

**EU-BiH Structured Dialogue on Justice and Additional Rule of Law Matters****TAIEX seminar on "Conflict of Interest in the Judiciary"****4-5 February 2015****EU Delegation in Sarajevo, Bosnia and Herzegovina (BiH)***Summary Conclusions by the European Commission services***Overview**

Through the use of the TAIEX instrument, the European Commission services organised a two-day seminar on 'Conflict of Interest in the Judiciary' in BiH as part of its activities under the framework of Structured Dialogue on Justice and additional Rule of Law matters (SDJ). The exercise aimed at discussing EU member states practices in organising the legal and institutional frameworks for prevention and fight against conflict of interest in the judiciary, with a particular focus on the deontology related to the members of supreme judicial councils. Against this backdrop, EU member states experts reviewed the discipline on conflict of interest currently in place at the High Judicial and Prosecutorial Council (HJPC) of BiH and discussed reform prospects, as well as possibilities to expand the current measures and establish a clearer deontology for all members of the judiciary.

The exercise included: an introductory seminar at the EU Delegation, focused on EU member states practices; a round of bilateral talks with relevant domestic interlocutors, as well as with relevant representatives from the international community; and a closing seminar on the current reform perspectives in BiH. The event was co-chaired by Mr Milan Tegeltija, President of the HJPC and Mr Giulio Venneri (Rule of Law Policy Officer for BiH at DG NEAR). Authorities and institutions were represented by high-ranking members of the judiciary throughout BiH, including all members of the HJPC, Presidents of Highest Courts and Chief Prosecutors. Moreover, representatives from civil society organisations that are actively monitoring the work of the judiciary and anti-corruption issues have also attended, thus giving an additional quality to the exercise. All participants contributed to a successful debate. Representatives from a number of EU member states embassies in Sarajevo attended in an observation capacity. The team of EU member states experts included the following four representatives:

- Mr Theo BYL, Judge, Belgium
- Mr Frank RICHTER, Magistrate, Germany
- Mr Alessandro SUTERA SARDO, Prosecutor, Italy
- Mr Kristian TURKALJ, Ministry of Justice, Croatia

The full list of participants is herewith enclosed.



## Background

Prevention of conflict of interest in the judiciary has been discussed for long time within the framework of EU-BiH Structured Dialogue on Justice (SDJ) which aims at addressing judiciary reforms and consolidation of judiciary in accordance with the relevant EU *acquis* and European Standards. In May 2014, SDJ was extended to additional Rule of Law matters, including anti-corruption, anti-discrimination and prevention of conflict of interest. On this basis, in May 2014, the European Commission issued a concrete list of related recommendations directly focusing on preventing the conflict of interest. Among others, these included the request for the adoption of a Book of Rules on conflict of interest for the HJPC (hereinafter referred as: Book of Rules), as an initial step towards a broader and clearer discipline of conflict of interest throughout the judicial sector. The HJPC in BiH fulfilled this recommendation by adopting a Book of Rules; such effort was commended by EU representatives and positively assessed in the 2014 Progress Report for BiH. It was expected that the adoption of the Book of Rules would be followed by adoption and implementation of broader set of rules to regulate and resolve conflict of interest within the broader judicial and prosecutorial services throughout the country.

The Book of Rules, passed under the Law on HJPC (Art. 10.2 and 16) includes concrete rules and defines the terms and meanings of potential conflict of interest as well as actions to be taken once a situation of conflict of interest is established. Soon after its adoption, some HJPC members criticised the regime in place and proposed amendments that would in effect downgrade the Book of Rules and backslide into a vacuum on questionable practices of conflict between private and public interest of its members. During 26/27 November 2014 session of HJPC, its members discussed both amendments and possible revocation of the Book of Rules in its entirety. This move was not welcomed by the EU, especially in light of further adoption of rules aiming at prevention of conflict of interest in the judiciary as a whole.

As a way forward, European Commission organised this TAIEX event as an opportunity for all relevant BiH institutions and authorities to get better acquainted with practices in EU member states, in order to assist for an effective enforcement of the new rules and to discuss the issue at the level of entire judiciary. The European Commission reiterates its commitment to support judiciary reform in BiH and the progress necessary in the delicate area of anti-corruption and prevention of conflict of interest, starting within the responsible judicial institutions and self-regulatory bodies, such as the HJPC.

## Summary of discussion

### - DAY 1 –

As regards to **Belgium**, Mr Theo Byl emphasised that rules on ‘Conflict of interest’, are seen as an essential element of an independent and impartial judiciary and of a fair treatment/trial (procedural equality). The judiciary keeps in mind that it is important to ensure that public distrust does not negatively impact their functioning. The White Marche (20/10/1996), with people demonstrating for a better judiciary system, was an indication for the Belgian authorities that they had to solve the serious breakdown in trust between citizens and the judicial authorities. In order to improve the justice system, the High Council of Justice was established in 1998 (article 151 of the Constitution). This High Council of Justice (44 members) has been working since 2000 to improve the functioning of the justice system in Belgium in three ways. The High Council organizes the judiciary entrance examinations and makes recommendations to the Justice Minister on the nomination of judges, oversees the operation of the judiciary by way of audits and special inquiries and by handling complaints regarding the way it operates, and finally takes initiatives and issues opinions on ways of improving the administration of justice, for the benefit of citizens.

The High Council of Justice, that is a totally independent body, has in Belgium rather ‘limited’ powers. It has a central role in the recruitment and promotion of magistrates as well as an advisory and auditing role on improvement of the justice system, but the High Council in Belgium has no disciplinary competence and is not responsible for the training of magistrates. In the procedures for the nomination of judges and the appointment of chiefs of jurisdiction there are a lot of checks and balances. They start with an open debate, candidates are compared (objectively) and the High Council must present (with motivated decision) a candidate, by a majority of two-thirds, to the Head of State. The latter may refuse the candidate presented on explicit grounds.

Article 259 bis 3 § 2 of the Belgian Judicial Code states that “substitute judges” or “substitute magistrates”, people with an elected official public function or a public professional activity (in the political sphere), and heads of a court or a prosecution can’t be part of the High Council of Justice.

There is an additional regulation on conflict of interest in the High Council of Justice in Belgium (article 259bis 19 of the BJC). This regulation states that a member of the Council shall seek his or her disqualification from the procedure for the proposal of a candidate if he/she has a personal interest, his/her spouse or persons related by blood or marriage, in a direct line or collaterally up to the fourth degree has a personal interest, or if the persons he/she is living officially together with has a personal interest.



Article 259 bis 3 § 2 of the Belgian Judicial Code states that there is an automatic termination of the mandate of a member of the High Council when an incompatibility arises, but also when the member is candidate for a nomination as a judge/prosecutor - head of a court/prosecution - federal prosecutor. Suspension of a mandate is possible by decision of the Council, but this just on serious ground, after heard the member and with a majority of two thirds of members present and voting.

There is also a regulation about conflict of interest for judges/prosecutors in Belgium. The impartiality and independence of judges/prosecutors are considered fundamental pillars of our democratic society. Articles 292 et seq. of the Belgian Judicial Code deal with some prohibitions of activities, especially commercial activities, for judges/prosecutors. There are also some other restrictions for judges/prosecutors. Relationships by blood or marriage constitute for example a further ground of incompatibility for judges. This aspect is mainly dealt with on a case-by-case basis (several grounds for recusal - article 828 Belgian Judicial code). There is no regulation about the declaration of interest or assets, although a draft law on the declaration of interest was recently created.

As regards to **Croatia**, Mr Kristian Turkalj emphasised that during the process of accession negotiations, the whole national legal system and particularly the judiciary went through comprehensive reforms. Legal system was changed also to tackle the problem of conflict of interest in judiciary. Specific changes were introduced on how to prevent conflict of interest in the area of appointment and promotion in the judiciary, conducting disciplinary proceedings and conducting non-judicial tasks (assignments) by judges and prosecutors, as well as to the system of assets declaration of judicial officials.

Croatian legal framework for prevention of conflict of interest in judiciary consists of Law on State Judicial Council, Law on State Prosecutorial Council, Law on Courts, Codex on judicial ethics, as well as procedural acts such as civil and criminal procedure acts.

Regarding appointment and promotion in judiciary, the system was strengthened by introduction of merit base and transparent system for entering in judiciary and for promotion on higher judicial functions. Furthermore, promotion in judiciary for Members of State judicial Council during their mandate was legally prohibited.

Regarding disciplinary proceedings, separation of investigation stage and decision making stage was introduced. As far as non-judicial jobs are concerned, rules were further strengthened by limiting possibilities for judges for extra engagements outside courts. Finally, assets declaration system was improved in the way that transparency and systematic control were introduced.

However, some potential risk of conflict of interest in judiciary still exists. This is particularly the case for process of defining Judicial Academy curriculum where those judicial officials defining the programme could also participate in its implementation. As far as conflict of



interest concerns conduct of a trial, Croatia has procedural rules defining when judges have to exclude themselves from the trial.

As regards to **Germany**, Mr Frank Richter recalled that, along the federal structure of the German state, the judiciary is in the competence of both the 16 states (Länders) and the Federal government. There is no judicial independence by a special council in any German state, but a number of checks and balances guarantee rigorous management of careers, beginning with the procedures to enter judicial careers and ending with appraisal procedures. The judiciary is organized by the different Ministries of Justice together with election committees for the appointment and promotion of judges and prosecutors. Judges and prosecutors are elected by election committees that consist of elected members from judges organizations, the bar association and members of parliament chaired by the Minister of Justice. The election process takes into account the grade point average of the two German state exams and of an interview at the Ministry of Justice into account. After 3-5 years judges are elected for life by the same election committee. For promotions, there exists another election committee which consists only of representatives of judges chaired by the chief justice of the Court of Appeals. For prosecutors there is another election committee chaired by the Chief Prosecutor. There are no members of parliament or attorneys involved in the promotion process. The Minister of Justice has to approve the decision of the election committee.

Judges and prosecutors are obliged to report on income of second jobs every year. They have to get permission for second jobs by the chief justice of the superior court or the chief prosecutor. The maximum additional income that can be earned is limited by law to 30 % of a yearly judge's income at the Court of Appeals. Judges and prosecutors do not have the obligation to declare their assets. Parties can check this register of second jobs and the performance of second jobs can be a reason for excluding a judge in a trial for a conflict of interest. There is additional case law concerning conflicts of interests but no statute. Especially close connections with parties and certain political activities can be reasons for excluding judges and prosecutors for the lack of the appearance of impartiality.

Public trust in the judiciary determines the rules on the conflict of interest issue in Germany. The public considers the judiciary to be independent and accountable. Judges and prosecutors feel the necessity to act without any doubts to their impartiality and usually make possible interests to parties known at the earliest moment. Parties can accept judges in the event of a potential conflict of interest by their choice.

As regards to **Italy**, Mr Alessandro Suter Sardo gave an overview on the deontology for the members of the *Consiglio Superiore della Magistratura* (High Council of Italian Magistracy), as well as a set of elements that allowed to understand how this self-governing body of Italian judges and prosecutors functions. The High Council is one and indivisible body without different section for judges and prosecutors because in Italy both categories belong equally to the judiciary, with the same degree of independence and autonomy, so it is possible for judges and prosecutors, during their career, to actually change function.



The most important rules regarding tasks and working procedures of the High Council are partially enshrined in the Italian Constitution; these are complemented on the one hand in the Ethics code of Italian Magistrates Association and, on the other hand, in a specific law dating back to 1958 (Law nr. 195/1958). The fourth title of the Italian Constitution is dedicated to the judiciary establishing some basic principles. Article 104 of the Constitution posits that the judiciary is an autonomous and independent power. Article 105 states that are under the responsibility of the High Council the recruitment, assignments, transfers, promotions and disciplinary measures regarding the magistrates. Judges and prosecutors are recruited and appointed by an open and competitive examination. Magistrates are "immovable". Judges cannot thus be dismissed or suspended from office or assigned to other courts or functions unless by decision of the High Council, which shall be adopted with clear reasoning and with the guarantees of defense established by the judiciary or with the agreement of the magistrates. The High Council is chaired by the President of the Republic. The mandatory members are the first president of the Supreme Court and the Attorney General of the Supreme Court. The other members are elected for two-thirds of all the ordinary judges and prosecutors belonging to the various categories and, for one third, by Parliament from amongst university professors and lawyers with at least fifteen years of relevant professional activity. The council elects a vice chairman from amongst the members designated by Parliament. The elected members of the Council remain in charge for four years and are not immediately re-elected. In article 104 there is also a first important statement about the prevention of conflict of interest, where it states that the members designated by Parliament, during their tenure in the High Council, cannot be registered in professional associations, and they cannot be part as members in Parliament, in the Regional Council, the Constitutional Court and they cannot either serve as Minister or Secretary of State.

Concerning in particular the issue of conflict of interest of members of the High Council, in addition to some references contained in the Constitution, the matter is governed by the Law of 24 March 1958 nr. 195. In the Italian system, the magistrates that become member of the High Council immediately lose their judiciary functions for all the duration of the mandate; at the same time, they maintain the right to return to the same place and to keep the same functions that they had before the election. The members elected by the Parliament, until are in charge, may not be registered in professional associations. They cannot even be business-owners, neither be a part nor owners of private companies.

Members of the High Council cannot be selected amongst the judges assigned to serve at the Ministry of Justice. They cannot be part of the Council relatives up to the fourth degree. Articles 34 and 35 of the 1958 law establish the rules on the Prohibition of participation in competitions and appraisals, as well as the Prohibition of assignment to executive offices. In particular, according to article 34, the judges who are members of the High Council cannot serve in the examining commission for public contests to entry judicial careers or even be part of promotion panels, until their tenure in the High Council has ended, at least one full year ahead of the deadline to apply for such contexts, or unless the Council has been dismissed ahead of such deadline.

According to article 35, that concerns the Prohibition of assignment of executive offices, magistrates elected as members of the High Council cannot be conferred executive offices except that, for at least a year, they have not been any longer part of the Council, or unless the whole Council has been dismissed. Article 36, concerning the prohibition of assumptions in the judiciary for their outstanding merits, establishes that the members of the Council elected by the Parliament cannot be recruited in the judiciary for their outstanding merits, until the Council to which they belong or have belonged is in charge.

Article 37, concerning the suspension and the dismissal of the judicial members of the High Council, establishes that the members of the High Council may be suspended from the appointment if they are prosecuted for an intentional crime. At the same time, this article states that the members of the High Council are immediately suspended from their office when, against them, is issued an order of arrest or warrant or also if it is validated the arrest for any offense. The judges and prosecutors members of the High Council are immediately suspended from their office if, subject to disciplinary proceedings, they have been suspended in accordance with the law. The members of the High Council are automatically dismissed from their office if they are convicted by final judgment for an intentional crime. The judges and prosecutors of the High Council are automatically dismissed from their office if they are convicted for a disciplinary offence more serious of the “warning”. The suspension and the dismissal are decided by the High Council. The optional suspension is deliberate with a secret ballot by a majority of two thirds of the members.

All the hearing and sessions are open and public: this provision is very important for ensure a maximum degree of transparency of the Council activities and at the same time to exercise the highest degree of control on possible cases of conflict of interest.

## - DAY 2 -

Serving as rapporteur for the experts team, Mr Richter emphasised that all four national experts consider the Book of Rules to have solid legal ground in the existing statutes. Art. 10 and 16 of the Law on HJPC give the legal basis for conflict of interest to be regulated in a bylaw. The experts do not see a conflict in the hierarchy of norms. Yet, if the Law on the HJPC will be revised in the future, the recommendation would be to include Conflict of Interest rules in the statute. All experts suggest that future activities to regulate Conflict of Interest should have the aim to improve the credibility and the accountability of the HJPC. There is no independent council in Europe that has as much power as the HJPC in BiH. The HJPC as a power center of the judiciary in BiH should be more careful to the conflict of interest issue than it is necessary in current EU member states. Maximum independence should lead to maximum awareness concerning possible conflict of interests.

The intensity of regulations concerning the Conflict of Interest should depend on the status of independence of the council. In the bilateral meetings the experts got the impression that



conflicts of interests currently exist in the BiH judiciary. Therefore, experts suggest that the HJPC does not change the current Rulebook to smoothen regulations in article 4 concerning necessary action if a conflict of interest is present. Any changes to the Rulebook that mitigate the existing regulations can be detrimental to the judiciary in BiH. The independence of the HJPC must not be put in danger.

The experts recommend that Conflict of Interest Rules are extended to the whole judiciary to cover all magistrates. The declaration of assets of all magistrates should be checked and controlled. There should be a limit on the earnings by extra judicial activities in the future.

## Conclusions

EU representatives to the exercise took note of the stance from the experts team that, in general terms, the current mechanism for preventing and resolving conflict of interest situations within HJPC, as established by the Book of Rules in force since May 2014, largely corresponds to the status and competences of the HJPC and does not pose issues related to hierarchy of norms or conflicts.

On the content of the Book of Rule, EU representatives took note and support the stance by EU member states' experts that an institution enjoying an unprecedented level of institutional independence shall also provide for clear and stringent measures to prevent conflict of interest situations. Due to historical context and specific circumstances under which the HJPC was established, independence and responsibilities of this body are far much higher than in most EU member states. This is particularly true with regards to the central and active role that the HJPC plays in managing all aspects regulating access to judicial careers (ranging from administration of open vacancies, examination procedures and final appointments), as well as in deliberating on appraisals and promotions for both judges and prosecutors. In addition to this comparative institutional perspective, it should also be noted that the HJPC is also operating in full independence from other powers of the state, the executive and legislative. The Commission has previously reiterated that the current regime of independence of the judiciary is key in a country like BiH, which requires special measures to guarantee that the judiciary consolidates its independence and authority. Therefore, any reform that would introduce an overexposure of the judiciary to the other powers of the state would not be advisable at this stage. Yet, operating almost without checks and balances, the HJPC shall maintain in place at all time a set of rigorous and clear norms on conflict of interest. In other words, the HJPC requires stronger rules on integrity and accountability of its members, proportional to the strength of the self-regulatory authority that such institution was entrusted with. Playing an important role in the entrenchment of the rule of law throughout BiH, the HJPC holds a key responsibility in the consolidation of professionalism and accountability in the judiciary. For this reason, the matter of conflict of interest should be disciplined with clear parameters, in order that the regulatory body appears to be above any suspicion of possible clientelism.



Based on the above, and in order to strengthen the credibility of the HJPC as an institution guaranteeing the rule of law in the process of EU integration, two sets of conclusions can be drawn:

1) On the issue of the Book of Rules on Prevention of the Conflict of Interest for HJPC members, the European Commission services

- Take note of the legality of this document, internal to the HJPC, which is based on the relevant provisions of the Law on HJPC, and published in the Official Gazette of BiH.
- Advise the HJPC to maintain and apply the Book of Rules as a currently valid bylaw.
- Invites HJPC members to carefully continue the internal debate on the rights of "third parties" (e.g. applicants to judicial careers). In view of a more detailed and comprehensive regulation on conflict of interest in the judiciary for the near future, amendments to the measures preventing conflict of interest can be foreseen, though these shall not be at the detriment of the existent regime or affect its overall thoroughness.

2) On extension of the conflict of interest regulations to the rest of the judiciary at different levels of authority in BiH, the European Commission services

- Call upon the HJPC and Ministry of Justice of BiH to devise clear limitations for HJPC members and other judicial office holders in the new Draft law on HJPC, giving due consideration to:
  - Consider limiting the possibility for court presidents and chief prosecutors to be appointed as council members, or otherwise consider the opportunity to foresee incompatibility between the holdings of the position of court president and chief prosecutor while holding office as Council member.
  - Prevent the Council members from applying to managerial, semi-managerial or other positions representing a personal promotion to higher judicial offices within two years from the expiration of their mandate as Council member, along with the model of the Law on Civil Service in Institutions of BiH.
  - Establish a mechanism that respects the rights of third persons to apply to judicial offices, while preventing that the conflict of interest situation of one or more Council members directly impacts, or is perceived as having an impact on the appointment process. In other words, a balance between legitimate public interest (preventing and combatting corruption and conflict of interest within judiciary) and individual rights should be met.
  - Prescribe a clear limitation, accompanied by strict control process, for the Council members and judicial office holders to engage in extra judicial activities and receive ad hoc compensations that are incompatible with holding of judicial office

(except for conducting training of judicial staff or periodic lecturing at public universities) and which would damage the perception of impartiality, honour, reputation, or otherwise damage the judiciary and the public perception. Incompatibilities regarding design of training activities and participation in it for the same judicial office holder/Council member should also be introduced.

- Include a mechanism which ensures an accurate and transparent declaration of assets for all judicial office holders, in line with best international standards and practices and compatible with individual privacy rights, including a verification procedure and prevention of false declaration.
- Invite the HJPC to develop, pending possible legislative developments in this area, a set of guidelines and principles for judicial integrity and the related monitoring mechanisms; such guidelines shall be submitted to all competent authorities and institutions for further adoption and implementation.