

Judicial and Prosecutorial Appointments – Monitoring Findings 2016 – 2020

This document presents key statistical data and trends based on the Organization for Security and Co-operation in Europe Mission to Bosnia and Herzegovina's (the Mission) monitoring of judicial and prosecutorial appointments across Bosnia and Herzegovina (BiH) by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC BiH) between 2016 and 2020.¹



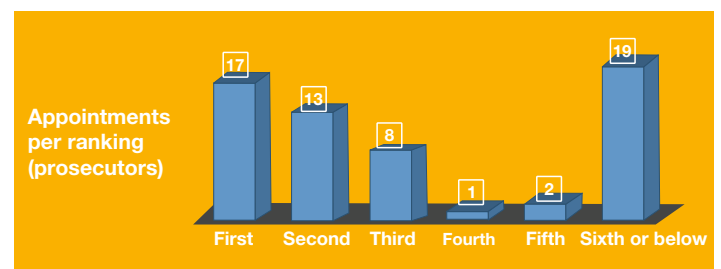
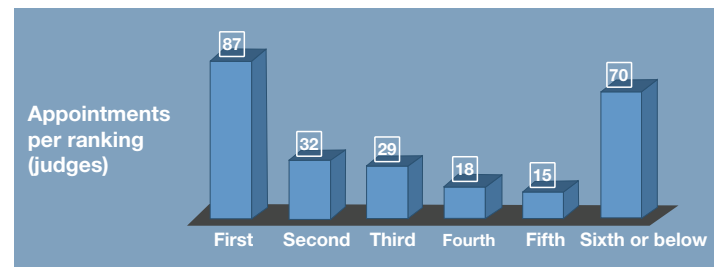
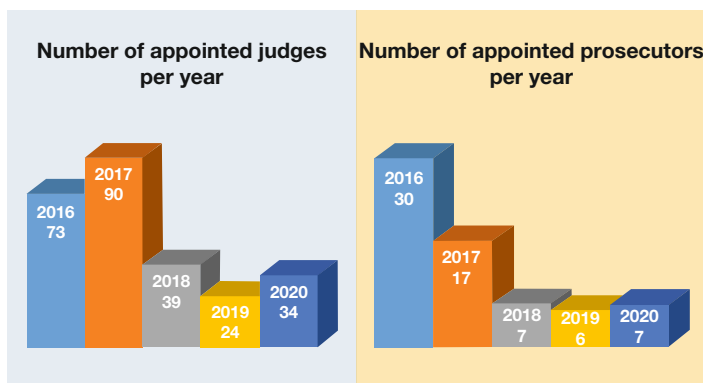
Established by the 2004 Law on the HJPC BiH as an independent, State-level regulatory institution, the HJPC BiH should ensure the independence, impartiality, and professionalism of the BiH judiciary. The appointment of judges and prosecutors is one of the HJPC BiH's key competences.² The HJPC BiH appointment procedures, which begin with a public announcement of a vacant position by the HJPC BiH, cover all judicial and prosecutorial positions, from entry-level seats to those at the highest ranks of the judiciary, throughout all jurisdictions across the country.

The Mission has been monitoring the work of HJPC BiH since 2015, including through attendance at plenary sessions and review of the HJPC BiH's working materials. Mission data on appointments, gathered through such monitoring, highlight **inconsistent and inefficient practices in the appointment of judges and prosecutors in BiH, which may lead to the appointment of lesser-qualified candidates.**

of Europe, judicial appointments should rest on a candidate's merit and professionalism.⁵ Other considerations, such as ethnicity, should only apply as complementary criteria to distinguish between candidates who otherwise achieve similar ranks based on objective criteria, such as the score achieved during a competitive examination.⁶

Based on the Mission's analysis and observations, the current practice by the HJPC BiH appears to give excessive weight to ethnic criteria at the expense of neutral metrics.⁷ As a result, candidates with lower merit-based and professional rankings often receive judicial and prosecutorial posts, rather than those with objectively higher qualifications. A lack of clear guidance on the application of the relevant criteria, along with inconsistent practice, leave space for suspicion that the HJPC BiH makes appointments arbitrarily.

Understanding the scope³



Balance of merit and representativeness

Per the Law on the HJPC BiH, the HJPC BiH shall "implement relevant Constitutional provisions regulating the equal rights and representation of constituent peoples and others;"⁴ however, the HJPC BiH struggles to uphold this legal obligation when balancing the principles of merit and ethnic representation during the appointment process. According to the Council

During the monitoring period of 2016-2020, a significant number of judicial and prosecutorial candidates ranked sixth or below received appointments. Based on Mission data, over one-fourth (~28%) of appointed judges and nearly one-third (~32%) of appointed prosecutors ranked sixth or below in HJPC BiH's appointment assessment procedures.

¹ As per data available to the Mission, based on records of HJPC BiH sessions, at the time of compilation of this document. Data on appointments of additional judges and of legal associates are intentionally excluded.

² Article 17 of the Law on HJPC BiH, Official Gazette of BiH nos. 25/04, 93/05, 48/07, and 15/08.

³ All charts and figures contained in this document cover the period between 2016 and 2020.

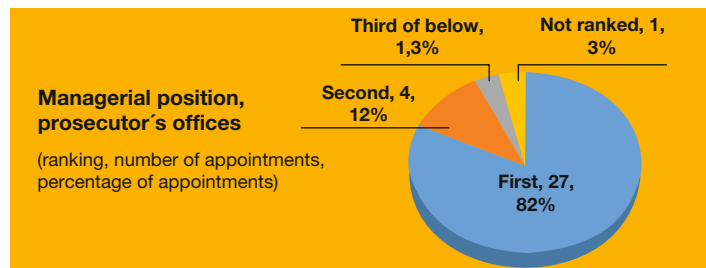
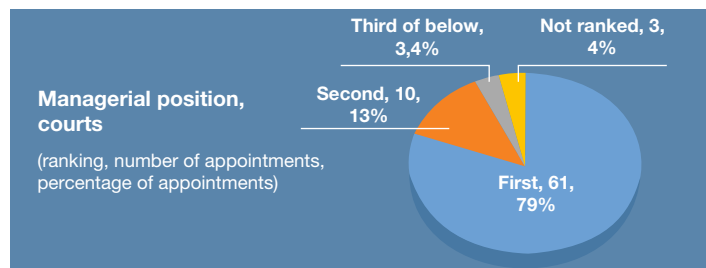
⁴ Article 43 (2) of the Law on HJPC BiH.

⁵ See Recommendation CM/Rec(2010)12 adopted by the Council of Europe on 1 November 2010, paragraph 44: "Decisions concerning the selection and career of judges should be based on objective criteria[...] such decisions should be based on merit, having regard to the qualifications, skills and capacity to adjudicate cases[...]"

⁶ Articles 54 – 59b of the HJPC Rules of Procedure, Official Gazette of BiH nos. 55/13, 96/13, 46/14, 61/14, 78/14, 27/15, 46/15, 93/16, 48/17, 88/17, 41/18, and 64/18.

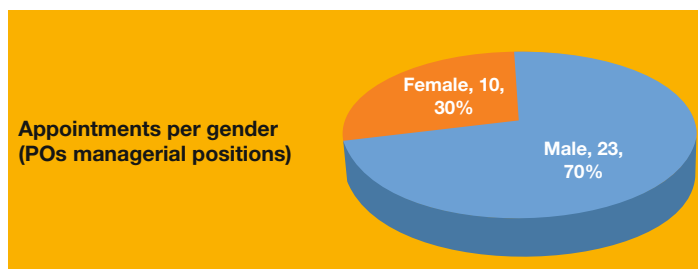
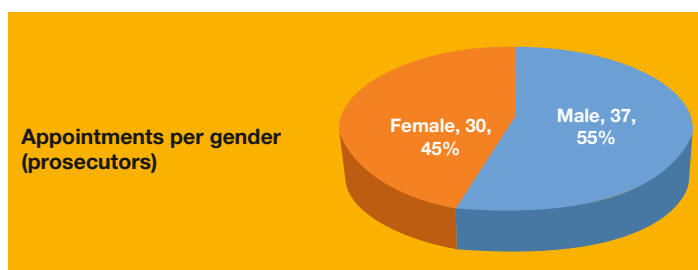
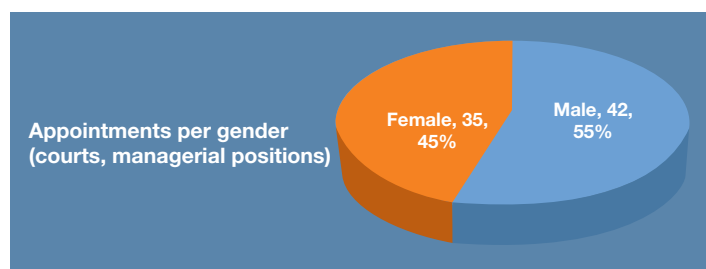
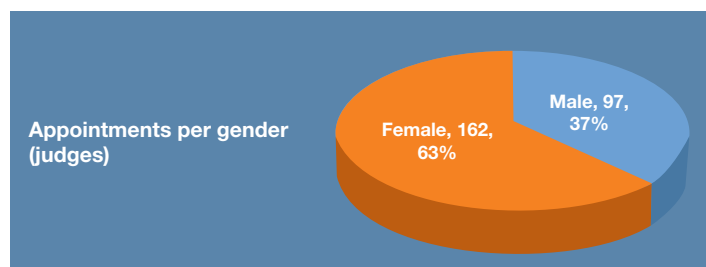
⁷ For additional details on the balancing of merit-based versus ethnic criteria, please see the 3rd ARC Report, p. 29, available at <https://www.osce.org/files/f/documents/4/e/471003.pdf>, and the Expert Report on Rule of Law issues in Bosnia and Herzegovina (so-called "Pribe Report"), Brussels, 5 December 2019, para. 71, available at <https://europa.ba/?p=66927>

In terms of managerial positions for courts (presidents and vice presidents) and prosecutor's offices (chief prosecutors and deputy chief prosecutors), appointments tend to follow merit-based rankings more closely. This may be due to adherence to the rankings themselves, or other factors, such as a lack of candidates applying for a given managerial post.



Gender considerations

By law and policy, the HJPC BiH should consider the gender composition of courts and prosecutor's offices in a similar manner to how it considers their ethnic balance.⁸ However, gender imbalances exist throughout the judiciary and are especially pronounced at managerial levels. As the figures below indicate, female representation declines considerably in the managerial ranks.



Efficiency

Inefficiencies in the HJPC BiH's current vacancy-based appointment procedures⁹ often lead to significant delays in filling vacant positions. As calculated by the Mission, between 2016 and 2020, following a vacancy announcement by the HJPC BiH, it took, on average, 322 days to fill a judicial seat and 312 days to fill a prosecutorial post. The shortest appointment procedure was completed in 30 days, whereas the longest lasted 838 days.

Recommendations

The Mission supports ongoing efforts to increase the efficiency and objectivity of HJPC BiH appointment procedures, including measures to ensure adherence to a merit-based system, by law, policy, and practice. To that end, the following represents a non-exhaustive list of recent recommendations made by Mission counterparts related to judicial and prosecutorial appointments:

- Merit and professionalism should be the prevailing standards for judicial and prosecutorial appointments, with ethnic representation considered only when deciding between two otherwise equally ranked candidates.¹⁰
- Procedures, including the timing of recruitment exams, should distinguish between an individual's initial entrance into the judiciary and transfer or promotion.¹¹
- A selected candidate's assignment should rest on needs demonstrated by the list of the vacant positions and the candidate's own preference, taking into account, secondarily and as needed, ethnic and gender criteria and representation.¹² At the same time, the HJPC must have as an objective gender balance at all levels of the judiciary.¹³
- Internal and horizontal transfer procedures should be simple, transparent, and expeditious.¹⁴

⁸ Article 43 (2) of the Law on HJPC BiH: "[...] Appointments at all levels of the judiciary should also have, as an objective, the achievement of equality between women and men."

⁹ In a vacancy-based system, each posting corresponds to a vacancy, as compared to a career-based system, in which one recruitment process is utilised for a fixed number of positions. For more information, please see the European Commission's Peer Review Recommendations, based on expert assessments of the Procedures and Criteria for Appointment of Judges and Prosecutors in Bosnia and Herzegovina, September 2016.

¹⁰ Expert Report on Rule of Law issues in Bosnia and Herzegovina, Brussels, 5 December 2019, para. 71, available at <https://europa.ba/?p=66927>.

¹¹ European Commission's Peer Review Recommendations based on expert assessments of the Procedures and Criteria for Appointment of Judges and Prosecutors in Bosnia and Herzegovina, September 2016.

¹² Ibid.

¹³ See Article 43 (2) of the Law on HJPC BiH.

¹⁴ Ibid, at footnote 11.