FBiH Law on Enforcement of Judgments currently in parliamentary procedure. Finally, a draft Law on Expert Witnesses is undergoing public consultations and the WB team has officially submitted its recommendations stemming from one of the reports.

### **Box 1 – Main recommendations for increasing efficiency in commercial case processing from the Project's 2019 reports**

#### ***To fast-track small claims:***

- ⇒ simplify the procedures for small claims of up to BAM 5000 (equivalent to approximately US \$3100),
- ⇒ reintroduce order of payment for all types of utility cases,
- ⇒ give judges greater leeway to apply the small claims procedure.
- ⇒ standardize court fees across the country.

#### ***To reduce caseload imbalances:***

- ⇒ accelerate backlogged decisions through case transfers and temporary hiring of additional judges,
- ⇒ improve the judicial quotas system to prevent delayed choices in the future,
- ⇒ promote out-of-court resolution in commercial cases.

#### ***To improve procedural efficiency:***

- ⇒ Improve civil procedure rules and select trial processes to increase procedural efficiency and reduce bottlenecks,
- ⇒ improve service of process,
- ⇒ introduce stricter rules on postponement of hearings and submission of evidence,
- ⇒ better monitor procedural (in)activity,
- ⇒ better manage expert witnesses and bankruptcy trustees,
- ⇒ improve cooperation among first- and second-instance courts.

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<sup>1</sup> Osmanovic-Pasic, Zuhra; Panzardi, Roberto O.; Petkova, Svetozara. 2019. [Fast-Tracking Small Claims in Bosnia and Herzegovina : A Comparative Analysis and Reform Proposals](#) (English). Washington, D.C.: World Bank Group.

<sup>2</sup> World Bank. 2019. [Strengthening Commercial Courts and Departments in Bosnia and Herzegovina : Caseload Distribution, Backlog, and Other Organizational Issues Affecting Performance](#). World Bank, Washington, DC.

<sup>3</sup> Panzardi, Roberto O.; Osmanovic-Pasic, Zuhra; Sipka, Olga; Sofijanic, Tatjana; Berhamovic, Esmin. 2019. [Leveraging Procedural Reforms to Improve Commercial Justice in Bosnia and Herzegovina](#) (English). Washington, D.C.: World Bank Group.

<sup>4</sup> The Court of BiH, FBiH Supreme Court, RS Supreme Court, and Brcko District Appellate Court.

13. **Most of the recommendations from the project's 2019 reports remain to be implemented.** The recommendations that aimed to speed up case processing while reducing the BiH judiciary's reliance on physical interactions are particularly important in this regard. If these had been implemented, they would have increased the justice system's potential to perform better during the COVID-19 crisis, which stalled or slowed down court operations for prolonged periods of time. Among these are the recommendation to create the opportunity for documentary examination of small claims, to allow electronic service of process and hearings via conference calls, and to modernize the procedure for liquidation of companies in FBiH.

14. **In 2020, the COVID-19 pandemic caused a dramatic shift in focus and prompted public institutions and businesses alike to operate in crisis management mode in order to minimize the adverse effects of the pandemic on essential business functions.** While the WB remains committed to supporting the implementation of the identified reforms, in light of these new circumstances, the Project has embarked on evaluating the impact of the pandemic on commercial justice in BiH and proposing measures to help address the consequences of the current crisis and build capacities to manage future emergencies.

15. **The Project adopted a two-phased approach in order to analyze the effect of the crisis and propose solutions that would be impactful in the short, medium and long term.** A Phase I Analysis finalized in February 2021 proposed a rapid response to the crisis centered around several groups of recommendations, namely: (1) improving and harmonizing the immediate response of the BiH judiciary to the COVID-19 crisis; (2) monitoring case flow at BiH courts and promptly responding to identified changes in caseload dynamics; (3) improving in-court and out-of-court organization of work during/after the crisis; (4) improving the efficiency of commercial case processing; (5) revisiting judicial training plans and methods; and (6) digitizing court procedures through e-communication and online hearings. The present Phase II Analysis builds on the first one to offer medium and long-term solutions that would help the BiH judiciary improve its functioning beyond the current crisis while building resilience and mechanisms to address any future emergency situations and similar challenges.

16. **The present Phase II Analysis is structured around four themes.** *First*, it takes a broader look at the effect of the crisis on caseload. Unlike the Phase I Analysis, which captures a snapshot of the pandemic's immediate effect on caseload, the Phase II Analysis looks at the entire 2020 caseload statistics, which became available at the time of writing this report, and captures more lasting trends and comparisons with previous years. *Second*, the report addresses substantive legal issues which are expected to arise more frequently as a result of the pandemic and which may lead to differences in interpretation and inconsistencies in adjudication. *Third*, in order to ensure medium to long-term speeding up of commercial justice in BiH, the report makes recommendations for amendments to procedural laws that would introduce fast-tracks for the processing of certain case types, namely a documentary and an online track. *Fourth*, building upon the recommendation of Phase I to introduce options for e-filing and e-communication with the court, the Phase II Analysis provides a detailed assessment of the current rules on e-identification and e-services in BiH and recommends measures that should be taken to enable procedural actions in electronic form.

17. **The methodology for this analysis was constrained by the pandemic.** Since no face-to-face meetings with BiH counterparts were possible, the project team relied extensively on ICT tools to virtually approach and obtain feedback from many BiH legal professionals. The analysis included: (1) desk research of relevant laws, draft laws and analytics; (2) analysis of case-flow statistics provided by the HJPC; (3) comparative legal research; (4) online survey of businesses supported by the RS and FBiH Chambers of Commerce; (5) online surveys of judges and lawyers; (6) focus group discussions with

judges from selected courts;<sup>5</sup> and (7) focus group discussions with lawyers practicing in the area of commercial law in RS and FBiH. The Business Survey<sup>6</sup> has been referred to extensively in the Phase I Analysis; this Phase II Analysis contains limited references to it and places more focus on the surveys of lawyers and judges instead.

18. **The target audience of this report are BiH policy makers and justice institutions, notably Ministries of Justice, the HJPC and the courts, as well as business associations.** In light of its numerous proposals for legislative action, the report will be of interest to the broader BiH legal community and will hopefully serve as a basis for strategic and technical-level discussions on how to modernize justice in BiH to meet the challenges of the 21<sup>st</sup> century. The report is also expected to benefit the broader international community of justice experts who look at developments in different countries to extract lessons.

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<sup>5</sup> All surveys were conducted online using the SurveyMonkey platform. The questionnaires are included as Annexes to this report.

<sup>6</sup> The Rapid Business Survey was run on SurveyMonkey platform in the period from October 8, 2020 to February 18, 2021. It was distributed to approximately 10,000 businesses with support of the local Chambers of Commerce. Responses were received from 536 businesses.

## I. Effect of the Crisis on Caseload

19. **The statistical analysis below examines commercial case processing at BiH courts during the year 2020 by looking into (i) incoming cases, (ii) resolved cases and (iii) pending cases (backlog).** While the Phase I Analysis provided a snapshot of the effect of the crisis on caseload over several months in 2020, the Phase II Analysis was prepared in the early 2021 when the annual judicial statistics for 2020 became available. Therefore, this report is able to capture some more meaningful trends through comparisons with annual statistics for previous years. The analysis reviews case flow in first-instance and second-instance courts from 1 January 2020 to 31 December 2020 and compares it to the case flow in the two years preceding the pandemic. For each of the three types of case flow (incoming, resolved and pending cases), the analysis provides further disaggregation by comparing the general statistics with the statistics in two major BiH cities, Sarajevo and Banja Luka. To do that, it examines statistics for: (i) first-instance Banja Luka District Commercial Court (Banja Luka DCC) and Sarajevo MC, and (ii) second-instance Higher Commercial Court in Banja Luka (HCC) and Sarajevo Cantonal Court (Sarajevo CC).

20. **The analysis focuses on the main types of commercial cases and does not analyze the trends for all types of cases being processed at these courts.<sup>7</sup>**

- At the first-instance, the analyzed case types comprise:
  - **Ps** – commercial disputes with a value over BAM 5,000 (appr. EUR 2,500);
  - **Mals Kom** – small utility commercial claims;
  - **Mals** – small commercial claims (non-utility);
  - **L** – liquidation;
  - **St** – bankruptcy.
- At the second instance, the analysis focuses just on appeals against first-instance commercial judgments and excludes cases with minimal contribution to caseload such as extraordinary remedies or appeals against prejudicial attachments, examining therefore only one major case type:
  - **Pž** – commercial appeals processed at second-instance courts.

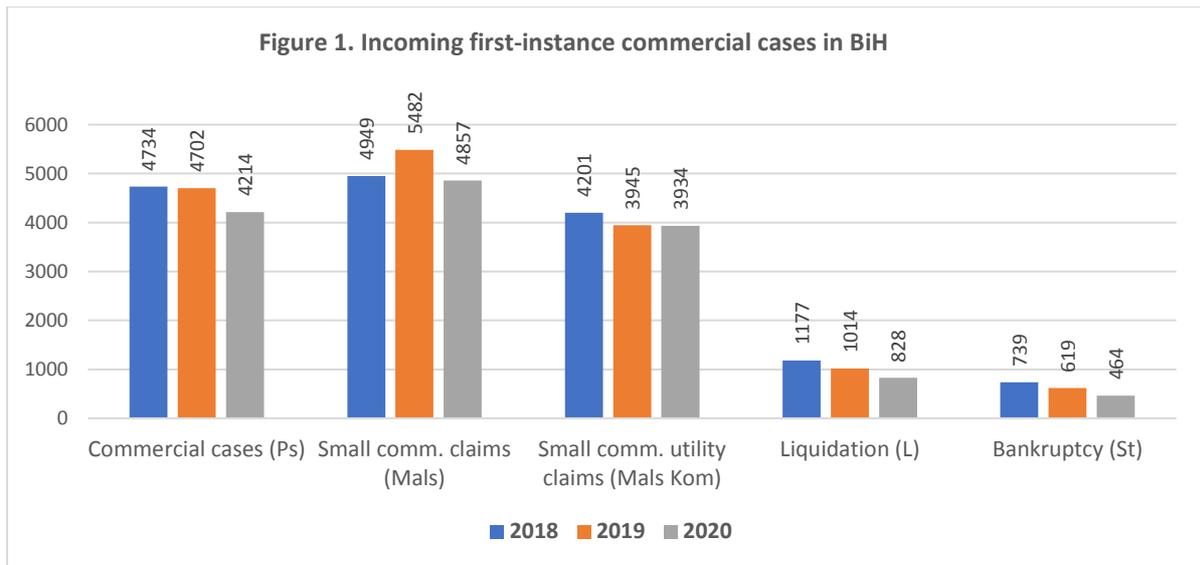
### 1. Incoming commercial cases at first-instance courts

21. **In 2020, there was a 9.3 percent decline in the number of incoming commercial cases to first-instance BiH courts** (Figure 1). A comparison with 2018 and 2019 data indicates that in 2020, the number of incoming commercial cases was similar (for small utility claims) or lower (for standard commercial claims, bankruptcy and liquidation). A notable decrease in the number of incoming liquidations and bankruptcies over the years can be observed and this trend continued and even intensified in 2020. Specifically, the number of incoming liquidation cases decreased by 13.8 percent from 2018 to 2019, and by 18.3 percent from 2019 to 2020, while the number of incoming bankruptcy cases decreased by 16.2 percent from 2018 to 2019, and by 25 percent from 2019 to 2020. The pronounced decrease in incoming liquidation and bankruptcy cases in 2020 may be due to the overall slowdown in almost all activities during the pandemic coupled with the state-imposed moratoriums on the payment and collection of some debts. However, the economic hardships reported by many businesses and developments in previous crisis situations worldwide give rise to an expectation that closures of businesses through liquidation and bankruptcy will intensify significantly in the coming months. The same expectation is shared by international analysts. Globally, this was expected to happen as early as 2020 but in BiH it may be postponed until 2021.<sup>8</sup>

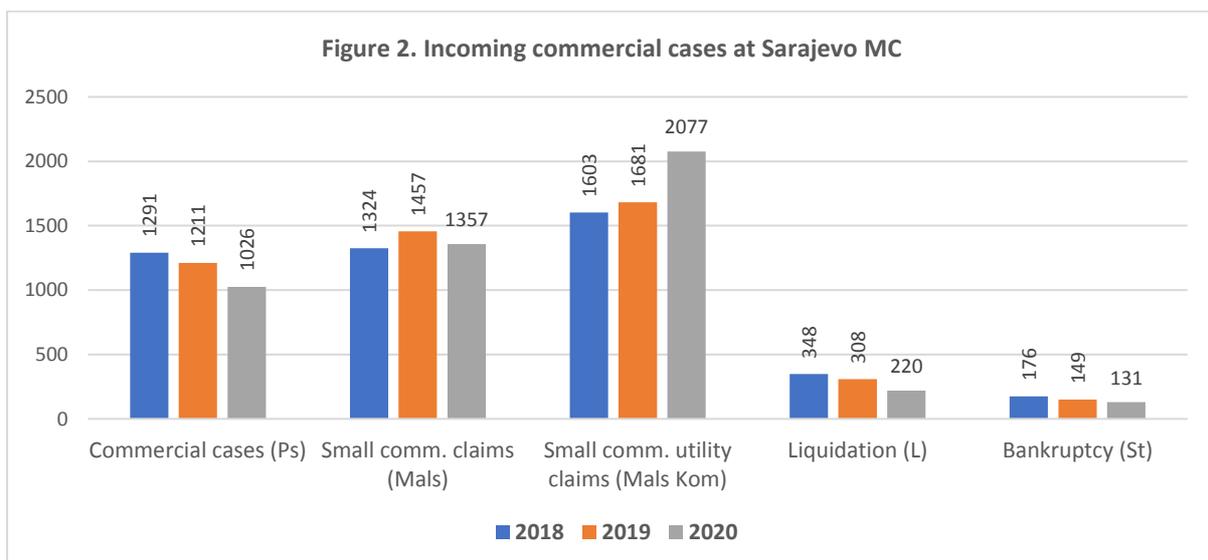
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<sup>7</sup>This is relevant for courts in FBiH (including Sarajevo) where specialized commercial courts have not been established.

<sup>8</sup> See Atradius Economic Research, [2020 Insolvencies Forecast to Jump Due to Covid-19](#), September 2020.

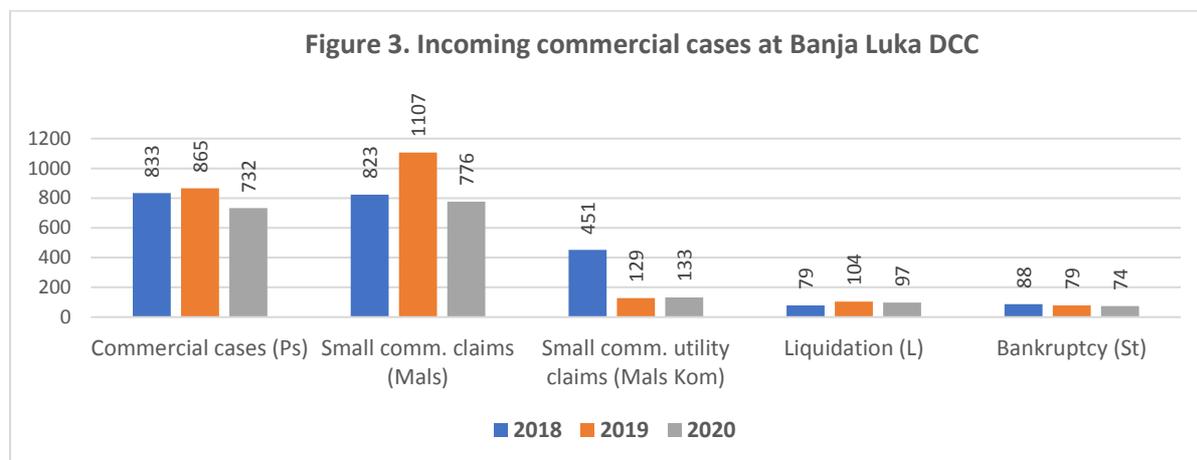


22. **Sarajevo MC displays some deviations from the general trend observed at the national level in that it did not experience a decrease in the overall number of incoming cases** (Figure 2). Specifically, in 2020, Sarajevo MC witnessed a stark increase of 23.6 percent in incoming small utility commercial claims against companies, a phenomenon which is present neither at the national level, nor in Banja Luka DCC. While it is difficult to state the reasons, the increase indicates that a growing number of Sarajevo-based commercial entities are having issues with the payment of utility bills for their offices and/or production facilities. Liquidation is another area in which the trends in incoming commercial cases in Sarajevo MC differ from the rest of the country. In 2020, incoming liquidation cases in Sarajevo MC decreased at a higher rate as compared to the rest of the country, namely by 28.6 percent as compared to 2019. Bankruptcy cases dynamics in Sarajevo MC also deviate somewhat from national trends, with a decrease in incoming cases of only 12 percent in 2020, compared to 25 percent countrywide.



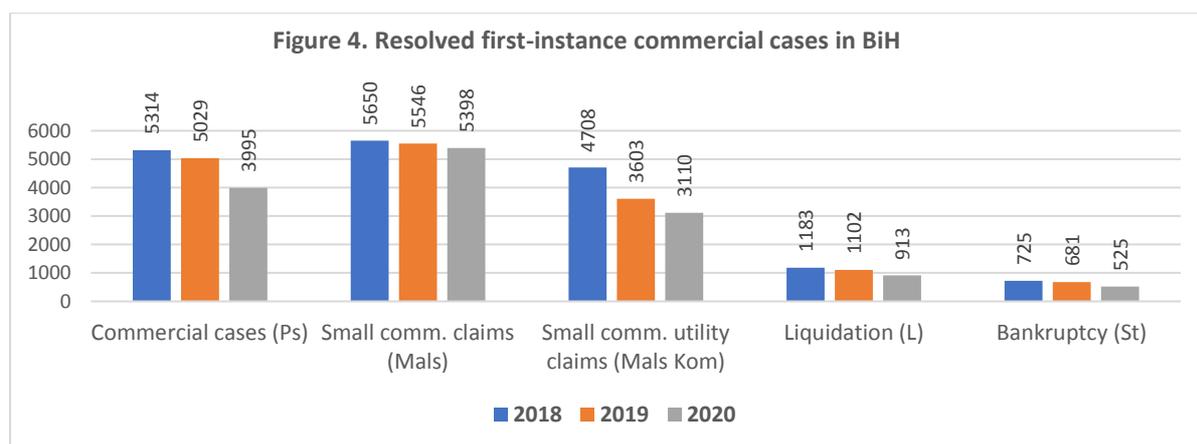
23. **Unlike Sarajevo MC, Banja Luka DCC does not display such deviations from the overall country dynamics of incoming cases** (Figure 3). It follows the general downward trend, one peculiarity being that the decrease in liquidation and bankruptcy cases in 2020 that was visible in the rest of the country, was very minor in Banja Luka. Furthermore, while incoming small commercial claims in this

court appear to have decreased substantially in 2020, this only appears significant because in 2019 there was a visible increase in incoming cases of this type.

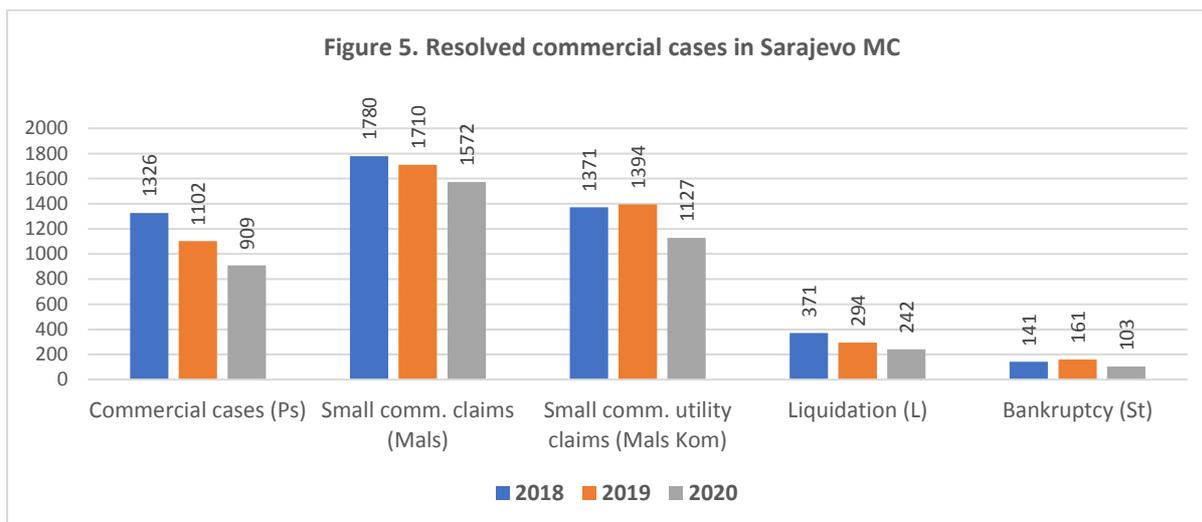


## 2. Resolved commercial cases at first-instance courts

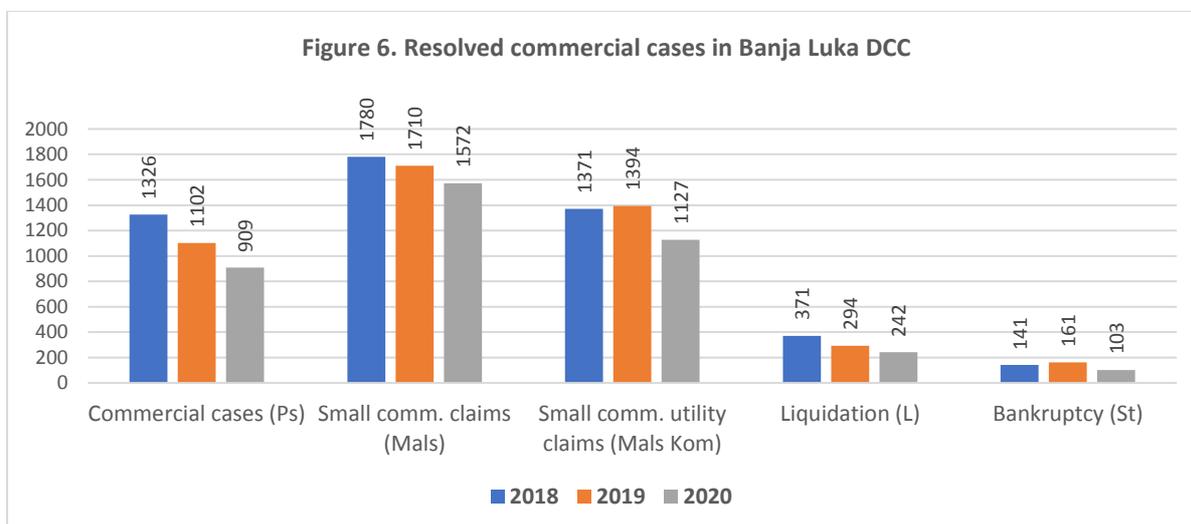
24. **Resolved cases in BiH follow the same downward trend as incoming ones** (Figure 4). The number of resolved commercial cases in BiH fell by 12.7 percent as compared to 2019. It has to be noted that for most examined case types, the decrease in resolution is not unique to 2020 but is part of a downward trend over the three-year period. The types of resolved cases that were most seriously affected are bankruptcies (22.9 percent decrease as compared to 2019), standard commercial cases (20.6 percent decrease), and liquidations (17.2 percent decrease). In essence, this means that in 2020 first-instance courts were not able to use the opportunity of the reduced number of incoming cases to clear existing backlog but, instead, generated new backlog. The reasons in all probability lay in the inability to hold hearings and work from home during the lockdown. The outcome however is bound to affect the number of pending cases.



25. **The statistics on resolved commercial cases in Sarajevo MC raise more concerns than those in the rest of the country** (Figure 5). The overall decrease in resolutions in Sarajevo MC is at 15.2 percent. Virtually in every case type, the resolved cases fell more significantly than those in BiH as a whole. The most problematic categories of cases in terms of resolution appear to have been bankruptcies, where the number of resolved cases is down by 36 percent as compared to the previous year, and small commercial utility claims where the number of resolved cases dropped by 19.2 percent compared to the previous year. The latter, coupled with the increase of incoming small commercial utility claims in 2020 does not bode well for the caseload of Sarajevo MC in 2021.

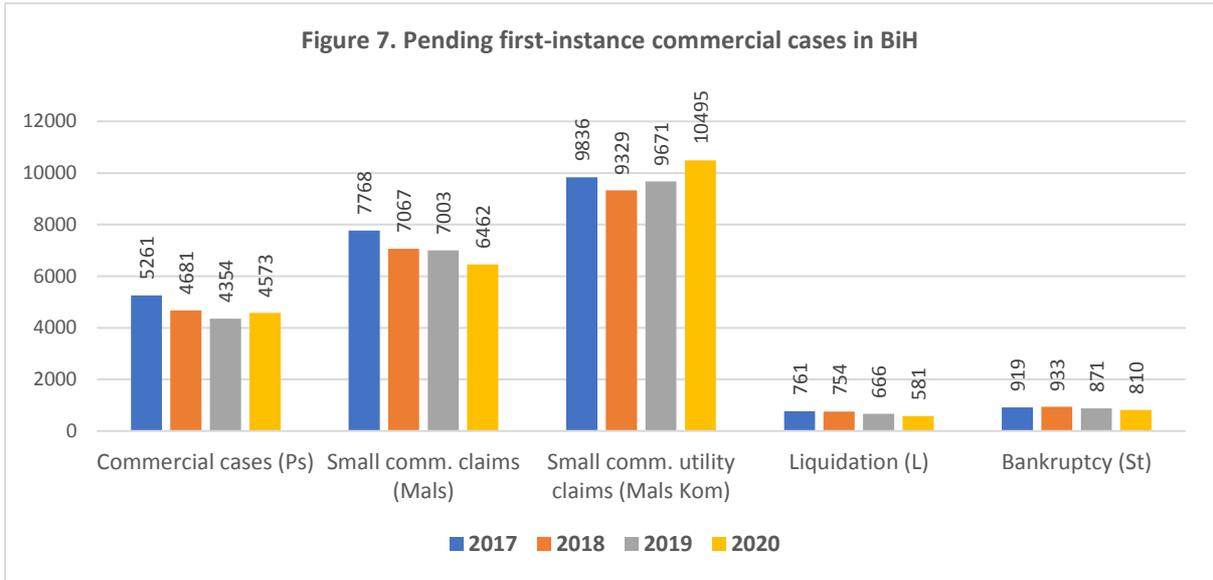


26. **Banja Luka DCC observes the same downward trend.** (Figure 6). However, for some case types (such as small commercial utility claims and bankruptcies), the court had managed to increase resolution in 2019 only to lose that advantage in 2020. Therefore, while the drop in resolved bankruptcy cases in 2020 seems sharp (36 percent, as compared to 2019), it is partially compensated by the increased resolution (14.2 percent, as compared to 2018) of this case type in 2019. The drop in resolved small commercial utility claims in 2020 (19.2 percent, as compared to 2019), as well as of standard commercial cases (Ps), the reduction is particularly noteworthy as it is part of a very stable downward trend. From 2018 to 2020, the number of resolved commercial cases per year amounts to 31.5 percent, indicating persisting difficulties in this court with this case type.

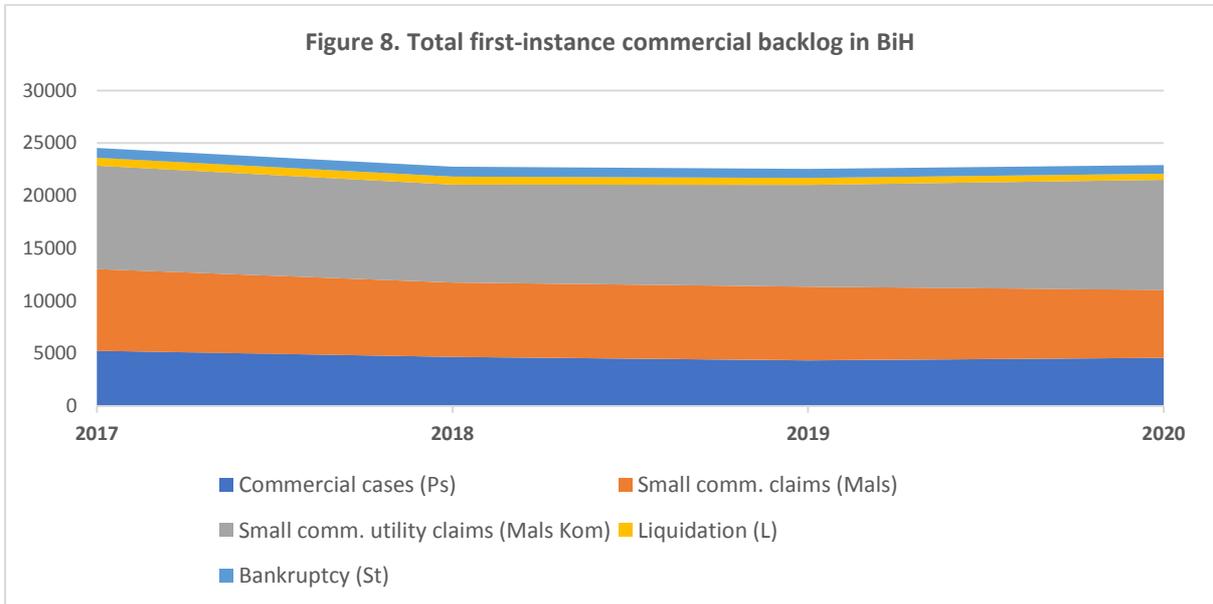


### 3. Pending commercial cases at first-instance courts

27. **At the level of BiH as a whole, the number of pending cases at the end of 2020 did not change significantly as compared to previous years** (Figure 7). However, the relatively low numbers of resolved cases led to an increase of 8.5 percent for small commercial utility claims and 5 percent for commercial cases. For the latter in particular, this increase reverses a prior trend of annual reduction in backlog. At the same time there was a decrease of pending small commercial claims (non-utility) and of liquidations.

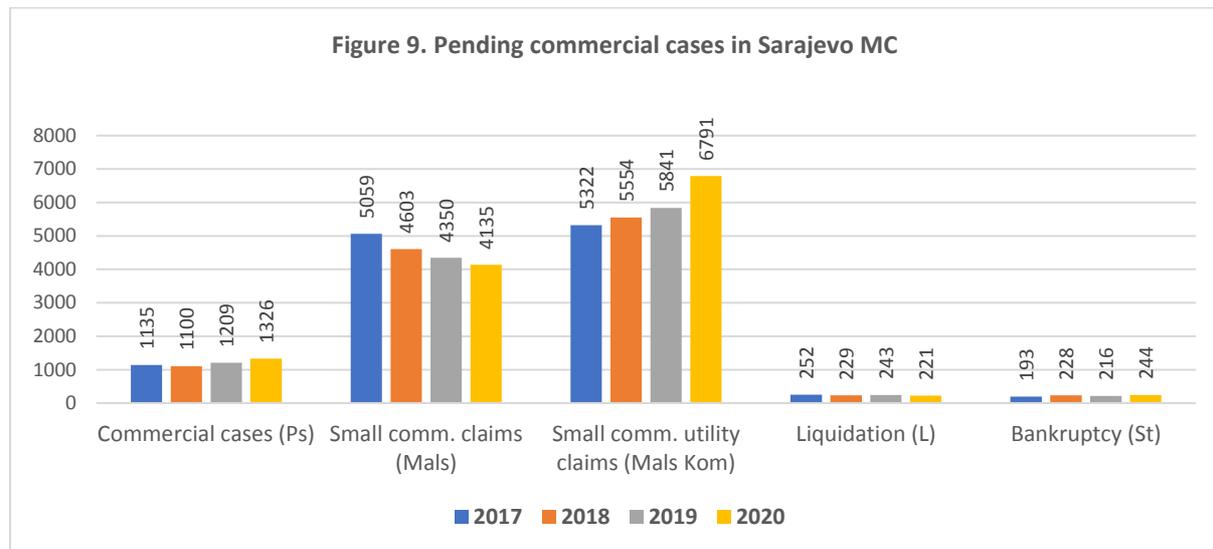


28. **Across case categories, in 2020, the BiH justice system managed to preserve pending cases at almost the same level as in prior years** (Figure 8). Overall commercial backlog at the first instance grew by 1.6 percent. This means that the courts neither let the lower resolution rates caused by the lack of hearings and difficulties with home-based work clog the system, nor took advantage of the lower number of incoming cases to clear some of the backlog.

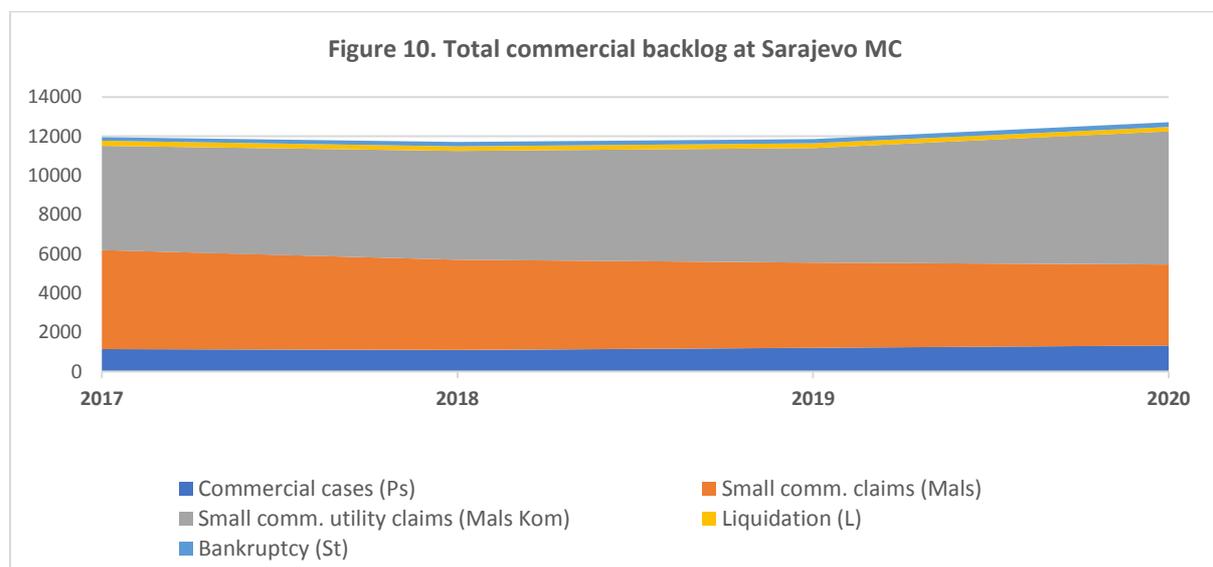


29. **In contrast to the overall BiH trend, the Sarajevo MC saw a substantial increase in pending small commercial utility claims by 16.3 percent** (Figure 9). This is unsurprising, given the increase in incoming cases of this category in 2020 coupled with the sizeable reduction in the number of resolved cases. As a result, an already existing trend towards a gradually increasing backlog of such cases intensified in 2020. In terms of absolute numbers, these cases are already the most voluminous category of commercial cases. Without some meaningful strides towards speeding up their resolution, they are bound to frustrate case processing at the Sarajevo MC Small Claims Department. At the end of 2020, Sarajevo MC also saw an increase of backlog in bankruptcies (by 13 percent) and in

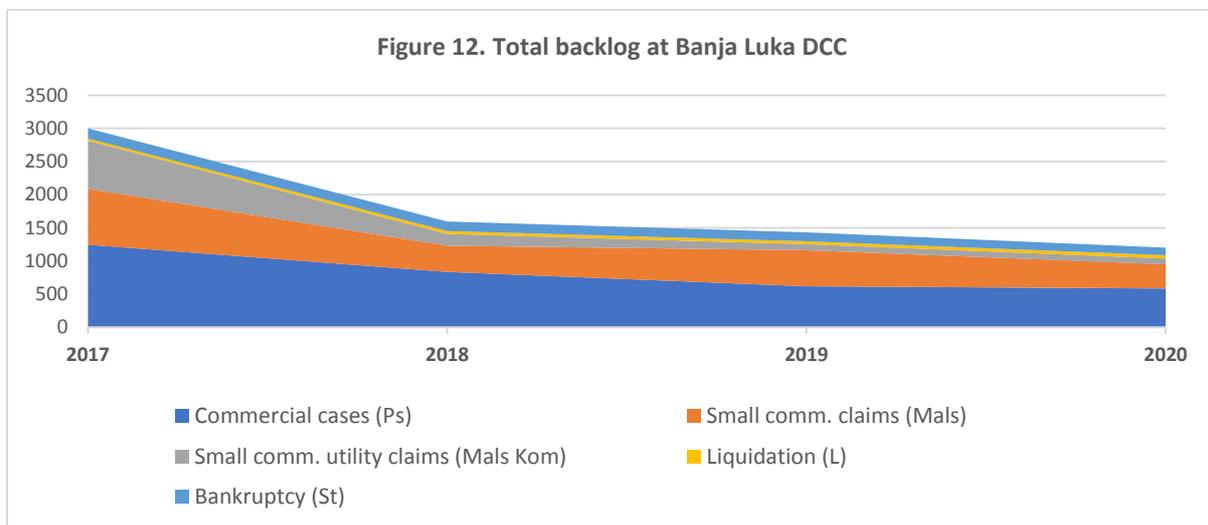
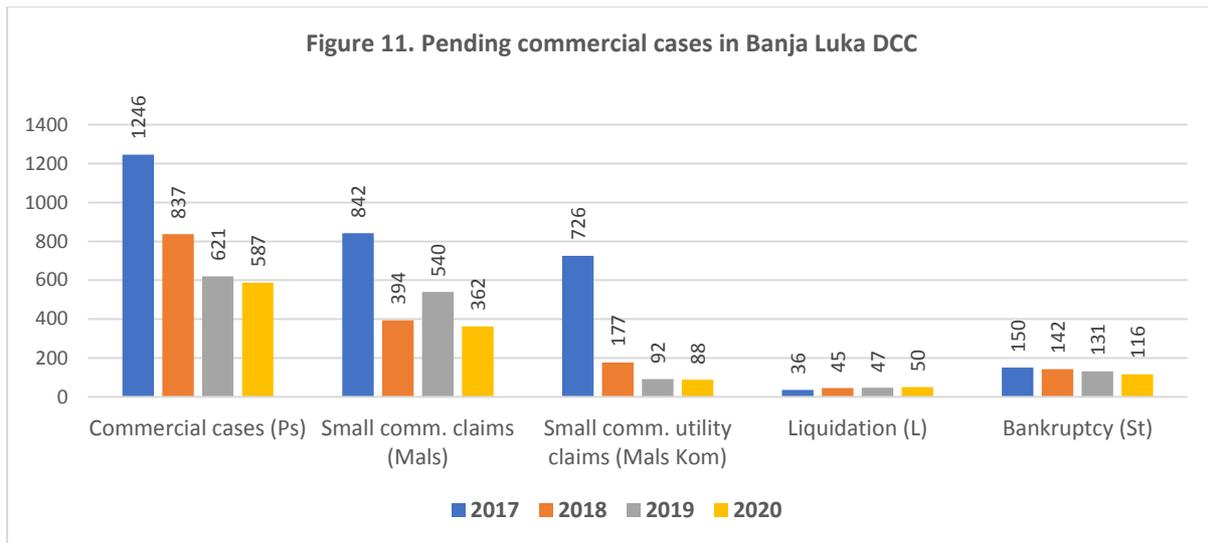
commercial cases (by 9.7 percent). Small commercial claims (non-utility) are the only category of cases where Sarajevo MC has managed to retain the trend of gradual backlog decrease.



30. **Sarajevo MC saw a 6.9 percent increase of overall commercial backlog in 2020, despite the lower number of incoming cases.** When looking at the combined number of cases, the increase (6.2 percent across examined case types) may not seem as stark as for small commercial utility claims, but it reverses a four-year trend of controlled backlog. Furthermore, if there is an increase of incoming cases in 2021, this may present judges at this court with serious difficulties in the near future.



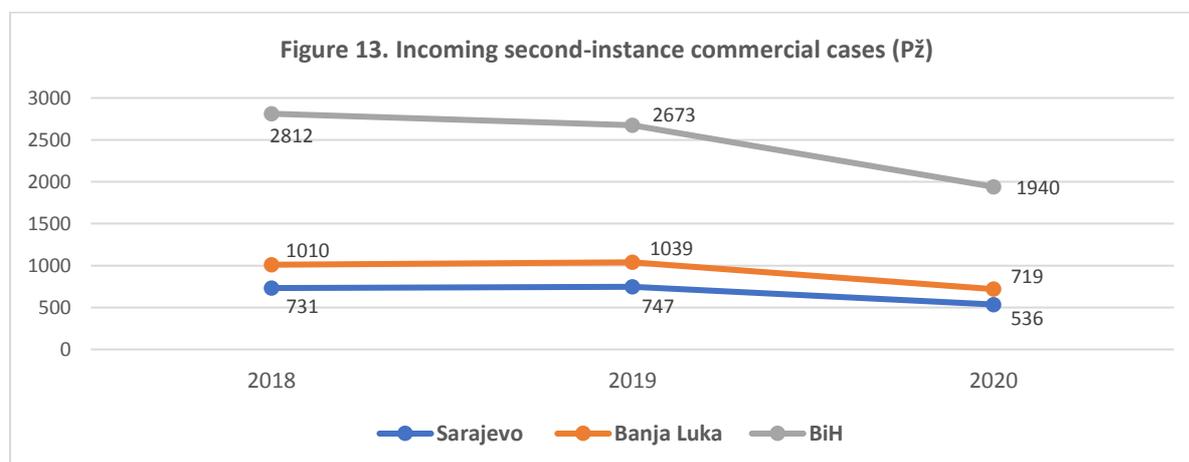
31. **Banja Luka DCC generated no new backlog; quite the contrary, it reduced the existing one.** The fewer incoming cases compensated for the lower number of resolved cases in this court. This is clear from the information on both pending cases by case type (Figure 11) and the dynamics of the total backlog over the last years (Figure 12).



32. To summarize, the crisis decreased the number of both resolved and incoming commercial cases at first-instance courts in BiH. As a result, backlog remained relatively stable. However, the available statistics do raise some concerns. First, Sarajevo MC is facing significant challenges with small commercial utility claims in the face of a rising influx of cases and decreasing resolution. Secondly, pending bankruptcies at this court are also increasing and although they are few in number compared to other case types, these are complex cases that generally take a long time to dispose of and involve many hearings and numerous participants. If the physical distancing measures persist, the progress in bankruptcy cases may be further protracted. Thirdly, utility claims in BiH also raise concerns. Businesses that are having trouble paying their utility bills are likely to also have difficulty with other payments. This, in turn means that 2021 may see an influx of new cases in other case types as well. Finally, the slowdown in incoming cases in 2020 may have been partly due to prolonged lockdowns and similar interruptions to business processes; litigations postponed due to such practical impediments may proceed in the near future. Of course, the anticipated surge in cases may never materialize; if however, 2021 does see an increase in incoming cases while resolution remains low due to new lockdowns and other restrictions, backlog may raise exponentially.

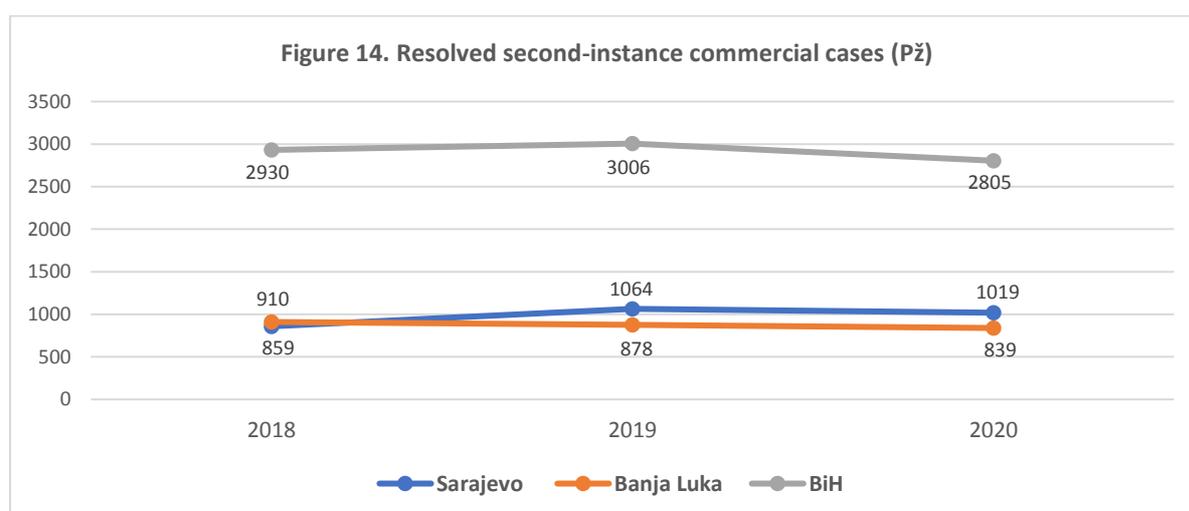
#### 4. Incoming cases at second-instance courts

33. In 2020, second-instance courts witnessed a decrease in the number of incoming commercial cases, similarly to first-instance courts. This is natural, as incoming cases at these courts directly depend on resolved cases at the first-instance courts. Thus, the lower resolution rates of first-instance courts led to a reduction in the number of incoming cases at the second instance. Furthermore, unlike with first-instance courts, the trends at the second-instance are the same country wide and in Sarajevo and Banja Luka – the reduction of incoming cases in 2020 as compared to 2019 ranged from 27 to 31 percent.



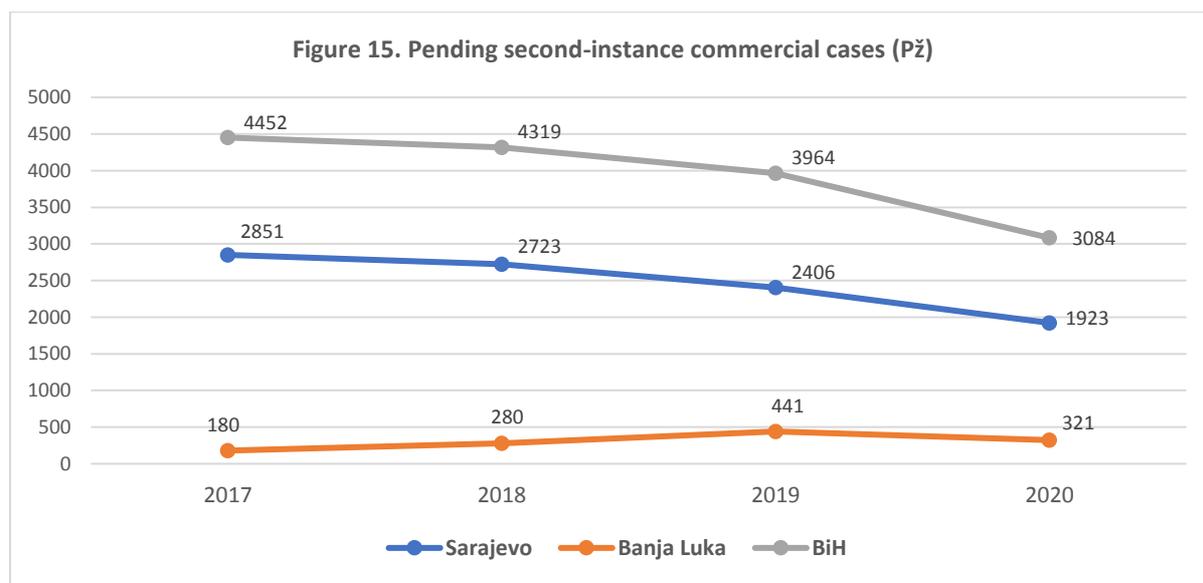
### 5. Resolved cases at second-instance courts

34. The nature of case processing at second instance courts differs significantly from first-instance courts in that hearings are not an essential element of the procedure. Therefore, second instance courts are not as affected by lockdowns and physical distancing rules as first-instance courts. This is also confirmed by the statistics on resolved cases. While the 2020 output of second-instance courts was reduced compared to 2019, the reduction rate is lower than in first-instance courts. Again, the trends are very similar between the courts in Sarajevo and Banja Luka and BiH overall, with Sarajevo and Banja Luka having a lower reduction rate (4 percent) compared to the country average (6.7 percent).



### 6. Pending cases at second-instance courts

35. **With a much lower number of incoming cases and an almost unchanged resolution rate, second-instance courts managed to reduce their backlog in 2020.** The reduction, as compared to 2019, is substantial across the board, ranging from 20 percent for BiH as a whole to 27 percent for Sarajevo CC. In the last three years, this court had fewer incoming cases in absolute numbers than Banja Luka HCC; it also had a slightly higher number of resolved cases. Nevertheless, the number of pending second-instance cases in Sarajevo is much higher as an absolute number than that in Banja Luka. This indicates that, regardless of the crisis in 2020, Sarajevo CC is still dealing with a substantial old commercial case backlog, which is being reduced year by year. Banja Luka HCC, on the other hand, had a tendency of increasing backlog over 2018 and 2019, which it managed to reverse in 2020.



36. **Overall, 2020 had a positive effect on the commercial caseload of BiH second-instance courts.** The courts benefited from a decreased influx of cases and as a result managed to significantly reduce their backlog. This puts them in a good position in the beginning of 2021 when first-instance courts will likely increase their output to make up for the slowdown in resolutions during 2020, which is expected to put a pressure on second-instance courts. Currently, second-instance courts appear well-positioned to handle that pressure.

## 7. Recommendations

37. **The examination of commercial caseload in 2020 shows that there are several areas of concern.** First, if incoming cases in 2021 go up to make up for the low activity in 2020, which is highly probable, courts will have to increase the speed of resolution substantially in order to deal with the increasing demand. They may have to do this while facing budget cuts due to the economic impact of the pandemic and reduced public budgets. Thus, the courts will likely have to do more with less resources.<sup>9</sup> Secondly, the Small Claims Department at the Sarajevo MC is overwhelmed and urgently needs to address the additional backlog accumulated in 2020 while preparing to meet new, potentially increasing inflow of cases in 2021. The most effective approach to address these two issues would be to speed up case processing. The recommendations throughout this report seek to address this challenge from different perspectives. The preventive and backlog processing recommendations listed

<sup>9</sup> Budget data demonstrates that many of the commercial courts in RS are projected to receive lower budget allocations in 2021, as compared to 2020. The same applies to some FBiH courts (e.g., in the Sarajevo and Zenica Cantons). Conversely, the 2021 budget projects increased allocations as compared to 2020 to the courts in Tuzla and Mostar. It should be kept in mind that the 2021 allocations can be changed during the 2021 budget adjustment process.

below are specific to this chapter while the measures to speed up case processing are covered in more detail in chapters II, III and IV of this report.

**38. Preventive measures:**

- The FBiH Chamber of Commerce or the court system could facilitate discussions between utility companies, businesses and the judiciary seeking to identify reasons behind the increase in defaults in payment of utility bills and possible preventive measures, including agreements and programs for restructuring such debt.

**39. Backlog reduction measures focused on Sarajevo MC:** The increasing backlog at the Sarajevo MC, especially at its Small Claims Department, should be examined carefully at the court or HJPC level. Backlog reduction measures could be taken at Sarajevo MC such as:

- Exploring the possibility of transferring some of the pending cases to other courts.
- Exploring the possibility of introducing longer working hours and work in shifts.<sup>10</sup>
- Exploring the possibility of engaging temporary staff for reducing the backlog.<sup>11</sup>

**40. Measures to speed up case processing,** as proposed by other relevant chapters of this report:

- Addressing the substantive legal issues posed by the pandemic (See Chapter II).
- Introducing amendments to the Civil Procedure Laws to enable fast-tracking of some types of cases (See Chapter III).
- Digitization of some court processes (See Chapter IV).

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<sup>10</sup> The introduction of work in shifts has also been recommended under the Phase I Analysis.

<sup>11</sup> The engagement of temporary judges and transfer of cases to less busy courts have also been recommended as a backlog reduction measure under the World Bank. 2019. [Strengthening Commercial Courts and Departments in Bosnia and Herzegovina: Caseload Distribution, Backlog, and Other Organizational Issues Affecting Performance](#). World Bank, Washington, DC.

## II. Substantive Legal Issues Posed by the COVID-19 Pandemic

41. **The pandemic caused unprecedented legal challenges to businesses worldwide.** To limit the spread of the virus most countries imposed an array of measures that impacted business operations globally. The most common measures that frustrated business operations were the rules limiting the movement of goods and people and imposing prohibitions on a wide range of activities. These measures directly affected economic performance and the provision of services. Furthermore, the social distancing rules required businesses to change the organization of the workforce. The prolonged crisis mode of operation put a significant pressure on the liquidity of companies and forced some businesses to close or face bankruptcy proceedings.<sup>12</sup>

42. **The lockdowns and the associated physical distancing measures affected performance under commercial agreements, by either making it impossible or overly difficult.** The restricted movement of people and goods caused a disruption of international supply chains and affected supply contracts. In many cases, they were not performed or were performed in breach of contractual deadlines. The prolonged closure of commercial establishments, such as shops, restaurants, gyms and beauty salons, made payment of rent and utility bills extremely burdensome for income-deprived businesses. Force majeure and other step-out clauses, e.g., material adverse change or frustration of purpose, were often invoked by parties unable to meet their contractual obligations. The definition and application of such clauses are expected to take center stage in business litigation. They need to be interpreted by courts across the world in light of the new circumstances.<sup>13</sup>

43. **Physical distancing rules mandated changes in workforce organization, which impacted employment rights and contracts.** To cope with the pandemic, some businesses switched to home-based work (HBW), others adjusted their working hours to accommodate work in shifts.<sup>14</sup> Quarantine usually meant that an employee would work from home or, if not possible, not work at all until the isolation period ran out. In many respects, businesses changed the manner in which they operate.<sup>15</sup> These changes were sometimes reflected in the internal rulebooks of companies or agreed with employee unions.<sup>16</sup> Some employers had to lay off workers. The massive changes to the conditions of employment necessitated by the pandemic put workers in a particularly vulnerable situation. It is likely that these circumstances will result in labor litigation that will have to strike a careful balance between the rights of workers and the economic realities brought about by the pandemic.

44. **Oftentimes states disrupted business operations by ordering temporary shutdown of business or shortening workhours.** To fight the virus, most countries ordered certain types of businesses, e.g., shopping malls, cinemas, hospitality industry, to close for an unforeseen amount of time whereas different levels of confinement entailed different degrees of closure.<sup>17</sup> Some businesses questioned whether the measures put in place were proportional, lawful and/or constitutional.<sup>18</sup> Furthermore, state aid packages and other incentives were provided to some and not to other

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<sup>12</sup> For more on key legal and business challenges caused by COVID-19 pandemic, see: [UK guide to significant commercial and legal issues](#), Linklaters; [COVID-19 impact on MSEs](#), The European Fund for Southeast Europe; [Business continuity in a crisis: COVID-19 challenges](#), CPA Canada.

<sup>13</sup> See: [UK guide to significant commercial and legal issues](#), Linklaters.

<sup>14</sup> [May the workforce be with you – The voice of the European workforce 2020](#), Deloitte.

<sup>15</sup> [COVID-19 Workforce and Mobility – A pragmatic guide to protecting your people, operations and values through a global crisis](#), EY.

<sup>16</sup> For more information on impact of COVID-19 pandemic on workforce, see [ILO Monitor: COVID-19 and the world of work. Third edition Updated estimates and analysis](#), International Labor Organization.

<sup>17</sup> E.g., [Guidance on Closing certain businesses and venues in England](#), Cabinet Office, United Kingdom, January 2021.

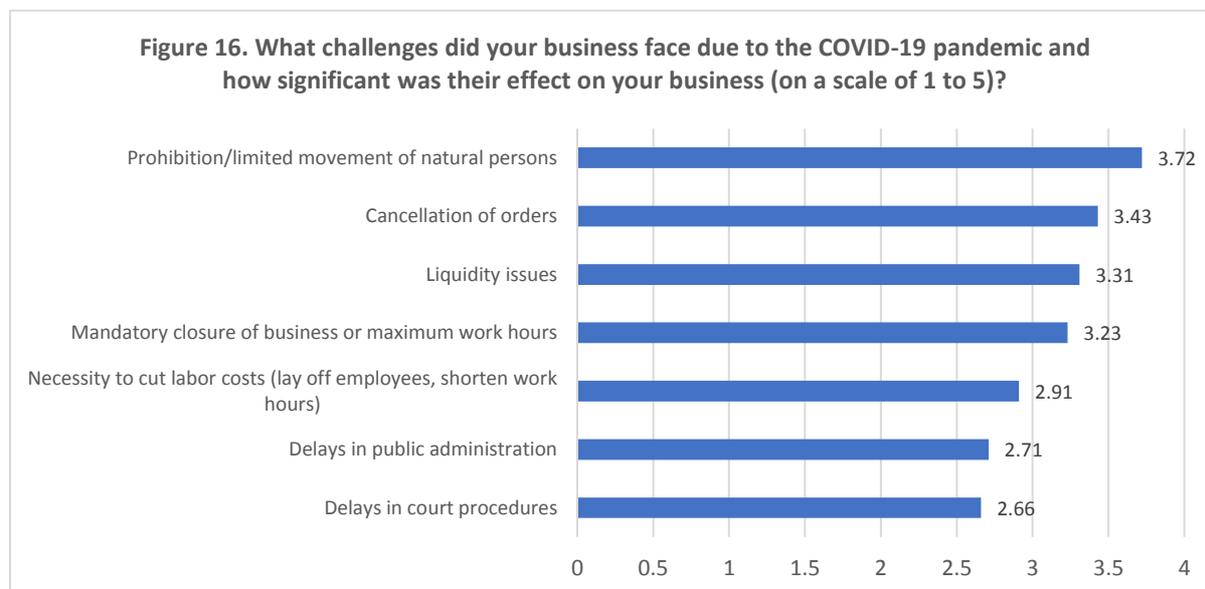
<sup>18</sup> Cases of constitutional appeals against lockdown were prominent in a number of countries, including [South Africa](#), [United States of America](#), [Australia](#), etc.

companies. Again, this made some businesses question the adequacy and fairness of the state response to the crisis.

45. **The prolonged disruption in business operations is expected to lead to an increased number of bankruptcy cases worldwide.** The crisis has persisted for more than a year so far and businesses have been functioning in a situation of ongoing disruptions. Continuity in supplies or payments has been frustrated, workforce availability particularly for SMEs has been constantly instable (due to isolation, quarantine, illness of employees) and lockdowns have curbed business operations. In such a setting, some businesses are unable to cope. It is expected that those may turn to liquidation before going bankrupt or slip into illiquidity and consequently into bankruptcy proceedings.<sup>19</sup>

### 1. The situation in BiH

46. **BiH is not immune to the issues that the crisis has raised worldwide.** To identify the challenges that businesses faced in 2020, the project, in cooperation with chambers of commerce, conducted a survey. It asked respondents to select and grade the significance of each challenge they faced during the crisis (see Figure 16). According to the weighted responses, the disruption in supply chains leading to the cancellation of orders and supply agreements was the most significant challenge caused by the crisis. Measures imposed to curb the spread of the virus, such as closure of businesses and limited mobility of natural persons, were also considered an important obstruction to business operations. The even-handedness of state measures supporting only the selected sectors was also questioned. In addition, interviews with lawyers revealed that they have received many inquiries on employment matters (e.g., the right to lay off workers or cut salaries). Other survey responses highlight the importance of real-estate contract renegotiation and the need to switch to digital mode of operation. The issues that will most likely require the attention of BiH courts include (i) non-performance of contractual obligations, (ii) employment issues, (iii) challenges to government measures introduced to curb the spread of the virus or to support struggling businesses; and (iv) issues related to the need to ensure quick closure of some businesses.



Source: Survey of Businesses, based on 361 responses

<sup>19</sup> See for example [What's Disrupting Bankruptcy Trends Predicted in the Pandemic?](#), Bloomberg law.

## 2. Non-performance of contractual obligations

47. **The crisis led to mass defaults in contract performance.** According to the Survey of Businesses, the restricted movement of persons and cancelation of orders had the most adverse effect. Interestingly, forced closure of businesses was graded as less significant. It seems that BiH businesses are dependent on the free movement of goods and people, and many of the survey respondents, particularly in the hospitality industry, have noted that the interruptions in supply chains have led to poor contract enforcement and poor collection of monetary claims and could ultimately lead to permanent closure of their businesses.

48. **Cancelled orders and terminated contracts will likely cause a host of disputes; therefore, a hot topic in legal literature nowadays has been whether the widespread defaults in performance caused by the pandemic can be deemed a force majeure event.**<sup>20</sup> The force majeure doctrine and similar legal concepts could be applied to relieve parties of their obligations under a contract, to excuse non-performance or to help amend the contractual conditions. Civil law systems<sup>21</sup> tend to have rules under which a party may be absolved of its contractual obligations, if certain circumstances, which are not attributable to the party have rendered the performance impossible. Some laws define force majeure (e.g., in France, Spain)<sup>22</sup> while others may leave it to the court to define what those unexpected circumstances could be (e.g., Germany, Italy).<sup>23</sup> In Germany, these provisions are quite limited and apply only to certain industries, such as the transportation industry, rather than to all types of contractual arrangements. A pandemic often renders performance impossible, e.g., in a situation when goods cannot be delivered because borders are closed or an entertainment event cannot be held due to restrictions on public gatherings.

49. **Apart from force majeure, which in most legal systems implies impossibility for performance, there are, in civil law jurisdictions, additional mechanisms that achieve similar purposes.** Certain changes in circumstances do not render performance impossible but make it burdensome or expensive to the extent that it compromises the contract's purpose. In many legislations, e.g., France,<sup>24</sup> Germany,<sup>25</sup> Italy,<sup>26</sup> this is a cause for either contract amendment or, in

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<sup>20</sup> See for example Hogan Lovells, [Supply chain and force majeure disputes in the COVID-19 era](#).

<sup>21</sup> In common law countries, the frustration of purpose concept is mostly used in such cases. However, contracts often include also force majeure clauses.

<sup>22</sup> For example, in France an event has to cumulatively meet five conditions to be considered force majeure: (i) it must be out of the debtor's control, (ii) it must not have been reasonably foreseeable at the time of entering into the contract, (iii) its effects could not have been avoided by appropriate measures, and (iv) it must prevent the debtor from performing its obligations. See Allen & Overy, [Covid-19 coronavirus: multi-jurisdictional survey on force majeure and equivalent doctrines](#), 1 June 2020.

<sup>23</sup> E.g., Art. 1256 of the Italian Civil Code provides that a party that fails to fulfil a contractual obligation will be liable for damages unless it proves that performance is impossible for a reason not attributable to it. In Germany, the exonerating effect of the impossibility for performance is regulated for certain sectors. Ibid.

<sup>24</sup> Article 1195 of the French Civil Code provides that for contracts entered into from 1 October 2016, the mechanism of unforeseeable change of circumstances shall be available if the following conditions are cumulatively met: (i) there is a change of circumstances that was unforeseeable at the time the contract was entered into, (ii) the change of circumstances makes the performance of the debtor's obligation excessively onerous, (iii) the debtor did not agree contractually to bear the risks of the change of circumstances, and (iv) the obligations at issue do not result from transactions on financial bonds or contracts listed in paragraphs I to III of Article L. 211-1 of the French Monetary and Financial Code. Where these conditions are met, the debtor may ask the counterparty to renegotiate the contract. Ibid.

<sup>25</sup> E.g., under Section 275 BGB, Germany, para 2, if the obligation is to perform in kind, the debtor may refuse performance to the extent that performance requires expense and effort, which (considering the subject matter of the obligation and the requirements of good faith) is grossly disproportionate to the interest in performance of the creditor. If these prerequisites are met, a claim for performance is excluded. As regards monetary claims, it is settled case law that it is never impossible to perform monetary obligations. Parties are assumed to always be able to pay a cash debt. Ibid.

<sup>26</sup> E.g., under Art. 1467 of the Italian Civil Code, when performance of an obligation by a party becomes excessively burdensome due to events that were not foreseeable or not avoidable (as an event of force majeure is), the party is entitled to ask the court to terminate the agreement. Ibid.

drastic cases, its termination. These types of situations could arise in a pandemic such as the current one. By way of example, a production facility that has seen the majority of its workers getting sick or being quarantined may still be able to perform its duties under a supply contract by hiring a large number of temporary workers (i.e. performance is not impossible) but, depending on the circumstances, the cost could be exorbitant.

**50. The laws of some jurisdictions excuse non-performance of contractual obligations in situations where an unanticipated event has changed the situation so much that requiring performance would be prejudicial to the equality between the parties or to the principle of good faith or to the purpose of the contract.** Like in the above case, this could serve as a cause for either amending or terminating the contract. Such rules are, for example, available in Germany,<sup>27</sup> France,<sup>28</sup> Italy.<sup>29</sup> These situations arise in cases where the market conditions have changed so drastically since the conclusion of the contract that its continued performance would greatly affect the competitiveness of one of the parties, e.g., in distribution contracts which provide for prices that are drastically different from the current ones. A similar situation might arise under rental agreements for commercial areas in shopping malls. Even though the lessee continues to hold the rented property throughout the entire period of a lockdown (i.e. the contract is being performed), the closure of shopping malls may mean that the merchant would not be able to use the rented property in the intended way.

**51. In addition to legislative provisions that may release the party from liability for non-performance, businesses often incorporate force majeure and similar clauses in their agreements.** These clauses may expand or narrow down the protection offered by the law. The quality of these clauses largely depends on the level of legal support that a business can afford. A micro, small or medium-sized enterprise is less likely to have considered all eventualities in the agreements it has entered into, as compared to a large business that uses the services of its own legal department or a law firm. To even the playing field, some chambers of commerce may draft and promote sample force majeure clauses that businesses can use in their agreements. In 2020, the International Chamber of Commerce (ICC) updated its sample force majeure and hardship clauses<sup>30</sup> to reflect the changed circumstances.

**52. Ultimately, if a dispute arises, it is up to the court to interpret and apply force majeure and similar clauses.** Even though it is likely that courts will consider the pandemic and the related restrictive measures a force majeure event,<sup>31</sup> they would most probably do so on a case by case basis, exploring the manner in which the unexpected circumstances affected each individual relationship. The same applies to the “certificates of force majeure” that some chambers of commerce, including the Foreign Trade Chamber of BiH, the China Council for the Promotion of International Trade,<sup>32</sup> the

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<sup>27</sup> E.g., under section 313 BGB, Germany, if the circumstances that form the basis of a contract have changed so drastically that adhering to the agreement would be against good faith, the party may request to amend the contract. Under extreme circumstances it might lead to a right to withdraw from or terminate a contract. Ibid.

<sup>28</sup> E.g., For certain types of contract (such as distribution and commercial representation contracts) which were entered into before 1 October 2016 and which have become excessively unbalanced, French case law provides that the supplier has a duty to renegotiate the contract in good faith in order to allow the counterparty to offer competitive prices to its own customers. Ibid.

<sup>29</sup> According to the doctrine in Italy, where it becomes impossible to achieve the essential purpose of the contract, a party entitled to ask the court to terminate the agreement. Ibid.

<sup>30</sup> See [ICC Force Majeure and Hardship Clauses](#), March 2020.

<sup>31</sup> The former, Severe Acute Respiratory Syndrome (SARS) epidemic was deemed by courts in China, Spain, Germany to constitute an event that might serve as a basis for applying the force majeure concept. See Allen & Overy, [Covid-19 coronavirus: multi-jurisdictional survey on force majeure and equivalent doctrines](#), 1 June 2020.

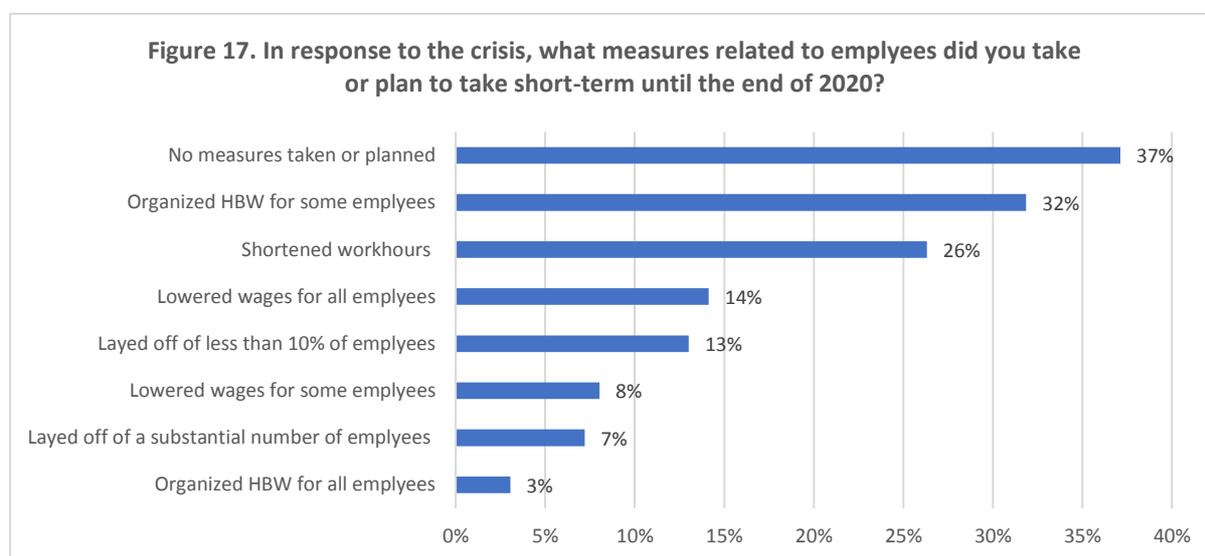
<sup>32</sup> Alison Frankel, [Chinese force majeure certificates presage complexity of resolving post-crisis disputes](#), Reuters, March 2020.

Ukrainian Chamber of Commerce,<sup>33</sup> have been issuing during the pandemic. While the purpose of these certificates is to prove, especially to a foreign contracting party, that the pandemic and the government actions stemming from it amount to a force majeure event, it would be up to the court to decide what weight to give to such certificates.

53. **In BiH, there are several applicable provisions of the FBiH/RS Obligations Acts that could excuse the non-performance of contractual obligations in a situation of crisis.** The provision of Art. 137 of the FBiH/RS Obligations Acts regulates the situation in which performance has become impossible due to an event for which neither party is responsible and Art. 133 to 136 regulate the situation in which a change in circumstances compromises the very purpose of the contract. The provision of Art. 263 of the FBiH/RS Obligations Acts stipulates that there is no liability for default if the debtor proves that the inability to perform was due to circumstances that took place after conclusion of the contract and that could not have been prevented or avoided. None of the provisions refers specifically to force majeure and there is no definition of this concept in the laws. Given the lack of definitions and the general nature of the relevant procedures in BiH Law, caselaw will play a key role in their application. Ensuring uniform interpretation will be paramount to protect legal certainty in the business environment.

### 3. Employment issues

54. **The crisis forced most businesses to undertake short-term measures to reorganize their workforce.** Some business in BiH had to (i) shorten work hours, (ii) switch to HBW, (iii) lay off some employees, or (iv) lower wages. The Survey of Businesses indicated that short-term most businesses have undertaken at least one of these measures to reorganize their workforce. The most common measure was HBW for all or at least some of the employees, though businesses have often had to lay off employees too (see Figure 17). Some companies reported having to switch to work in shifts or reschedule vacation days to endure the lockdown.



Source: Survey of Businesses, based on 361 responses

55. **The labor legislation in BiH does not regulate most of the workforce reorganization measures undertaken to mitigate the effect of the crisis.** Like in other countries, employment and

<sup>33</sup> In March 2020, Ukraine amended its Law on Chambers of Commerce and Industry of Ukraine to include quarantine to the list of force majeure events. See Maxim Oleksiyuk, "[Covid-19 Quarantine is Legislatively Recognized as Force Majeure: Consequences and Opportunities for Businesses](#)", KM Partners.

employees' rights in BiH are regulated on multiple levels by a range of instruments. The RS/FBiH Labor Laws regulate employee's key rights and obligations and prevail over other regulations and employment contracts.<sup>34</sup> Collective labor agreements and the internal rulebooks of employers govern employment matters in specific sectors or for specific employers, while labor contracts regulate terms of employment between an individual employee and an employer. However, these regulations are not adapted to a crisis and either do not regulate at all or regulate in a different context some of the workforce reorganization measures induced by the pandemic. First, HBW is not prohibited under the RS/FBiH Labor Laws but it is not regulated either and most employment rulebooks and contracts do not envisage the need for HBW. No rule requires an employee to switch to HBW under certain circumstances. Similarly, labor laws do not envision situations where an employer could prohibit an employee from coming to work and obligate her/him to take sick leave. Layoffs are possible but only based on specifically set reasons and under procedures prescribed by the law.

**56. Efforts to amend the FBiH Labor Law to regulate some of the workforce reorganization measures necessitated by the crisis were unsuccessful.** A new draft FBiH Labor Law was proposed as early as Spring 2020 to provide a framework for the workforce reorganization measures undertaken by businesses in FBiH. The draft provides flexibility for employers in introducing HBW and in reorganizing workhours (by allowing a maximum of 72-hour work week, with shorter work hours in subsequent weeks). Furthermore, it allows for mandatory leave for a period of up to 20 days. It also intended to introduce a mandatory status of employment inactivity for a period of three months during which employees would receive minimum wage.<sup>35</sup> The status of employment inactivity was to be used by businesses which had a 35 percent or more of income reduction or that had to close due to lockdown. The draft law caused a major uproar among unions claiming that the proposed solutions are misusing the crisis and allowing businesses to exploit workers.<sup>36</sup> As a result, the draft has not been adopted yet. The FBiH Government is working on the proposal and administering consultation procedures.

**57. In October 2020, FBiH adopted a new Worker Protection Law (WPL).** The new WPL aligns FBiH rules with the modern regulation in the field. Its adoption has been long awaited as worker protection in FBiH was previously governed by rules adopted 30 years back. Although the new WPL does not directly tackle the topics raised by the crisis, the pandemic put worker protection into focus and acted as a catalyst for the adoption of the law. WPL is expected to fill in some gaps by setting a new regulatory framework for interpreting the worker protection issues raised by the pandemic.

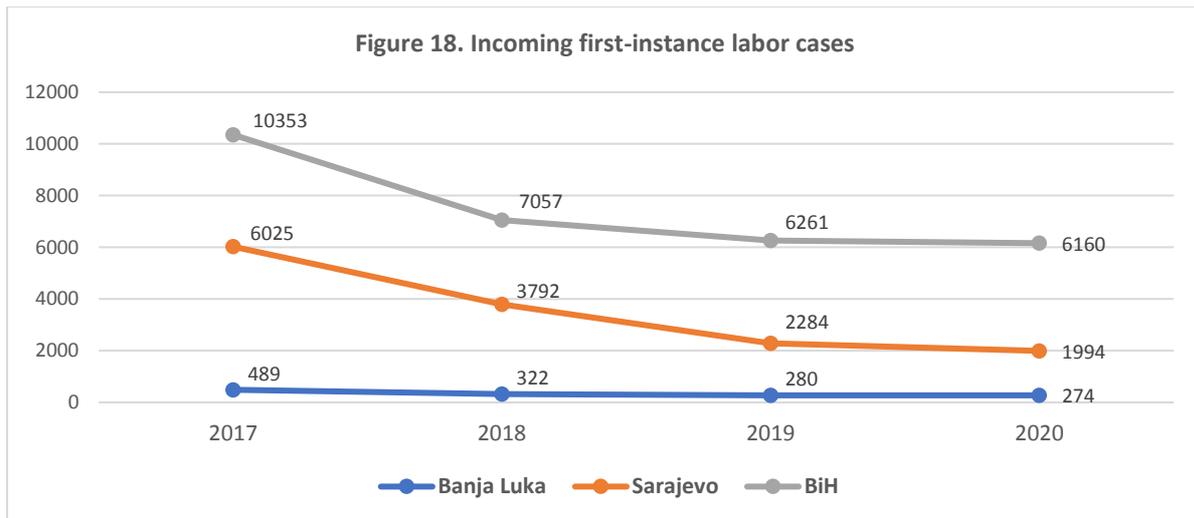
**58. BiH caseload statistics illustrate that so far there has been no increase in labor litigation as a result of the crisis,** neither countrywide, nor in Banja Luka and Sarajevo in particular (see Figure 18). However, unlike other case types, there has been no sizeable reduction either. Interviews with lawyers point to a potential surge in such cases in 2021, depending on how the crisis unfolds.

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<sup>34</sup> FBiH Labor Law Article 19, RS Labor Law Article 9.

<sup>35</sup> See draft [FBiH Labor Law](#).

<sup>36</sup> See Slobodna Evropa, [Protest of Unions in Sarajevo due to changes in FBiH Labor Law](#).



#### 4. Constitutional challenges to governmental acts

59. **The measures put in place to curb the spread of the virus entailed mandatory closure of certain types of businesses.** In March 2020, emergency rules were imposed at different levels of government in BiH: BD and FBiH authorities declared a ‘state of natural disaster’ on their respective territories,<sup>37</sup> while the RS Government declared an ‘emergency situation’.<sup>38</sup> The BiH Council of Ministers declared a ‘state of natural disaster’ countrywide. These declarations enabled the enacting of restrictive measures in order to stop the spread of the virus, including closure of certain types of businesses, e.g., in the hospitality industry.<sup>39</sup> Many businesses therefore had to temporarily close, limit, and adjust their operations throughout the crisis period.

60. **In BiH, like in many countries across the world, the legality of emergency rules was questioned.** Since the crisis started, there has been a public uproar against the measures put in place to stop the spread of the virus. Many were questioning their proportionality and necessity, calling for a review of their constitutionality. In April 2020, the BiH Constitutional Court decided that the measures restricting the movement of elderly and children<sup>40</sup> were passed in violation of human rights. In December 2020, the BiH Constitutional Court again ruled against the measures of FBiH crisis authorities, this time squashing the rules on limited movement and mandatory use of facemasks.<sup>41</sup> Furthermore, there is intense debate internationally on the constitutionality and the general lawfulness of the measures requiring a total closure of business operations, and in particular, on the manner in which these businesses were selected or declared as non-essential.<sup>42</sup> It is quite possible that businesses in BiH will soon file or have already filed motions to the Constitutional Courts challenging the constitutionality of the measures which limit their freedom to operate, such as curfews, work hours limitations and temporary closures.

<sup>37</sup> Decision Declaring the State of Natural or Other Disaster Caused by COVID-19 in FBiH, published in FBiH Official Gazette no., on March 16 2020.

<sup>38</sup> [Decision Declaring the Emergency Situation for the Territory of Republika Srpska](#), published in RS Official Gazette no. 25/20.

<sup>39</sup> Information on all emergency orders and their amendments is available on websites of the [FBiH Government](#) at and the [RS Chamber of Commerce](#).

<sup>40</sup> Slobodna Evropa, [After the ruling of the Constitutional Court, the order to prohibit movement of elderly revised](#).

<sup>41</sup> N1, Constitutional Court BiH: [Measures on limited movement and wearing facemasks violating rights](#).

<sup>42</sup> See [Butler vs Wolf](#) District Court for the Western District of Pennsylvania; also Harvard Law Today, [Uncharted territory: Legal experts weigh in on the COVID-19 outbreak](#).

61. **The Governments also adopted a number of regulations to help businesses recover or at least endure through the crisis.** In May 2020, the first recovery package, the so-called Corona Law I, came into force in FBiH.<sup>43</sup> The law provided for subsidies and tax relief, suspended enforcement and established the Guarantee Fund for Recovery. In October 2020, a new bylaw was adopted, putting in place a set of recovery measures for particular sectors.<sup>44</sup> In addition, different cantons in FBiH, such as Sarajevo and Bosnian-Podrinje Canton, designed their own recovery packages. RS provided tax and salary subsidies from a Solidarity Fund to businesses, which had to close and adopted a number of bylaws introducing recovery measures and grants for specific sectors.<sup>45</sup> Finally, bank regulators passed rules that enabled moratoriums on the return of loans and interest.<sup>46</sup>

62. **The regulations on recovery packages were often criticized as poorly drafted, unclear and discriminatory.** The broad array of newly drafted acts and the speed at which they were issued inevitably caused issues with their clarity and application in practice. Some complained that the rules were inadequate and that they did not meet their purpose, others claimed that they were not in accordance with the law and the Constitution.<sup>47</sup> Some law firms published articles criticizing the FBiH Corona Measures I & II as discriminatory and suggesting that businesses could question their constitutionality/lawfulness in court.<sup>48</sup> Corporate lawyers noted in interviews that many practical issues arose with regard to the implementation of moratoriums on loans as different banks were interpreting these provisions differently. Approximately 45 percent of the Survey of Businesses respondents were not satisfied with the measures that governments put in place to alleviate the economic effect of the crisis. Over a hundred respondents provided individual comments dwelling on their dissatisfaction with the measures, mainly criticizing the implementation, the selection of the measures, or the sectors and businesses entitled to receive support.

63. **Successful legal challenges against emergency rules or recovery plans could swamp BiH courts with new lawsuits.** If any of the new rules is declared unconstitutional by the Constitutional Courts or unlawful by other high courts, such rulings could bring forth a surge of new lawsuits. Depending on the specific rulings of the Constitutional Courts, affected businesses could file lawsuits seeking damages for unlawful closure, denied recovery packages and/or similar claims. Declaring any of the emergency rules unconstitutional would also cause a domino effect as measures imposed based on them would also become void. This could provide plaintiffs with opportunities to request compensation for damages.

## ***5. Closure of businesses***

64. **Due to the crisis, many BiH businesses experienced liquidity and viability problems, a result of the lockdown and the changes in consumer behavior.** For example, the hospitality industry has been struggling not just because hotels are the first to close and the last to reopen as measures to curb the spread of the virus change, but also because travel is limited and customers have no interest in using hospitality services. As many as 10.8 percent of surveyed businesses stated they would consider liquidation if the crisis persists, while 4.5 percent would expect to become insolvent (see Figure 19).

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<sup>43</sup> Law on Mitigating the Negative Economic Effects (Official Gazette FBiH no. 28/2020).

<sup>44</sup> Decree on intervention measures and support to sectors effected by the COVID-19 pandemic (Official Gazette 74/2020).

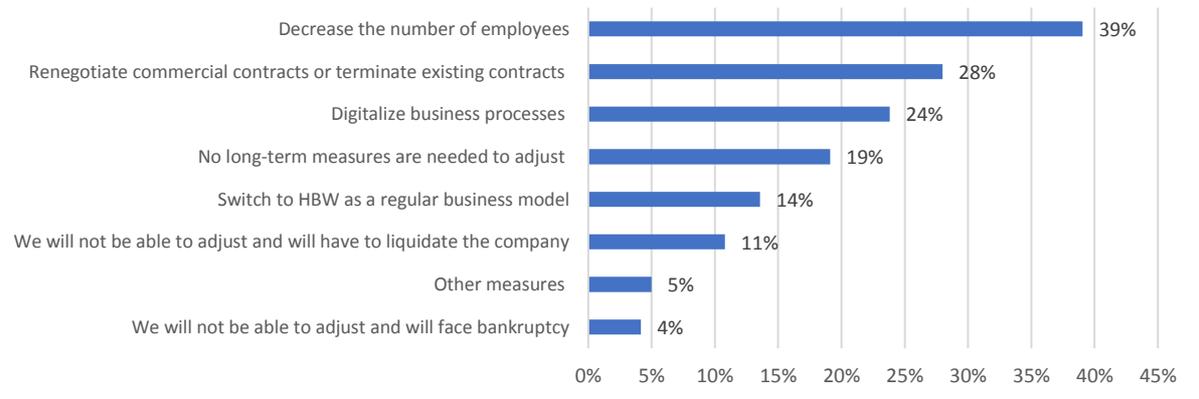
<sup>45</sup> See for example Rulebook on Award of Funds to Legal Persons and Entrepreneurs to Mitigate the Effects of the Pandemic of Corona Virus for April 2020 (Official Gazette of RS no. 54/2020).

<sup>46</sup> See decisions of the [Banking Agency](#) of Republika Srpska or [Banking Agency](#) of Federation of Bosnia and Hercegovina.

<sup>47</sup> Klix, [Protests of small business owners in Sarajevo and other cities](#); or [Corona II Angers Farmers](#), the Government discriminates in favor of big exporters and ignores 98 percent of the rest.

<sup>48</sup> See news of law firm Dimitrijevic, [Discriminatory Treatment of Business Regarding Subsidies in Bosnia and Hercegovina](#).

**Figure 19. If the crisis persists, what long-term measures do you plan to take to adjust you operations to new circumstances (check all that apply)?**



Source: Survey of Businesses, based on 361 responses

65. **Courts will be expected to liquidate businesses quickly; however, while RS and BD modernized their legal frameworks fairly recently,<sup>49</sup> FBiH courts are constrained by cumbersome liquidation proceedings.<sup>50</sup>** The survey indicates that business owners will increasingly initiate liquidation of companies, which are not able to viably operate long-term. Some businesses will undergo liquidation as their shareholders decide to change their business focus and transfer value to more viable economic options. Interviewed lawyers noted that liquidation proceedings in FBiH last for years and are cumbersome and expensive. The regulatory framework necessary to facilitate swift liquidation of companies is not in place and the new draft FBiH Law on Liquidation has been stuck in the adoption process for years.

66. **BiH courts have been struggling to resolve bankruptcy cases during the pandemic.** The number of pending bankruptcies at Sarajevo MC increased by 13 percent in 2020 (see Chapter I above). Bankruptcy proceedings require the simultaneous presence of large groups of attendees such as creditors, debtor, bankruptcy trustee, and court experts at a certain location. Therefore, social distancing rules that limit large gatherings prevent bankruptcy hearings or meetings. As a result, many bankruptcy proceedings are not moving forward and have been dormant at the courts for months. Reducing the dependence of bankruptcy proceedings on physical hearings will be critical to prevent further growth in backlog, especially if the crisis persists or crises with a similar impact occur in the future.

## **6. Training of commercial judges**

67. **By the end of 2020, the courts in BiH had not experienced an influx of disputes caused by the crisis but this can be expected in 2021.** In interviews conducted in early December 2020, court presidents reported no influx of crisis-related litigation, but only sporadic cases materially linked to the crisis. Statistical analysis also shows no increase in the number of commercial, bankruptcy, and liquidation cases received by BiH courts in 2020. However, interviews with commercial lawyers point to a wave of client inquiries on crisis-related topics ever since the beginning of the crisis. The expectation is that in 2021, businesses will start to file an increased number of lawsuits to resolve matters which they have been unable to resolve amicably in 2020.

<sup>49</sup> The RS Liquidation Procedure Act was passed in October 2019, while the BD Liquidation Procedure Act was passed in June 2019. Both acts envisage several types of liquidation procedures, including a fast-track liquidation procedure.

<sup>50</sup> FBiH Liquidation Procedure Act was passed in 2003 and has not been amended since. This law governs only standard liquidation procedure, which applies equally to all businesses.

68. **Substantive legal issues posed by the pandemic require enhancing tailored training for commercial judges in BiH, which is currently insufficient.** The Centers for Judicial and Prosecutorial Training (CESTs) offer introductory training modules for judicial associates and obligatory training modules for newly appointed judges. Although the introductory training for judicial associates is not a requirement for being appointed as a judge, it is an additional reference, which is why the training is attended by a large number of participants. It lasts for three years and includes several modules annually. The training covers general skills and topics such as legal ethics training, EU law, jurisprudence of the European Court of Human Rights, procedural law, and case management and writing techniques for court rulings. Upon being appointed, judges undergo a one-year introductory training for new judges. Although this training is intended to be in modular form, no special module is organized in practice. Instead, judges attend eight days of any of the offered training programs. As a result, there is currently no structured approach towards providing tailored entry-level training for newly appointed judges of commercial courts/departments.

69. **Improving capacities of commercial judges requires introducing specialized training for newly appointed judges of commercial courts/departments.** After their appointment to the post and completion of the introductory training, judges with commercial departments/courts still need to acquire specialized knowledge in areas specific to commercial justice. The European Judicial Training Network (EJTN) recommends e-learning tools as a cost-effective method for this purpose.<sup>51</sup> E-learning modules have been successfully developed in several EU countries.<sup>52</sup> The crisis has led to an increased interest and participation of BiH judges in online training and also propelled CESTs to improve their training infrastructure and enhance the provision of online training. The project already supported the FBiH CEST to improve its training infrastructure through the installation of a cloud-based platform to link the existing open-source learning platform LMS (Learning Management System) Moodle to WebEx application. The previous discussion on the effect of the crisis on caseload (Chapter I) points to the need to give special attention to training in the areas of liquidation and bankruptcy. Furthermore, feedback received from judges indicates interest in topics such as intellectual property, banking and finance.

## 7. Recommendations

70. **Preventive measures:** Before the anticipated influx in commercial cases materializes, the chambers of commerce should take preventive action to reduce the number of crisis-induced disputes going to court. This could include:

- Developing sample force majeure and similar clauses that limit liability for non-performance in situations of pandemic, quarantine or similar, in order to better protect businesses that do not have adequate legal support;
- Facilitating mediation, conciliation and other consensual solutions aimed at re-negotiating business agreements that the COVID-19 crisis has rendered obsolete or excessively burdensome for the parties.

71. **Dispute resolution:** Efficient case processing should be facilitated by:

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<sup>51</sup> EJTN Handbook on Judicial Training Methodology in Europe, 2016, 45.

<sup>52</sup> Iva Ivanisevic Mostovac, Uldis Pavlus, Report on Different Distance Learning Program Experienced in EU Member States, EU-funded Twinning Project, "Strengthening Judicial Training through Twinning", 2017.

- Issuing interpretative opinions of the FBiH and RS Supreme Courts on controversial legal matters that arise from COVID-19 cases (sporno pravno pitanje)<sup>53</sup>. The first-instance courts could request this based on CPLs.
- Convening sessions of higher-level court departments on initiative of lower-level courts (*sjednice sudskih odjeljenja neposredno višeg suda*) to obtain opinion and guidance on matters relevant for the processing of COVID-19 cases.<sup>54</sup> Publishing the opinions of higher-level courts (*pravna shvatanja*) on COVID-19 related matters and making them available to all would boost communication and ensure a more coordinated approach among the courts.
- Disseminating case law and good practice examples, modelling on existing RS practices. When reviewing decisions on appeal, appellate courts could share selected good practice examples with first-instance courts. This would promote legal certainty and transparency in decision-making by lower-instance courts.
- Organizing general (*opšta sjednica*) and extended (*proširena sjednica*) sessions of the FBiH and RS Supreme Courts to issue general legal opinions (načelni pravni stav) on matters relevant for the coherent application of laws. The RS HCC is also competent to adopt general legal opinions in the field of commercial law. These opinions would provide guidance on the interpretation and implementation of rules issued in response to the pandemic.
- Convening case law harmonization panels<sup>55</sup> of the highest instance courts under HJPC's auspices to discuss and issue guidance on complex or legally unclear topics. This would also boost inter-entity cooperation and dialogue between the highest judicial instances on matters relevant for processing of COVID-19 cases.
- Publishing decisions on COVID-19 related on a dedicated website, to enable easy access by judges from all courts, as well as by other legal professionals. This would allow judges and court presidents to screen for inconsistencies in case law and contribute to more efficient case processing.
- Producing regular reports on COVID-19 case processing by courts to provide information on the key legal challenges. These reports could be used by HJPC and higher instance courts as a basis for planning future action, such as selection of pilot cases, developing training curricula, or convening case law harmonization panels.
- Launching a pilot case initiative to assist lower instance courts in processing COVID-19 cases.<sup>56</sup> Categorization and piloting of COVID-19 cases which involve novel legal issues could improve efficiency in case processing. First-instance courts could nominate cases based on their frequency and legal and factual background. Higher courts could then select the cases to handle as a priority on appeal or revision. The decisions of higher courts in pilot cases should be made available to all first-instance courts in order to guide them in resolution of similar cases.

## 72. Measures to improve the processing of liquidation and bankruptcy cases:

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<sup>53</sup> Articles 61a and 61b of the CPL FBiH and Articles 61a and 61b of the CPL RS.

<sup>54</sup> Articles 18 and 19 of the Rulebook on Internal Court Processes of BiH and Articles 18 and 19 of the Rulebook on Internal Court Processes of RS.

<sup>55</sup> See [Rules of the Case Law Harmonization Panels](#) and Article 9 (3) of the RS/FBiH Rulebooks on Internal Court Processes.

<sup>56</sup> A similar initiative related to CEPEJ Checklist indicators for more efficient case processing was launched in Commercial Court in Zagreb, Croatia, in 2007. It was supported by support the Presidents of the Supreme Court and Higher Commercial Court.

- Online hearings could be introduced as an option for bankruptcy cases, which require large gatherings of people and are therefore particularly risky in times of a pandemic, as discussed in Chapter III below.<sup>57</sup>
- New rules governing liquidation proceedings in FBiH should be adopted. While these rules have been improved recently in other parts of the country, the FBiH Law on Liquidation Proceedings<sup>58</sup> is yet to be streamlined and improved to facilitate quick and easy wind-down of companies. Timely liquidations will allow shareholders to swiftly relocate investment from businesses that are no longer attractive to more efficient businesses which are viable in current circumstances.

**73. Training:**

- In 2021, judges should be offered training in the areas where legal challenges are likely to arise, focusing on: (i) interpretation and implementation of rules and regulations passed in response to the pandemic, (ii) general civil and commercial law rules that will require interpretation in line with the new circumstances, such as force majeure, termination of employment contracts and unpaid leave, and (iii) debating and showcasing relevant decisions of higher courts.<sup>59</sup>
- CESTs should develop and provide specialized training for newly appointed commercial judges through self-learning e-modules. In the FBiH CESTs such modules should be delivered through the newly established cloud-based platform connecting FBiH CEST's LMS Moodle to WebEx, which is being developed with the support of the project. The e-modules should be complemented with interactive sessions to ensure complete understanding of the module and foster discussion on most complex issues in judicial practice, and cover topics such as liquidation, bankruptcy, intellectual property, banking and finance. They could include: (i) a kick-off session for participants and teachers, with instructions for opening a Moodle account and using the platform, general information on the course and teachers, and expectations from the course, (ii) targeted self-learning modules with self-assessment tools such as quizzes, essays or case studies, and (iii) a final interactive session with the teachers.

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<sup>57</sup> The enabling of online hearings in bankruptcy cases has also been recommended under the Phase I Analysis.

<sup>58</sup> FBiH Law on Liquidations Proceedings (Official Gazette FBiH no. 29/2003)

<sup>59</sup> The introduction of targeted training in topics such as force majeure and bankruptcy has also been recommended under the Phase I Analysis.

### III. Fast-tracking Civil and Commercial Cases

74. **The crisis disrupted court hearings which, in turn, led to significant delays in case processing.** Even before the pandemic, court hearings with the associated summoning, adjournments and cancellations were a major reason for case delay.<sup>60</sup> The inability to hold court hearings in all but the most urgent cases during the 2020 lockdown, as well as the frequent postponement of hearings in the following months due to the failure of quarantined parties to attend, further exacerbated case delays. This lowered significantly the level of resolved cases, especially at first-instance courts.

75. **While the crisis highlighted the extent to which civil justice in BiH is dependent on physical hearings, it might also become a catalyst for reform.** The pandemic could trigger major reforms that have the potential to speed up justice beyond the current emergency situation and help economize the resources of the parties and the justice system. This can be achieved by using various techniques aimed at avoiding or minimizing physical court hearings. The most common characteristic of judiciaries that dealt well with the crisis was their ability to continue operations despite the inability to meet and examine parties and witnesses in court, by switching to some form of remote work.

76. **To reduce the dependence of the BiH justice system on physical hearings, this report examines the possibility for introducing two fast-tracks for dispute resolution: (i) documentary track; and (ii) audiovisual (online) track.** These tools have been used by various jurisdictions long before 2020. Furthermore, reforms of civil procedure in BiH through documentary examination for small claims and hearing of witnesses via conference calls have been recommended earlier within the framework of this project. Had these recommendations been addressed, the COVID-19 crisis would have probably caused milder interruptions to case processing in BiH. However, this opportunity was missed. The COVID-19 pandemic intensified both the use of such tools, as well as the debate on how they can be utilized beyond crisis situations, to improve justice overall. These two tracks are examined here, starting with a review of international examples and proceeding to a discussion of the local context. In addition to the current legislative framework in BiH, the report examines the attitude of the local legal community towards these tools, based on online surveys of judges and lawyers. Finally, it presents recommendations for introducing a documentary and an online track for examining some case types.

#### 1. Documentary track

77. **Documentary examination of a case happens when the court decides only on the basis of the parties' written submissions.** Another term used to describe this approach is "paper hearing".<sup>61</sup> The documentary or written-only method for examining civil cases has long been in use. It is one of the most frequent deviations from the principle of orality in civil litigation. This method is particularly popular in small claims. The European small claims procedure as well as many small claims procedures in EU member states empower the court to omit a hearing altogether and make a judgment solely on the basis of parties' written submissions and written evidence, as long as a party does not specifically

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<sup>60</sup> World Bank. 2019. *Leveraging Procedural Reforms to Improve Commercial Justice in Bosnia and Herzegovina*. World Bank, Washington, DC.

<sup>61</sup> A classification of remote hearings divides them into (i) paper, (ii) audio and (iii) video ones and has been introduced by Susskind, Richard. *The Future of Courts*. Remote Courts, Volume 6, Issue 5, July/August 2020. Center on the Legal Profession. Harvard Law School.

request to be heard.<sup>62</sup> In 2019, the World Bank recommended that BiH could also incorporate an opportunity for a written-only examination within its small claims procedure.<sup>63</sup>

78. **While the documentary track has been a standard tool in many types of cases, in the face of the lockdowns resulting from the COVID-19 pandemic, many countries further expanded the possibilities for a written-only examination.** Thus, the emergency legislation of Italy, *Cura Italia*, authorized the use of the so-called “documental hearings”. Their use is limited to “*civil hearings that do not require the presence of persons other than the defenders of the parties*”.<sup>64</sup> Similarly, in France, an emergency Ordinance stipulated that where the parties must be represented by a lawyer or where they are in fact assisted or represented by a lawyer although this is not mandatory, the judge or the president of the court panel may decide that the proceedings shall be exclusively written and no hearing shall take place.<sup>65</sup> In Hungary, too, the emergency legislation authorized courts to examine cases without holding a hearing in civil and administrative matters. Although the legislation also allowed conducting of procedural actions by way of an electronic communications network or other means suitable for image and sound transmission, most judges opted for examining cases on paper rather than holding an audio or a video hearing.<sup>66</sup>

79. **This analysis explored the attitudes of the BiH legal community towards the introduction of a documentary track for the examination of civil and commercial cases.** This was done through focus group discussions and two online surveys – one for judges and another one for lawyers. The surveys explored the extent to which legal professionals support documentary examination of cases in general, as well as modalities of the procedure that could be most acceptable. Currently, the courts in BiH are authorized to decide cases without a hearing when a duly served defendant has failed to respond to the claim within the statutory deadline.<sup>67</sup> In such cases, the court can issue a judgment based on non-appearance. However, such judgment can be issued only at the claimant’s request. If the claimant has not asked the court to render a judgment based on non-appearance, a hearing would need to be scheduled, although the defendant has not responded to the claim. The *Fast-tracking Small Claims in Bosnia and Herzegovina*<sup>68</sup> report developed under the project recommended a legislative amendment to expand these court powers for small claims by enabling the court to issue a judgment based on non-appearance if the duly served defendant failed to respond to the claim, even in the absence of an explicit request thereof.<sup>69</sup> Furthermore, the report recommended introducing written-only case examination as the default option for all small claims procedures.

80. **Generally, the survey results confirmed that in BiH the time might be right for expanding, by legislative measures, the opportunities for a written-only examination of some case types.** The majority (54 percent) of judges who took part in the survey believe that the CPLs could be amended

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<sup>62</sup> See Article 5, para 1, [Regulation \(EC\) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure](#). See also [The European Justice Portal, Small claims](#).

<sup>63</sup> Osmanovic-Pasic, Zuhra; Panzardi, Roberto O.; Petkova, Svetozara. 2019. [Fast-Tracking Small Claims in Bosnia and Herzegovina : A Comparative Analysis and Reform Proposals](#) (English). Washington, D.C.: World Bank Group.

<sup>64</sup> See [Cura Italia Decree, Art. 83](#), para 7h.

<sup>65</sup> Article 8, Ordonnance no 2020-304 of 25 March 2020 portant adaptation des règles applicables aux juridictions de l’ordre judiciaire statuant en matière non pénale et aux contrats de syndic de copropriété, Journal Officiel 26 March 2020. See also [French Civil Justice during Corona Times](#). Frédérique Ferrand, Director of the Institute of Comparative Law Edouard Lambert (IDCEL), University of Lyon/ Augsburg, 20 April 2020.

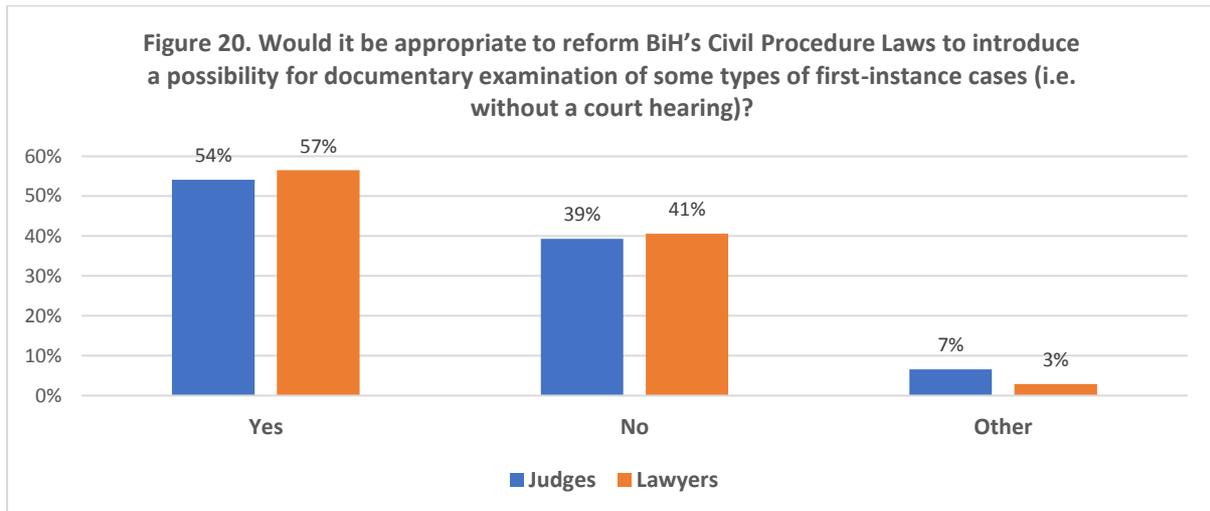
<sup>66</sup> See KPMG Legal Tóásó Law Firm, [Digital courts in Hungary Effects of Covid-19 on digital courts](#), July 2020.

<sup>67</sup> Art. 75 and 182 of the Civil Procedure Law of FBiH; Art. Art. 75 and 182 of the Civil Procedure Law of RS; Art. 196, 307 and 308 of the Civil Procedure Law of BD; in BD, there is an additional condition – that the non-appearance judgment shall not be issued if the claimant did not provide all evidence that could reasonably be provided with the claim.

<sup>68</sup> Osmanovic-Pasic, Zuhra; Panzardi, Roberto O.; Petkova, Svetozara. 2019. [Fast-Tracking Small Claims in Bosnia and Herzegovina : A Comparative Analysis and Reform Proposals](#) (English). Washington, D.C.: World Bank Group.

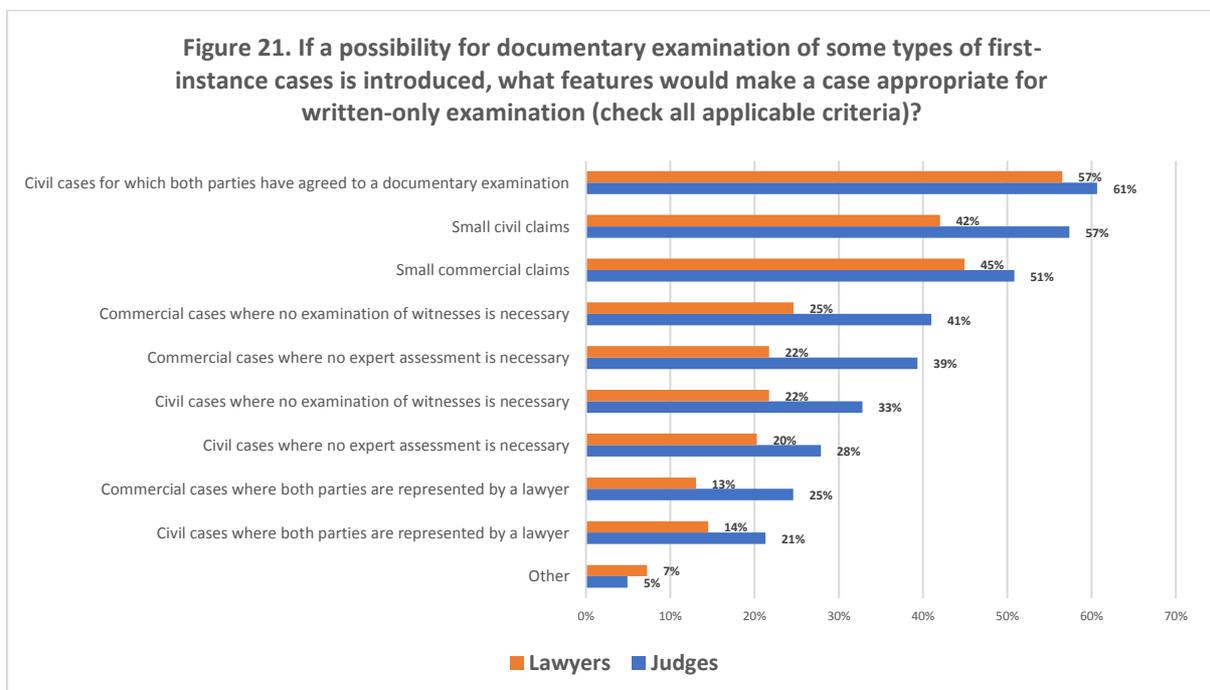
<sup>69</sup> Osmanovic-Pasic, Zuhra; Panzardi, Roberto O.; Petkova, Svetozara. 2019. [Fast-Tracking Small Claims in Bosnia and Herzegovina : A Comparative Analysis and Reform Proposals](#) (English). Washington, D.C.: World Bank Group.

to allow for the resolution of certain types of disputes based on written documents and without holding of hearings. As many as 57 percent of surveyed lawyers supported this proposal (Figure 20).



Source: Survey of judges and survey of lawyers; based on 61 judges’ responses and 69 lawyers’ responses.

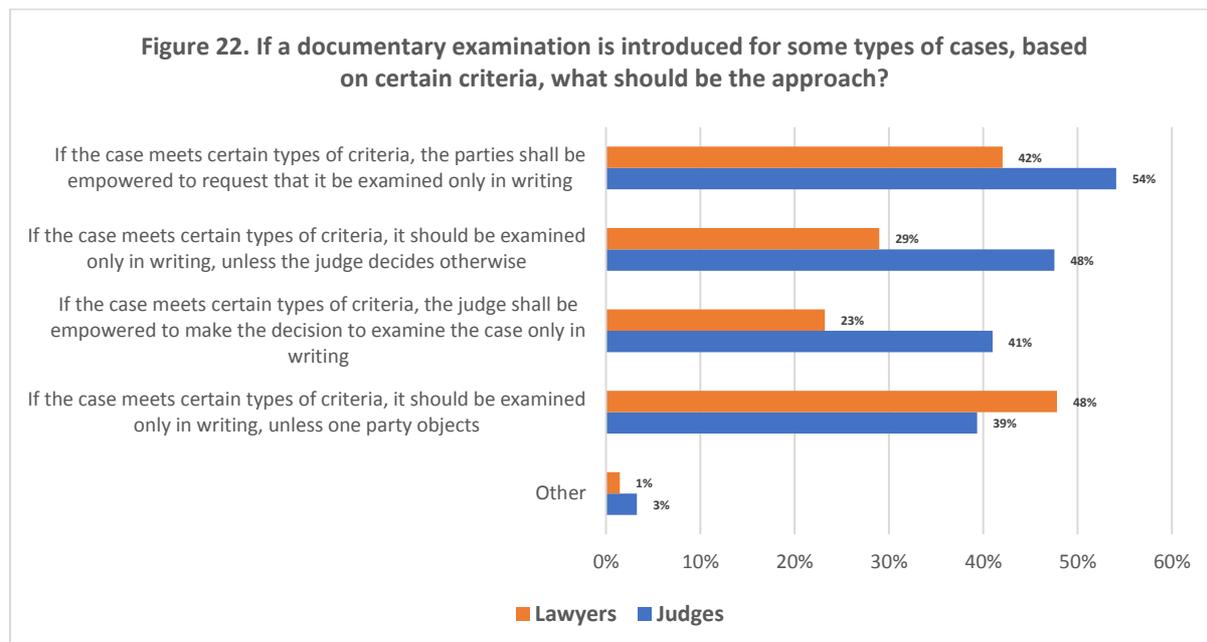
81. **Furthermore, the analysis sought to identify types of disputes for which introducing a possibility of written-only resolution would be most suitable.** Both judges and lawyers agree that written-only examination is suitable for civil and commercial small claims, as well as for disputes in which both parties have agreed to a documentary examination (Figure 21). According to survey responses, written examination would be suitable for (i) civil cases for which both parties have agreed to a documentary examination (61 percent of judges and 57 percent of lawyers), (ii) small civil claims (57 percent of judges and 42 percent of lawyers), and (iii) small commercial claims (51 percent of judges and 45 percent of lawyers).



Source: Survey of judges (based on 61 responses) and survey of lawyers (based on 69 responses).

82. **In systems allowing for a documentary examination of some types of disputes, the rule is not absolute, and a hearing can still be held under certain circumstances.** For example, in some

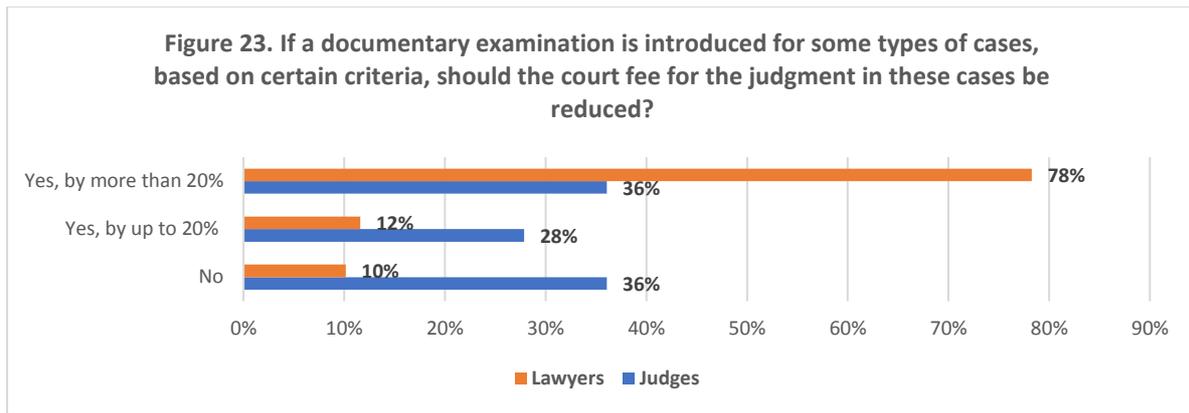
procedural laws small claims are by default be examined without a hearing, but judges can decide to nevertheless hold a hearing if they deem it necessary for establishing the truth or if one of the parties explicitly makes such a request (e.g., the EU small claims procedure). In other systems, the omission of the hearing is just one of many simplifications that judges may decide whether to apply or not (e.g., Estonia). While the legal community in BiH does not appear to have a strong preference for any of these approaches, the survey shows that judges would like to have discretion to decide whether to conduct a hearing or not, while lawyers emphasize the right of the parties to request either a hearing or a written-only case examination.



Source: Survey of judges (61 responses) and survey of lawyers (69 responses).

83. **Finally, the analysis sought the opinion of the BiH legal community on whether the savings from dispute resolution without a hearing could justify a reduction in the court fee.** The majority of legal professionals considered such reduction justified. Specifically, 36 percent of the surveyed judges believed the fee could be reduced by more than 20 percent; 36 percent – that reducing the court fee would be inappropriate; and 28 percent – that the fee could be reduced by up to 20 percent. Unsurprisingly, this is an area where the opinions of judges and lawyers vary the most. As many as 78 percent of lawyers considered that the court fee could be reduced by more than 20 percent if the case is examined without a hearing; 12 percent – that the fee should be reduced by up to 20 percent; and only 10 percent – that the fee should not be reduced (Figure 23).

84. **If the consent of both parties is required for resolving a dispute without a hearing, a reduction of the court fee could serve as an incentive.** Normally when a case commences, it is difficult to predict whether a hearing would be necessary. However, in BiH, part of the court fee is paid at the time of issuance of the judgement, which allows for modification of the final fee, e.g., in situations where the parties have agreed to have their case examined without a hearing.



Source: Survey of judges (61 responses) and survey of lawyers (69 responses).

## 2. Audiovisual (online) track

85. **The audiovisual track for examining cases comes in different forms.** These include audio hearings (usually conducted by phone) and audiovisual hearings (usually conducted by videoconference) that combine sound with video. As a result of the COVID-19 outbreak and the expanded use of online platforms, the legal community worldwide started referring to audiovisual hearings also as online or virtual hearings.

86. **Empirical data on the use of the various forms of remote hearings is still scarce.** In England and Wales, remote hearings were used extensively during the lockdown in the Spring of 2020. This allowed for a rapid review of the implementation of remote hearings during the lockdown through a survey of 1,077 court users<sup>70</sup> (hereinafter referred to as the Rapid Review). Despite limitations of the rapid review, it is at this point a rare document that shows actual experiences with remote hearings.

87. **Audio hearings are hearings conducted by phone or another audio-only system.** In practical terms, audio hearings are usually in the form of a phone call. They can be partly audio, i.e. a physical hearing into which some participants are connected by audio, or fully audio, i.e. all participants are connected by audio. Audio hearings have long been employed, especially in small claims procedures, usually to replace the pre-trial hearing (e.g., in countries like Denmark, Estonia).<sup>71</sup> In some jurisdictions, pre-trial hearings are as a rule done by telephone, not just in small claims but across the board (e.g., Canada<sup>72</sup>, Norway<sup>73</sup>). The option of audio (telephone) hearings was introduced or further expanded in some jurisdictions in response to the COVID-19 pandemic (e.g., England and Wales, Finland, New Zealand).<sup>74</sup> Generally, for countries where judges have an experience with phone hearings, it is easier to also use this technique as a substitute for a hearing in person during lockdowns. While in countries that do not have prior experience with audio hearings this method may often be

<sup>70</sup> Byrom, Natalie & Beardon, Sarah & Kendrick, Abby. (2020). [The impact of COVID-19 measures on the civil justice system](#).

<sup>71</sup> Osmanovic-Pasic, Zuhra; Panzardi, Roberto O.; Petkova, Svetozara. 2019. [Fast-Tracking Small Claims in Bosnia and Herzegovina : A Comparative Analysis and Reform Proposals](#) (English). Washington, D.C.: World Bank Group, p. 35.

<sup>72</sup> See [Virtual Civil Trials](#), The Law Library of Congress, Global Legal Research Directorate, April 2020, p. 13.

<sup>73</sup> See Anna Nylund, [Civil Procedure in Norway and Covid-19: Some Observations](#), Septentrio Reports, Issue No 5 (2020): Civil Justice and Covid-19.

<sup>74</sup> Protocol Regarding Remote Hearings issued on March 26, 2020 by the Judiciary of England notes that remote hearings may utilize any method available to participants, including telephone calls. See Judiciary of England and Wales, [Civil Justice in England and Wales Protocol Regarding Remote Hearings](#). See also [Virtual Civil Trials](#), The Law Library of Congress, Global Legal Research Directorate, April 2020, pp. 24, 50.

underestimated, the Rapid Review shows that in 59.2 percent of all remote hearings, surveyed court users had taken part in a fully audio hearing.<sup>75</sup>

88. **Audiovisual hearings (or hearings conducted by a videoconference) are widely regarded as having a great potential to serve the interests of justice in times of crisis.** Audiovisual hearings are also viewed as an option for more efficient litigation regardless of the crisis, as they offer a much less costly alternative to traditional physical hearings. They are expected to play an ever-increasing role with a view to globalization and the increasing need to interrogate participants in proceedings who might reside far away from the seat of the court.

89. **Like audio hearings, audiovisual hearings can be partly or fully audiovisual.** The partly audiovisual hearings entail a physical hearing in a courtroom, with some participants connected via video conference link. This form of videoconferences has long been available in numerous jurisdictions (e.g., Austria, China, Finland, Germany, Ireland),<sup>76</sup> and is generally used to gather evidence from experts and/or witnesses without the need for their physical presence in the court room. Fully audiovisual hearings are the ones where all participants are connected online. These have been the focus of attention since the outbreak of the COVID-19 pandemic.

90. **Jurisdictions that authorized audiovisual hearings even before 2020 (e.g., Australia, Norway, United Kingdom) have best leveraged ICT for such hearings during the pandemic.** In other jurisdictions, the opportunity for hearings via videoconference was introduced or significantly expanded with the emergency legislation issued as a result of the pandemic. For example, in Italy, the emergency legislation stipulated that if a civil hearing requires only the presence of the parties, their defendants and persons appointed by the judge (e.g., experts), the court president can decide that these cases can be examined via an “*online hearing*” using remote connection methods approved by the Ministry of Justice.<sup>77</sup> In Austria, the taking of evidence by videoconference was authorized even before the pandemic and expanded by the 2<sup>nd</sup> COVID-19 Act by stipulating that “*if an oral hearing is strictly necessary, it may be conducted without the parties being personally [physically] present by using appropriate technical means of communication [videoconferencing]*”.<sup>78</sup> China, too, expanded its existing provisions regarding online hearings and encouraged courts to “*fully implement online litigation*” through designated online litigation platforms.<sup>79</sup>

91. **Different jurisdictions provide different levels of detail when regulating audiovisual hearings.** Some specify in detail what the modality of the hearing shall be while others retain some flexibility by authorizing online hearings and leaving the specifics to the discretion of the judge. The main questions which are being raised in respect of conducting audiovisual hearings are: (i) what ICT system to use; (ii) from what location shall the participants connect; (iii) how can the court verify the identity of participants; (iv) is the consent of the parties needed to schedule an audiovisual hearing in a civil case; and (v) whether and how to ensure publicity of the hearing. International examples for regulating these issues will be examined below.

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<sup>75</sup> See Byrom, Natalie & Beardon, Sarah & Kendrick, Abby. (2020). [The impact of COVID-19 measures on the civil justice system](#), p. 34. See also Susskind, Richard. [The Future of Courts](#). Remote Courts, Volume 6, Issue 5, July/August 2020. Center on the Legal Profession. Harvard Law School, in which the author sub-divides audio and video hearings into fully and partly audio/video ones.

<sup>76</sup> See [Virtual Civil Trials](#), The Law Library of Congress, Global Legal Research Directorate, April 2020.

<sup>77</sup> See [Cura Italia Decree, Art. 83](#), para 7f.

<sup>78</sup> [2. COVID-19-Gesetz, BGBl. I Nr. 16/2020](#), art. 21, § 3.

<sup>79</sup> On 6 March 2020, for example, a primary court in Suzhou, Jiangsu Province conducted a trial involving a contract dispute through videoconferencing with the judge in the courtroom, the representative of the plaintiff at home, and the defendant at a highway rest area. This was reportedly the 550th case that particular court had tried online since the outbreak of COVID-19 in China. See [Virtual Civil Trials](#), The Law Library of Congress, Global Legal Research Directorate, April 2020, pp 17-18.

92. **Audiovisual hearings may be conducted through dedicated ICT systems of the judiciary or through commercially available ICT platforms.** Evidence-gathering through videoconferences has traditionally been carried out using the justice system's own ICT resources and platforms. However, in the face of exponentially increasing needs to use audiovisual hearings in lieu of physical hearings during the COVID-19 pandemic, judiciaries around the world have turned to commercially available and widely accessible platforms for online meetings. For example, the UK authorizes remote hearings by court video link, British Telecommunications (BT) conference call, Skype for Business, BT MeetMe, Zoom and ordinary telephone call, among others;<sup>80</sup> Italy authorizes only Microsoft Teams and Skype for Business.<sup>81</sup> In Ireland, a virtual meeting room (VMR) that uses the PEXIP video-streaming application is set up for the purpose of remote hearings. The software runs on tablets, PCs, laptops and smartphones. Parties can join a PEXIP VMR session from a range of video-streaming service providers, including Skype, Zoom, Cisco Webex and Teams, and all parties do not need to use the same application or an integration tool to connect.<sup>82</sup> Interestingly, even though the England and Wales judiciary has its own platform for audiovisual hearings (Cloud Video Platform - CVP),<sup>83</sup> according to the Rapid Review, very few people joined audiovisual hearings using this platform and preferred technologies like Skype instead.<sup>84</sup> This suggests that a plurality of options may yield better results than limiting online hearings to only platforms that are proprietary for the courts.

93. **The provisions authorizing remote participation in the proceedings may set particular requirements to the location from which the videoconference may be conducted or may leave this matter open.** For example, the legislation of Austria does not set limitations with regard to the location of the videoconference;<sup>85</sup> the legislation of England and Wales also leaves this matter open. The legislation of Australia is somewhat more specific. It stipulates that the judge may only grant a request to use a video link after determining that the courtroom or other place where the judge is sitting and the place at which the remote participant is located are both equipped with technology that allows "all eligible persons present" to see and hear persons who are appearing, giving testimony, or making submissions.<sup>86</sup> By contrast, in Russia and Ukraine, the law is quite restrictive and requires the person participating in a court hearing from a distance to do so from another court building equipped with videoconferencing facilities.<sup>87</sup>

94. **Another question that sometimes arises is how to verify the identity of the parties in virtual hearings.** Some jurisdictions regulate this matter in detail while others leave it to the discretion of the court. For example, Italian judges are given a lot of leeway in ascertaining the identity of the participants (the law simply stipulates that this should be done, without describing a method).<sup>88</sup> In Spain, too, the law does not regulate in much detail the method of identity verification and leaves it to the official responsible for the management of court proceedings to verify the identity of people participating by videoconference through prior verification, direct exhibition of identity documents, or other suitable procedural means.<sup>89</sup> In England and Wales, the protocol regarding remote hearings does not address this question at all and leaves it to the discretion of the judge. By contrast, the rules in Russia are rather restrictive. The court providing the videoconferencing equipment for remote

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<sup>80</sup> [Protocol Regarding Remote Hearings](#) issued on March 26, 2020 by the Judiciary of England, point 13.

<sup>81</sup> See European Commission for the Efficiency of Justice (CEPEJ), [Management of the judiciary - compilation of comments and comments by country](#), Italy.

<sup>82</sup> Halpin, Rebecca (2020), [Remote Court Hearings](#), Oireachtas Library & Research Service, p. 8.

<sup>83</sup> See <https://www.gov.uk/government/publications/how-to-join-a-cloud-video-platform-cvp-hearing/how-to-join-cloud-video-platform-cvp-for-a-video-hearing>.

<sup>84</sup> See Byrom, Natalie & Beardon, Sarah & Kendrick, Abby. (2020). [The impact of COVID-19 measures on the civil justice system](#), p. 34.

<sup>85</sup> See [Virtual Civil Trials](#), The Law Library of Congress, Global Legal Research Directorate, April 2020., p. 8.

<sup>86</sup> *Ibid.*, p. 3.

<sup>87</sup> *Ibid.*, pp. 58 – 59 and p. 69.

<sup>88</sup> See [Cura Italia Decree, Art. 83](#), para 7f.

<sup>89</sup> [Ley 6/1985 Orgánica del Poder Judicial art. 229.2.](#), B.O.E., July 3, 1985, Art. 229, last para.

testimony is required to verify the identity of those who appear in the trial and collect signed forms confirming that participants were informed about their procedural rights and obligations. This is done by an assigned judge at the court from which the participant connects. The signed documents are then forwarded to the court where the hearing has been conducted, to be added to the trial records.<sup>90</sup> In jurisdictions where audio or audiovisual hearings are not used the verification of the parties' identity is often seen as a challenge; however, jurisdictions that have such practices do not report of issues in this regard. Even audio hearings, where the court and the other party cannot see the faces of participants, are widely used without reporting issues related to the verification of the parties' identity. Generally, in civil litigation, parties know each other and can inform the judge if they consider that a person is attempting to claim a false identity at a remote hearing.

95. **An issue to consider is also whether the consent of the parties is needed to conduct online hearings.** This issue presents itself when online hearings are scheduled as a crisis management measure in the context of the COVID-19 crisis. While in many countries the emergency legislation authorizes judges to schedule online hearings even without the consent of the parties (e.g., Italy, Norway), others (e.g., France<sup>91</sup>) require such consent. In England and Wales, the court may propose a remote hearing to the parties. If they disagree, they may propose more appropriate means by written submission (by email), copying other parties. Based on submissions from all parties, the judge makes a binding determination as to how the hearing will take place and provides the necessary directions.<sup>92</sup>

96. **A final issue that jurisdictions need to resolve when regulating remote hearings is whether and how to ensure publicity of the virtual hearing.** As during the pandemic many emergency rules restricted public access even to traditional hearings, by extension, numerous jurisdictions have not ensured such public access to remote hearings either (e.g., Italy). Other jurisdictions ensured public access by ICTs such as live streaming of remote hearings or their upload on YouTube or similar platforms. In England and Wales, this was achieved in a number of ways: (a) a person (judge, clerk or another official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the Internet.<sup>93</sup> Similar rules have been in place in the United States.<sup>94</sup> Furthermore, online hearings are usually recorded by the court and access to such recordings can be provided just as any other access to court hearing protocols.

97. **While the CPLs in BiH do not provide for online hearings or for the taking of evidence by means of a videoconference, such rules are present in criminal procedure.** The most recent example are the 2020 amendments to the BD Criminal Procedure Law (CrPL) introducing audiovisual hearings in criminal proceedings.<sup>95</sup> They can be deployed whenever there is an imminent health hazard or severe public danger for hearing participants.<sup>96</sup> Save for stipulating that online hearings will be held using technical tools approved by the HJPC, the BD CrPL does not regulate other details relevant for online hearings (e.g., location from which participants can connect, means to ensure publicity, procedures for identity verification, etc.) so the acting judge/public prosecutor will have discretion to decide on these matters. According to the BD CrPL, the decision to hold an online hearing shall be made by the judge or the public prosecutor (during the investigative phase of the criminal proceedings). This implies that the consent of participants in the hearing is not needed.

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<sup>90</sup> [Federal Law No. 66 of April 26, 2013, on Amending the Civil Procedure Code of the Russian Federation, Ros. Gaz. No. 94, Apr. 30, 2013](#), Art. 1551, para 3.

<sup>91</sup> [Code de l'organisation judiciaire](#), art. L111-12.

<sup>92</sup> [Protocol Regarding Remote Hearings](#) issued on March 26, 2020 by the Judiciary of England, point 17.

<sup>93</sup> *Ibid.*, point 8.

<sup>94</sup> See National Center for State Courts, [State court judges embrace virtual hearings as part of the 'new normal'](#).

<sup>95</sup> Amendments to BD CrPL were passed in response to the COVID-19 pandemic.

<sup>96</sup> Article 205a of the BD CrPL.

98. **In all BiH jurisdictions, witnesses in criminal proceedings can be examined via a videoconference under the CrPLs and the special laws on witness protection.** The rules on online examination of witnesses in CrPLs are very laconic and leave most details to the discretion of the judge. The general rule is that witnesses can be examined through videoconferencing if this is deemed justified based on age, mental/physical conditions and/or other conditions of the witness.<sup>97</sup> The witness has the right to ask for an examination via a videoconference if he/she cannot access the trial court.<sup>98</sup> However, the decision is always made by the judge.

99. **The CrPLs are quite general when it comes to the location from where the witness can connect to the hearing.** If a witness cannot come to the court due to an illness or other reasons, he or she can be examined at her or his home, at a hospital or at another location.<sup>99</sup> Usually such examination would be with the physical presence of the judge. However, the rules leave open the question whether it would also be possible to examine a witness who is in a private accommodation, hospital or another location via a video conference. In case of protected witnesses, the rules are somewhat more detailed and allow examining the protected witnesses through a videoconference<sup>100</sup> by connecting from another room located in the same court, or from *'another place'*.<sup>101</sup> It is not specified if this has to be another court but in practice it always is. The rules on the examination of protected witnesses further require the presence of court staff to ensure that examination is in line with criminal procedure rules and there is no witness tampering.<sup>102</sup>

100. **In practice, until recently, there were no technical capacities in BiH to conduct video hearings from locations that were not specially equipped with videoconferencing equipment.** On its website, HJPC instructs<sup>103</sup> that witnesses can only connect from another BiH court that is integrated with the judicial video-conferencing system, or from a foreign judicial institution. Similarly, the HJPC 2013 Annual Report explains that absent witnesses can connect to the hearing from other courts.<sup>104</sup> Recently, however, the judicial video-conferencing system was integrated with the Cisco Webex cloud-based telepresence platform, which now enables witnesses to connect from their home or office computers. However, while the technical capacities may be in place, judges may need a clear legislative authorization to employ such techniques more broadly.

101. **The criminal procedure of BiH does not introduce special rules on the verification of the identity of a witness in the framework of a videoconference.** Given that until now such witnesses have always been examined in another judicial institution, it is likely that the officials there could have inspected the ID card of the witness. Interestingly, the BiH Law on International Legal Aid in Criminal Matters stipulates that, in case a witness/suspect/expert is examined in BiH at the request of a foreign court, her/his identity is to be verified by that authority and not by the BiH court.<sup>105</sup> By analogy, the BiH court should be the one to verify the identity of a witness who is being examined abroad, but this is not explicitly stipulated.

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<sup>97</sup> Article 86 of the BiH CrPL, Article 151 of the RS CrPL, Article 100 of the FBiH CrPL, Article 86 of the BD CrPL.

<sup>98</sup> HJPC's circular "[Video-conference system in the BiH judiciary](#)".

<sup>99</sup> Article 81 of the BiH CrPL, Article 146 of the RS CPL, Article 95 of the FBiH CPL, Article 81 of the BD CPL.

<sup>100</sup> Article 9 of the RS Law on Protection of Witnesses in Criminal Proceedings, Article 10 of the FBiH Law on Protection of Witnesses under Threat and Vulnerable Witnesses, Article 9 of the BiH Law on Protection of Witnesses under Threat and Vulnerable Witnesses, Article 9 of the BD Law on Protection of Witnesses under Threat and Vulnerable Witnesses.

<sup>101</sup> E.g., Article 10 of the RS Rules of Procedure for Implementation of Measures for Protection of Witnesses, Article 10 of the BD Rules of Procedure for Implementation of Measures for Protection of Witnesses, Article 10 of the Rules of Procedure for Implementation of Measures for Protection of Witnesses enacted by the Municipal Court in Bosanska Krupa.

<sup>102</sup> See [Manual and Commentary on the RS Rules of Procedure for Implementation of Measures for Protection of Witnesses](#).

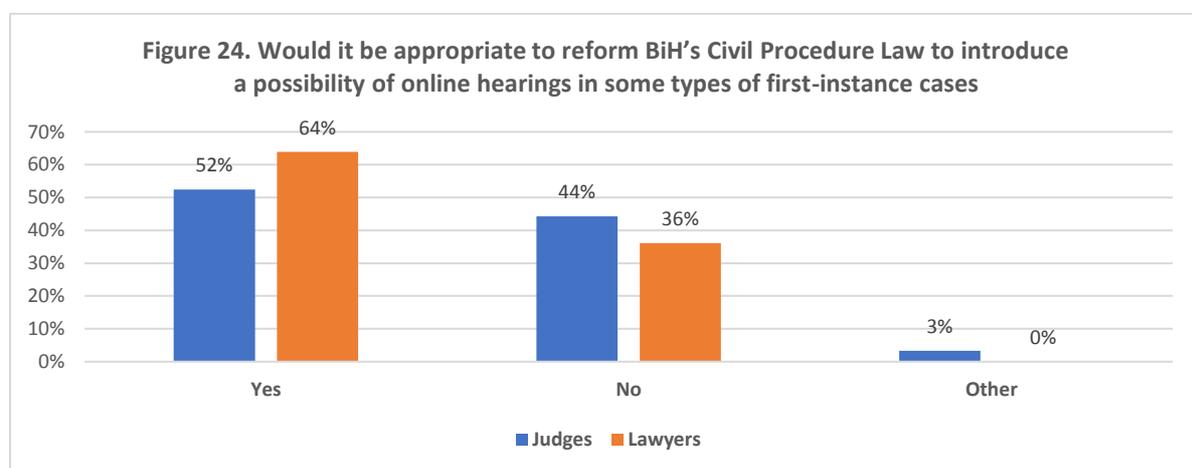
<sup>103</sup> See [https://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=56611&vijesti\\_jezik=E](https://www.pravosudje.ba/vstv/faces/vijesti.jsp?id=56611&vijesti_jezik=E).

<sup>104</sup> See [2013 Annual report](#), p. 26.

<sup>105</sup> Article 16a of the BiH Law on International Legal Aid in Criminal Matters.

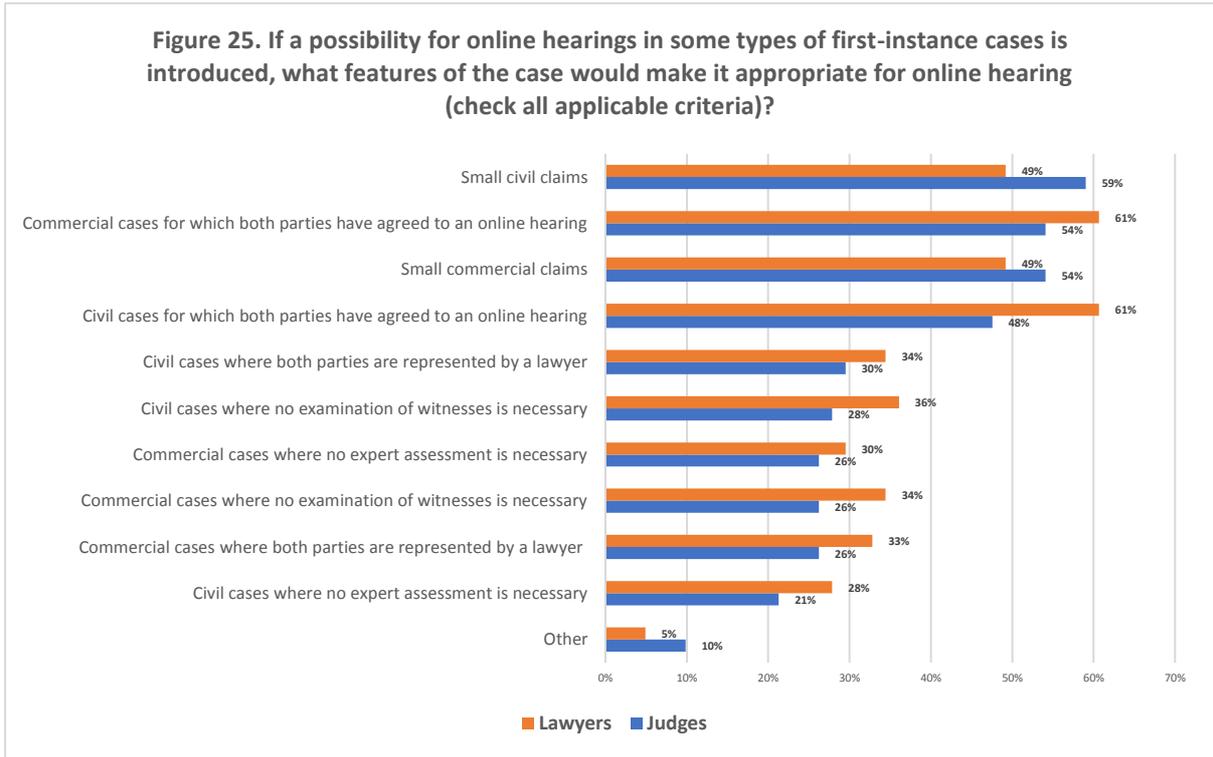
102. **The fact that online hearings have been introduced in BD criminal procedure and that witness testimony through videoconference is admissible and used in criminal procedure throughout BiH, means that this concept is not entirely new to the local legal community and it can find its way into civil justice as well.** Naturally, the rules of criminal procedure are rather limiting and, due to their nature, cannot be transposed directly into civil procedure. Nevertheless, these rules and the experience with their implementation can serve as a good foundation for introducing audiovisual hearings in civil procedure as well. Such an evolution would be quite natural; many other jurisdictions have first allowed partial audiovisual hearings where the trial is held in an open courtroom and only one or more witnesses participate through a videoconference and only later have proceeded to authorize full-blown online hearings. In BD, the COVID-19 pandemic paved the way for full-blown online hearings where all parties can connect via a videoconference. It can be expected that online hearings may soon be recognized by criminal procedure rules at other BiH government levels too. This would make BiH judges even more accustomed to the virtual environment and would prepare the legal community for the further digital transformation of court services and procedures.

103. **The survey results indicate that the BiH legal community is amenable towards the introduction of online hearings for some case types.** Focus groups discussions and online surveys of judges and lawyers were used to explore the attitudes of the BiH legal community towards the introduction of online hearings in civil and commercial cases. The surveys explored the support among legal professionals for online hearings in general, as well as the modalities that would be most appropriate. As many as 52 percent of surveyed judges approved amendment of CPLs to allow for online hearings. Even more lawyers (64 percent) approve such reform (Figure 24). BiH’s geographic characteristics should also be considered in this matter. Although the country area is relatively small (51,129 km<sup>2</sup>), in-country travel is quite time-consuming due to the hilly terrain and the poor transport infrastructure. Some lawyers reported travelling for many hours only to attend a 20-minute long pre-trial hearing. This is costly for litigants. Online hearings could bring efficiency gains and cost savings in such cases.



Source: Survey of judges (61 responses) and survey of lawyers (61 responses).

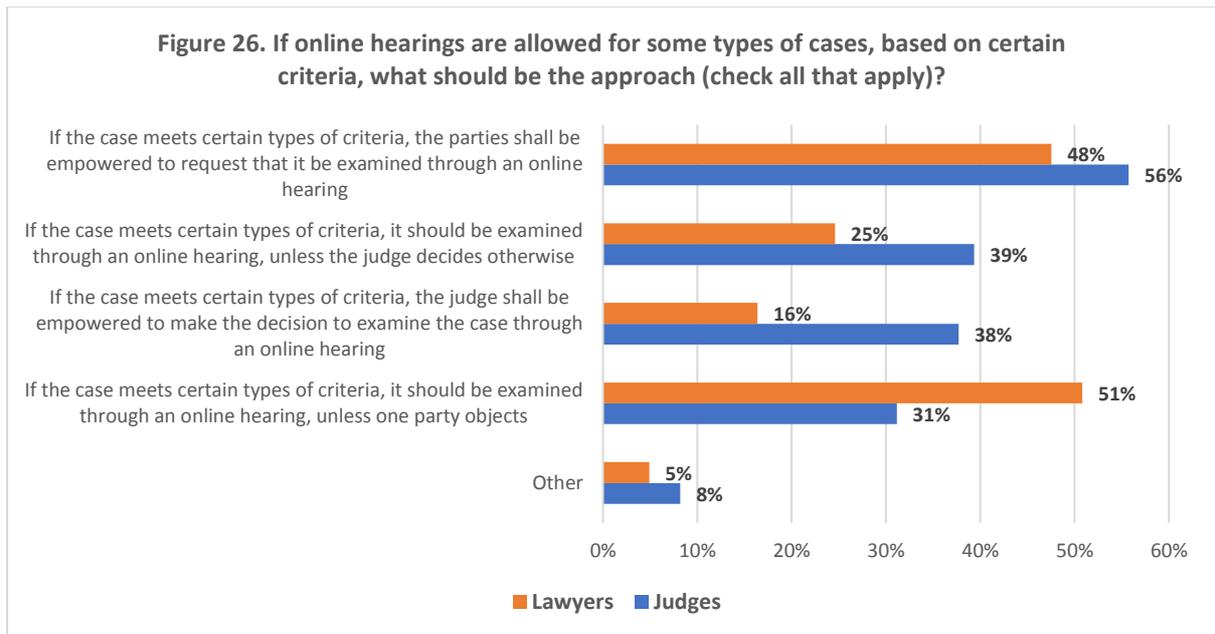
104. **The analysis sought to identify the types of disputes, which the BiH legal community considered most suitable for online hearings.** Judges and lawyers generally agree that online hearings are suitable for civil and commercial small claims, as well as for disputes in which both parties have agreed to participate in such a hearing. Specifically, the survey indicated that online hearings would be suitable for (i) small civil claims (59 percent of judges and 49 percent of lawyers), (ii) commercial cases for which both parties have agreed to an online hearing (54 percent of judges and 61 percent of lawyers); (iii) small commercial claims (54 percent of judges and 49 percent of lawyers), and (iv) civil cases for which both parties have agreed to an online hearing (48 percent of judges and 61 percent of lawyers) (Figure 25).



Source: Survey of judges (61 responses) and survey of lawyers (61 responses).

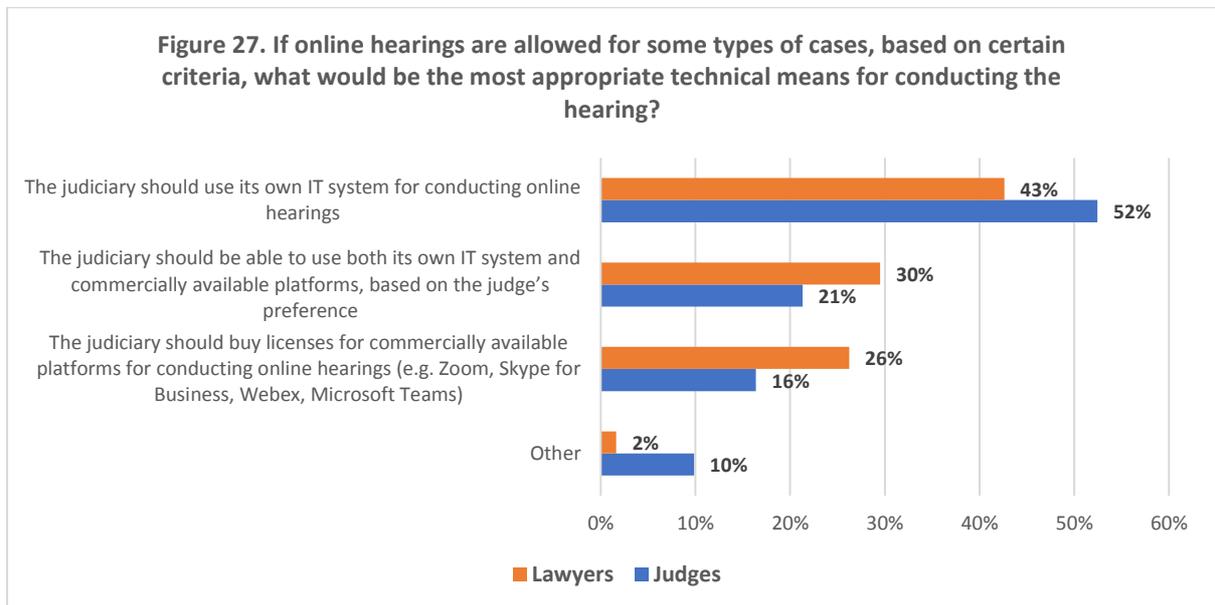
105. **Introducing online hearings and meetings as an option in bankruptcy proceedings should also be considered.** At the time of designing the survey, bankruptcy cases were not explored as an option to this question; however, the caseload analysis and interviews with judges and lawyers suggested that these proceedings were stalled during the pandemic as they require the physical presence of numerous participants. To allow these types of cases to move forward even in emergency situations, the law could give judges discretion to hold bankruptcy hearings and meetings through videoconference.

106. **While it is always the court that decides whether to hold an online hearing or not, there are variations in approaches, specifically in respect to (i) whether in some cases the online hearing can be the default option; and (ii) who should initiate the online hearing.** Overall, both judges and lawyers believe that online hearings could be appropriate in a wide range of circumstances and that courts should have sufficient flexibility. While the judges favor a variety of approaches, most of them believe that if a case meets certain criteria, the parties shall be empowered to request examination through an online hearing (56 percent). The approach most recommended by lawyers is that if a case meets certain criteria, it should be examined online, unless a party objects (51 percent) (Figure 26).



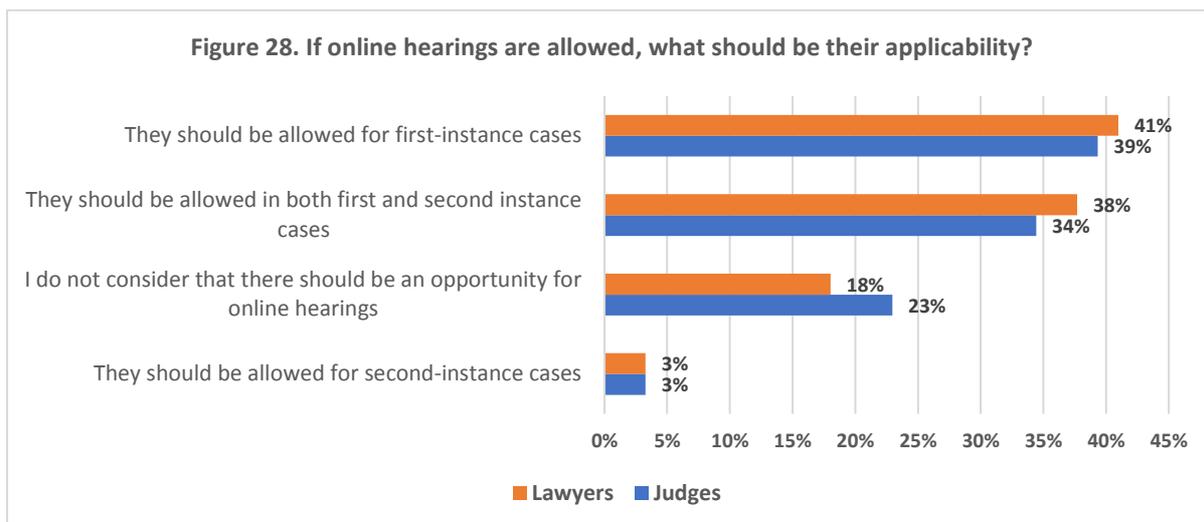
Source: Survey of judges (61 responses) and lawyers (61 responses).

107. **Next, the analysis sought the opinions of the legal community on what kind of platform would be most appropriate for online hearings** (Figure 27). As many as 52 percent of judges and 43 percent of lawyers believe that the judiciary should use its own ICT system for online hearings. Lawyers have a more liberal attitude towards the platforms that could be used. While only 21 percent of judges are of the opinion that the judiciary should be able to use both its own ICT system and commercially available platforms, as many as 30 percent of lawyers are of this opinion.



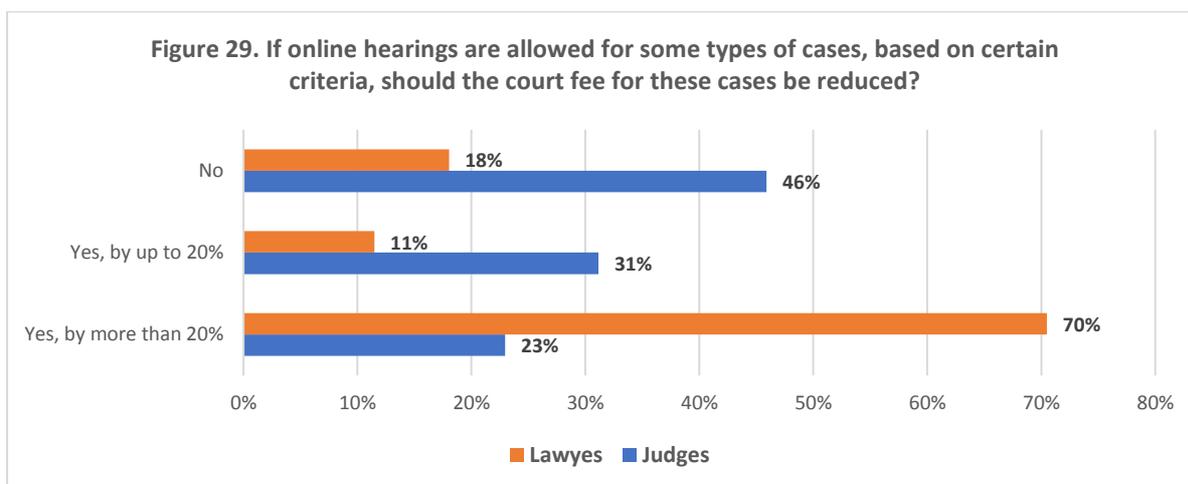
Source: Survey of judges (61 responses) and lawyers (61 responses).

108. **The positions of the legal community on whether online hearings would be appropriate only in first-instance cases or also in second-instance ones are divided** (Figure 28). The divisions in opinions are almost identical among judges and lawyers. As many as 41 percent of judges and 39 percent of lawyers believe that such hearings would be appropriate only in first-instance cases, while 23 percent of judges and 34 percent of lawyers see them as appropriate both for first and second instance cases.



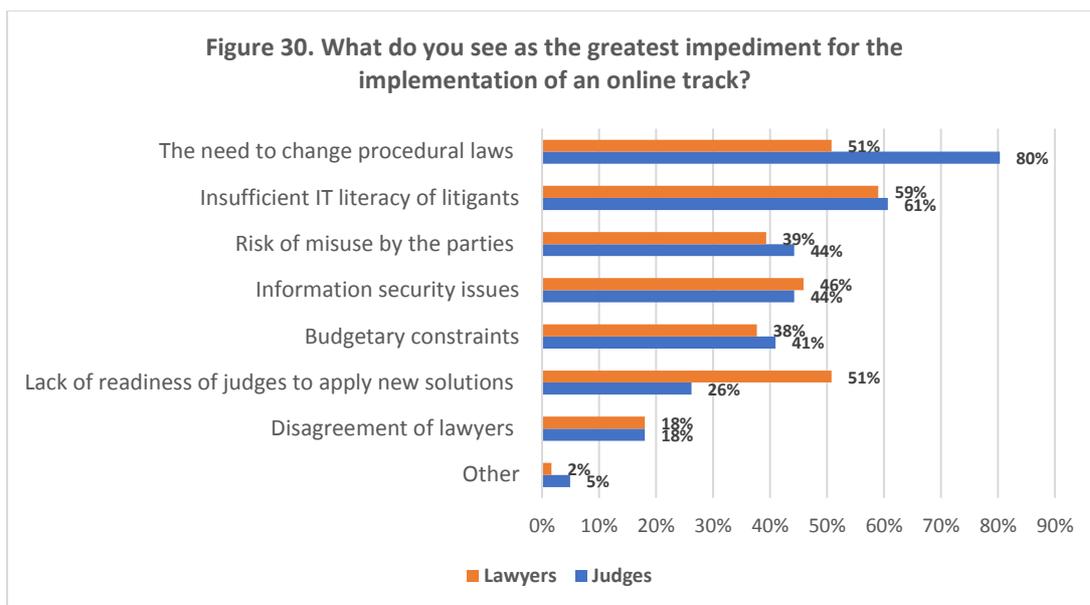
Source: Survey of judges (61 responses) and lawyers (61 responses).

109. **The positions of the legal community on whether a reduction in the court fee could be justified if the case is examined through an online hearing are also divided.** Unlike the opinions regarding the documentary track, most judges (46.3 percent) are of the opinion that the court fee should not be reduced for online hearings. Most lawyers however believe that a reduction of the court fee would be appropriate in this situation as well (Figure 29).



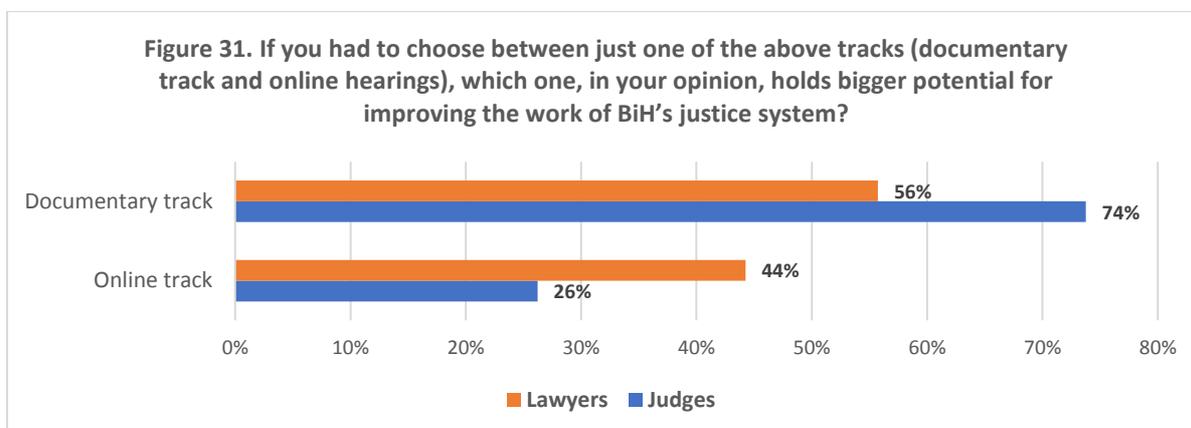
Source: Survey of judges (61 responses) and survey of lawyers (61 responses).

110. **Finally, the surveys of judges and lawyers sought to identify anticipated obstacles to introducing online hearings** (Figure 30). According to judges, the biggest obstacle would be need to change the procedural laws (80 percent), followed by the insufficient ICT literacy of litigants (61 percent). Lawyers rate the main problems differently, stating insufficient ICT literacy of litigants as the main obstacle (59 percent), followed by the reluctance of judges to apply new solutions (51 percent), and the need to change the procedural laws (51 percent).



Source: Survey of judges (61 responses) and lawyers (61 responses).

111. **International experience and the results of the focus groups and surveys indicate that both the documentary examination of cases and the conducting of some hearings through videoconferences could improve the processing of civil and commercial cases in BiH.** To better understand the attitudes of the BiH legal community towards these two tracks, the survey asked respondents to indicate which of the two methods holds bigger potential for improving the work of BiH’s justice system. Overall, both lawyers and judges believe that the documentary track is more promising than the online one, but nevertheless either has its supporters.



Source: Survey of judges (61 responses) and survey of lawyers (61 responses)

### 3. Recommendations

112. **In order to reduce the time and costs for resolving certain types of cases, the Civil Procedure Laws of BiH should be amended to introduce (i) a documentary track; and (ii) an online (audiovisual) track, with the following characteristics:**

113. **Documentary track:**<sup>106</sup>

<sup>106</sup> The introduction of a possibility for written-only examination of small claims has been recommended under Osmanovic-Pasic, Zuhra; Panzardi, Roberto O.; Petkova, Svetozara. 2019. [Fast-Tracking Small Claims in Bosnia and Herzegovina : A Comparative Analysis and Reform Proposals](#) (English). Washington, D.C.: World Bank Group.

- Small claims could by default be examined without a hearing (based only on documents) unless the judge assesses that a hearing is necessary for full clarification of the circumstances of the case. Parties should also have the right to request a hearing and if the judge refuses, he/she should provide a reason for the refusal.
- In civil and commercial cases with a value exceeding the small claim threshold, the claimant may request, in the claim, that the case be resolved without a hearing. If the defendant consents to the claimant's request in the response and the judge does not deem that a hearing is necessary for full clarification of the circumstances of the case, the case may be resolved based only on the documentary submissions of the parties.
- If a civil and commercial case with a value exceeding the small claim threshold has been resolved without a hearing based on the parties' consent (i.e. excluding situations where the case was resolved without a hearing because the defendant failed to respond), the court fee for the judgment could be reduced by up to 20 percent. Introducing this change would require amendments to numerous acts that regulate court fees across different jurisdictions in BiH.

**114. Online track:<sup>107</sup>**

- As a rule, preliminary hearings in commercial cases where one of the parties resides in another town could be held by means of a videoconference, unless the judge deems it is necessary to have a physical hearing or one party objects to the hearing via videoconference stating objective reasons for its inability to take part in such a hearing.
- Any party may propose that a hearing in a civil and commercial case be held via a videoconference. If the other party does not object, the judge may conduct a hearing if he/she deems it is appropriate for the case.
- Online hearings should be an option in bankruptcy proceedings, in order to allow these types of cases to move forward even in emergency situations.
- The legal rules on online hearings should be sufficiently broad to allow the judge to determine whether to use the court's proprietary videoconferencing system or a commercially available platform for holding the hearing.
- The legal rules on the location of the video hearings should be sufficiently broad to allow the parties to connect from any location that has adequate technical equipment. However, there should be clear guidance from the justice system on the technical specifications that a location and the equipment therein should meet in order to be suitable for holding an online hearing.
- Given that even criminal procedure does not have special rules for verification of the parties' identities, there is even more reason for the rules to be sufficiently liberal also in civil procedure and the verification of the parties' identities could be left to the judge's discretion. For example, the identity documents could be shown via the video link. This kind of check would be only marginally more superficial than the kind of verification which is carried out during a physical hearing. Furthermore, given that civil procedure is as a rule adversarial, the expectation is that in case of suspected fraudulent appearances at online hearings, the other party would react.
- This report does not propose a reduction of court fees for online hearings for several reasons: (i) the judges predominantly assess that online hearings would not reduce the level of effort on the part of the court, and (ii) conducting online hearings requires the engagement of ICT support and equipment, which entails expenses for the court, at least in the short-term. Nevertheless, there would be cost savings for litigants in terms of lower transportation costs

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<sup>107</sup> The introduction of a possibility for online hearings for some case types has also been recommended under the Phase I Analysis.

and spared travel time. Furthermore, the scheduling of some hearings online would reduce the pressure on the use of available courtrooms and could speed up case processing at courts where the scheduling of hearings is constrained by an insufficient number of courtrooms.

## IV. E-justice

115. **The findings and recommendations of the Phase I Report emphasized the potential of e-filing and e-communication for alleviating the work of courts and making them more user-friendly while enabling an effective crisis response.** Similarly, earlier reports produced within the framework of this project recommended the introduction of electronic service of process.<sup>108</sup> E-filing and e-communication with justice institutions are the building blocks of a comprehensive system of e-justice. E-justice is defined by the Council of Europe as “the use of ICT in the conduct of justice by all stakeholders of the judiciary in order to improve the efficiency and quality of the public service, in particular, to individuals and businesses. It includes electronic communication and data exchange, as well as access to judicial information.”<sup>109</sup> The COVID-19 crisis highlighted the potential of e-justice to ensure the uninterrupted functioning of justice systems in times of prolonged lockdowns and other physical distancing measures. Numerous international sources have pointed to the fact that paper exchanges and the need for physical presence have hampered access to and efficiency of justice during these challenging times.<sup>110</sup> Universally, e-justice is seen as the solution to these challenges.<sup>111</sup>

116. **The development and implementation of an e-justice system is contingent upon several factors.** The most important ones are: i) availability of ICT equipment and services in courts, ii) availability and features of the case management system (CMS), iii) digital skills of court staff/court users and their overall readiness to use e-communication, and iv) legal framework for use of ICT.<sup>112</sup> These are examined below to assess the current level of development of e-justice in BiH and its readiness for further evolution.

### 1. Availability of ICT equipment and services in BiH courts

117. **ICT equipment is generally available in BiH courts.** As of 2004, significant funds have been invested to procure new and modernize existing ICT equipment.<sup>113</sup> According to the latest available data, the ratio of personal computers to court staff in BiH courts is at least 1, i.e., every judge/judicial associate has a personal computer with access to the Internet and to the CMS.<sup>114</sup> The focus groups with judges confirmed this. Similarly, the 2016 CEPEJ *Thematic Report: Use of Information Technology in European Courts* (2016 CEPEJ Thematic Report) reported that basic facilities and automation tools

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<sup>108</sup> See Panzardi, Roberto O.; Osmanovic-Pasic, Zuhra; Sipka, Olga; Sofijanic, Tatjana; Berhamovic, Esmin. 2019. [Leveraging Procedural Reforms to Improve Commercial Justice in Bosnia and Herzegovina](#) (English). Washington, D.C.: World Bank Group.

<sup>109</sup> See [Recommendation CM/Rec \(2009\)1 of the Committee of Ministers to member states on electronic democracy \(e-democracy\)](#) (Adopted by the Committee of Ministers on 18 February 2009 at the 1049th meeting of the Ministers’ Deputies).

<sup>110</sup> See for example International Commission of Jurists, [The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan](#), 2020.

<sup>111</sup> See for example European Commission, [Digitalisation of justice in the European Union, A toolbox of opportunities](#), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, December 2020. See also

<sup>112</sup> See European judicial systems: Efficiency and quality of justice, CEPEJ Studies No. 24, [Thematic report: Use of information technology in European courts](#), p. 11.

<sup>113</sup> Source: HJPC [Annual Reports](#) and [newsletters](#).

<sup>114</sup> 2016 data for all FBiH Municipal and Cantonal courts showed that on 1803 judges and other staff, there were 2042 desktop and laptop computers, 1310 printers and 81 scanners available. Please see: Harley, Georgia; Svirčev, Srđan; Matić Bošković, Marina; Krnić, Ana; Esquivel Korsiak, Victoria. 2016. [Improving commercial case management in the Federation of Bosnia and Herzegovina: feasibility study \(English\)](#). Washington, D.C.: World Bank Group, page 42. See also Article 100 of the RS Rulebook on Internal Court Processes and Article of BiH Rulebook on Internal Court Processes.

are available in BiH courts.<sup>115</sup> Apart from computers, other ICT equipment is also available in some courts, e.g., spare laptops, headsets, cameras, and video conferencing systems.<sup>116</sup>

118. **All judges have email addresses.** According to the RS and BiH Rulebooks on Internal Court Processes,<sup>117</sup> electronic exchange between judges and other court staff can be done through their email accounts. Via email, judges and other court staff receive operational information and announcements relevant for their work.<sup>118</sup> Judges can also use these accounts to exchange information with any external email users. Judges are required to check their emails on a daily basis. All email addresses have a standardized format ([name.surname@pravosudje.ba](mailto:name.surname@pravosudje.ba)) for security and accessibility reasons. During focus group discussions, judges confirmed that they all have email addresses which can be accessed also from their private computers and phones.

## 2. Case management system in BiH courts

119. **BiH courts have a multifunctional CMS in place.** It was first designed and deployed as part of the ICT/CMS Project implemented by HJPC and supported by Sweden, Norway and the Netherlands (2007–2011), as well as the European Union. As of 2008, activities were undertaken to advance the CMS and install it in all courts (new functionalities were added, the system was modernized to ensure full automation of processes and rules of use were enacted, among others). In 2018 and 2019, as per the EU Peer Review recommendations,<sup>119</sup> focused actions were taken towards ensuring the accuracy of CMS data.<sup>120</sup>

120. **Currently, the BiH CMS is one of the strongest case management systems in the region with numerous features.**<sup>121</sup> Key CMS functionalities include random case assignment, electronic notification of new cases, easy review of all case information, notification of deadlines and tasks in pending cases, access to case files by the parties (all incoming and outgoing documents are scanned and stored in the CMS), tracking of service of process, electronic records of all decisions and tracking of their enforcement, e-transfer of data between courts, generation of reports on the work of courts, etc. With these and other functionalities, CMS forms a solid ICT basis for further digital transformation of the BiH judiciary.

121. **However, the CMS is not an interactive tool.** Through the CMS, parties have read-only access to case files either via Internet or via the mobile application E-SUD.<sup>122</sup> To access the platform, a party needs to obtain unique login credentials from the court comprising: i) CCN – a code uniquely linked to the case; and ii) WACC – a code uniquely linked to the party accessing the case. This allows parties to

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<sup>115</sup> See European judicial systems: Efficiency and quality of justice, CEPEJ Studies No. 24, Thematic report: Use of information technology in European courts, p. 11.

<sup>116</sup> Source: Focus group discussions held with the District and High Commercial Courts in RS, Municipal Court in Tuzla, Cantonal Court in Zenica on November 19-26, 2020.

<sup>117</sup> Usage of ICT in courts is governed by RS and BiH Rulebook on Internal Court Processes. BiH Rulebook on Internal Court Processes applies at the state level, in FBiH and BD, whereas RS has its own Rulebook. HJPC is the key authority in charge of overseeing the use of ICT in courts and ensuring that the ICT usage is uniform and efficient. HJPC issues instructions, rulebooks and guidelines on the use of ICT, protection of safety and integrity of ICT users. HJPC approves any new ICT solutions and upgrades to the existing software and system infrastructure. Together with individual courts, HJPC Secretariat is in charge of administering and maintaining the judicial ICT system, as well as providing end user support services.

<sup>118</sup> Article 99 of the RS Rulebook on Internal Court Processes and Article 99 of the BiH Rulebook on Internal Court Processes.

<sup>119</sup> [EU Peer Review recommendations for BiH](#).

<sup>120</sup> Source: [2019 HJPC Annual Report](#).

<sup>121</sup> See European judicial systems: Efficiency and quality of justice, CEPEJ Studies No. 24, [Thematic report: Use of information technology in European courts](#), pp. 21 and 74.

<sup>122</sup> The access to CMS case file is enabled only for the parties and their legal representatives.

track various stages of their case and access relevant case information such as the date and location of their hearing, case reassignment, procedural decisions made, etc. The E-SUD application, however, does not let court users file documents online or interact with the acting judge or the court staff electronically. On a similar note, the 2016 CEPEJ Thematic Report noted that the use of ICT for court administration, case management and assistance to judges is on a much higher level compared to the use of ICT tools for electronic communication with professionals and court users.<sup>123</sup>

122. **BiH has a system in place that allows for e-filing of utility claims (SOKOP-Mal).** It was first introduced in 2012 and has been upgraded significantly since. Currently, SOKOP-Mal enables e-filing of utility claims and start-to-finish electronic processing of utility cases. The system is reserved for utility cases,<sup>124</sup> the motive being that unlike other small claims, utility cases are often undisputed and do not require the court to conduct a hearing or examine evidence. External users (e.g., utility companies) can access the SOKOP-Mal system with a qualified electronic certificate as set forth in the BiH Law on Electronic Signature.<sup>125</sup> In 2019, actions were taken to further improve the system by connecting additional first-instance courts and utility companies to the system, as well as by enabling access to case files for defendants. By the end of 2019, the SOKOP-Mal user network encompassed 30 first-instance courts and 23 utility companies, as well as over 75 percent of all utility cases in BiH.

### ***3. Digital skills of judges and court users and overall readiness to use e-communication***

123. **BiH judges and lawyers report insufficient use of e-communication.** This issue was brought to light by the pandemic. Although all judges have email addresses, they are wary when using them for communicating with parties. Some are simply not used to communicating via email. Commercial lawyers confirmed that some judges cannot be reached by email or have their assistants reply to email messages. However, there are judges who encourage this type of communication (e.g., at Municipal Court in Tuzla). According to interviewed judges, email communication is not used primarily because civil procedure rules do not regulate precisely when and which type of e-communication can be used, which results in ambiguity and subsequently, aversion towards this kind of communication. For this reason, judges and parties almost always rely on registered mail (even if information is shared electronically, parties almost always follow-up by sending hard copies via registered mail).

124. **However, both BiH lawyers and judges are ready and willing to use e-communication more frequently in their work.** They are aware of the growing need for deploying electronic communication in the BiH judiciary as a result of the pandemic. Overall, there is a broad consensus among interviewed lawyers that efforts should be made towards further digitalization of court processes and that commercial cases are the right arena for this to happen.<sup>126</sup> Interviewed BiH judges are also in favor of introducing some e-services in courts (e.g., electronic service of process); however, they have stressed that prior changes to the relevant legal framework would be necessary. Both judges and lawyers have pointed to a need for capacity-building for judges and court staff in order to ensure efficiency in developing e-justice.

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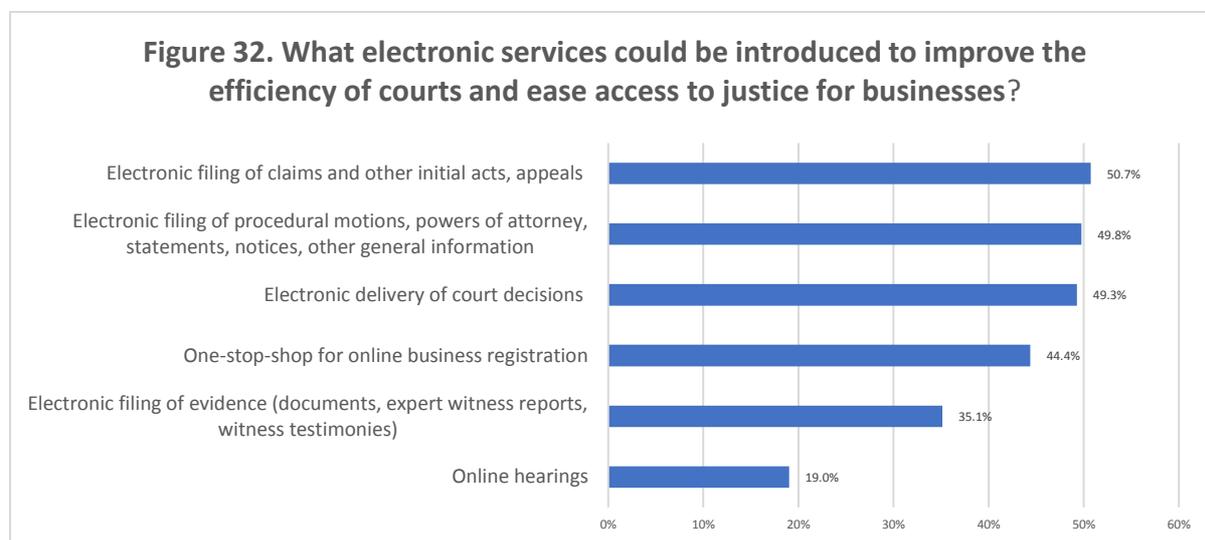
<sup>123</sup> For more details on IT development indices for BiH, please see: European judicial systems: Efficiency and quality of justice, CEPEJ Studies No. 24, [Thematic report: Use of information technology in European courts](#).

<sup>124</sup> On December 31, 2019, there was over 1.4 million pending cases registered in SOKOP-Mal, which is more than 75% of all utility cases in BiH.

<sup>125</sup> In practice, they currently use Halcom-issued qualified electronic signatures. If they wish, they could also use electronic signatures issued by qualified trust services providers accredited in EU member states.

<sup>126</sup> Some exceptions do exist e.g., as reported by the Municipal Court of Tuzla, not so many lawyers in Tuzla Canton use/are willing to use electronic communication in their day-to-day work.

125. **BiH businesses also show readiness to engage in e-communication with courts.** The e-services supported the most by surveyed businesses include: (i) e-filing of procedural motions, powers of attorney, statements, notices, and other general information (54.5 percent), (ii) electronic submission of court decisions (52.7 percent) and (iii) electronic filing of lawsuits and other initial acts, appeals (48.8 percent) (see Figure 32).



Source: Survey of Businesses, based on 361 responses.

#### 4. Legal Framework for E-justice

126. **Introducing electronic communication between the court and the parties, and ultimately e-justice, requires a clear legal framework that defines admissible forms of identification, e-documents, e-services and other elements of the e-governance infrastructure.** This framework is set by legislation on e-signature, e-documents, e-ID, as well as by authorization of the admissible means of electronic identification and communication under the procedural laws. According to the 2016 CEPEJ Thematic Report, the legal framework for the use of ICT is the least developed among all factors determining the level of ICT development of the BiH judiciary<sup>127</sup>. Unfortunately, not much has changed in this regard since 2016. The BiH regulatory framework for e-identification and e-services as well as the current state of infrastructure and procedural laws are examined below with a view to identifying measures that could help breathe life into e-justice in BiH.

##### 4.1. Regulatory framework of e-identification and e-services

127. **BiH strives to harmonize its legislation in the area of e-identification with the state-of-the-art EU legislation.** While the latest EU instrument in this field is EU Regulation (EU) No. 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in the European Internal Market (hereinafter eIDAS),<sup>128</sup> the BiH laws in force are mostly aligned with its predecessor, namely Directive 1999/93/EC on a Community Framework for Electronic Signatures.<sup>129</sup> Therefore, the current BiH laws are outdated and incompatible with contemporary EU law on e-identification. The only BiH instrument

<sup>127</sup> For more details on IT development indices for BiH, please see: European judicial systems: Efficiency and quality of justice, CEPEJ Studies No. 24, [Thematic report: Use of information technology in European courts](#), pp. 14 and 90.

<sup>128</sup> See Regulation (EU) No. 910/2014 of the European Parliament and of the Council on Electronic Identification and Trust Services for Electronic Transactions in the European Internal Market.

<sup>129</sup> See Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for Electronic Signatures.

that corresponds to eIDAS is the Draft BiH Law on the Electronic Identification and Trust Services for Electronic Transactions, which has been in Parliamentary procedure since March 2019.

128. **Furthermore, the regulatory framework governing electronic identification, authentication and trust services in BiH is highly fragmented and decentralized.** Due to its complex governance structure, BiH has four separate sets of rules governing e-services at different levels. The State, the two entities and BD claim to have autonomy to regulate this area in accordance with their constitutional competences.<sup>130</sup> As a result, the regulatory framework has been developing at an uneven pace, with some levels of authority still not having their laws on electronic identification in place. Moreover, the rules at the different levels are not harmonized in a way that would ensure their interoperability.

**Box 2. Regulatory framework of e-identification and e-services in BiH:**

**BiH (state) level:**

- ⇒ Law on Electronic Document,
- ⇒ Law on Electronic Signature,
- ⇒ Law on Electronic Legal and Business Transactions,
- ⇒ Law on Personal Identification Cards of BiH Citizens, and
- ⇒ Draft Law on the Electronic Identification and Trust Services for Electronic Transactions (in Parliamentary procedure), which should replace the BiH Law on Electronic Document and Law on Electronic Signature.

**RS (entity) level:**

- ⇒ Law on Electronic Document,
- ⇒ Law on Electronic Signature, and
- ⇒ Law on Electronic Commerce.

**FBiH (entity) level:**

- ⇒ Law on Electronic Document, and
- ⇒ Draft Law on Electronic Signature (in parliamentary procedure).

**BD level:**

- ⇒ Law on Electronic Document (LED), and
- ⇒ Law on Electronic Signature (LES).

129. **A major drawback of the existing laws is their unclear territorial scope.** With the exception of the BD law,<sup>131</sup> the existing laws leave unanswered the question of whether electronic identification issued under the rules of one jurisdiction would be recognized in others. On the other hand, all of these laws stipulate that electronic certificates issued by authorities based in the EU will be recognized with no additional conditions.<sup>132</sup>

130. **The rules are also fragmented in terms of their subject-matter scope.** Every jurisdiction has separate laws governing electronic signatures and electronic documents. Additionally, RS and BiH have separate laws on electronic commerce. This increases the risk of conflict between the laws and the resulting implementation challenges. This level of fragmentation is also not in line with the state-of-the-art practices in the field, where there is a strong tendency towards codification. In the recent future, this would likely improve at the state level, with the adoption of the BiH draft Law on Electronic

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<sup>130</sup> While BiH authorities claim to have this power in accordance with Article III of the BiH Constitution, according to which central Government is competent for affairs related to establishment and operation of domestic and international communication facilities, entity-level authorities base their competence on Article III 3) of the BiH Constitution, according to which entity-level Governments have competence in all those fields that are not expressly assigned to the BiH Government, as well as relevant Articles of RS/FBiH Constitutions. The basis of BD competence to regulate this area is Article 22 of the BD Statute.

<sup>131</sup> In its Article 13 BD LES stipulates that a qualified certificate issued anywhere in BiH will be valid in BD.

<sup>132</sup> Article 24 of BiH LES, Article 33 of RS LES. The FBiH draft LES, in its Article 35, implicitly equates electronic certificates issued in BiH and in the FBiH. The BiH draft Law is the first BiH law to lay down rules for interoperability of electronic identification and trust services throughout the country.

Identification and Trust Services for Electronic Transactions, which is to govern both e-signature and the e-document, as well as other identification, authentication and trust services. However, for the remaining BiH jurisdictions, codification is not expected to occur in the near future.

131. **The lack of harmonization and interoperability of the rules on electronic identification and trust services was noted in the EC 2020 Progress Report for BiH.** As stated in the report: *“Bosnia and Herzegovina made no progress in adopting a countrywide strategy and an associated action plan. Bosnia and Herzegovina needs to adopt a law on electronic identity and trust services for electronic transactions with a single supervisory body for the whole country in line with the EU acquis. At the same time, no progress has been made in ensuring the interoperability of the electronic signature system throughout the country.”*<sup>133</sup> The EU is clear on the need to codify the rules on e-services, harmonize them and ensure their interoperability between jurisdictions.

#### 4.2. Electronic signature

132. **The current BiH legislation in the area of e-signature is significantly more restrictive than eIDAS.** This, in turn, limits the opportunities for the use of e-identification in accessing public and justice services in the country. Specifically, the definition of what constitutes electronic signature in the EU (eIDAS) is broader than that in BiH.

##### Box 3. Types of e-signatures under eIDAS

- ⇒ **“Electronic signature”** means data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign.
- ⇒ **“Advanced electronic signature”** means an electronic signature which is:
  - uniquely linked to the signatory;
  - capable of identifying the signatory;
  - created using electronic signature creation data that the signatory can use under his sole control, with a high level of confidence, and
  - linked to the data signed therewith in such a way that any subsequent change in the data is detectable.
- ⇒ **“Qualified electronic signature”** means an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures.

133. **eIDAS gives Member States the flexibility to provide e-services using a number of means for electronic identification with different levels of security.** In essence, the eIDAS definition of electronic signature means that even the simplest electronic statement, such as an e-mail with the name of the sender at the bottom, is considered electronically signed with a simple e-signature.<sup>134</sup> This is the lowest level of security. The next level is the advanced e-signature, which entails higher security by necessitating the use of certificates, cryptographic keys and similar forms of secure login. Finally, a qualified e-signature meets the requirements of an advanced one and, additionally, is based on a qualified e-signature certificate issued by a qualified trust service provider. A qualified e-signature has legal effect equivalent to that of a handwritten signature. However, this does not mean that the advanced and the simple e-signatures do not have legal effect. Quite the contrary, eIDAS stipulates that an e-signature is not denied legal effect and admissibility as evidence in legal proceedings solely on the grounds of it being in electronic form or not meeting the requirements for a qualified e-signature. This means that public and private entities in member states are free to determine the legal effects of the simple and the advanced e-signature in their relationships and governments are free to

<sup>133</sup> [Bosnia and Herzegovina 2020 Report Accompanying the Communication from the Commission to the European Parliament](#), the Council, the European Economic and Social Committee and the Committee of the Regions, p. 72.

<sup>134</sup> See “What is an electronic signature” at <https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/Introduction+to+e-signature>.

recognize electronic identification means with lower identity assurance levels.<sup>135</sup> Additionally, eIDAS allows public sector bodies in member states to provide e-services based both on qualified e-signatures and on advanced ones.<sup>136</sup>

134. **By contrast, definitions of e-signature in BiH, RS and BD LESs are narrower and recognize only two types of e-signature: an *ordinary/simple* one, and a *secure/qualified* one.**<sup>137</sup> Save for some differences in the language of LESs, the definition of the secure/qualified e-signature seems to roughly cover the requirements for the qualified signature under eIDAS. The definition of the ordinary e-signature in BiH seems to encompass both the *simple e-signature* and the *advanced e-signature* under eIDAS. There is no distinction between these two levels of security in BiH and it is not clear whether an identification as simple as the name of the author of an e-mail would be recognized as a simple form of e-signature, or whether only identification that has been issued by trust service providers (qualified or non-qualified) would be valid under BiH legislation.

#### Box 4. Types of e-signatures in BiH

- ⇒ **“Ordinary/simple electronic signature”** is any electronic data that is attached to or logically associated with other data and enables identification of the signatory, with some laws (e.g., the RS and the draft FBiH LES) also stipulating that it serves to verify the authenticity of the signed e-document.
- ⇒ **“Advanced electronic signature”** means an electronic signature which:
  - uniquely linked to the signatory,
  - created using means that are under sole control of the signatory,
  - capable of identifying the signatory,
  - makes any subsequent changes to related data detectable, and
  - based on a qualified certificate and created using a secure-signature-creation device.<sup>138</sup>

135. **Similarly to eIDAS, all BiH LESs stipulate that a qualified/secure e-signature has the same legal effect as a handwritten signature.** This rule is not without exceptions. Specifically, the BiH LES foresees cases in which a secure e-signature will not be equal to a wet ink signature (e.g., declarations of will and other declarations/statements in family and inheritance law which are subject to written or stricter form requirement, other submissions that require official certification, judicial or notarial authentication or notarial deed, or statement of guarantee given by a person in their professional capacity).<sup>139</sup> Like eIDAS, all LESs explicitly state that an e-signature may not be denied legal effect or admissibility as evidence simply because it is in electronic form or because it does not meet the criteria for a qualified e-signature.<sup>140</sup>

### 4.3. Electronic identification cards

136. **Other electronic identification means in BiH include electronic identification cards (eID card).** The BiH Law on Personal Identification Cards of BiH Citizens from 2013 introduced eID cards. Based on this law, eID cards started to gradually replace old ID cards from March 2013. According to the BiH Agency for Identification Documents, Records and Data Exchange (IDDEEA) website, the aim was to issue a total of 1.9 million eID cards from 2016 to 2020<sup>141</sup> but it is not clear to what extent these targets have been met. The eID card stores and cryptographically protects personal data about the

<sup>135</sup> See [eIDAS Preamble](#), (15).

<sup>136</sup> See eIDAS, Art. 27.

<sup>137</sup>The RS and BD LES refer to the highest-level security signature as a ‘qualified electronic signature’ (as defined in eIDAS), whereas the BiH LES refers to it as a ‘secure electronic signature’ (as defined in Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for Electronic Signatures).

<sup>138</sup> Article 3 of BiH LES, Articles 2, 3, 4 and 8 of RS LES, Articles 2, 4 and 5 of BD LES.

<sup>139</sup> Article 5 of BiH LES.

<sup>140</sup> Article 4 of BiH LES, Article 6 of RS LES, Article 6 of BD LES, Article 6 of the FBiH draft LES.

<sup>141</sup> For more information, see 2016-2018 and 2018-2020 [IDDEEA Medium-term Work Plans](#).

holder. To access this data, a six-digit PIN is needed, known only to the card holder. The eID card can also be used for digital signing provided that it stores a qualified certificate for electronic signature. Qualified certificates are to be stored on eID cards by IDDEEA<sup>142</sup> on request by the eID card holder and need to meet all criteria set forth in the BiH LES. As it is not a certified qualified trust service provider yet, IDDEEA is not able to integrate qualified certificates for e-signature in the eID cards. Once IDDEEA receives such certification, it will be possible to use the eID cards also for qualified digital signing. This will be particularly convenient for citizens who will be able to access digital services simply by using their eID card. A good example is Estonia, where eID cards are universally used. They allow authentication in the digital environment (much like a traditional ID card), electronic signing with a qualified signature (which enables all citizens to access government e-services provided in Estonia, e-services provided across the EU, and e-services from many private sector providers) and encryption services (the eID card allows citizens to securely send encrypted information to others).<sup>143</sup>

#### 4.4. Electronic document

137. **At the EU level, the eIDAS rules on the e-document are quite laconic, comprising only two short provisions.** According to eIDAS, ‘electronic document’ means any content stored in electronic form, in particular text or sound, visual or audiovisual recording. An electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form. In a time when much of users’ content is kept and transmitted in electronic form, such broad and liberal rules allow member states to use a variety of e-documents without being limited by form or content.

138. **By contrast, the BiH jurisdictions all have separate laws on the e-document, which include much stricter requirements on form and content.** The definitions of e-documents in local laws are quite detailed and pose numerous requirements for electronic content to qualify as an e-document. Furthermore, the numerous local laws and draft laws display significant variations in their rules on the legal effect and the authorized uses of e-documents. Only the BiH LED stipulates that the e-document cannot be rejected or challenged solely on the basis of being in the electronic form.<sup>144</sup> Under all LEDs, when assessing the admissibility of an e-document, the acting authority should consider relevant information on its creation, transmission, storage, authenticity and integrity.<sup>145</sup> Furthermore, the usage of an e-document in BiH is based on consent. Such consent, however, cannot be withheld solely on the basis of the document being created or transmitted in electronic form.<sup>146</sup>

#### Box 5. E-documents in BiH

**Definition:** The e-document is a complete set of data created using computers and/or other electronic devices, that is sent, received or stored on electronic, magnetic, optical and/or other media and contains features which allow to identify the author of the document, validate its authenticity and determine the time of its creation.<sup>147</sup> Every e-document comprises:

- ⇒ content, including the name of the intended recipient;
- ⇒ one or more e-signatures, time of creation and other documentational features (e.g., time of dispatch/receipt of the document), if any.<sup>148</sup>

**Legal effect:**

<sup>142</sup> In practice, these certificates will be issued once IDDEEA is accredited as qualified trust service provider.

<sup>143</sup> For more information on Estonia’s eID card, see <https://e-estonia.com/eid-in-estonia/>.

<sup>144</sup> Article 12 of BiH LED.

<sup>145</sup> Article 11 of BD LED, Article 11 of RS LED, Article 11 of FBiH LED.

<sup>146</sup> Article 3 of BD LED, Article 2 of RS LED, Article 2 of FBiH LED, Article 6 of BiH LED.

<sup>147</sup> Article 2 of BD LED, Article 4 of RS LED, Article 3 of FBiH LED, Article 4 of BiH LED.

<sup>148</sup> Article 5 of BD LED, Article 5 of RS LED, Article 5 of FBiH LED, Article 8 of BiH LED.

- ⇒ BiH LED states that a qualified e-signature is needed for an e-document to have the same legal effect as a paper document,<sup>149</sup>
- ⇒ BD, FBiH and RS LEDs require the e-document to be signed with an “electronic signature”, without specifying its type.<sup>150</sup>

**Authorized uses:**

- ⇒ BiH LED admits e-documents as evidence only in administrative proceedings;<sup>151</sup>
- ⇒ BD and FBiH LEDs allow the use of e-documents as evidence in administrative and arbitration proceedings;<sup>152</sup>
- ⇒ RS LED does not explicitly allow the use of e-documents as evidence in court or other proceedings.

139. **The difference between the approaches of eIDAS and the current BiH laws to the concept of e-document is stark.** State-of-the-art rules tend to liberalize the rules on use of e-documents to the extent possible and regulate them within the same act as electronic identification. The BiH laws take the exact opposite approach and pose numerous requirements to the e-document. The Draft Law on the Electronic Identification and Trust Services for Electronic Transactions of BiH takes eIDAS’ approach. However, given the complexities related to the territorial application of the various BiH laws in this sphere, it is not clear how long it will take before the same rules become applicable across BiH.

#### 4.5. Trust service providers

140. **eIDAS refers to the private or public entities responsible for issuing certificates for e-signatures (as well as other e-identification services) as trust service providers; the BiH laws use a wide variety of terms to refer to those same entities.** The terms used are “certifier” (*ovjerilac*) (BiH LES); “certification body” (*certifikaciono tijelo*) (RS LES), “service provider” (*davalac usluga*) (BD LES), “trust service provider” (*pružatelj usluga povjerenja*) (draft FBiH LES) and “certification body” (*certifikaciono tijelo*) (BiH Draft Law on the Electronic Identification and Trust Services for Electronic Transactions). Using so many different terms to signify a single function within a single country adds to the overall fragmentation and complexity in an area which is already quite technical and not easily understandable neither to the layperson, nor to the BiH legal community.

141. **eIDAS regulates two types of trust service providers: qualified and non-qualified ones.** Qualified trust service providers (i.e. the entities issuing qualified certificates for electronic signatures) should be certified by a designated supervisory body in the respective Member State. By contrast, the requirements for non-qualified trust service providers (e.g., ones that issue advanced electronic signatures) are rather relaxed. State supervision over the activity of non-qualified trust service providers should be subject to a “light touch” and *ex-post* supervision. The supervisory body therefore has no general obligation to supervise non-qualified service providers and should only act when it is informed that they do not comply with the eIDAS requirements.<sup>153</sup>

142. **For qualified trust service providers, the RS LES and the draft FBiH LES introduce a certification regime, similarly to eIDAS.** This means that an entity wishing to issue qualified certificates would first need to be certified by a designated public body. By contrast, the BiH LES

<sup>149</sup> BiH LED uses the term “advanced electronic signature based on a qualified certificate” which is in essence the qualified electronic signature as defined under eIDAS. Further, electronic document cannot be used if notarial authentication of a document is required. See Articles 5-8 of BiH LED.

<sup>150</sup> Articles 5 and 7 of BD LED, Articles 5 and 7 of RS LED, Articles 5 and 7 of FBiH LED. Note, however, that FBiH and BD LED both have a contradiction in this regard. Namely, they define the “author of an electronic document” as the person signing the document with a qualified electronic signature. It is unclear why this requirement is introduced and whether/how it affects the validity of an electronic document signed with a simple/advanced electronic signature. This contradiction does not exist in the RS LED.

<sup>151</sup> Article 12 of BiH LED.

<sup>152</sup> Article 11 of BD LED, Article 11 of FBiH LED.

<sup>153</sup> See eIDAS, Preamble (36).

provides only for a voluntary certification scheme for issuers of qualified e-signatures. Once the current BiH LES is replaced by the pending draft Law on the Electronic Identification and Trust Services for Electronic Transactions, certification of qualified trust service providers will become mandatory also at the state level.

143. **As for non-qualified trust service providers, the BiH LESs are much stricter than eIDAS and provide for a registration regime, rather than a “light touch” approach.** The BiH LES requires a provider of trust services to immediately notify the supervisory body of the commencement of its work, and to provide it with its internal rules on service provision, as well as any subsequent changes to those rules. Similarly, the RS LES requires a provider of trust services that issues non-qualified electronic certificates to communicate to the Ministry of Scientific and Technological Development, Higher Education and Information Society (MNRVOID) the commencement of electronic certification services at least 14 days in advance. The supervisory authorities are obliged to keep a registry of trust service providers. The FBiH draft LES goes even further. It provides for a certification regime both for qualified and non-qualified trust service providers.

#### 4.6. *Supervisory framework*

144. **eIDAS establishes a supervisory framework comprised of three types of bodies: (i) supervisory body, (ii) conformity assessment body and (iii) national accreditation body.** Together, these bodies form the institutional infrastructure for e-identification and provision of e-services. The functions of these bodies are examined below and compared with the existing supervisory infrastructure in BiH.

145. **eIDAS requires Member States to designate a supervisory body responsible for the supervisory tasks under the Regulation.** The two principal tasks of supervisory body are: (i) *ex-ante* supervision, i.e. granting of qualified status to trust service providers and ensuring that all the prerequisites for the provision of services are in place, and (ii) *ex-post* supervision of both qualified and non-qualified trust service providers, i.e. various kinds of assessments and inspections to ensure that trust service providers act in conformity with the law.<sup>154</sup>

146. **BiH’s many laws establish several supervisory bodies, in line with the country’s fragmented governance structure.** The state-level (BiH) Office for Supervision and Accreditation of Certification Authorities<sup>155</sup> carries out both *ex-ante* supervision (voluntary certification of trust service providers issuing secure electronic signatures) and *ex-post* supervision. Although the BiH LES was adopted 14 years ago, this supervisory body was established only in 2018.<sup>156</sup> Under the RS and the draft FBiH laws, the supervisory function is further fragmented, with *ex-ante* supervision assigned to one body and *ex-post* supervision – to another one. In RS, the certification of trust service providers (i.e. *ex-ante* supervision) is assigned to the MNRVOID and *ex-post* supervision – to the RS Administration for Inspection Affairs.<sup>157</sup> The draft LES of FBiH envisages that certification (i.e. *ex-ante* supervision) should be done by the Federal Ministry of Transport and Communications<sup>158</sup> and *ex-post* supervision – by the FBiH Administration for Inspection Affairs.<sup>159</sup> The BD LES does not provide for its own supervisory body but stipulates that relevant BiH and entity-level rules on this matter shall be valid in BD; consequently, any trust services provider certified under either BiH or entity-level laws would automatically be recognized in BD too.

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<sup>154</sup> Article 17, eIDAS.

<sup>155</sup> Article 20, para 1 and Article 23 of the BiH LES.

<sup>156</sup> For reference, please see Article 15 of BiH LES.

<sup>157</sup> Articles 22 and 34 of the RS LES.

<sup>158</sup> Article 21 of the Draft FBiH LES.

<sup>159</sup> Article 36 - 39 of the Draft FBiH LES

147. **To ensure the compliance of qualified trust service providers with the legal requirements, eIDAS requires conformity assessment carried out by a conformity assessment body.** Such bodies must be accredited in accordance with Regulation (EC) No 765/2008<sup>160</sup> to carry out conformity assessment of qualified trust service providers against pre-defined technical, functional, and organizational standards.<sup>161</sup> The resulting conformity assessment reports are submitted to the supervisory body.

148. **In BiH, conformity assessment is regulated differently at the different levels.** According to BiH LES, the conformity of qualified signature creation devices should be confirmed by accredited local public or private bodies. The BiH LES also provides for recognition of conformity assessment reports issued by EU-based conformity assessment bodies.<sup>162</sup> There are currently no accredited conformity assessment bodies at the state level (the only qualified trust service provider in the country, Halcom, obtained its conformity assessment report from the EU). The RS and FBiH laws do not provide for conformity assessment bodies. Although the rules on this matter are not explicit, it can be inferred that conformity assessment at entity level should be done by expert commissions as part of the qualified service providers' certification process. These expert commissions are appointed by the supervisory bodies (the RS MNRVOID and the FBiH Ministry of Transport and Communications) to assess whether the trust service providers meet the conditions for certification.<sup>163</sup> As with the supervisory bodies, the BD LES does not provide for its own conformity assessment bodies/procedures but envisages that the relevant state and entity-level rules on this matter shall also apply in BD.

149. **eIDAS requires that conformity assessment bodies be accredited by a national accreditation body which meets the requirements set forth in Regulation (EC) No 765/2008.** In BiH, accreditation is done by the BiH Accreditation Institute. As the RS LES and the draft FBiH LES do not regulate conformity assessment bodies (see above), they do not set up accreditation bodies either.

#### **4.7. Existing e-identification infrastructure in BiH**

150. **While the various LESs in BiH provide for a certification regime for qualified trust service providers and a registration regime for non-qualified ones, in practice both the certification and the registration processes for those two types of providers have been advancing rather slowly.** At the state (BiH) level, only one qualified trust service provider, the company Halcom, has been certified so far, under the procedure for voluntary certification.<sup>164</sup> It is expected that in the near future the status of qualified trust service providers will be granted also to some state agencies, such as the Indirect Taxation Authority of BiH (ITA BiH) and IDDEEA. Currently, the BiH Office for Accreditation and Supervision's website does not point to any registered non-qualified trust service provider. At the RS level, MNRVOID's Unit for Management of Digital Identities within the Department for Information Society is expected to soon start issuing qualified certificates.<sup>165</sup> Given that MNRVOID also exercises ex-ante supervision over qualified trust service providers in RS, it is not clear whether it will certify itself as a qualified trust service provider. It is also questionable whether the public body exercising ex-ante control of qualified trust service providers could be a trust service provider itself under the rules of eIDAS. The MNRVOID website points to three registered non-qualified trust service providers

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<sup>160</sup> See [Regulation \(EC\) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products.](#)

<sup>161</sup> Article 3, (18), eIDAS.

<sup>162</sup> Articles 14 and 15 of the BiH LES.

<sup>163</sup> Article 22 of the RS LES. Article 21 of the draft FBiH LES.

<sup>164</sup> According to the European Commission 2020 Progress Report for BiH: "[i]n October 2019, the Office for the Supervision and Accreditation of Certifiers, established within the Ministry of Communication and Transport, registered the first trust service provider, paving the way for the introduction of qualified electronic signature in the country."

<sup>165</sup> See MNRVOID's website at <https://www.vladars.net/sr-SP-Cyrl/Vlada/Ministarstva/mnk/ca/Pages/default.aspx>.

in RS: (i) RS Ministry of Administration and Local Self-Government; (ii) RS Tax Administration; and (iii) SBERBANK Inc. Banja Luka. Given that the FBiH law is still a draft, there are no certified or registered trust service providers in this entity.

#### 4.8. Procedural laws

151. **Unlike their counterparts in some European countries,<sup>166</sup> the BiH CPLs do not have separate sections on e-communication in civil cases.** Nevertheless, the CPLs in all four BiH jurisdictions<sup>167</sup> set forth some basic rules on e-communication in civil cases.

152. **Civil procedure rules in BiH enable e-filing in civil cases.** All four CPLs envisage the possibility of filing case submissions electronically, namely: i) lawsuit, response to lawsuit, counterclaim, response to counterclaim, legal remedies and others statements, proposals and information submitted to the court can be filed electronically;<sup>168</sup> ii) to be accepted by the court, electronic submissions need to be signed with a qualified e-signature;<sup>169</sup> iii) electronic submissions will be considered officially filed at the time specified in the validation of the e-signature.<sup>170</sup>

153. **Apart from the rules on e-filing, the BiH CPLs do not envisage any other rules on e-communication in civil cases.** Service of process can be done either via registered mail or through court couriers.<sup>171</sup> The CPLs do not foresee the option of serving documents on parties electronically.<sup>172</sup> Expert witness reports are also submitted in writing – the CPLs do not envisage the possibility of having those reports sent electronically.<sup>173</sup> Court decisions are made in writing and can be either dispatched via registered mail/court courier or collected at the court.<sup>174</sup> There is no mention of electronic delivery of court judgments. The scheduling of hearings is done either orally (if the party is physically present in court) or in writing.<sup>175</sup> Only the RS CPL stipulates the possibility of scheduling commercial case hearings via email.<sup>176</sup> The CPLs do not allow the holding of hearings or taking of evidence through video conferencing.

#### Box 6. E-communication in BiH administrative procedure

E-communication is regulated by the RS and BiH Administrative Procedure Acts (APAs), and by BD APA albeit to a somewhat lesser extent. The FBiH APA does not regulate e-communication in administrative cases.<sup>177</sup>

In the APAs, which allow for e-communication, the electronic form is admissible for:

<sup>166</sup> E.g., Austria, Croatia, Germany.

<sup>167</sup> There are four Civil Procedure Codes applicable on the territory of BiH – RS CPL, BD CPL, FBiH CPL and BiH CPL. BiH CPL applies only to civil proceedings before the Court of BiH.

<sup>168</sup> Article 334 of the FBiH CPL, Article 334 of the RS CPL, Article 274 of the BiH CPL, Article 72 of the BD CPL.

<sup>169</sup> Ibidem. A qualified e-signature is a signature that is created by a qualified electronic creation device and is based on a qualified certificate for e-signatures.

<sup>170</sup> Article 325 of the FBiH CPL, Article 325 of the RS CPL, Article 265 of the BiH CPL, Article 77 of the BD CPL.

<sup>171</sup> Service of process to persons located abroad is to be conducted via diplomatic channels, unless otherwise stipulated in the law itself or in an international agreement.

<sup>172</sup> Articles 337-355 of the FBiH CPL, Articles 337-355 of the RS CPL, Articles 277-293 of the BiH CPL, Articles 91-108 of the BD CPL.

<sup>173</sup> Articles 154 and 156 of the FBiH CPL, Articles 154 and 156 of the RS CPL, Articles 121 and 123 of the BiH CPL, Articles 278 and 280 of the BD CPL.

<sup>174</sup> Articles 185 and 186 of the FBiH CPL, Articles 185 and 186 of the RS CPL, Articles 152 and 153 of the BiH CPL, Article 309 of the BD CPL.

<sup>175</sup> Article 95 of the FBiH CPL, Article 95 of the RS CPL, Article 62 of the BiH CPL, Article 218 of the BD CPL.

<sup>176</sup> Article 433g of the RS CPL.

<sup>177</sup> With two minor exceptions – Article 130 of the FBiH APA envisages that decisions in accelerated procedures can be made electronically and Article 162 of the FBiH APA envisages that documentary evidence can be submitted in electronic form. The reason behind this could be the fact that the FBiH APA was not amended since 1999.

- ⇒ communication with the Single Point of Contact (SPC) in RS<sup>178</sup> – this entails the exchange of information and forms, as well as filing of requests;<sup>179</sup>
- ⇒ communication between administrative authorities and the parties (RS, BiH, BD) – unlike the RS APA, the BD and BiH APAs allow e-communication only with the party's consent.<sup>180</sup> For the exchange of submissions, APAs explicitly stipulate that the conditions set forth in the special laws governing electronic communication need to be met, without specifying further what this entails. Other matters are also regulated, such as when e-filing is possible, when electronic submissions will be considered officially filed, what the consequences are if the authority cannot read/access the file submitted electronically, etc. The BiH APA also regulates cases when the identity of the person filing the submission cannot be determined with certainty;<sup>181</sup>
- ⇒ delivery of documents (RS, BiH) – the APAs govern when such delivery is considered orderly.<sup>182</sup> The BiH APA specifies that electronic delivery can be made either through a special ICT system of the acting authority or by an authorized provider of electronic communication services. Recipients can access the delivered document using their qualified e-signature certificate;<sup>183</sup>
- ⇒ keeping of case files (RS, BiH), in which case the authority is to provide technical conditions for their review;<sup>184</sup>
- ⇒ issuing of decisions (RS) – such decisions must meet conditions set forth in relevant laws governing e-documents.<sup>185</sup>

154. **The introduction of e-communication with appellants and lawyers in proceedings before the BiH Constitutional Court in January 2020 is a good practice example.** This communication encompasses filing and receipt of documents. The Court's Rulebook on Electronic Communication provides for two types of e-communication: i) unlimited e-communication – it is reserved for lawyers and enables e-filing of all documents, if they are signed with an e-signature based on a certificate issued by the BiH Constitutional Court;<sup>186</sup> and ii) limited e-communication – it is available to both appellants and lawyers but does not allow for e-filing of all submissions (e.g., constitutional appeal or power of attorney). Documents eligible for such e-filing can be signed by hand and then scanned. The BiH Constitutional Court is actively promoting e-communication through online campaigns.<sup>187</sup>

155. **The analysis of admissible forms of e-communication under BiH procedural laws shows that the rules are fragmented and vary greatly both between the jurisdictions and between the various fields of procedural law.** Quite possibly, it is difficult for judges and parties alike to form a clear understanding of the admissible forms of e-communication in every single situation. Furthermore, despite the relatively underdeveloped e-identification infrastructure in BiH and the fact that there is only one qualified trust service provider in the country, many of the procedural rules that allow for e-communication require using a qualified e-signature. While in the future the number of providers of qualified signatures in BiH will probably grow, at present it is highly unlikely that many court users would be able to take advantage of the possibilities provided for in the procedural laws.

#### 4.9. International experiences

<sup>178</sup> The SPC is a one-stop-shop that allows for easier access to administrative services and competent authorities in RS. Instead of going directly to the competent authority (or several authorities if so is needed) parties can file a request to the SPC, which will then forward it to the competent authority (or authorities). Also, parties can obtain from SPC relevant information about procedural and other requirements needed for the competent authority to decide on such request.

<sup>179</sup> Article 37a of the RS APA. The RS APA, however, does not go into more detail on which type of electronic communication would be acceptable for communicating with the PCS.

<sup>180</sup> Article 57a of the RS APA, Article 50 of the BD APA and Articles 56 and 57 of the BiH APA.

<sup>181</sup> *Ibidem*. According to Article 60 of the BiH APA, if the acting authority is not certain that the submission is filed by the person specified in the e-mail, it can conduct an evidentiary procedure in order to determine the identity of that person with certainty.

<sup>182</sup> Article 71a of the RS APA, Articles 73 and 75a of the BiH APA.

<sup>183</sup> Article 75a of the BiH APA.

<sup>184</sup> Article 68 of the RS APA, Article 72 of the BiH APA.

<sup>185</sup> Article 194 of the RS APA.

<sup>186</sup> Appendices do not have to be signed with an advanced electronic signature.

<sup>187</sup> For more details, please visit: [http://www.ustavnisud.ba/admin//public/down/El\\_komunikacija\\_web\\_A4\\_bs.pdf](http://www.ustavnisud.ba/admin//public/down/El_komunikacija_web_A4_bs.pdf).

156. **Many judicial systems place e-communication between courts and parties at the core of their digital transformation strategy, in order to improve the efficiency and accessibility of justice.** The CEPEJ Thematic Report on the Use of Information Technology in European Courts<sup>188</sup> looks at e-communication services across COE countries, with a focus on: i) e-filing of cases, ii) online application for legal aid, iii) e-summoning, and iv) online tracking of court proceedings. Jurisdictions that offer at least some of these services to court users seem to do so primarily in civil and commercial cases.<sup>189</sup>

157. **For example, in Croatia, e-communication with courts in civil cases is now mandatory for all state bodies, the State Attorney's Office, lawyers, notaries, court experts, court appraisers, court interpreters, bankruptcy trustees, commissioners and legal entities residing in the country.** E-communication is done through an online platform called "e-komunikacija". To gain access to this system, parties must: i) register with the Ministry of Justice, ii) obtain electronic credentials of level 3 or higher, and iii) obtain a qualified electronic signature.<sup>190</sup> E-filing can only be done through the "e-komunikacija" system, while e-delivery of documents to some recipients can be done using other channels too. All electronic submissions in civil proceedings have to be signed with a qualified e-signature. E-service of process is possible subject to the party's consent, which does not have to be explicit (if the party filed electronically, its consent for e-service is presumed). E-delivery to state bodies, the State Attorney's Office, lawyers, notaries, court experts, court appraisers, court interpreters, bankruptcy trustees, commissioners and legal entities residing in Croatia can either be done through the "e-komunikacija" platform or "in another appropriate manner". The law does not specify what the appropriate manner would be and judges can determine this on a case-by-case basis.

158. **In Austria, numerous court services are offered in electronic form.** With a very developed ICT facilities, a sound legal framework and a highly developed strategic governance, Austria stands out among other Council of Europe (COE) countries when it comes to e-justice.<sup>191</sup> E-communication with courts was first introduced in 1990 and has grown significantly by 2020. Court users are offered the option of bringing a case to the court online, through a system called *Elektronischer Rechtsverkehr* (ERV) or ERV-web.<sup>192</sup> The use of ERV is mandatory for professional users such as lawyers, notaries and bar associations. Summons for hearings and pre-hearing appointments are sent to parties electronically. Expert witnesses and interpreters are able to submit expert opinions and translations electronically. Courts are allowed to send judgments, transcripts and other documents electronically.<sup>193</sup>

159. **Italy is another example of a country with highly developed e-justice services.** E-filing of all acts in civil proceedings in Italy became mandatory in 2014, except for filings with the courts of peace.<sup>194</sup> To communicate with the court, lawyers and some other categories of professional users are

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<sup>188</sup> For more details, please see: European judicial systems: Efficiency and quality of justice, CEPEJ Studies No. 24, [Thematic report: Use of information technology in European courts](#).

<sup>189</sup> *Ibid.* Also see: [Coronavirus: Electronic Signatures: When Can These Be Used? A Global Perspective](#), Clifford Chance.

<sup>190</sup> For more details, please visit: <https://usluge.pravosudje.hr/komunikacija-sa-sudom/>. Note that there is an active e-komunikacija user experience survey, which continuously assesses the quality of this system.

<sup>191</sup> For more details and comparisons, please see: European judicial systems: Efficiency and quality of justice, CEPEJ Studies No. 24, [Thematic report: Use of information technology in European courts](#).

<sup>192</sup> The use of ERV requires customized software and an Austrian bank account. Furthermore, a unique identification code is required. The code is provided by Bar Association to lawyers, by the Chamber of Notaries to public notaries and by the Ministry of Justice to the other users. To use ERV-web, the user is identified using a qualified certificate for the electronic signature.

<sup>193</sup> For more details, please see: Federal Ministry of Constitutional Affairs, '[IT Applications in the Austrian Justice System](#)', 2018.

<sup>194</sup> Courts of Peace in Italy are competent to examine small claims with a value of up to EUR 5000; claims for compensation for damages caused by the circulation of vehicles and boats, provided that the value of the dispute does not exceed EUR 20 000; as well as some other specific types of claims regardless of their value (e.g., neighbors disputes).

obliged to have a qualified e-signature and a certified email address.<sup>195</sup> All notifications made to the certified email address are presumed to be delivered, without need for further proof. Filings and references can be done via a national e-justice portal with a restricted access area for qualified users and a public access area with limited case information for the general public. The requirement for electronic submission of almost all court filings and notifications resulted in quick development of the ICT skills of legal professionals.<sup>196</sup>

## 5. Change management

160. **The implementation of e-justice solutions requires profound change not only in the justice sector but also of the surrounding environment.** Its success hinges on the quality of the country's broader e-government systems, which are the backbone for provision of e-services across the sectors. In BiH, these systems unfortunately remain significantly behind regional comparators and undermine the government effectiveness. The operation of an e-justice system in an environment where the requisite governmental digital infrastructure is lacking or is not sufficiently developed would be challenging.

161. **An assessment of the overall digital readiness of BiH government system is beyond the scope of this analysis.** However, the transition to e-justice will need to be managed as an integral part of the government's overall digital transformation. Any digital transformation involves reengineering of business processes to adapt them to the use of digital platforms and requires assessment of a number of technical and non-technical factors including the technological, institutional, leadership, capacity and change management-related aspects of digital transformation.<sup>197</sup>

162. **Furthermore, the introduction of e-justice would pose particular challenges to justice sector professionals.** Even though they currently use the CMS on the daily basis, a fully electronic mode of operating and communicating with the parties would be completely novel to them. As a guarantor of the stability and rule of law, the judicial power is oftentimes more conservative than other sectors. This conservatism and strict adherence to the rules and regulations are inherent in any justice system. They need to be given particular attention in the process of digital transformation.

## 6. Recommendations

163. **While the availability of a sophisticated CMS and ICT equipment and services across BiH courts show that the country has advanced in its efforts to introduce e-justice, a number of critical steps remain to be made.** The COVID-19 pandemic emphasized the need for these actions to take place as soon as possible and will most probably act as a catalyst for introducing e-justice in BiH. A number of steps could be taken to help making e-justice operational countrywide.

164. **Upgrading the CMS:**<sup>198</sup> The current CMS needs to be upgraded to be an interactive tool allowing for communication between the court and the parties, similarly to the SOKOP-Mal system. The CMS should allow for various procedural actions to be conducted electronically, such as:

- E-filing,
- E-service of court notices, including judgments,

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<sup>195</sup> Certified electronic mail addresses are issued by various providers. Bar associations in Italy enter into agreements with such providers and are able to offer such addresses to their members for free.

<sup>196</sup> For a detailed description of e-justice system in Italy, see [https://www.studiocataldi.it/guide\\_legal/procedura-civile/il-processo-civile-teleumatico.asp#par3](https://www.studiocataldi.it/guide_legal/procedura-civile/il-processo-civile-teleumatico.asp#par3) (in Italian).

<sup>197</sup> See World Bank. 2020. [Digital Government Readiness Assessment Toolkit: Guidelines for Task Teams](#). World Bank, Washington, DC.

<sup>198</sup> An upgrade of the CMS with a view to enabling home-based work has been recommended also in the Phase I Analysis.

- scheduling and postponing of hearings electronically, and
- communicating with expert witnesses, lawyers, notaries and other professionals electronically.

**165. Improving the regulatory framework on e-services and e-identification and building the required infrastructure:**

- The outdated regulatory framework in the area of e-identification and e-services should be replaced with acts in full conformity with the eIDAS, preferably as codified as possible.
- Reducing the fragmentation of the rules in this area both in terms of subject matter and in terms of territorial scope of the applicable laws would be highly beneficial. Ideally, there should be a single law on electronic identification and trust services applicable countrywide. However, this might not be feasible given the constitutional distribution of powers between the different government levels. Therefore, it would be advisable for law-makers in BiH jurisdictions to work collaboratively on codifying and harmonizing the legislative framework so that their laws on e-identification could be identical or very similar to one another (much like the current CPLs which have only minor differences between them thus facilitating litigation countrywide). This would lower the risk of proliferation of divergent systems for regulation, certification, operation and supervision of trust service providers in BiH.
- To ensure the smooth and secure functioning of e-identification, BiH should build a functioning supervisory infrastructure in accordance with eIDAS, including supervisory body/bodies, conformity assessment bodies and a national accreditation body/bodies.
- Ideally, there should be one supervisory body for the entire country, conducting both *ex-ante* and *ex-post* supervision of trust service providers.<sup>199</sup> If several different systems continue to operate in BiH, the individual laws should enable mutual recognition of certificates issued by trust service providers at the different BiH government levels, like this is done for certificates from EU member states.
- Regardless of whether a single supervisory body or several ones operate on the territory of BiH, efforts should be made to ensure that many trust service providers are certified so that trust services could be offered in a competitive environment, thus fostering quality and a competitive cost. While public bodies may issue advanced electronic signatures and may further be granted a status of qualified trust service providers and issue qualified certificates for electronic signatures, it is questionable whether a public body granting such status would be sufficiently rigorous in exercising *ex-ante* supervision, if it has to accredit itself as a qualified trust service provider.
- In line with eIDAS, BiH should liberalize its definition of e-documents.

**166. Improving the procedural rules that govern the admissible forms of electronic identification in communicating with the court:**

- In parallel with the upgrade of the CMS, the procedural laws of BiH should be amended to allow more types of procedural actions in electronic form.
- BiH procedural laws should, at least at this early stage of development of e-identification infrastructure, adopt a more liberal approach towards the admissible forms of e-identification in online provision of justice services. Requiring a qualified electronic signature for filing of court papers in BiH at a time when the necessary infrastructure is still not in place is rather limiting. Various forms of advanced or even simple e-signatures could be allowed, possibly based on parties' consent. A good example is the functionality allowing parties online access

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<sup>199</sup> Also emphasized in the European Commission 2020 Progress Report for BiH.

to their cases via the mobile application E-SUD or the Internet, as well as the e-communication with the BiH Constitutional Court. The same type of credentials could be used to enable e-filing. Similarly, an interactive e-justice platform could be accessed by electronic ID cards.

- The procedural rules of BiH should also enable e-service of court documents.<sup>200</sup> With a view to the current development of the e-identification infrastructure in the country, at this early stage, electronic service need not be carried out only through overly sophisticated means such as the qualified electronic registered delivery service regulated by eIDAS, but by simpler e-delivery services that are feasible now, such as email, based on the consent of the parties. As the BiH infrastructure develops, more complex solutions could be considered. E-service of court documents is a good example of how e-communication could improve the quality and cost-effectiveness in the provision of court services. The inefficient and lengthy postal service of court letters is one of the main reasons for delays of court proceedings, especially in civil and commercial cases.<sup>201</sup> Enabling electronic service of process would shorten the delivery time from days (or even months) to minutes or less, and create significant savings for courts, as there would be no need to pay postage.<sup>202</sup> These savings could be used to fund courts' operating expenses, including maintenance of ICT system.
- At the early stages of introducing e-justice, electronic procedural actions are usually voluntary and based on incentives for the users who choose to file documents and receive notices electronically. However, the international experience demonstrates that countries with developed e-identification infrastructure tend to at some point make electronic procedural actions mandatory for all professional court users, such as lawyers, notaries, and possibly companies, in order to dramatically improve the efficiency of justice. This has been done in Austria, Croatia, and Italy where professional court users such as lawyers are obliged to conduct procedural actions in electronic form. A requirement for conducting all procedural actions in electronic form could face resistance by some professional users who either have insufficient ICT literacy or prefer to retain the flexibility to delay service of process when it suits their goals. However, experience across Europe demonstrates that such evolution is inevitable and ultimately benefits both the court system and its users. In parallel with building the necessary infrastructure, BiH policy makers should gradually act to ensure increased use of e-services over time in order to achieve sizeable cost and procedural efficiencies.

#### 167. **Change management:**

- Conduct a Digital Government Readiness Assessment (DGRA)<sup>203</sup> to identify the strengths and weaknesses of the current digital government status, and future-looking action plans for digital transformation, at both countrywide and sector level.
- Once the CMS is upgraded to be an interactive tool, judges, court staff and users should receive practical training in using the tools for e-communication.
- Judges should also be trained in the area of e-identification and trust services so that there is a clear and uniform understanding what kinds of electronic identification and electronic documents can be used in judicial procedures and how they can be authenticated.

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<sup>200</sup> Enabling e-service of process has also been recommended under the Phase I Analysis and under Panzardi, Roberto O.; Osmanovic-Pasic, Zuhra; Sipka, Olga; Sofijanic, Tatjana; Berhamovic, Esmir. 2019. [Leveraging Procedural Reforms to Improve Commercial Justice in Bosnia and Herzegovina](#) (English). Washington, D.C.: World Bank Group.

<sup>201</sup> For more details, please see: *Leveraging Procedural Reforms to Improve Commercial Justice in Bosnia and Herzegovina* (English). Washington, D.C.: World Bank Group.

<sup>202</sup> In the example of Austria, justice system reported yearly savings on postage worth more than EUR 12 million. For more details, see: Federal Ministry of Constitutional Affairs, 'IT Applications in the Austrian Justice System', 2018.

<sup>203</sup> See World Bank. 2020. [Digital Government Readiness Assessment Toolkit: Guidelines for Task Teams](#). World Bank, Washington, DC.



## Conclusion

168. **The COVID-19 crisis stalled or slowed down litigation for extended time periods.** Many of the challenges that arose in 2020 persisted in 2021. The net effect of the crisis on commercial litigation has been a significant decrease in both incoming and resolved cases and, as a result, a slight increase in the first-instance backlog. In Sarajevo MC, there was no reduction in the number of incoming cases; consequently, the slow resolution led to a sizeable increase of backlog at this court and especially at its Small Claims Department. This caseload dynamics raises concerns. Firstly, the number of incoming commercial cases is expected to increase in 2021 to compensate for the slowdown and to address commercial cases arising as a result of the crisis. If the anticipated increase materializes and the court system does not reduce its reliance on physical interactions, backlog may increase exponentially. Secondly, the significant slowdown in resolutions points to missed opportunities resulting from poor digitization of business processes within BiH's judiciary. If the courts' CMS had enabled home-based work for judges and court staff, and if e-communication, online hearings and documentary examination of some case types had been authorized, the justice system would have probably shouldered the crisis much better.

169. **Nevertheless, the unprecedented challenges that the crisis posed could serve as a catalyst for positive changes.** Transition to a digital mode of operation now seems inevitable. In the near future, BiH must ensure electronic communication between the courts and the parties, make electronic service of process the norm especially in commercial litigation, reduce reliance on physical hearings, and adjust civil procedure rules to allow alternative forms of examining civil and commercial cases, namely based on documents only or through online hearings. Such reforms would require a thorough digital transformation of governance in BiH. They would entail an integral approach comprising technological measures and an upgrade of existing systems, legislative changes both to the laws regulating e-identification and e-services and the procedural laws, as well as intensive training and public awareness raising to ensure that both the court system and its users are ready to change their mode of operation.

170. **Substantive reforms such as the ones proposed in this report are never easy; the main challenge is not modernizing the technology but rather changing the regulations and mindsets of participants in these processes.** In the context of BiH, change may be particularly challenging because of the country's fragmented government structure. Transitioning to e-justice would require BiH to amend key pieces of legislation such as the Civil Procedure Laws, as well as to adopt new ones in the area of e-services and e-identification. Doing this consistently at different government levels would necessitate multiple processes of drafting, public consultations and parliamentary procedures. A concerted and synchronized countrywide approach would be critical for avoiding inconsistencies in the legislation and putting in place uniform procedures throughout the country. The latter is particularly important as both judges and litigants would need to apply novel rules and processes. Discrepancies between the government levels could make the change management difficult.

171. **Finally, there has never been a more opportune time for changing the mindsets of judges and litigants.** The COVID-19 crisis has pushed both sides to operate outside of their comfort zones. The use of electronic communication, albeit limited within the constraints of the current legislative arrangements, has risen exponentially within the last year. The need for an option of online hearings in civil and commercial cases has become apparent and was confirmed by the surveys of judges, lawyers and businesses conducted under this project. This may be a momentous point in transitioning to e-justice in BiH, and one that needs to be managed wisely and decisively.

## Annex 1 – Table of Recommendations

Recommendations and key activities:	Responsibility	Timeline <sup>204</sup> Risks and mitigation measures
<b>I. Minimizing the negative effect of the crisis on caseload</b>		
<p><b>1. Preventive measures:</b></p> <ul style="list-style-type: none"> <li>- The FBiH Chamber of Commerce or the court system could facilitate discussions between utility companies, businesses and representatives of the judiciary seeking to identify the reasons behind the increase in defaults in payment of utility bills in Sarajevo, and recommend preventive measures, including agreements and programs for debt restructuring</li> </ul>	<p><b>FBiH Chamber of Commerce, HJPC</b></p>	<p><b>Short-term</b></p> <p>The risk is associated with the short timeline for the recommended actions and the ongoing pandemic which still limits public gatherings. The Chambers of Commerce could use various interactive forms of communication (such as videoconferences, distribution of online surveys) to mitigate this risk.</p>
<p><b>2. Backlog reduction measures focused on Sarajevo MC:</b> The increasing backlog at the Sarajevo MC and especially its Small Claims Department should be examined carefully at the court or HJPC level, and backlog reduction measures could be taken such as:</p> <ul style="list-style-type: none"> <li>- Explore the possibility of transferring some of the cases pending at Sarajevo MC to other courts.</li> <li>- Explore the possibility of introducing longer working hours and work in shifts at Sarajevo MC.</li> <li>- Explore the possibility of engaging temporary staff for reducing the backlog at Sarajevo MC.</li> </ul>	<p><b>HJPC, Sarajevo MC</b></p>	<p><b>Mid-term</b></p> <p>For some of the proposed measures, it would be necessary to ensure compliance with various types of laws and regulations (e.g., relating to labor and judicial organization). Engaging temporary staff would require provision of adequate training and potentially an additional workspace. To mitigate these risks, opportunities to engage recently retired judges and enable home-based work should be explored.</p>
<b>II. Addressing the substantive legal issues posed by the COVID-19 pandemic</b>		
<p><b>1. Preventive measures:</b> Take preventive measures to limit the number of crisis related disputes going to court, such as:</p> <ul style="list-style-type: none"> <li>- Develop sample force majeure and similar clauses that limit liability for non-performance in situations of pandemic, quarantine and similar measures so that businesses that do not have high-level legal support could still ensure that their interests are better protected against unanticipated events occurring in the future;</li> <li>- Facilitate mediation, conciliation and other consensual solutions aimed at re-negotiation of business agreements that the COVID-19 crisis has rendered obsolete or excessively burdensome for parties.</li> </ul>	<p><b>Chambers of Commerce</b></p>	<p><b>Short-term</b></p> <p>The risk is associated with the short timeline for the recommended actions and the ongoing pandemic which still limits public gatherings. The Chambers of Commerce could use various interactive forms of communication (such as videoconferences, distribution of online surveys) to mitigate this risk.</p>

<sup>204</sup> For the purposes of this report, timelines are set as follows: (i) short-term: up to one year; (ii) mid-term: from one to three years; (iii) long-term: more than three years.

<p><b>2. Dispute resolution:</b> Facilitate judges in ensuring uniform interpretation of the substantive legal issues posed by the pandemic by activities such as:</p> <ul style="list-style-type: none"> <li>- Courts could request interpretative opinions from RS/FBiH Supreme Courts on legal matters that arise in COVID-19 cases.</li> <li>- Based on relevant Rulebook on Internal Court Processes, lower-instance courts could initiate sessions of the higher court departments to obtain their opinion and guidance on matters relevant for processing COVID-19 cases. These opinions or guidance should be published and made available to all courts.</li> <li>- Appellate courts could, when reviewing decisions on appeal, select good practice examples and share them with first instance courts.</li> <li>- Supreme Courts/HCC could convene and issue general legal opinions on interpretation and implementation of rules issued in response to the pandemic.</li> <li>- In line with the Rules of the Case Law Harmonization Panels, meetings of the highest instance courts could be convened under HJPC's auspices to discuss and issue guidance on issues of common interest for lower courts.</li> <li>- All decisions in COVID-19 cases could be published in a dedicated website providing judges and lawyers with access to information on the manner in which a certain legal issue was analyzed by courts.</li> <li>- Courts could be bound to prepare regular reports on COVID-19 case processing with information on COVID-19 cases by type, as well as key legal challenges that have arisen in those cases. HJPC should keep records of these reports and use them as basis for future actions (selection of pilot cases, developing training curricula, convening of case law harmonization panels etc.);</li> <li>- Launching a pilot case initiative to assist lower instance courts in processing COVID-19 cases. First-instance courts could select cases that are, in terms of their legal and factual background, similar to other cases and that are increasingly reaching first-instance courts. These cases could then be marked as pilot cases and handled as priority by higher courts (on appeal/revision). A decision of a higher court in one pilot case would facilitate the decision-making of first instance courts and</li> </ul>	<p><b>HJPC, Courts</b></p>	<p><b>Mid-term</b></p> <p>The numerous and wide-reaching actions proposed herein would require significant logistical arrangements and excellent coordination to ensure that activities are well-targeted, reach all judges who need guidance and cover the most problematic issues. If this is not ensured, the effect of the proposed measures could be less than optimal. To minimize this risk, the HJPC and the Supreme Courts should take a leading role to ensure effective information flow between courts at various levels, and enable judges to provide feedback and have access to information and training.</p>
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<p>provide guidance for the resolution of all such cases. The decisions of higher courts in pilot cases should be made available to all first-instance courts.</p>		
<p><b>3. Measures aimed at improving the processing of liquidation and bankruptcy cases:</b></p> <ul style="list-style-type: none"> <li>- Bankruptcy proceedings: Online hearings could be introduced as an option for bankruptcy cases, which require large gatherings of people and are therefore particularly risky in times of a pandemic.</li> <li>- Liquidation proceedings: New rules governing liquidations proceedings in FBiH should be adopted.</li> </ul>	<p><b>Parliaments, MoJs</b></p>	<p><b>Mid-term</b></p> <p>Both measures require legislative action, which is usually time-consuming and involves a complex and lengthy process of consensus building. To help mitigate this risk and speed up the adoption of legislative amendments, the Parliaments and MoJs need to actively interact and communicate with professional communities such as judges and lawyers to ensure that the necessary changes come from expert input rather than as a political imperative.</p>
<p><b>4. Training on specific topics:</b></p> <ul style="list-style-type: none"> <li>- Judges should be offered training in the areas where novel legal challenges are likely to arise, namely: <ul style="list-style-type: none"> <li>o Training on the rules and regulations that have been passed in response to the pandemic.</li> <li>o Training on general civil and commercial law rules that will require novel interpretation in line with the new circumstances such as force majeure, termination of employment agreements, unpaid leave, etc. Higher courts' judgments on such matters should be showcased and debated at such trainings.</li> </ul> </li> </ul>	<p><b>CESTs</b></p>	<p><b>Short-term</b></p> <p>To react in a timely manner to the crisis at hand, CESTs would need to be quick and responsive. As the timeliness of these training activities are the greatest risk, special attention should be paid to various logistical aspects, including conducting some form of quick needs assessment, organizing the training and making sure they reach those judges that need them. The short-term timeframe and the ongoing pandemic may require conducting most of the training online.</p>
<p><b>5. Introduction of specialized training for newly appointed commercial judges:</b></p> <ul style="list-style-type: none"> <li>- To improve the preparedness of commercial judges in general, CESTs should develop and provide specialized training for newly appointed commercial judges through self-learning e-modules. In the FBiH CESTs such modules should be delivered through the newly established cloud-based platform connecting FBiH CEST's LMS Moodle to WebEx, which was developed with the project's support. The e-modules should be complemented with interactive sessions to ensure complete understanding of the module and foster discussion on most complex issues in judicial practice, and cover topics such as liquidation, bankruptcy, intellectual property, banking and finance. They could be structured as follows: <ul style="list-style-type: none"> <li>o a kick-off session for participants and teachers, with instructions for opening a Moodle account and using the platform, general information on the course and</li> </ul> </li> </ul>	<p><b>CESTs</b></p>	<p><b>Mid-term</b></p> <p>CESTs may not have sufficient resources to develop and design high-quality online training. CESTs and the HJPC should seek support from government and donors to mitigate this risk.</p>

<p>teachers, and expectations from the course;</p> <ul style="list-style-type: none"> <li>○ targeted self-learning modules with self-assessment tools such as quizzes, essays or case studies;</li> <li>○ <b>a final interactive session with the teachers.</b></li> </ul>		
<p><b>III. Fast-tracking of civil and commercial cases</b></p>		
<p><b>1. Documentary track: Introduce a documentary track for the examination of civil and commercial cases with the following characteristics:</b></p> <ul style="list-style-type: none"> <li>- By default, small claims can be examined without a hearing (based only on documents) unless the judge assesses that a hearing is necessary for full clarification of the circumstances of the case. Parties should have the right to request a hearing and if the judge refuses, he/she should provide a reason thereof.</li> <li>- In civil and commercial cases with a value exceeding the threshold for a small claim, the claimant may request in the claim, that the case be resolved without a hearing. If the defendant consents to the request in the response and the judge does not deem that a hearing is necessary for full clarification of the circumstances of the case, the case may be resolved based only on the documentary submissions of the parties.</li> <li>- If a civil and commercial case with a value exceeding the threshold for a small claim has been resolved without a hearing based on the consent of the parties (i.e. excluding situations where the case was resolved without a hearing because the defendant failed to respond), the court fee for the judgment could be reduced by 20 percent (since numerous acts govern court fees across BiH, the introduction of this change would require an amendment to all of them).</li> </ul>	<p><b>Parliaments, MoJs</b></p>	<p><b>Mid-term</b></p> <p>As mentioned above, measures requiring legislative action are usually time-consuming and require a complex and lengthy process of consensus building. To help mitigate this risk and speed up the adoption of legislative amendments, the Parliaments and MoJs need to actively interact and communicate with professional communities such as judges and lawyers to ensure that the necessary changes are generated as a result of an expert discussion rather than as a political imperative.</p> <p>A further risk stems from the BiH fragmented government structure. Ensuring a uniform approach would be particularly important in the area of court fees, which vary considerably among jurisdictions. Again, this could be facilitated through seeking a countrywide professional consensus on the topics at hand.</p>
<p><b>2. Online (audiovisual track):</b> Introduce an online track for the examination of civil and commercial cases with the following characteristics to be introduced through legislative amendments:</p> <ul style="list-style-type: none"> <li>- As a rule, preliminary hearings in commercial cases where one of the parties resides in another town could be held by means of a videoconference, unless the judge deems that it is necessary to have a physical hearing or one of the parties objects to the hearing via videoconference</li> </ul>	<p><b>MoJs, Parliaments</b></p>	<p><b>Medium to long-term</b></p> <p>As mentioned above, measures requiring legislative action are usually time-consuming and require a complex and lengthy process of consensus building. To help mitigate this risk and speed up the adoption of legislative amendments, the Parliaments and MoJs need to actively interact and communicate with professional communities such as judges and lawyers to ensure that the necessary changes are</p>

<p>stating objective reasons for its inability to take part in such a hearing.</p> <ul style="list-style-type: none"> <li>- Any party may propose that a hearing in a civil and commercial case be held via a videoconference. If the other party does not object, the judge may conduct a hearing if he deems that it is appropriate for the case.</li> <li>- Online hearings should be an option in bankruptcy proceedings so as to allow these types of cases to move forward even in emergency situations.</li> <li>- The legal rules on online hearings should be sufficiently broad so as to let the judge determine whether to use the court's proprietary videoconferencing system or a commercially available one.</li> <li>- The legal rules on the location of the video hearings should be sufficiently broad to allow the parties to connect from any location that provides adequate technical facilities. However, there should be clear guidance as to the technical specifications that a location and the equipment therein should meet in order to be suitable for holding an online hearing.</li> <li>- Given that for videoconferences in criminal proceedings there are no special rules for the verification of the identity of the parties, <b>a fortiori</b>, the rules could be liberal also in civil procedure and the verification of the identity of the parties could be left to the discretion of the judge.</li> <li>- The law could specifically authorize the holding of online sessions in bankruptcy proceedings in epidemic situations or when the physical gathering of many people poses a heightened risk of contagious diseases.</li> </ul>		<p>generated as result of an expert discussion rather than as a political imperative.</p>
<p><b>IV. E-justice</b></p>		
<p><b>1. Upgrade the current CMS system</b> to allow various procedural actions to be conducted electronically, such as:</p> <ul style="list-style-type: none"> <li>- E-filing</li> <li>- e-service of court notices, including judgments</li> <li>- scheduling and postponing of hearings electronically</li> <li>- communicating with expert witnesses, lawyers, notaries and other professionals electronically.</li> </ul>	<p><b>HJPC</b></p>	<p><b>Mid-term</b></p> <p>Technically, the required upgrade of the CMS should not be particularly challenging since it is already a quite sophisticated system and BiH already has the experience from an interactive system such as the Sokop-MAL. However, technical upgrades alone, without the supporting regulatory amendments would be of little use. Therefore, HJPC should work to ensure that that the technical upgrades go hand-in-hand with the required regulatory amendments which are discussed below.</p>
<p><b>2. Improve the regulatory framework on e-services and e-identification and build the required infrastructure:</b></p>	<p><b>Parliaments, Mojs</b></p>	<p><b>Medium to long-term</b></p> <p>The BiH fragmented government structure poses a substantial risk. As e-identification</p>

<ul style="list-style-type: none"> <li>- Ensure that the outdated regulatory framework in the area of e-identification and e-services is replaced with acts in full conformity with eIDAS, preferably as codified as possible.</li> <li>- Reduce the fragmentation of the rules in this area both in terms of subject matter and in terms of territorial scope of applicable laws. Ideally, there should be a single law on electronic identification and trust services applicable countrywide. If this is not feasible, harmonize the legislative framework so that the different laws on e-identification could be identical or very similar to one another.</li> <li>- Build a functioning supervisory infrastructure, including supervisory body/bodies, conformity assessment bodies and a national accreditation body/bodies.</li> <li>- Ideally, set up one supervisory body for the entire country, conducting both ex-ante and ex-post supervision of trust service providers. If several different systems continue to operate in BiH, the individual laws should envisage mutual recognition of certificates issued by all trust service providers at the different levels.</li> <li>- Ensure that numerous trust service providers are certified so that trust services could be offered in a competitive environment.</li> <li>- Liberalize the definition of e-documents.</li> </ul>		<p>and e-services are regulated separately at each government level, extensive coordination and consultations will be needed to harmonize the legislative framework and ensure mutual recognition of e-identification instruments. BiH's overarching policy goal to align the legislative framework in this area with the European Union instruments could help mitigate this risk and ensure harmonization.</p>
<p><b>3. Reform the procedural rules that govern the admissible forms of electronic identification in communicating with the court:</b></p> <ul style="list-style-type: none"> <li>- In parallel with the upgrade of the CMS, amend the procedural laws of BiH to allow for more types of procedural actions in electronic form.</li> <li>- Adopt a more liberal approach towards the allowed forms of e-identification in the provision of justice services. Various forms of advanced or even simple e-signatures could be admissible, possibly based on parties' consent. Allow the use of electronic ID cards for accessing court services.</li> <li>- Enable electronic service of court documents by means that are feasible in BiH now, e.g., by email, based on the consent of the parties. Once BiH infrastructure develops, more complex solutions could be considered.</li> <li>- Use a staged approach in introducing e-justice. At first, electronic procedural actions could be voluntary and based on incentives</li> </ul>	<p><b>Parliaments, Mojs</b></p>	<p><b>Medium to long-term</b></p> <p>As for any recommendation involving legislative amendments, the fragmented governance structure poses a risk. Nevertheless, the existing Civil Procedure Laws are generally harmonized and hopefully this will be preserved also in respect of their rules on e-communication in the framework of court procedures.</p>

<p>for users who choose to file documents and receive notices in this manner. At the second stage, electronic procedural actions can become mandatory for professional court users, such as lawyers, notaries, possibly companies. Once the necessary infrastructure is in place, BiH policy makers should gradually undertake actions to ensure that the usage of e-services grows over time in order to achieve sizeable cost and procedural efficiencies.</p>		
<p><b>4. Change management:</b></p> <ul style="list-style-type: none"> <li>- A Digital Government Readiness Assessment (DGRA) for BiH at both country and sectoral level is recommended to assess the country's readiness for digital transformation, define gaps and needs and ensure that e-justice has its well defined place in the overall e-government strategy of BiH.</li> <li>- Once the CMS is upgraded to be an interactive tool, judges, court staff and court users should receive practical training in the use of this and other tools for communication between the court and its users.</li> <li>- Judges should be trained in e-identification and trust services so that there is a clear and uniform understanding what kinds of electronic identification and electronic documents can be used in judicial procedures and how they can be authenticated.</li> </ul>	<p><b>All government levels</b></p> <p><b>CESTs</b></p>	<p><b>Short to mid-term</b></p> <p>With regard to the DGRA, governments may lack interest and resources to conduct such an assessment. The MoJs and the HJPC could take proactive role to initiate the DGRA assessment in the justice sector by liaising with governments and development partners.</p> <p>With regard to training, the judiciary may lack resources to implement the recommended training. The HJPC and CESTs should seek to ensure sustainable financing for these activities from governments. Donors could also provide support.</p>

## Annex 2 – Judges Survey

The survey was open in the period 24 November 2020 – 1 February 2021 and was filled out by 70 judges.

### QUESTIONNAIRE

#### Using innovative techniques to address justice system challenges

#### I. General Questions

**1. For how long have you worked as a judge?**

- Up to 2 years
- Between 2 and 5 years
- Between 5 and 10 years
- More than 10 years

**2. Where is your court located?**

- Federation BiH
- RS
- BD

**3. If your court is located in FBiH, where is it?**

- Sarajevo
- Another town

**4. If your court is located in RS, where is it?**

- Banja Luka
- Another town

**5. What kind of court are you currently working at?**

- First-instance court
- Second-instance court

**6. What kind of cases are you examining (check all applicable)?**

- Commercial
- Civil
- Labor
- Small Claims
- Bankruptcy
- Other

#### II. Documentary Track

**7. In your opinion, would it be appropriate to reform BiH's Civil Procedure Law to introduce a possibility of a documentary examination of some types of first-instance cases (i.e. without a court hearing)?**

- Yes
- No
- Other

**8. If a possibility for documentary examination of some types of first-instance cases is introduced, what features of the case would make it appropriate for written-only examination (check all applicable criteria)?**

- Small civil claims
- Small commercial claims
- Civil cases for which both parties have agreed to a documentary examination
- Commercial cases for which both parties have agreed to a documentary examination
- Civil cases where both parties are represented by a lawyer
- Commercial cases where both parties are represented by a lawyer
- Civil cases where no examination of witnesses is necessary
- Commercial cases where no examination of witnesses is necessary
- Civil cases where no expert assessment is necessary
- Commercial cases where no expert assessment is necessary
- Other

**9. In your opinion, if a documentary examination is introduced for some types of cases, based on certain criteria, what should be the approach?**

- If the case meets certain types of criteria, it should be examined only in writing, unless the judge decides otherwise
- If the case meets certain types of criteria, it should be examined only in writing, unless one party objects
- If the case meets certain types of criteria, the judge shall be empowered to make the decision to examine the case only in writing
- If the case meets certain types of criteria, the parties shall be empowered to request that it be examined only in writing
- Other

**10. In your opinion, if a documentary examination is introduced for some types of cases, based on certain criteria, should the court fee for the judgment in these cases be reduced?**

- Yes, by up to 20%
- Yes, by more than 20%
- No

### **III. Online Track**

**11. In your opinion, would it be appropriate to reform BiH's Civil Procedure Law to introduce a possibility of online hearings (i.e. hearings through videoconference)?**

- Yes
- No
- Other

**12. If a possibility for online hearings is introduced, what features of the case would make it appropriate for online hearings (check all applicable criteria)?**

- Small civil claims
- Small commercial claims
- Civil cases for which both parties have agreed to an online hearing
- Commercial cases for which both parties have agreed to an online hearing
- Civil cases where both parties are represented by a lawyer
- Commercial cases where both parties are represented by a lawyer

- Civil cases where no examination of witnesses is necessary
- Commercial cases where no examination of witnesses is necessary
- Civil cases where no expert assessment is necessary
- Commercial cases where no expert assessment is necessary
- Other

**13. In your opinion, if online hearings are allowed for some types of cases, based on certain criteria, what should be the approach (check all that apply)?**

- If the case meets certain types of criteria, it should be examined through an online hearing, unless the judge decides otherwise
- If the case meets certain types of criteria, it should be examined through an online hearing, unless one party object
- If the case meets certain types of criteria, the judge shall be empowered to make the decision to examine the case through an online hearing
- If the case meets certain types of criteria, the parties shall be empowered to request that it be examined through an online hearing
- Other

**14. In your opinion, if online hearings are allowed for some types of cases, based on certain criteria, should the court fee for these cases be reduced?**

- Yes, by up to 20%
- Yes, by more than 20%
- No

**15. In your opinion, if online hearings are allowed for some types of cases, based on certain criteria, what would be the most appropriate technical means for conducting the hearing?**

- The judiciary should use its own ICT system for conducting online hearings
- The judiciary should buy licenses for commercially available platforms for conducting online hearings (e.g., Zoom, Skype for Business, Webex, Microsoft Teams)
- The judiciary should be able to use both its own ICT system and commercially available platforms, based on the judge's preference
- Other

**16. If you had to choose between just one of the above tracks (documentary track and online hearings), which one, in your opinion holds the bigger potential for improving the work of BiH's justice system?**

- Documentary track
- Online track

**17. If online hearings are allowed, what should in your opinion be their applicability?**

- They should be allowed for first-instance cases
- They should be allowed for second-instance cases
- They should be allowed in both first and second instance cases
- I do not consider that there should be an opportunity for online hearings

**18. What do you see as the greatest impediment for implementation of the online track?**

- Budgetary constraints
- Insufficient ICT literacy of litigants
- Disagreement of lawyers
- Lack of readiness of judges to apply new solutions

- The need to change procedural laws
- Information security issues
- Risk of misuse by the parties
- Other

**19. Please, share any additional comments that you might have regarding the possibility for introducing a documentary and an online track?**

#### **IV. Training**

**20. Which functionalities do you use in Webex when attending online training sessions?**

- I attend with camera switched off and muted microphone
- I attend with my camera on
- I participate in the oral discussion
- I use chat boxes
- I have never used Webex

**21. Would you use any additional Webex functionalities to improve your training experience?**

- I would use more functionalities if this would help simulate face to face training session
- I would use more functionalities if this would enable better quality of training sessions
- I would use more functionalities if this would enable me to spend less time in training
- I would not use any additional functionalities

**22. Are there any areas of law in which you think that associates should have additional continuous training?**

- procedural law
- banking and finance
- intellectual property
- competition law
- economy
- bankruptcy and liquidation
- other: \_\_\_\_\_ -

**23. Are there any areas of law in which you think that judges need additional continuous training? If yes, which are they?**

## Annex 3 – Lawyers Survey

The survey was open in the period 26 November 2020 – 1 February 2021 and was filled out by 90 lawyers.

### QUESTIONNAIRE

#### Using innovative techniques to address justice system challenges

#### V. General Questions

**24. For how long have you worked as a lawyer?**

- Up to 2 years
- Between 2 and 5 years
- Between 5 and 10 years
- More than 10 years

**25. Where do you work predominantly?**

- Federation BiH
- RS
- BD

**26. If you work predominantly in FBiH, in which town do you predominantly represent clients before the court?**

- Sarajevo
- Another town

**27. If you work predominantly in RS, in which town do you predominantly represent clients before the court?**

- Banja Luka
- Another town

**28. What kind of cases are you examining (check all applicable)?**

- Commercial
- Civil
- Labor
- Small Claims
- Bankruptcy
- Other

#### VI. Documentary Track

**29. In your opinion, would it be appropriate to reform BiH's Civil Procedure Law to introduce a possibility of a documentary examination of some types of first-instance cases (i.e. without a court hearing)?**

- Yes
- No
- Other

**30. If a possibility for documentary examination of some types of first-instance cases is introduced, what features of the case would make it appropriate for written-only examination (check all applicable criteria)?**

- Small civil claims
- Small commercial claims
- Civil cases for which both parties have agreed to a documentary examination
- Commercial cases for which both parties have agreed to a documentary examination
- Civil cases where both parties are represented by a lawyer
- Commercial cases where both parties are represented by a lawyer
- Civil cases where no examination of witnesses is necessary
- Commercial cases where no examination of witnesses is necessary
- Civil cases where no expert assessment is necessary
- Commercial cases where no expert assessment is necessary
- Other

**31. In your opinion, if a documentary examination is introduced for some types of cases, based on certain criteria, what should be the approach?**

- If the case meets certain types of criteria, it should be examined only in writing, unless the judge decides otherwise
- If the case meets certain types of criteria, it should be examined only in writing, unless one party objects
- If the case meets certain types of criteria, the judge shall be empowered to make the decision to examine the case only in writing
- If the case meets certain types of criteria, the parties shall be empowered to request that it be examined only in writing
- Other:

**32. In your opinion, if a documentary examination is introduced for some types of cases, based on certain criteria, should the court fee for the judgment in these cases be reduced?**

- Yes, by up to 20%
- Yes, by more than 20%
- No

## **VII. Online Track**

**33. In your opinion, would it be appropriate to reform BiH's Civil Procedure Law to introduce a possibility of online hearings (i.e. hearings through videoconference)?**

- Yes
- No
- Other:

**34. If a possibility for online hearings is introduced, what features of the case would make it appropriate for online hearings (check all applicable criteria)?**

- Small civil claims
- Small commercial claims
- Civil cases for which both parties have agreed to an online hearing
- Commercial cases for which both parties have agreed to an online hearing
- Civil cases where both parties are represented by a lawyer
- Commercial cases where both parties are represented by a lawyer
- Civil cases where no examination of witnesses is necessary

- Commercial cases where no examination of witnesses is necessary
- Civil cases where no expert assessment is necessary
- Commercial cases where no expert assessment is necessary
- Other

**35. In your opinion, if online hearings are allowed for some types of cases, based on certain criteria, what should be the approach (check all that apply)?**

- If the case meets certain types of criteria, it should be examined through an online hearing, unless the judge decides otherwise
- If the case meets certain types of criteria, it should be examined through an online hearing, unless one party object
- If the case meets certain types of criteria, the judge shall be empowered to make the decision to examine the case through an online hearing
- If the case meets certain types of criteria, the parties shall be empowered to request that it be examined through an online hearing
- Other

**36. In your opinion, if online hearings are allowed for some types of cases, based on certain criteria, should the court fee for these cases be reduced?**

- Yes, by up to 20%
- Yes, by more than 20%
- No

**37. In your opinion, if online hearings are allowed for some types of cases, based on certain criteria, what would be the most appropriate technical means for conducting the hearing?**

- The judiciary should use its own ICT system for conducting online hearings
- The judiciary should buy licenses for commercially available platforms for conducting online hearings (e.g., Zoom, Skype for Business, Webex, Microsoft Teams)
- The judiciary should be able to use both its own ICT system and commercially available platforms, based on the judge's preference
- Other

**38. If you had to choose between just one of the above tracks (documentary track and online hearings), which one, in your opinion holds the bigger potential for improving the work of BiH's justice system?**

- Documentary track
- Online track

**39. If online hearings are allowed, what should in your opinion be their applicability?**

- They should be allowed for first-instance cases
- They should be allowed for second-instance cases
- They should be allowed in both first and second instance cases
- I do not consider that there should be an opportunity for online hearings

**40. What do you see as the greatest impediment for implementation of the online track?**

- Budgetary constraints
- Insufficient ICT literacy of litigants
- Disagreement of lawyers
- Lack of readiness of judges to apply new solutions

- The need to change procedural laws
- Information security issues
- Risk of misuse by the parties
- Other

**41. Please, share any additional comments that you might have regarding the possibility for introducing a documentary and an online track?**

## Annex 4 – Rapid Businesses Survey

The survey was open in the period 8 October 2020 – 18 February 2021 and was filled out by 536 business representatives.

### COVID-19 IMPACT ON COMMERCIAL JUSTICE AND BUSINESSES IN BiH

#### Section I – General

1. How large is your enterprise?
  - a. Entrepreneur
  - b. Micro enterprise (up to 10 employees)
  - c. Small enterprise (11-50 employees)
  - d. Medium enterprise (51-250 employees)
  - e. Large enterprise (more than 250 employees)
  
2. What is the percentage of women employed in your company?
  - a. Less than 10%
  - b. 10%-30%
  - c. 31%-50%
  - d. 51%-75%
  - e. More than 75%
  
3. Is your company owned or managed by a woman?
  - a. Yes, at least 51 percent of my company is owned by a woman
  - b. Yes, my company is managed by one or more women
  - c. No, my company is neither owned nor managed by a woman
  
4. What is the core business of your company?
  - a. Agriculture
  - b. Civil engineering
  - c. Information and communication
  - d. Industry/production
  - e. Professional, scientific, innovative and technical activities
  - f. Tourism and catering
  - g. Transport and storage
  - h. Education
  - i. Real estate
  - j. Financial and insurance activities
  - k. Arts
  - l. Entertainment and recreation
  - m. Water supply and wastewater management
  - n. Mining
  - o. Other
  
5. What region in BiH do you predominantly operate in? [*choose up to 3 answers*]
  - a. Una-Sana Canton
  - b. Posavina Canton
  - c. Tuzla Canton
  - d. Zenica-Doboj Canton
  - e. Bosnia-Podrinje Canton

- f. Central Bosnia Canton
- g. Herzegovina-Neretva Canton
- h. West Herzegovina Canton
- i. Sarajevo Canton
- j. Canton 10
- k. Banja Luka Region
- l. Bijeljina Region
- m. Doboj Region
- n. Trebinje Region
- o. Istocno Sarajevo Region
- p. Prijedor Region
- q. Brcko District

## Section II – Effects of the COVID-19 pandemic to workforce and business operations

6. Has any of the following affected your company and to what extent, following the declaration of the state of emergency? [*please mark all that apply and rate them from 1-5 or mark "Did not affect my company"*]
- a. Postponement/cancellation of supply/purchase orders (Scale 1-5)
  - b. Necessity to implement workforce reduction strategies (layoffs, part-time work) (Scale 1-5)
  - c. Liquidity problems (Scale 1-5)
  - d. Delay in public administration (issuing of permits, licensing, administrative decisions) (Scale 1-5)
  - e. Delay in conduct of court proceedings (delays in case processing, cancellation of hearings, other adjournments) (Scale 1-5)
  - f. Travel restrictions for natural persons (Scale 1-5)
  - g. Operating restrictions (operation bans or reduction of working hours) (Scale 1-5)
  - h. Other (please specify)
7. What measures regarding your employees have you taken to date or you are planning to take by the end of 2020? [*check all that apply*]
- a. Reducing working hours
  - b. Introducing home-based work for part of employees
  - c. Introducing home-based work for all employees
  - d. Laying off less than 10% of employees
  - e. Laying off employees and preparing a redundancy program on that basis
  - f. Reducing salaries for part of employees
  - g. Reducing salaries for all employees
  - h. Other measures affecting employment contracts (please explain)
  - i. We did not take any measures and do not plan to take any measures in the short term
8. What measures regarding your business (excluding measures related to employees listed above) have you taken to date or are you planning to take in the short term (up until the end of 2020)? [*check all that apply*]
- a. Negotiating with creditors on delaying debt repayment
  - b. Renegotiating or terminating existing rent agreements
  - c. Temporary shutdown of business processes

- d. Digitalization of business processes (remote contracts, e-documents, e-tools for communication and collaboration)
  - e. Ceasing business and initiating liquidation proceedings
  - f. Ceasing business and initiating bankruptcy proceedings
  - g. Other measures (please specify)
  - h. We did not take any measures and do not plan to take any measures in the short term
9. If the crisis persists, how do you plan to adjust your business operations to the new situation in the long run [*check all that apply*]:
- a. Decrease the number of employees
  - b. Switch to home-based work as a regular business model
  - c. Renegotiate or terminate commercial contracts (supply and purchase agreements, rental agreements, transportation and logistics services agreements, storage agreements etc.)
  - d. Digitalization of business processes (remote contracts, e-documents, e-tools for communication and collaboration)
  - e. We will not be able to adjust and will have to liquidate the company
  - f. We will not be able to adjust and will have to initiate bankruptcy proceedings
  - g. Other (please specify)
  - h. No adjustment of business operations is required
10. Which ones of the following legal issues arose or are likely to arise in your business operations due to/in relation to the COVID-19 outbreak? [*check all that apply and rate them from 1-5 or mark "No relevance"*]
- a. Inability to meet contractual obligations due to force majeure (Scale 1-5)
  - b. Insurance coverage issues (Scale 1-5)
  - c. Right to terminate contracts due to the fundamental change of circumstances (Scale 1-5)
  - d. Worker protection issues in the HBW business model (Scale 1-5)
  - e. Employment contract issues (right to lay off workers) (Scale 1-5)
  - f. Abuse of sick leave related to COVID-19 (Scale 1-5)
  - g. Management liability for implementation of COVID-19 protection measures (Scale 1-5)
  - h. Inability to recover sums paid in advance for long-term/subscription-based contracts, the performance under which was made impossible or temporarily impossible by the crisis (Scale 1-5)
  - i. Other (please specify)
11. Are you satisfied with the measures undertaken by competent RS/FBiH authorities in response to COVID-19 pandemic [*measures are defined in the: 1) Regulation with the power of law on tax measures to mitigate economic consequences caused by the COVID-19 disease, 2) Regulation on subsidies for businesses and entrepreneurs to mitigate the negative consequences of the COVID-19 pandemic for April 2020, 3) Law on mitigation of negative economic consequences, 4) Decisions on temporary measures aimed at banks and microfinance organizations to mitigate negative consequences caused by the COVID-19 virus*]
- a. We are not acquainted with these acts
  - b. Yes, we are satisfied
  - c. No, we are not satisfied (please explain why)

### Section III – Dispute resolution during COVID-19 crisis

12. Do you have more difficulties in meeting contractual and other obligations than before the COVID-19 pandemic?
  - a. Yes
  - b. No
13. Do you have greater difficulties in solving disputes than before the COVID-19 pandemic?
  - a. Yes
  - b. No
14. Did you have more disputes to solve as a consequence of the COVID-19 pandemic?
  - c. Yes
  - d. No
15. Have any new cases involving your company been initiated or are anticipated due to/in relation to COVID-19 outbreak?
  - a. Yes
  - b. No
16. If YES, please state the type of such cases:
  - a. Consumer protection cases
  - b. Debt collection cases
  - c. Small claim cases
  - d. Contractual disputes (supply and purchase, transportation, logistics, storage etc.)
  - e. Labor cases
  - f. Real estate cases, including rent
  - g. Insurance coverage cases
  - h. Liquidation cases
  - i. Bankruptcy cases
  - j. Other (please specify)
17. How do you perceive the courts' overall organization and ability to process commercial cases during COVID-19 pandemic?
  - a. We have court cases and given circumstances we are satisfied with the courts' ability to process commercial cases
  - b. We have court cases and given circumstances we believe that courts could have organized better to process commercial cases
  - c. We have court cases and given circumstances we are completely dissatisfied with the courts' ability to process commercial cases
  - d. We do not have court cases but have heard from others that the courts responded adequately to the crisis
  - e. We do not have court cases but have heard from others that the courts responded poorly to the crisis
18. In your opinion, were there striking differences between different BiH courts in terms of their organization and ability to process commercial cases during pandemic?
  - a. We have court cases and have experienced striking differences in response during pandemic
  - b. We have court cases and have not experienced any differences in response during pandemic
  - c. We do not have court cases but have heard from others that different courts responded to the crisis differently

- d. We do not have court cases but have heard from others that there was no difference in response between different courts during pandemic
  - e. We do not have any information on the differences in work of courts during pandemic
19. How do you perceive the level of access to the courts during COVID-19 pandemic (communication with the public and ability to file documents)?
- a. We have court cases and given circumstances we are satisfied with the accessibility of courts during pandemic
  - b. We have court cases and given circumstances we are not satisfied with the accessibility of courts during pandemic as we were not able to file documents or this was overly difficult
  - c. We have court cases and given circumstances we are not satisfied with the accessibility of courts during pandemic as we were not able to reach the court to get an important information (via phone, email or in person) or this was overly difficult
  - d. We do not have court cases but have heard that the courts were accessible during pandemic
  - e. We do not have court cases but have heard that businesses struggled to reach the courts during pandemic
  - f. We do not have any information on the accessibility of courts during pandemic
20. How do you perceive the ability of courts to conduct commercial case hearings during COVID-19 pandemic?
- a. We have court cases and given circumstances we are satisfied with the ability of courts to conduct hearings
  - b. We have court cases and given circumstances we believe that courts could have organized online hearings
  - c. We have court cases and given circumstances we believe that courts could have organized facilities better to conduct more hearings
  - d. We have court cases and given circumstances we are not satisfied because time sensitive hearings were rescheduled
  - e. We do not have court cases but have heard that the courts were well organized and have held important hearings
  - f. We do not have court cases but have heard that the courts did not organize well to hold hearings
  - g. We do not have any information on the organization of commercial case hearings during pandemic
21. How do you perceive the ability of courts to pronounce judgments on already finalized trials during COVID-19 pandemic?
- a. We have court cases and given circumstances we are satisfied with the ability of courts to pronounce judgments on already finalized trials during COVID-19 pandemic
  - b. We have court cases and given circumstances believe that courts could have pronounced more judgments on already finalized trials during COVID-19 pandemic
  - c. We do not have court cases but have heard that the courts were well organized and have been sufficiently active in pronouncing judgments on already finalized trials during COVID-19 pandemic
  - d. We do not have court cases but have heard that the courts did not organize well to pronounce judgments on already finalized trials during COVID-19 pandemic
  - e. We do not have any information on the organization of courts to pronounce judgments on already finalized trials during COVID-19 pandemic

#### Section IV – Use of ICT tools

22. Do you use electronic communication (emails, document processing programs such as Word, Excel etc.)?
- In our company everybody is fully comfortable and extensively uses emails / process documents electronically
  - Relevant staff uses emails and processes documents electronically but not all employees
  - Few employees are equipped to use emails and process documents electronically, however the staff is not fully comfortable with using these e-tools
  - We do not use emails nor other e-tools and are not comfortable with using these tools
23. Do you use online collaboration tools (Cisco Webex, MS Teams, Skype, Google Meet, etc.)?
- In our company everybody is fully comfortable and regularly uses online collaboration tools
  - Relevant staff uses online collaboration tools but not all employees
  - Few employees are equipped to use these tools, however the staff is not fully comfortable with using these e-tools
  - We have never used these e-tools and are not comfortable with using them
24. Have you communicated with BiH courts electronically?
- Yes, we communicated with BiH courts via email
  - Yes, we communicated with BiH courts via other platforms
  - No, we did not communicate with BiH courts electronically because we do not have capacities for this kind of communication
  - No, we did not communicate with BiH courts electronically because there is no legal framework that would enable this kind of communication (e-signature, e-document)
  - No, we did not communicate with BiH courts electronically because we do not consider this kind of communication secure enough
25. In your opinion, which e-services should be introduced to improve efficiency of courts and ease access to justice for businesses, especially in the light of COVID-19 pandemic?
- One-stop-shop for online business registration
  - Online hearings
  - E-filing of lawsuits and other initial acts, appeals
  - E-filing of evidence (documents, expert witness reports, written examination of witnesses)
  - E-filing of procedural motions, powers of attorney, statements, notices, other general information
  - Electronic submission of court decisions
  - Other
26. If you have case(s) before the court, have you been using the existing electronic service for access to cases via [www.pravosudje.ba](http://www.pravosudje.ba) or E-SUD mobile application:
- Yes
  - No
  - We did not know that such electronic service exists
  - We do not have court cases