



# Examining the Experts

## A Comparative Analysis of the Role of Expert Witnesses in Court Systems of the Western Balkans

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This Report was produced by a team of World Bank justice reform specialists and advisors. The team was led by Ms. Runyararo Gladys Senderayi (Task Team Leader and Public Sector Specialist) and comprised Ms. Olga Šipka (Lead Author and an Attorney at Law), Ms. Tatjana Sofijanić (co-author and a Legal Expert), Ms. Nevenka Ivanovska (Legal Expert), Mr. Nenad Milić (Data Specialist), and Ms. Aleksandra Stećuk (Data Collection Associate).

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## Executive Summary

1. **As part of a broader World Bank initiative to Inform Justice Policy Dialogue in the Western Balkans, this Report examines if and how expert witnesses cause contention and frustration in the justice systems of four jurisdictions—Serbia, Montenegro, North Macedonia and Bosnia and Herzegovina (BiH).<sup>1</sup>**

2. **The use of expert witnesses is common in court systems across the Western Balkans, yet laws and policies that regulate the profession are often unclear and/ or implemented unevenly.** This has adverse effects on the performance of the justice system from an efficiency, quality and access perspective. Unclear rules on the engagement of experts in trials and poor implementation of these rules by judges compromises the quality, efficacy and transparency of the work of expert witnesses and, in turn, hampers the overall efficiency of courts. This is particularly important given the vital role that expert witnesses play in trials; they are often called upon to analyze complex issues and their expert opinions are a key factor in the decision-making process. Thus, improving legal frameworks that govern the work of expert witnesses and increasing effectiveness in the implementation of legislation contribute to improving transparency, efficiency and quality of justice.

3. **More and more countries in the Western Balkans are prioritizing strengthening the performance of their justice system, and as countries prepare for accession to the EU it is important to ensure that all aspects of their justice systems are aligned with relevant EU benchmarks.** This involves, among other things, enhancing transparency and increasing efficiency and improving the quality of justice, which can be achieved, in part, by ensuring that expert witnesses expedite and facilitate, rather than hinder the trial process.

4. **To this end, this report provides a comparative overview of the role of expert witnesses in court proceedings in Serbia, Montenegro, North Macedonia and BiH, identifies and highlights common challenges and proposes legal and policy recommendations to address these challenges.** The recommendations proposed in this report are customized to the countries examined for two reasons: (i) they are developed based on, and in response to, a diagnostic of the existing legal framework that governs expert witnesses in each country; and (ii) they are informed by best practices on the work of expert witnesses outlined in The European Commission for Efficiency of Justice's (CEPEJ) Guidelines on the Role of Court-Appointed Experts in Judicial proceedings of the Council of Europe's Member States and the Guide to Good Practices in Civil Judicial Expertise in the European Union (EGLE Guide). These can therefore be leveraged in the reform process to facilitate integration into the EU.

5. **The data on expert witnesses summarized in this report can be used to inform future improvements in the justice systems of the countries covered.** Specifically, procedural reforms to improve the trial process. Improvements in the way expert witnesses conduct their work and interact with the courts can increase efficiency in the trial process and improve the quality of decisions handed down by courts. When court processes are agile and effective and

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<sup>1</sup> Please note that BiH is largely decentralized and comprises of autonomous entities – Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS), and a self-governing administrative unit, Brčko District (BD). All the entities are examined in this report.

when courts deliver high quality judgments, this inspires confidence. Improving the role and engagement of expert witnesses in the justice system is important for improving the delivery of justice and the overall performance of the courts. Then, citizens and investors begin to trust the system and are more open to using it.

## Key Findings

6. **In all the jurisdictions analyzed, except for FBiH, the criteria used to license expert witnesses is disconnected from the real needs of the courts/Public Prosecutor's Offices (PPOs).** The main reason for this is that on the books, there is a sufficient number or even an oversupply of experts, but in practice, there is a shortage of qualified expert witnesses.

7. **The lack of experienced expert witnesses means that those who are highly experienced are continuously engaged by the courts and are overstretched with work (notably in Serbia, BiH and Montenegro).** Because of the heavy workload, expert witnesses either refuse to take on assignments or are dilatory in the submission of opinions which then causes trial delays. An unequal distribution of work among experts was reported in all the jurisdictions examined.

8. **In North Macedonia, the Bureau of Expert Witnesses (BEW) holds a legal monopoly on the provision of expert testimony for state institutions and public enterprises, and a *de facto* monopoly on the provision of super-expertise (*superveštačenje*).**<sup>2</sup> In practice, this arrangement raises issues with regards to the independence of the BEW, as well as the quality and efficiency of expert work done by this institution.

9. **There is a perception that the courts' reliance on expert witnesses is excessive.** This is especially true in Serbia and BiH where the impression is that expert witnesses are sometimes called for cases where expert knowledge is not necessary to examine or establish relevant facts. **However, the statistical data obtained from the courts is not consistent with the perception that expert witness opinions are used too often.** On average, the use of expert witnesses in civil and commercial litigation cases, criminal cases and commercial offenses<sup>3</sup> is only about 13.5% in Serbia, and 5.3% in BiH.<sup>4</sup>

10. **None of the countries examined require new expert witnesses to undertake training on trial processes prior to engaging in the work.** Furthermore, new expert witnesses are not trained in trial requirements (except in FBiH, following their appointment). Therefore, the

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<sup>2</sup> Expertise by a commission of experts which is ordered in case of two conflicting expert opinions.

<sup>3</sup> Case types in which expert witnesses are more commonly used. In the absence of a comprehensive case-by-case analysis, it is difficult to say with certainty whether the use of experts is in fact excessive, especially at the level of courts/individual judges.

<sup>4</sup> According to the 2014 CEPEJ Study on the role of experts in judicial systems of the Council of Europe Member States: "the amount of data available on the ratio of cases was also somewhat limited. There were a few with the information such as the Irish, who said 15%, or Slovenia, where 1.7% (650 cases) used experts. The Norwegian respondent estimated that 20% of civil cases, and 10% of criminal cases needed experts, whereas in Estonia, it was 1 in 100. The respondent in Berlin stated that 4% of all cases needed experts. One of the Swiss courts gave an average of about 0.5%. No respondent went higher than this." (available at: [https://static1.squarespace.com/static/534f89eee4b0aedbe40ae270/t/558a6d15e4b0dfba0a2afcc8/1435135253774/3rev\\_2014\\_CEPEJ-GT-QUAL\\_RoleExperts\\_en.pdf](https://static1.squarespace.com/static/534f89eee4b0aedbe40ae270/t/558a6d15e4b0dfba0a2afcc8/1435135253774/3rev_2014_CEPEJ-GT-QUAL_RoleExperts_en.pdf)).

opinions of new and inexperienced expert witnesses are sometimes of low quality and of little or no value to the court. For example, in Montenegro, it was reported that some expert opinions are so complex and unclear that they cannot be reviewed properly by courts or the parties.

11. **In Serbia and Brčko District (BD), there are no exams to test an expert witness' knowledge prior to joining the profession; in North Macedonia, there is an exam, but it can be improved** so that it tests the practical knowledge of candidates more effectively (knowledge of trial requirements and procedures for conducting assessment).

12. **In all the jurisdictions examined, even if mandated, continuous training for expert witnesses is never (or seldom) organized.** In Serbia, Brčko District (BD) and FBiH, experts do not have a duty to continuously update their knowledge.

13. **Across the countries examined, expert witnesses often submit expert opinions late, or submit opinions that need to be revised, supplemented or clarified.** At times, this results in the postponement of hearings, or the engagement of several experts in one trial. Also, because none of the jurisdictions cap the number of experts that can be engaged in trial at any one time, this can cause inordinate delays in the resolution of a case because of indefinite adjournments that arise when a new expert witness is engaged to examine a matter that has been examined before.

14. **Judges are not using the available tools to manage the work of expert witnesses to keep trial schedules on track.** Adjournments and slippages in trial schedules because of delays on the part of expert witnesses or the litigants are common. In Serbia, BiH and Montenegro, instructions given to expert witnesses are often not precise or sufficiently clear.

15. **Existing monitoring and accountability mechanisms are weak and ineffective.** Authorities that supervise and monitor the work of expert witnesses seem to be lenient and do not revoke expert witnesses' licenses on grounds of unethical, incompetent or inadequate work.

16. **Rules on the reimbursement of expert witnesses are uneven across the countries examined.** In BD, there are no rules in place, in RS they are outdated, in North Macedonia they are not sufficiently precise and in Serbia and Montenegro they are simply not applied in practice. In each of the countries, the appropriate reimbursement to be paid to an expert witness seems to depend on discretion of the judge or prosecutor. This can lead to wide disparities in the fees paid to experts for the same kind of expertise, increasing the risk of corruption and adversely impacting the independence of expert witnesses.

## **Recommended actions:**

### *Improving the Licensing / Selection Process of Expert Witnesses*

17. **To improve the licensing process of expert witnesses, the countries examined may consider introducing the following policy changes and amendments to the law:**

- a. Introduce regular calls for applications and admission to the profession in Serbia, BiH and Montenegro;
- b. Introduce mandatory calls for applications at the request of courts / PPOs in all selected jurisdictions to connect the real need for expertise identified by courts/PPOs with the availability of experts in relevant fields;
- c. Introduce mandatory exams for entry into the profession in Serbia and BD;
- d. Introduce clear requirements for admission to the profession in FBiH and improve the licensing exam in North Macedonia to better test candidates' knowledge of trial processes and procedures for conducting expertise; and
- e. Allow expert witnesses to take on trainees, interns and associates and clearly define the rights and duties of expert witnesses – this would allow experts who are overburdened with work to delegate tasks and in turn reduce the time needed to produce an expert opinion, thereby reducing trial delays. In the long run, it would also help to develop a cadre of high-quality expert witnesses.

**18. To improve the selection process of expert witness for trials, the countries examined may consider introducing the following amendments to procedural rules:**

- a. For criminal procedures in BiH, it may be beneficial to select expert witnesses primarily from the list of permanent court experts; and
- b. In all jurisdictions, set clear rules on the process to be used by PPOs in their selection of expert witnesses.

*Improving the Quality of Expert Witnesses' Work and Efficiency of the Trial*

**19. Introducing rules/standards for drafting of the expert opinion.** To ensure that the expert opinion is coherent, well-structured and comprehensible, both courts and expert witnesses would benefit from guidance on the structure, format and contents of the expert opinion. If expert opinions are drafted in a coherent and comprehensive fashion, this will reduce the need for further clarifications and supplements to the opinion, facilitate the work of judges when reviewing the opinion and increase the overall efficiency of the work of expert witnesses in trial.

**20. Develop training for expert witnesses.** Consideration should be given to making the continuous training of experts in their fields of expertise as well as in trial requirements mandatory. Competent bodies (Expert Commissions in BiH and Montenegro, the Ministry of Justice (MOJ) in Serbia and Chamber of Expert Witnesses in North Macedonia) could be tasked with keeping a record of the training conducted. Furthermore, attending training could be set as a precondition for license renewal. In North Macedonia, consideration could be given to allowing the training of expert witnesses outside of the Chamber of Expert Witnesses (currently the only body entitled to organize training for expert witnesses in this country).

**21. Develop training for judges.** It may be beneficial for judges to be required to have a general understanding and knowledge of the common issues that experts are usually called in for (e.g. reading financial statements or calculation of the default interest rate). This way, judges will be adequately capacitated to manage the work of expert witnesses more effectively by, for example, only allowing expert witnesses to give their opinion when it is

truly needed, precisely determine the subject matter and scope of expertise and review expert opinions.

#### *Eradicating Superfluous Expertise to Increase Efficiency of Trials*

22. **Expert witnesses should not be called where superfluous.** Through their decisions, higher instance courts might support first instance courts in dismissing superfluous proposals for expertise in cases where such expertise is not needed (e.g. no special knowledge is required to assess facts). Consideration could be made to limiting the number of expert witnesses that can be used in a trial to examine a specific issue (e.g. no more than three experts per trial).

#### *Strengthening Accountability of Expert Witnesses*

23. **Trial management techniques can greatly increase the efficiency of a trial and improve the accountability of expert witnesses.** Simple trial management techniques and tools such as: (i) determining the exact date when the expert witness opinion will be received; (ii) frequent review of case files outside of the scheduled hearings to keep track of all required activities; (iii) monitoring adherence to deadlines and justifications for breaches; (iv) scheduling hearings strategically to allow enough time between hearings; and (v) providing only selected (electronic) copies of document case files to expert witnesses, can expedite the trial process and help to establish an environment where expert witnesses are more accountable.

24. **Courts and parties could be vested with more authority to monitor and sanction the work of expert witnesses.** In the face of undue delay, incompetence or unprofessionalism, courts could have the power to initiate proceedings against expert witnesses. Parties would benefit from clear rights to report wrongdoing of expert witnesses to all relevant authorities.

#### *Addressing the Remuneration of Expert Witnesses*

25. **Rules on reimbursement could be revised to improve criteria for the calculation of expert witness fees and costs. Furthermore, consistent application of these rules in practice would be highly beneficial.** To ensure the uniform and consistent remuneration of experts, it would be helpful for rules on reimbursement to include specific criteria that enable the remuneration of an expert witness to be commensurate with the difficulty, duration and quality of the work carried out, the qualifications of the expert (moral and professional), as well as material liability incurred by experts.<sup>5</sup> Courts of higher instance would be in the best position to provide guidance on the application of the criteria.

26. **Remunerating expert witnesses promptly, ideally soon after they have provided their expert opinion, would create additional incentives for experts to be efficient.** Given that by the time an expert witness has given their expert opinion, the money should already

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<sup>5</sup> Please see para. 6.3 of CEPEJ Guidelines.

be available in court deposit accounts (at least in civil procedures<sup>6</sup>), there is no reason to delay the payment of expert witnesses. Judges and parties could request an estimated value of the fees and costs involved to engage the expert witness in advance of the trial. This way, any issues related to fees and payment would be resolved before the expert witness gives their expert opinion in the trial.

**27. Detailed recommendations that outline the authority responsible for implementation are provided in Table 1.** The report also provides country specific recommendations that counterparts can use to plan and monitor the relevant reforms (Table 2 to Table 5). The Recommendations section also includes the prioritization of select reforms that can be impactful in the short, medium and long term.

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<sup>6</sup> Articles 258 and 268 of the Serbian CPC, Articles 242 and 248 of the Montenegrin CPC, Articles 146, 160 and 161 of the RS and FBiH CPCs, Articles 270, 284 and 285 of the BD CPC, Articles 234 and 241 of the Macedonian CPC.

## Introduction

28. **This Report examines if and how expert witnesses impact the integrity, impartiality and efficiency of adjudication in four countries—Serbia, Montenegro, North Macedonia and BiH.<sup>7</sup> The report is part of a broader World Bank initiative to raise awareness of reform opportunities and inform policy dialogue on efficiency of justice, quality of justice and access to justice across countries in the Western Balkans, with a view to improving the performance of their justice systems.** The Report provides an objective review of the performance of the justice system in the selected countries and recent achievements and opportunities for reform *vis a vis* the role of expert witnesses in trials. Recognizing the formative role that expert witnesses play in the trial process, the report provides recommendations on how to leverage and improve the role of expert witnesses in trials with a view to enhancing the overall quality, efficiency and performance of the justice system.

29. **Objective fact-finding is the basis of any court process; expert witnesses play a key role when specialized facts need to be established and complex issues analyzed.** In such trials, expert witnesses provide judges with comprehensive and substantiated opinions on specific and complex issues (financial, medical, scientific, artistic, linguistic, etc.). Expert witnesses deal with matters of fact and not with matters of law. They are commissioned to determine the facts and present them to the court. They are not expected or required to draw legal conclusions, as this is beyond their scope of responsibility and expertise. That said, the specialized opinions of expert witnesses are an integral aspect of the court’s decision-making process. The world is changing rapidly, and fast-paced scientific developments in modern societies have resulted in an increase in the demand for expert witnesses, who are engaged more and more frequently in trials.<sup>8</sup> Expert witnesses have become a key component in the dispensation of justice and their expertise has come to be depended upon by judges and parties to the trial.

30. **Expert witness reports are used as evidence in trials. Although expert opinions are not binding on judges, they tend to have a decisive influence on the outcome of the trial.** In some legal systems, experts act as the “*technical eyes and brain of the court*” and are proxies for the judges. In others, experts act as special witnesses summoned by the parties to underpin their factual allegations. In both cases, because of their important role in trials, expert witnesses are subject to stringent requirements regarding their competence, independence, impartiality and code of conduct.<sup>9</sup>

31. **Both the Council of Europe (CE) and the European Union (EU) recognize the important role played by expert witnesses in the justice system and have developed Guides on best practices related to the work of expert witnesses to improve court processes in their member states.** The European Commission for Efficiency of Justice (CEPEJ) issued Guidelines on the Role of Court-Appointed Experts in Judicial proceedings of the Council of Europe’s

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<sup>7</sup> Please note that BiH is largely decentralized and comprises of autonomous entities – Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS), and a self-governing administrative unit, Brčko District (BD).

<sup>8</sup> Please see *Civil-law expert reports in the EU: national rules and practices* published by the Policy Department: Citizens’ Rights and Constitutional Affairs, European Parliament, p. 8; available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL\\_IDA\(2015\)519211\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_IDA(2015)519211_EN.pdf).

<sup>9</sup> *Idem*, p. 13.

Member States (CEPEJ Guidelines)<sup>10</sup> to provide a reference framework for legislators, judges and parties to a lawsuit regarding the role of experts during a trial. The CEPEJ Guidelines set a minimum standard of practice that should be maintained by all experts and address key topics such as the subject matter of expert opinions, the persons acting as experts, the selection procedure, duties and rights of experts, etc.<sup>11</sup> Similarly, the European Expertise and Expert Institute (EEEI) and the European Commission's Directorate-General for Justice and Consumers prepared the Guide to Good Practices in Civil Judicial Expertise in the European Union (EGLE Guide), to serve as an European model to improve and harmonize different practices across EU member states. The EGLE Guide contains a set of recommendations that each state can adapt to ensure quality and efficient judicial expertise.

**32. Using the analytical framework provided in the CEPEJ Guidelines and the EGLE Guide, this Report aims to identify whether and how expert witnesses cause contention and frustration among trial parties and courts in selected jurisdictions.** First, the Report provides a comparative overview of the existing legal framework that governs the work of expert witnesses in four selected countries—Serbia, Montenegro, North Macedonia and BiH. The Report then analyzes implementation of the legislation in practice, highlighting examples of best practices in the region. An overview of the main findings across countries is then presented. The overview focuses on the issues that are common to the jurisdictions examined. Finally, the Report provides recommendations to address the issues identified, relying on guidance provided in the CEPEJ Guidelines and in the EGLE Guide.

**33. The data in the report is based on statistics collected from 22 courts through tailor-made questionnaires on the engagement of expert witnesses and on-the-spot review of closed cases – the team reviewed approximately 1,100 cases in the four countries examined.**<sup>12</sup> Using this innovative approach, the team gathered invaluable information on the quality of the work of expert witnesses and was able to thoroughly examine the link between engaging experts and the overall efficiency of trials. To the best of the research team's knowledge, no such analysis, both in terms of methodology and scope of quantitative and qualitative assessment of data, has been carried out in the Western Balkans to date. When using statistics, the Report attempts to confirm the findings empirically and to pin-point the main reasons for the existing issues.

**34. Based on the findings, this Report proposes legislative and policy changes that can support the countries examined to align their justice systems with relevant EU benchmarks.** To achieve an efficient, high-performing justice sector it is necessary to, among other things, improve the role of expert witnesses the judicial system, as this strengthens the trust that judges, litigation parties and lawyers have in expert opinions and improves the overall quality of judicial decisions. This Report presents an overview of findings that can be leveraged to

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<sup>10</sup> The CEPEJ Guidelines are available at: [https://www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines\\_en.pdf](https://www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf).

<sup>11</sup> The EGLE Guide is available at: <https://experts-institute.eu/wp-content/uploads/2018/03/2016-01-07-eeee-guide-to-good-practices-egle-en-brochure.pdf>. For more on expert witnesses also see: *Civil-law expert reports in the EU: national rules and practices published by the Policy Department: Citizens' Rights and Constitutional Affairs*, European Parliament, available on: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL\\_IDA\(2015\)519211\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_IDA(2015)519211_EN.pdf), and the *CEPEJ Study on the role of experts in judicial systems of the Council of Europe Member States*, available at: [https://static1.squarespace.com/static/534f89eee4b0aedbe40ae270/t/558a6d15e4b0dfba0a2afcc8/1435135253774/3rev\\_2014\\_CEPEJ-GT-QUAL\\_RoleExperts\\_en.pdf](https://static1.squarespace.com/static/534f89eee4b0aedbe40ae270/t/558a6d15e4b0dfba0a2afcc8/1435135253774/3rev_2014_CEPEJ-GT-QUAL_RoleExperts_en.pdf).

<sup>12</sup> For detailed information on methodology, please see Annex 1 of the Report.

facilitate justice sector reform and improve the transparency and efficiency of justice in the countries examined. The findings can also contribute to the countries' EU accession discussions, as advancing negotiations under Chapter 23 on the "*Judiciary and fundamental rights*" requires continuous and concerted efforts on reforming the judiciary to achieve impartiality, integrity and a high standard of adjudication — all essential factors to safeguard the rule of law.

## Legal Framework and Trial Requirements

35. In all the countries examined, the statutory aspects of the expert witness profession are governed by specific laws, while improvements to the role and status of expert witness are part of judicial reform strategies. In Serbia, North Macedonia and Montenegro, laws on expert witnesses (LEW/LEWs) are passed at the national level. In BiH, the legal status of expert witnesses is governed by entity-level laws enacted in RS and FBiH, and a rulebook enacted in BD:

- a. **Serbia:** Serbian LEW was enacted in 2010.<sup>13</sup> The National Strategy for Judicial Reform for the period 2013-2018<sup>14</sup>, which is complemented by the Action Plan for Implementation of the National Strategy for Judicial Reform for the period 2013-2018<sup>15</sup> requires that the LEW be amended to include new criteria for the appointment of expert witnesses into the profession and improve procedures for revocation of expert witness licenses. Also, the Strategy and accompanying Action Plan envisage implementation of transparent mechanisms to strengthen training and improve expertise and accountability of expert witnesses.
- b. **Montenegro:** Montenegrin LEW<sup>16</sup> was enacted in 2016, as part of the National Strategy for Judicial Reform for the period 2014-2018<sup>17</sup>, to achieve the following strategic goals: i) improve the procedure of licensing and revocation of licenses; ii) strengthen the accountability of expert witnesses; and iii) set up continuous training for expert witnesses. The Report on the Implementation of the Strategy for the Period 2014-2016 acknowledges that the 2016 LEW accomplished the first two strategic goals, while there is still room for improvement when it comes to the third one – expert witness trainings.<sup>18</sup> The Action Plan for the Implementation of the National Strategy for Judicial Reform for the Period 2017-2018 reiterates the need for the continuous training of expert witnesses.<sup>19</sup>
- c. **North Macedonia:** The 2010 LEW<sup>20</sup> in North Macedonia was an important step in regulating the expert witness profession and the activities of expert witnesses. The LEW was amended several times to improve rules on expert witness status (examination of expert witness candidates, expert witness fees and costs, control over expert witness work, revocation of expert witness licenses, functioning of the Chamber of Expert Witnesses, sanctions for misdemeanor, etc.). The National Strategy for the Reform of the Justice Sector 2017-2022, through the Action Plan for the implementation of the National

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<sup>13</sup> Serbian LEW is available only in local language, please see: [https://www.paragraf.rs/propisi/zakon\\_o\\_sudskim\\_vestacima.html](https://www.paragraf.rs/propisi/zakon_o_sudskim_vestacima.html).

<sup>14</sup> Strategy is available at: <https://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.-godine.pdf>.

<sup>15</sup> Action Plan is available at: <https://www.mpravde.gov.rs/tekst/2963/akcioni-plan-za-sprovodjenje-strategije.php>.

<sup>16</sup> Montenegrin LEW is available only in local language, please see: <http://www.katalogpropisa.me/wp-content/uploads/2016/11/Zakon-o-sudskim-vestacima.pdf>.

<sup>17</sup> The Strategy is available at: <https://sudovi.me/podaci/vrhs/dokumenta/6290.pdf>.

<sup>18</sup> The Report is available at: <http://cemi.org.me/wp-content/uploads/2017/04/IZVJE%C5%A0TAJ-O-REALIZACIJI-STRATEGIJE-REFORME-PRAVOSU%C4%90A-2014-2016.pdf>.

<sup>19</sup>The Action Plan is available at: <https://sudovi.me/podaci/vrhs/dokumenta/6290.pdf>.

<sup>20</sup> Macedonian LEW is available only in local language, please see: <https://www.pravdiko.mk/zakon-za-veshtachen-e/>.

Strategy for the Reform of the Justice Sector 2017-2022<sup>21</sup>, envisages measures for further improvement to the status of expert witnesses, notably improvement of procedures to license expert witnesses and closing of the Bureau of Expert Witnesses;

- d. **BiH:** In **RS**, expert witnesses are governed by the LEW enacted in 2017. As reported by the RS Ministry of Justice, the 2017 RS LEW<sup>22</sup> was passed to improve the status of expert witnesses, most notably the appointment process, rights and duties of expert witnesses, as well as liability and supervision. In **FBiH**, expert witnesses are governed by the FBiH LEW<sup>23</sup> which came into force in 2005 (amended in 2008). Amendments to the FBiH LEW were planned as early as 2016 but according to publicly available information and as reported by the FBiH Ministry of Justice, these amendments are still in the pre-drafting stage.<sup>24</sup> In **BD**, the legal status of expert witnesses is governed by the 2016 Rulebook on Conditions, Manner and Procedure of Licensing of Expert Witnesses (BD Rulebook)<sup>25</sup> enacted by the BD Judicial Commission.

**36. LEWs and the BD Rulebook in BD govern the licensing process, revocation of status, and rights and duties of expert witnesses<sup>26</sup>:**

- a. **Licensing:** In all the jurisdictions examined, the licensing of expert witnesses is conducted under the auspices of the Ministry of Justice (MOJ), with the exception of BD, where the process is entrusted to the presidents of BD courts and the Judicial Commission.<sup>27</sup> In all jurisdictions except for Serbia and BD, an expert commission (Commission) appointed by the MOJ has specific powers and responsibilities in the licensing process of expert witnesses. In Montenegro, the Commission issues/revokes expert witness licenses<sup>28</sup>, while in other jurisdictions the Commission is primarily responsible for examining candidate expert witnesses.<sup>29</sup> The licensing process in Serbia, Montenegro, FBiH and BD is initiated by the MOJ once the courts / prosecutors have informed the MOJ of the need for expert witnesses for a specific area of expertise. According to the FBiH LEW, the FBiH MOJ publishes a call for applications based on the courts' proposal<sup>30</sup>; in Serbia and Montenegro, the MOJ only publishes the call for applications if it determines that the need for

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<sup>21</sup> Strategy and Action Plan are available at: <https://rm.coe.int/action-plan-for-implementation-of-the-judicial-sector-for-the-period-2/16808c4383>.

<sup>22</sup> RS LEW is available only in local language, please see: <https://www.paragraf.ba/propisi/republika-srpska/zakon-o-vjestacima-republike-srpske.html>.

<sup>23</sup> FBiH LEW is available only in local language, please see: <https://www.paragraf.ba/propisi/fbih/zakon-o-vjestacima.html>.

<sup>24</sup> The 2018 FBiH MOJ Work Program, available only in local language, please see: <http://www.fmp.gov.ba/bs/id-2018.html>.

<sup>25</sup> BD Rulebook is available only in local language, please see: <http://www.pkbd.ba/vjestaci/pdf/PravilnikTumaciVjestaci38-16.pdf>.

<sup>26</sup> According to the 2014 CEPEJ report on European Judicial Systems: Efficiency and Quality of Justice, judicial experts are regulated by legal standards in 20 out of 28 countries, and their title is protected in 17 countries out of 28. These standards are the result of procedural rules and/or autonomous texts framing experts' activities.

<sup>27</sup> Article 4 of the Serbian LEW, Article 9 of the Montenegrin LEW, Article 19 of the Macedonian LEW, Article 8 of the RS LEW, Article 10 of the FBiH LEW, Article 62 of the BD Law on Courts and Article 4 of the BD Rulebook.

<sup>28</sup> Articles 9, 18, 24 and 33 of the Montenegrin LEW.

<sup>29</sup> Article 12 of the Macedonian LEW, Articles 6 and 7 of the RS LEW, Articles 6 and 7 of the FBiH LEW.

<sup>30</sup> Article 4 of the FBiH LEW.

an expert witness is justified<sup>31</sup>; in BD, the Judicial Commission *can* publish the call for applications based on proposal of courts or other authorities using expertise (e.g. PPOs).<sup>32</sup> In BD and North Macedonia, expert witnesses can be admitted to the profession at their request<sup>33</sup> provided they prove that they fulfill the set requirements. The request is submitted to MOJ in North Macedonia / Judicial Commission in BD. In North Macedonia, experts have the opportunity to take the professional exam for entry into the profession at least twice a year.<sup>34</sup> In all the jurisdictions examined except FBiH, to obtain a license, experts need to have at least five years of work experience and an undergraduate degree.<sup>35</sup> In all the jurisdictions examined except for Serbia and BD, expert witnesses are required to pass a professional exam to obtain a license.<sup>36</sup> The professional exam tests their expert knowledge or both their expert knowledge and knowledge of trial requirements. In North Macedonia and RS certain individuals can obtain an expert witness license without having to take and pass the exam (e.g. candidates who have obtained a PhD in the relevant field).<sup>37</sup> An expert witness license is valid for 4 years in BD<sup>38</sup>, 5 years in North Macedonia<sup>39</sup>, and 6 years in other jurisdictions, with the possibility of renewal.<sup>40</sup> *A contrario*, Serbian LEW does not prescribe a time limit on the validity of an expert witness' license. This is contrary to both the EGLE Guide and the CEPEJ Guidelines, according to which the expert witness status should be temporally restricted.<sup>41</sup>

- b. **Revocation:** An expert witness' license can be revoked, if, among other things, the expert witness is performing duties in an unethical, incompetent or inadequate manner<sup>42</sup>, e.g. refuses to provide expertise, does not appear when summoned, breaches deadlines, provides incomplete, unclear, contradictory or wrong opinions etc. Licenses are revoked by the MOJ in all the jurisdictions examined (save for BD where this responsibility is assigned to BD court presidents).
- c. **Rights and duties:** In all the jurisdictions examined, expert witnesses can be a legal or a natural person. In North Macedonia, the Bureau of Expert Witnesses

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<sup>31</sup> Article 11 of the Serbian LEW, Article 11 of the Montenegrin LEW. In Montenegro, the MOJ notifies Commission on expressed need for appointment of expert witnesses in certain field. Commission determines if expressed need is justified (Article 11), while the MOJ publishes the call for applications (Article 12).

<sup>32</sup> Article 10 of the BD Rulebook.

<sup>33</sup> Article 19 of the Macedonian LEW, Article 9 of the BD Rulebook.

<sup>34</sup> Article 14 of the Macedonian LEW.

<sup>35</sup> Article 6 of the Serbian LEW, Article 6 of the Montenegrin LEW, Article 9 of the Macedonian LEW, Article 3 of the RS LEW, Article 5 of the BD Rulebook. Please note that other qualification criteria include fulfillment of general requirements for work in a state institution, professional knowledge and practical skills in certain field of expertise and ethics for performing activities of expert witnesses. Only exceptionally, expert witnesses can have a high school degree.

<sup>36</sup> Article 13 of the Montenegrin LEW, Article 11 of the Macedonian LEW, Article 7 of the RS LEW, Article 7 of the FBiH.

<sup>37</sup> Article 20 of the Macedonian LEW, Article 7 of the RS LEW. Similar solution exists also in Serbia – certain candidates are also exempted from proving their qualifications (Article 7 of the Serbian LEW).

<sup>38</sup> Article 13 of the BD Rulebook.

<sup>39</sup> Article 19 of the Macedonian LEW.

<sup>40</sup> Article 29 of the RS LEW, Article 10 of the FBiH LEW, Article 17 of the Montenegrin LEW. Please note that expert witnesses are not required to pass the professional exam when their license is being renewed.

<sup>41</sup> Please see CEPEJ Guidelines, para. 52.

<sup>42</sup> Articles 18 and 19 of the Serbian LEW, Article 31 of the Montenegrin LEW, Articles 25 and 27 of the FBiH LEW, Articles 17 and 20 of the RS LEW, Article 23 of the BD Rulebook, and Article 26 and Article 40 of the Macedonian LEW.

(BEW) which is a legal entity within the MOJ, has the exclusive right to provide expert opinions to all Government, public institutions and state enterprises.<sup>43</sup> Expert witnesses have the right to be reimbursed for their expenses and to be paid a fee for their services. In turn, they are obliged to provide quality expertise and adhere to deadlines and confidentiality rules. In RS, North Macedonia and Montenegro, expert witnesses are obliged to undergo continuous training.<sup>44</sup>

- d. **Chamber of Expert Witnesses:** The Macedonian LEW establishes the Chamber for Expert Witnesses (the Chamber)<sup>45</sup> as an independent professional institution intended to protect and strengthen the professional competence and knowledge of expert witnesses, uphold their rights and responsibilities, and monitor the quality of the work done by expert witnesses. Membership to the Chamber is mandatory for all licensed expert witnesses and the Chamber has significant powers to supervise the work of expert witnesses.<sup>46</sup> By way of comparison, the Montenegrin Association of Expert Witnesses (established as a non-governmental organization) is empowered under the Montenegrin LEW to exercise certain public powers (e.g. to propose members of the Montenegrin Commission),<sup>47</sup> however, membership to the Association is not mandatory.<sup>48</sup> In Serbia and BiH, there are a number of expert witness associations<sup>49</sup>, however, none of them is entrusted with power in the same way that the Chamber and the Montenegrin Association of Expert Witnesses are.

**37. In all the jurisdictions examined, the role of expert witnesses in a trial is regulated by civil procedure rules contained in Civil Procedure Codes (CPC) and criminal procedure rules contained in Criminal Procedure Codes (CrPC).<sup>50</sup> Key rules governing the role of expert witnesses in a trial include:**

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<sup>43</sup> Article 5a of the Macedonian LEW.

<sup>44</sup> Article 41 of the Montenegrin LEW, Article 26 of the RS LEW, Article 25 of the Macedonian LEW.

<sup>45</sup> Article 31 of the Macedonian LEW.

<sup>46</sup> Article 32 of the Macedonian LEW. For instance, the Chamber can impose disciplinary measures against experts in case of unprofessional, unethical or otherwise incompetent work.

<sup>47</sup> Articles 9, 13 and 41 of the Montenegrin LEW.

<sup>48</sup> According to the publicly available information, less than 15% of licensed experts are members of the Association. Please see [http://www.hracion.org/wp-content/uploads/sudskivjestaci\\_analiza-1.pdf](http://www.hracion.org/wp-content/uploads/sudskivjestaci_analiza-1.pdf);

<sup>49</sup> Some of them are: <http://ssvs.rs/>, <http://www.forensicexp-vojvodina.org.rs/>, <http://search.bisnode.rs/rs/883852/udruzenje-sudskih-vestaka-forenzika-novi-sad/>, <http://www.udruzenje-vjestaka.com/>, <http://search.bisnode.rs/ba/258319/udruzenje-saobracajnih-sudskih-vjestaka-ekspert-banja-luka/>.

<sup>50</sup> Serbian CrPC is available at: <https://www.mpravde.gov.rs/files/Criminal%20Procedure%20Code%20-%202012.pdf>, while for the Serbian CPC (available only in Serbian) please see: [https://www.paragraf.rs/propisi/zakon\\_o\\_parnicnom\\_postupku.html](https://www.paragraf.rs/propisi/zakon_o_parnicnom_postupku.html). Other texts are available only in local languages, as follows: Montenegrin CrPC is available at: <https://www.paragraf.me/propisi-crnegore/zakonik-o-krivicnom-postupku.html> while Montenegrin CPC is available at: <https://www.paragraf.me/propisi-crnegore/zakon-o-parnicnom-postupku.html>. Macedonian CrPC is available at: <http://www.slvesnik.com.mk/Issues/BDBF29F810D5E9468FC65FA542B857B3.pdf> while Macedonian CPC is available at: <https://www.pravdiko.mk/wp-content/uploads/2013/11/Zakon-za-parnichnata-postapka-20-01-2011-prechisten-tekst.pdf>. RS CrPC is available at: <https://www.paragraf.ba/propisi/republika-srpska/zakon-o-krivicnom-postupku-republike-srpske.html> while RS CPC is available at: <https://www.paragraf.ba/propisi/republika-srpska/zakon-o-parnicnom-postupku.html>. FBIH CrPC is available at: <https://www.paragraf.ba/propisi/fbih/zakon-o-krivicnom-postupku-federacije-bosne-i-hercegovine.html> while FBIH CPC is available at: <https://advokat-prnjavorac.com/zakoni/Zakon-o-parnicnom-postupku-FBIH-precisceni-tekst-2015.pdf>. BD CrPC is available at:

- a. **Engagement of expert witnesses in a trial and their selection:**<sup>51</sup> In Serbia, BiH and Montenegro, civil procedure rules envisage that a party informs the court that it would like an expert opinion as part of the evidence in a trial. The party recommends an expert witness and outlines the subject matter and scope of expertise. The court then decides on the request.<sup>52</sup> In North Macedonia, expert witness reports/opinions are admissible as evidence if they are submitted by the party along with the claim or response to the claim. Only in exceptional circumstances will the court allow an expert report or opinion based on a party's proposal after the initial claim or response to the claim has been filed.<sup>53</sup> Criminal procedure rules in the jurisdictions examined provide for the right of the court or the public prosecutor to unilaterally, and in the absence of a request from a party, decide on the appointment of an expert witness.<sup>54</sup> Procedural rules in all the jurisdictions examined, except for BiH (RS, FBiH and BD criminal procedure rules), stipulate that expert witnesses are primarily selected from a list of permanent court experts.<sup>55</sup> Only in exceptional circumstances can experts who are not on the list be selected.
- b. **Number of expert witnesses in a trial:** As a general rule, one expert should be engaged for one type of expertise.<sup>56</sup> This is not explicitly prescribed by the Macedonian CPC, due to specific rules that exist in North Macedonia. For instance, as explained above, in North Macedonia, parties engage expert witnesses themselves and submit expert opinions together with their initial claim.<sup>57</sup> None of the jurisdictions examined sets a limit on the number of expert witnesses that can appear in a case.<sup>58</sup>

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<https://www.paragraf.ba/propisi/brcko/zakon-o-krivicnom-postupku-brcko-distrikta-bosne-i-hercegovine.html> while BD CPC is available at: <https://www.paragraf.ba/propisi/brcko/zakon-o-panicnom-postupku-brcko-distrikta-bih.html>.

<sup>51</sup> According to the 2015 Civil-law Expert Reports in the EU: National Rules and Practices, “[t]wo main categories of statute exist in the various legal systems. In a number of systems (11 countries out of 22 usable replies), experts are proxies for the court [...] and are therefore subject to the same obligations and prerogatives as the judge. Therefore, in these countries (making up half of the usable replies), judges alone are competent for appointing experts. In other systems (11 countries), which could be described as “Anglo-Saxon” (and this indeed holds true for the United Kingdom), once the decision has been made by the court, or with its consent, to have recourse to an expert report, each party is invited to appoint its expert (who is compensated on the basis of an agreement between expert and party) and the judge only becomes involved if the parties do not make such an appointment (9 countries).”

<sup>52</sup> Article 260 of the Serbian CPC (Based on Article 262 of the Serbian CPC, court may decide to undertake expert witness opinion *ex officio* if this is set out under specific laws), Article 147 of the RS and FBiH CPCs, Article 271 of the BD CPC, Article 244 of the Montenegrin CPC.

<sup>53</sup> Article 235 of the Macedonian CPC.

<sup>54</sup> Article 114 of the Serbian CrPC, Article 137 of the Montenegrin CrPC, Article 110 of the FBiH CrPC, Article 161 of the RS CrPC, Article 96 of the BD CrPC, Article 236 of the Macedonian CrPC.

<sup>55</sup> Article 264 of the Serbian CPC and Article 117 of the Serbian CrPC, Article 245 of the Montenegrin CPC and Article 137 of the Montenegrin CrPC, Article 273 of the BD CPC, Article 149 of the RS and FBiH CPCs, Article 236 of the Macedonian CPC and Article 236 of the Macedonian CrPC.

<sup>56</sup> Article 114 of the Serbian CrPC and Article 264 of the Serbian CPC, Article 137 of the Montenegrin CrPC and Article 245 of the Montenegrin CPC, Article 236 of the Macedonian CrPC and Article of the Macedonian CPC. Please note that this rule is not stipulated in RS, FBiH and BD criminal procedure rules.

<sup>57</sup> Article 235 of the Macedonian CPC.

<sup>58</sup> Article 264 of the Serbian CPC and Article 114 of the Serbian CrPC, Article 245 of the Montenegrin CPC and Article 137 of the Montenegrin CrPC, Article 273 of the BD CPC, Article 149 of the RS and FBiH CPCs, Articles 235 and 236 of the Macedonian CPC and Article 236 of the Macedonian CrPC. Please note that in BiH civil procedure, it is explicitly stipulated that more experts can be engaged only for expertise in more than one field (however this does not exclude the possibility of dismissing the appointed expert witness and appointing a new one in the same trial (Article 155 of the FBiH CPC, Article 279 of the BD CPC and Article 154 of the RS CPC).

- c. **Adherence to trial schedules:** In all the jurisdictions examined, under both civil and criminal procedure rules, expert witnesses can be fined by the courts if they do not appear as summoned or if they, without a justified reason, decline to provide their opinion.<sup>59</sup>
- d. **Deadlines for providing the opinion:** Civil and criminal procedure rules in all the examined jurisdictions (except for the RS, FBiH and BD criminal procedure rules) indicate that a court order requesting an expert opinion must specify the deadline for producing such opinion.<sup>60</sup> In Serbia and North Macedonia, deadlines for providing the opinion in civil procedure cannot be longer than 60 days from the date of the court order,<sup>61</sup> while in all the jurisdictions examined, the expert opinion must be forwarded to both parties of a civil case at least eight days before the hearing.<sup>62</sup>
- e. **Reimbursement:** Civil procedure rules on the reimbursement of expert witnesses are the same in all the jurisdictions examined. Expert witness fees are paid out of the court deposit<sup>63</sup> based on an advance payment made by the party proposing expertise. If the advance payment was not made, the court requires the payment to be made within 8 days of the decision on expert witness fees/costs.<sup>64</sup> In criminal procedures initiated *ex officio*, expert witness fees are paid in advance from the PPO's or the court's funds.<sup>65</sup> In Serbia, if an expert opinion is requested by the party, the court/prosecutor can request the initial down payment for the service.<sup>66</sup>

**38. Rules in all the jurisdictions examined, except for BD, outline how to calculate expert witness fees and determine which expenses an expert can be reimbursed for.** In **Serbia**, expert witnesses' fees are paid per hour – the basis for the calculation is double the amount of the average monthly salary per employee in Serbia.<sup>67</sup> In **Montenegro** and **RS**, expert witnesses earn credits for specific activities performed (in Montenegro, one credit is worth EUR 5.50 and in RS one credit is worth EUR 0.5).<sup>68</sup> In **FBiH**, the rules envisage three ranges of

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<sup>59</sup> Article 267 of the Serbian CPC and Article 115 of the Serbian CrPC; Article 182 of the Montenegrin CPC and Article 138 of the Montenegrin CrPC; Article 411 of the FBiH CPC and Article 264 of the FBiH CrPC; Article 411 of the RS CPC and Article 264 of the RS CrPC; Article 145 of the BD CPC and Article 249 of the BD CrPC, Article 240 of the Macedonian CPC and Article 237 of the Macedonian CrPC.

<sup>60</sup> Article 269 of the Serbian CPC and Article 118 of the Serbian CrPC, Article 249 of the Montenegrin CPC and Article 137 of the Montenegrin CrPC, Article 245 of the Macedonian CPC and Article 236 of the Macedonian CrPC, Article 150 of the FBiH CPC, Article 150 of the RS CPC, Article 263 of the BD CPC.

<sup>61</sup> Articles 269 of the Serbian CPC, Article 245 of the Macedonian CPC (deadline for submitting an expert witness opinion in North Macedonia cannot be longer than 45 days, that is 60 days in complex cases).

<sup>62</sup> Article 270 of the Serbian CPC, Article 253 of the Montenegrin LEW, Article 82 of the FBiH CPC, Article 280 of the BD CPC, Article 82 of the RS CPC.

<sup>63</sup> Court deposits consist of sums which are paid under the orders of the court with the intention that they should be paid out again either to the depositor or to a third person.

<sup>64</sup> Articles 258 and 268 of the Serbian CPC, Articles 242 and 248 of the Montenegrin CPC, Articles 146, 160 and 161 of the RS and FBiH CPCs, Articles 270, 284 and 285 of the BD CPC, Articles 234 and 241 of the Macedonian CPC.

<sup>65</sup> Article 261 of the Serbian CrPC, Article 226 of the Montenegrin CrPC, Article 96 of the RS CrP, Article 199 of the FBiH CrPC, Article 185 of the BD CrPC and Article 102 of the Macedonian CrPC.

<sup>66</sup> Article 117 of the Serbian CrPC.

<sup>67</sup> The Rulebook on Reimbursement of Court Expenses of Serbia.

<sup>68</sup> Article 43 of the Montenegrin LEW and the Tariff of Fees and Expenses of Expert Witnesses of RS (as publicly available). In both jurisdictions, Montenegrin Government and RS Ministry of Justice are mandated to render the tariff of fees and expenses of expert witnesses.

expert witness fees depending on the complexity of the expertise: the lowest range – EUR 25 to EUR 75; the middle range – EUR 75 to EUR 150; and the highest range – EUR 150 to EUR 1,000<sup>69</sup>. The level of complexity is to be determined by the court for each specific case.<sup>70</sup> In **North Macedonia**, expert witness fees are set in ranges determined in accordance with the time needed to provide the expert opinion, complexity of the question under examination and the value of the subject matter of expertise.<sup>71</sup> The level of complexity of the work and the value of the subject matter of expertise are determined by the court in each specific case.

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<sup>69</sup> Values are approximate.

<sup>70</sup> Article 2 of the Tariff on Fees and Expenses of Expert Witnesses of FBiH.

<sup>71</sup> Rulebook on the Manner for Calculating of the Fees for Performed Expertise and Super-Expertise and Reimbursement of Real Costs (Official Gazette No.102/2014). Rules do not specify further how these criteria are applied.

## Understanding the Role of Expert Witnesses in Court Proceedings

39. **Through analysis of existing legal frameworks and practices in the selected jurisdictions, this Report seeks to better understand the role of expert witnesses in court proceedings by exploring seven key areas:** (i) scope and need for expert witness opinion; (ii) persons who act as experts; (iii) selection of expert witnesses; (iv) quality of expertise; (v) timing and management of the work of expert witnesses in a trial; (vi) remuneration of expert witnesses; and (vii) possibilities to sanction expert witnesses. The framework is guided by the topics analyzed under the CEPEJ Guidelines and the World Bank Comparative Study on Expert Witnesses in Court Proceedings<sup>72</sup> and has been adjusted to address issues that are specific to the countries covered by this Report.

### Scope and Need for an Expert Witness Opinion

#### No Opinion on Matters of Law

40. **Expertise can only be used in cases where expert skills or scientific knowledge in a specific field are necessary for relevant facts to be established by the court.** Procedural rules in all the jurisdictions examined are clear on when expert witnesses can be engaged and what their role in the trial is. A court should only engage an expert witness to give an opinion on the facts if it does not have the necessary knowledge to establish the veracity of the facts. The expert opinion is to *assist* the court to establish relevant facts and thus make a decision. Expert witnesses should not be asked to provide an opinion on matters of law and should never take the role of the judge. This is also in line with internationally recognized guides on the engagement of expert witness, notably the CEPEJ Guidelines and the EGLE Guide.<sup>73</sup> According to the CEPEJ Guidelines, “[t]he work of the experts ends where the appraisal of the facts begins, which is the task of the judge alone”.

41. **Still, it seems that expert witnesses in Serbia, BiH and Montenegro, either at the courts’ request or on their own initiative, give opinions on matters of law:**

- a. **Courts in Serbia often request expert witnesses to opine on questions of law.** Both the Serbian CPC and CrPC, in accordance with internationally recognized standards, clearly state that an expert witness should be engaged only to establish matters of fact.<sup>74</sup> However, based on information provided by Serbian judges and expert witnesses, it seems that courts in Serbia often rely on expert witnesses to provide guidance on matters of law. For example, it is not uncommon for expert witnesses to be asked to determine whether there is a legal basis for a claim or whether a debt has matured (see *Box 1*).

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<sup>72</sup> Comparative Study on Expert Witnesses in Court Proceedings, World Bank June 30, 2010.

<sup>73</sup> Please see the CEPEJ Guidelines para 18 and the EGLE Guide para 2.2.

<sup>74</sup> Article 259 of the CPC; Article 113 of the CrPC.

Box 1 – Example of a Court Instruction Given to an Expert Witness in Serbia<sup>75</sup>

The court orders the expert witness to provide an opinion on **whether the applicable laws require construction workers to adhere to the occupational safety rules.**

In a criminal case before a Serbian Basic Court, the court ordered an expert witness - a construction engineer - to determine whether, based on evidence in the case files, the (i) bundling slab was positioned adequately and in compliance with all relevant regulation and (ii) **whether the construction workers were required by law to adhere to the occupational safety rules.**

- b. **Expert witnesses in BiH and Montenegro sometimes provide opinions on legal matters.** A review of the cases in these jurisdictions showed that expert witnesses, although not called/entitled to, sometimes exceed the scope of their responsibility and engage in the legal analysis of examined facts (see *Box 2*). This (problematic) practice is also noted in existing analytical work on the engagement of expert witnesses, both in BiH and Montenegro. As mentioned in these analyses, it is not uncommon for experts to give legal qualifications in trials, thus interfering with the competences of the judge who has the sole authority and responsibility to interpret facts and rules on matters of the law.<sup>76</sup> This practice goes against internationally recognized standards and best practices. Namely, the CEPEJ Guidelines clearly state that an expert witness *“has to limit him- or herself strictly to conducting the production of the expert opinion and not [...] undertake legal evaluation vis-à-vis the court.”*<sup>77</sup>

Box 2 – Example of an Expert Witness Opinion in BiH and Montenegro

- Basic Court in Banja Luka (BiH)

In a criminal case before the Basic Court in Banja Luka, an expert witness specialist for neuropsychology stated in his opinion: **“it stems from the examined facts that the accused person had committed an act of domestic violence”.**

- Basic Court in Kotor (Montenegro)

In a case before the Basic Court in Kotor, the court did not accept a **qualification of the legal status of a customer given in an expert opinion provided by electrical engineering and fire protection experts**, as legal matters do not fall under expert witness' competence.

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<sup>75</sup> See also the report *Examining the Experts – the Role of Expert Witnesses in Serbia, and How Reform Could Improve Efficiency and Quality of Justice*, p. 16, available at: <http://www.mdtfjss.org.rs/archive//file/EW%20Report%20FINAL.PDF>.

<sup>76</sup> USAID Analysis of the System for Engaging Expert Witnesses in Cases of Corruption and Organized and Economic Crime in BiH, available at: <https://usaidjp.ba/assets/files/publication/1516869370-analiza-sistema-angazovanja-vjestaka-u-predmetima-korupcije-i-organizovanog-kriminala-u-bih.pdf>, p. 64 (USAID Analysis); Study on Expert Witnesses in the Montenegrin Legal System, p. 9. The Study is available only in local language, please see: [http://cemi.org.me/wp-content/uploads/2017/08/sudskivjes%CC%8Ctaci\\_analiza.pdf](http://cemi.org.me/wp-content/uploads/2017/08/sudskivjes%CC%8Ctaci_analiza.pdf).

<sup>77</sup> Please see CEPEJ Guidelines, para. 88.

## When Should the Expert Witness Opinion be Requested?

42. **The general perception in all the jurisdictions examined (except for North Macedonia) is that expert witnesses are used more often than needed.** Rules on civil and criminal procedures in all the jurisdictions state that experts should only be engaged in cases where the court does not possess the required expert knowledge to establish relevant facts. Still, it seems that courts rely on expert witnesses' opinion even in cases when this adds little or no value to the case. This practice only delays the trial and increases trial costs.

43. **The frequent use of expert witnesses is perceived to be a common practice in Serbia.** The 2014 Serbia Judicial Functional Review (Functional Review) reports that Serbian judges excessively rely on expert witnesses. According to the Functional Review, there is a fear among judges that Appellate Courts will not support a judge's decision if it is not based on an expert witness' opinion.<sup>78</sup> Litigant lawyers and first instance court judges also shared the same sentiments during informant interviews.

44. **In Serbia, this overreliance on experts is particularly seen in so-called "template" cases.** These are cases where different parties have very similar or identical claims and where defendants are usually the state, municipality, state owned enterprises (SOEs), a state pension or a health fund, e.g. a claim for damages for a stray dog bite, labor disputes on wages owed for working in shifts or at night (particularly against the State Railway), compensation of daycare fees (against the municipal governments), disputes over pension amounts. There seems to be a vast number of such cases and for almost all these *template cases*, expert witnesses are regularly called (see *Box 3*). Needless to say, expert witness opinions in such cases are superfluous. First, these cases should not be in court—they should be settled out of court, but public defenders lack the interest or capacity to pursue such settlements. Second, in these cases, expert witness statements are used as a substitute for evidence that the public defenders fail to provide. So, judges call expert witnesses to conduct fact-finding instead of using the burden of proof rules to the detriment of the party that has failed to provide adequate evidence.<sup>79</sup> Further, in these cases, expert witnesses are sometimes called to simply "rubber-stamp" the court's decision. This is because courts are reticent to rule against the State in the absence of expert evidence that underpins or supports their decision. Concerns that the decision will be overturned on appeal if all the evidence, including that of an expert witness, is not presented, or if a party's request for an expert opinion is declined. Due to the engagement of experts, *template cases* usually last more than a year, even though winning a case against the State defendant is almost certain. These cases clog up the system and affect efficiency of case processing. They are a classic case of how engaging expert witnesses unnecessarily can be an obstacle to the effectiveness of the courts.

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<sup>78</sup> See p. 111 of the MTFD Functional Review. MTFD Functional Review is available at: <http://www.vk.sud.rs/sites/default/files/attachments/Serbia%20Judicial%20Functional%20Review-Full%20Report.pdf>.

<sup>79</sup> For example, the EGLE Guide in para 6.1 clearly states that "*the Expert and the judge will need to ensure that the cost of the expertise remains proportionate to the value of the case.*"

### Template Case – Stray Dog Bite

To resolve a claim for damages for a stray dog bite filed against a local city government, a court needs to schedule at least four hearings and call two expert witnesses. One expert witness should be a doctor, who assesses the degree of physical injury. The other expert witness is a psychiatrist who determines the emotional suffering and fear of the human at the time of the bite. These two experts are needed to evaluate the total value of the claim for damages.

Adjudication is expected within two years. Winning the case against the municipal government is almost certain. Awarded damages are usually not more than RSD 100,000 (approx. EUR 850). Total trial costs are higher or at best close to the value of damages awarded. The municipal government is ordered to pay all trial costs.

45. **In BiH and Montenegro, expert witnesses are sometimes called to give an opinion on facts which do not require expert knowledge.** For instance, BiH Appellate and Supreme Courts reported that first instance judges engage financial experts to calculate the total amount of a debt by summing up amounts on invoices issued. Naturally, expert knowledge is not required for such a simple task. Similarly, in one of the cases reviewed in the Basic Court in Kotor (Montenegro), an expert witness was engaged to determine whether an amount, EUR 980, was lower than the amount set forth in the collective labor agreement, although this could have been easily determined by the judge himself. The engagement of experts for simple tasks prolongs the trial and causes unnecessary trial costs for the parties.

### Box 4 – Example of an Ordered Expertise in BiH

- District Commercial Court in Banja Luka – Two Expert Witnesses engaged to Establish the Exact Amount of Money in a Defendant’s Bank Account

In a commercial case, the court hired two experts; a finance expert and an IT expert, to determine: i) **the exact amount of money in the defendant’s bank account on January 10, 2012**; ii) **whether, when and which amount of money was transferred from the defendant’s bank account to third parties**; and iii) whether a bill of exchange issued by the plaintiff was entered in the defendant’s bank system.

46. **The excessive use of expert witness opinions in BiH was also reported by RS and FBiH judicial and prosecutorial bodies.** The Educational Module developed by the High Judicial and Prosecutorial Council (HJPC), Center for Education of Judges and Prosecutors of FBiH, and Center for Education of Judges and Prosecutors of RS<sup>81</sup>, notes that in some cases, expert witnesses are engaged in civil proceedings in BiH even if there is no need for their expertise. For example, expert opinions are often requested to estimate the value of an item, even

<sup>80</sup> See also the report *Examining the Experts – the Role of Expert Witnesses in Serbia, and How Reform Could Improve Efficiency and Quality of Justice*, p. 20, available at: <http://www.mdtfjss.org.rs/archive//file/EW%20Report%20FINAL.PDF>.

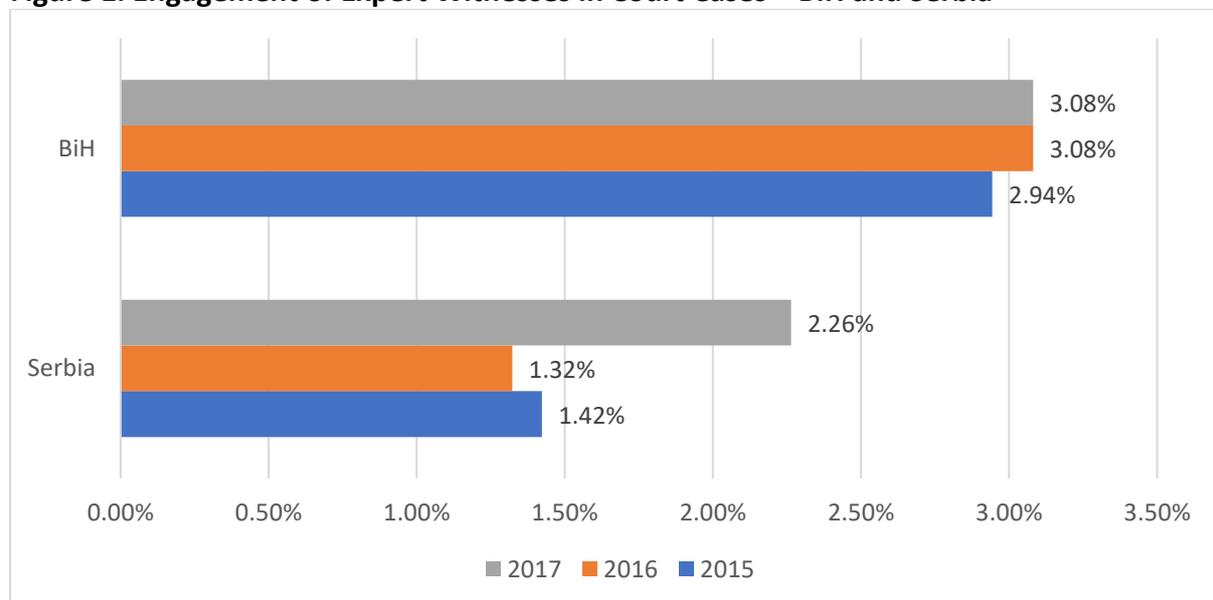
<sup>81</sup> The Educational Module is available only in local language, please see: [https://pravosudje.ba/vstv/faces/pdfservlet;jsessionid=0ff22a967c43ee9497c2de18a2272e02ce685d24f1ac28c462b04b9b45b6a7d3.e34TbxyRbNiRb40Qb34Ma3yRbNb0?p\\_id\\_doc=347;](https://pravosudje.ba/vstv/faces/pdfservlet;jsessionid=0ff22a967c43ee9497c2de18a2272e02ce685d24f1ac28c462b04b9b45b6a7d3.e34TbxyRbNiRb40Qb34Ma3yRbNb0?p_id_doc=347;)

though the value or the purchase price can easily be determined by the receipt or other proof of payment.

47. **The USAID Analysis also found that BiH prosecutors and courts rely on financial expertise even when this is superfluous.** According to the survey, commissioned for the USAID Analysis, 42% of the prosecutors who were surveyed stated that expert opinions on financial matters are often requested even if a criminal offense can be proven without engaging an expert.<sup>82</sup>

48. **However, the statistical data collected does not seem to confirm the perception that expert witness opinions are used too often in trials before Serbian and BiH courts.**<sup>83</sup> According to the data collected for 2015 and 2016, expert witnesses were engaged in around 1.4% of cases before Serbian courts and in less than 3% of cases in BiH courts. In Serbia, the ratio was somewhat higher in 2017. Please see the statistics in the figure below.

**Figure 1. Engagement of Expert Witnesses in Court Cases – BiH and Serbia<sup>84</sup>**



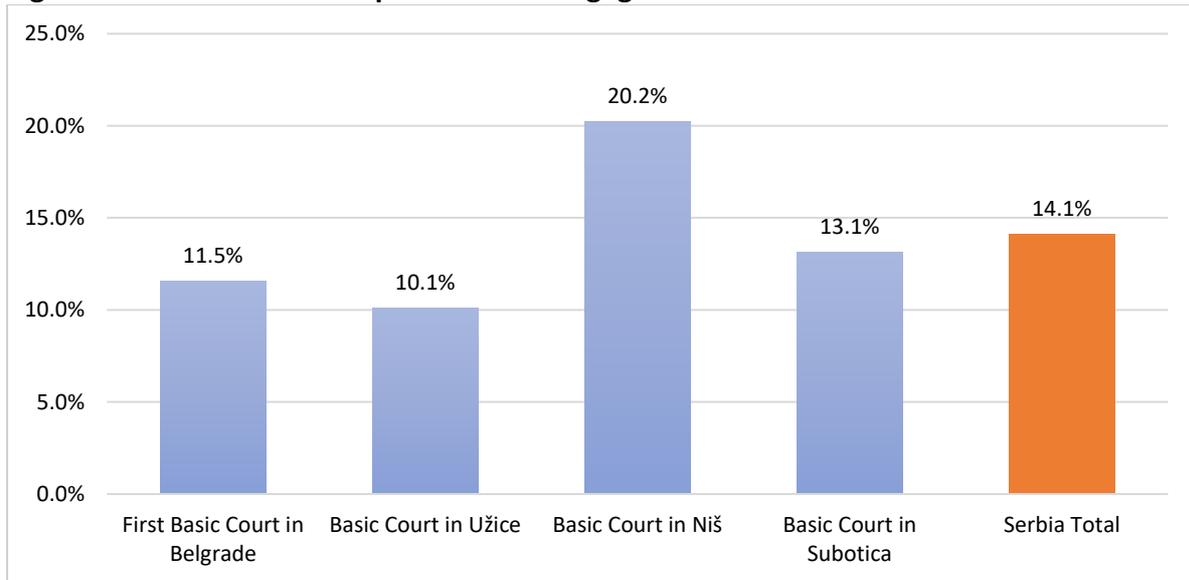
**An analysis of the rate of engagement of experts for cases that typically rely on expertise i.e. civil and commercial litigation cases, criminal cases and commercial offenses, shows that on average, expert witnesses appear in only about 13.5% of all such cases in Serbia and 5.35% of cases in BiH.** Naturally, for certain case types, expert witness opinions are seldom if ever used (e.g. for some types of enforcement proceedings). Therefore, the analysis only focuses on the frequency with which expert witnesses are engaged in types of cases where their engagement is appropriate. Specifically, if one compares (i) the number of cases where an expert witness was engaged with (ii) the number of civil, labor, family and criminal cases, and commercial and commercial offense cases the statistics show that expert witnesses were engaged on average in 13.5% of all such cases in Serbia and 5.35% of cases in BiH. Please find the statistical overview below.

<sup>82</sup> The USAID Analysis, p. 69.

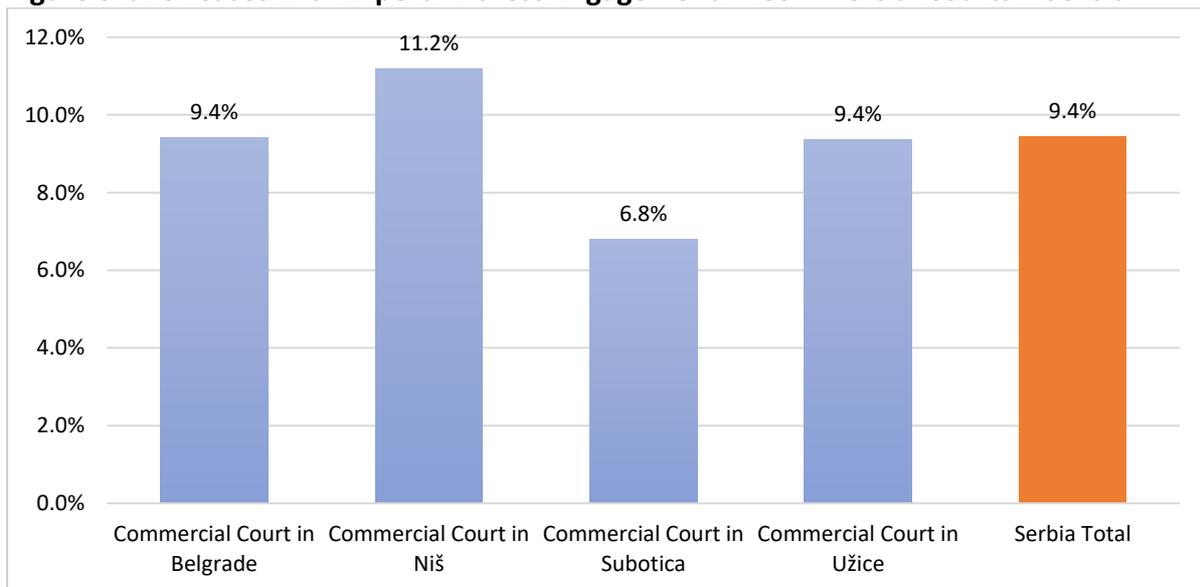
<sup>83</sup> Statistical data is not available for North Macedonia and Montenegro.

<sup>84</sup> Statistics based on data obtained from courts.

**Figure 2. % of Cases with Expert Witness Engagement in Basic Courts – Serbia<sup>85</sup>**



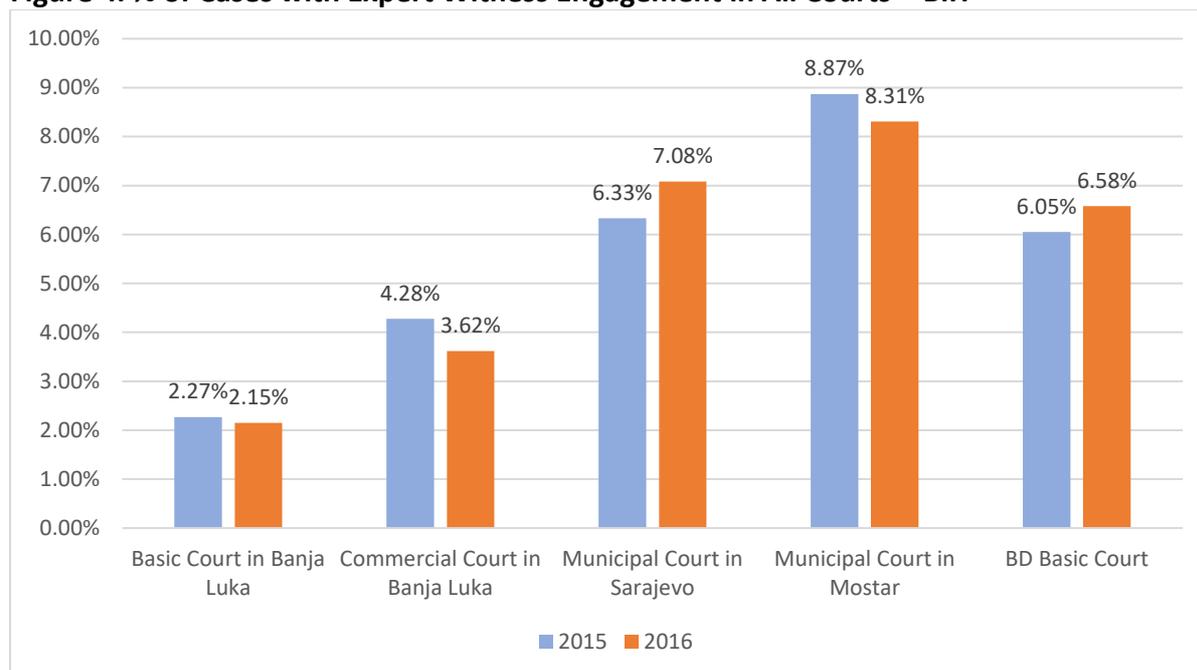
**Figure 3. % of Cases with Expert Witness Engagement in Commercial Courts – Serbia<sup>86</sup>**



<sup>85</sup> Statistics based on data obtained from courts.

<sup>86</sup> Statistics based on data obtained from courts.

**Figure 4. % of Cases with Expert Witness Engagement in All Courts – BiH<sup>87</sup>**



## Persons Acting as Experts

### Legal Persons vs Individuals as Expert Witnesses

49. In all the jurisdictions examined, both natural and legal persons can be expert witnesses. However, in Serbia and BiH it is more common for natural persons to be engaged as expert witnesses. A legal entity can be an expert witness as long as it has registered expert witnesses as employees. Still, data obtained from the courts show that, in practice, very few legal persons are called to be expert witnesses.<sup>88</sup> This is especially true in BiH where the 10 most commonly hired experts are all individuals. A similar situation exists in Serbia, where around 80% of the top 10 most frequently engaged expert witnesses are individuals.<sup>89</sup> In North Macedonia<sup>90</sup>, the distribution of work between individual experts and legal persons appears to be equal. However, this can be attributed to the fact that the BEW (which is a legal entity) has (i) a legal monopoly for providing expert opinions in trials involving state institutions/firms, and a (ii) *de facto* monopoly for providing a so called *super-expertise* (as explained in paragraphs 49 and 50 below).<sup>91</sup> There are still some exceptions to this rule – e.g. in Basic Courts in Štip and Veleš, 82% and 75% of hired experts respectively were individuals.

<sup>87</sup> Statistics based on data obtained from courts.

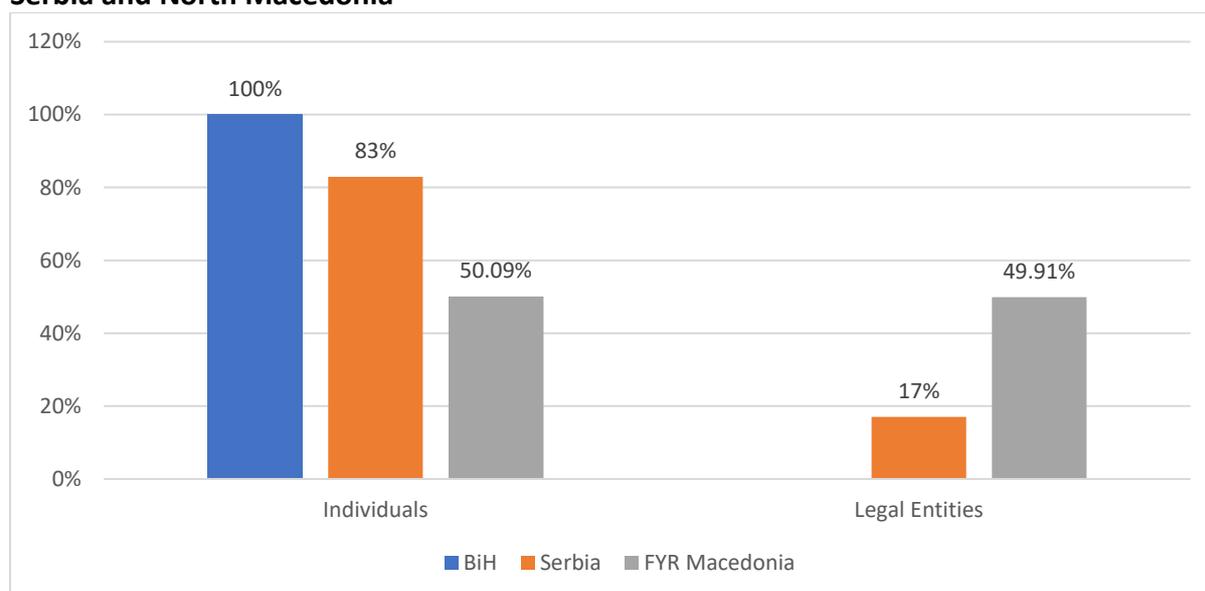
<sup>88</sup> Statistical data is not available for Montenegro.

<sup>89</sup> According to the report *Examining the Experts – the Role of Expert Witnesses in Serbia, and How Reform Could Improve Efficiency and Quality of Justice*, this is particularly the case in Basic Courts where the top 10 most frequently engaged expert witnesses are all individuals (p. 20).

<sup>90</sup> Based on the reviewed case sample.

<sup>91</sup> Super-expertise is a third expertise provided in trial. It is used if there is a need to reconcile the findings of previous two expert witnesses with opposing views on the same subject matter.

**Figure 5. Top 10 Expert Witnesses (Share of Individual Experts and Legal Entities) – BiH, Serbia and North Macedonia<sup>92</sup>**



50. **Macedonian LEW grants the Bureau of Expert Witnesses, which is a publicly funded state entity, the exclusive right to provide expert opinions for the Government, all public institutions and state-owned enterprises.** This effective monopoly impedes the development of a free and competitive market for expert witnesses. Also, it creates a perception of a lack of independence and bias in favor of the state.

51. **In North Macedonia, the BEW also has *de facto* exclusivity of the so called “super expertise” (*supervestačenje*) – expertise by the commission of experts in the event of conflicting expert opinions.** Macedonian LEW states that any institution that is eligible to provide expertise can also provide “super expertise” as long as it employs three licensed expert witnesses in the same field. However, in a small market such as North Macedonia, there are very few private companies that can satisfy the eligibility criterion of a minimum of three licensed expert witnesses in the same field. Therefore, in most cases only public institutions provide “super expertise” and in many subject areas there is only one institution that can provide the super expertise (e.g. the Medical Faculty of the University of Skopje and the Institute for Forensic Medicine in Skopje in their respective fields). Interestingly, even in cases where there are multiple institutions that can be engaged to provide “super expertise”, instead of randomly assigning the service to one of those institutions as mandated by the LEW, judges almost always opt for the BEW. It also does not help that the electronic system for random assignment of “super expertise” is still not in place. Again, the status quo is in conflict with the purported free and competitive market for expert witnesses.

52. **Laws on expert witnesses in the jurisdictions examined do not include the right of individual expert witnesses to hire support staff.** The CEPEJ Guidelines provide that expert witnesses should have the right to hire support staff,<sup>93</sup> yet laws on expert witnesses in all the countries examined are silent on this matter. Furthermore, the existing practice seems to be

<sup>92</sup> Statistics for Serbia and BiH are based on data obtained from courts. In North Macedonia, data on the share of individual experts and legal entities was obtained during the review of cases.

<sup>93</sup> The CEPEJ Guidelines para 25.

that expert witnesses work alone. For instance, interviews with expert witnesses in Serbia revealed that it is not common for expert witnesses to hire support staff, even in cases when natural persons establish sole entrepreneurship. The reticence to hire support staff may stem from the fact that neither Serbian LEW nor the CPC or CrPC give any guidance on the role or rights of support staff for expert witnesses. Without support staff, expert witnesses are bound to do all the work themselves, which can both prolong the time needed to produce expert opinions (and lead to delays) and impact the quality of expert witnesses' work. The risk is even higher in jurisdictions in which the same expert witnesses are recurrently engaged by the court and are overburdened with work (please see paragraph 78 below).

## Available Expertise

### 53. Shortages of high-quality experts were reported in the jurisdictions examined<sup>94</sup>:

- a. In **Serbia**, some regions and courts do not have an adequate supply of expert witnesses. For example, judges of the Basic Court in Subotica note a lack of high-quality experts in a number of fields. Because of this, experts are often called from Novi Sad. Given the high travel costs associated with engaging expert witnesses in some regions, parties are reluctant to use them which causes contention in the trial and frustrates all the parties involved. Expert witnesses from Belgrade also report having to travel to service the needs of courts across the country. Also, graphology expertise is lacking in Serbia and other professions seem to supply it. This causes concern about the knowledge of the experts who are engaged and quality of their expertise.

#### Box 5 – Shortage of Expertise in Serbia<sup>95</sup>

##### **One of the Commercial Courts observed in Serbia has no Information Technology Experts**

In a case before the Commercial Court, the claimant objected to the person proposed as an expert witness by the defendant and requested that the court to select another expert. The court determined that **there are no information technology experts registered in the territory of the Higher Court**<sup>96</sup> and called an expert from Belgrade to conduct the expertise. The expert witness from Belgrade had to travel for over five hours to attend hearings and pick up/review case files. This led to delays and increased the costs of the trial.

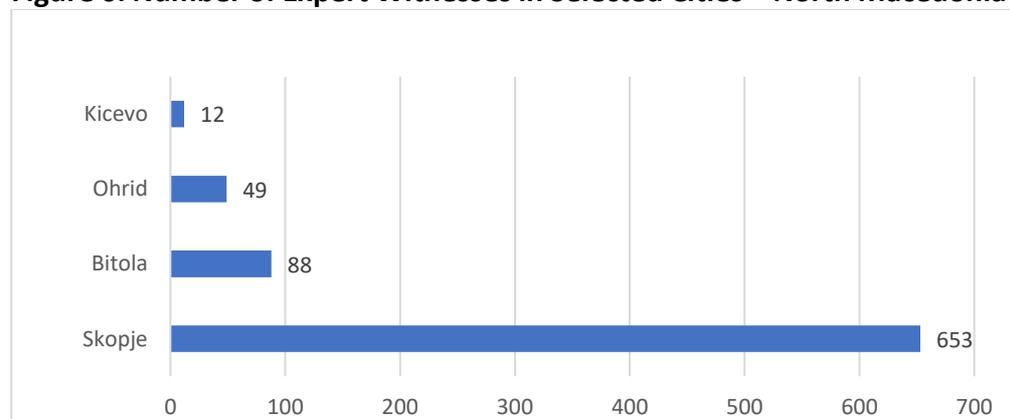
<sup>94</sup> According to the 2014 CEPEJ Study on the Role of experts in Judicial Systems of the Council of Europe Member States: *“Lack of experts was cited by the majority of respondents as a cause of delays. However, for those who cited lack of experts, some of the respondents also made it clear that it was a more prevalent problem in some areas than others. In Turkey, e.g., it is particularly hard to find experts in small cities for certain types of cases, such as cyber-crimes and forensics. Where such cases do occur, evidence is sent to larger courts to find an appropriate expert, where possible. In Slovenia, along the same lines, it has been described that some ‘good experts are overloaded with different cases in different courts’.”* [...] *“The biggest problem is the lack of experts. This is something that policy makers in access to justice issues must pay attention to in order to maintain high quality and integrity of the expert bodies in their respective jurisdictions.”*

<sup>95</sup> See also the report *Examining the Experts – the Role of Expert Witnesses in Serbia, and How Reform Could Improve Efficiency and Quality of Justice*, p. 21, available at: <http://www.mdtfjss.org.rs/archive//file/EW%20Report%20FINAL.PDF>.

<sup>96</sup> In the Republic of Serbia expert witnesses are registered for the territories of Higher Courts. The register is available on the MOJ website: <https://www.mpravde.gov.rs/court-experts.php>.

- b. In **North Macedonia**, there is a total of 1,261 registered expert witnesses. More than half of the expert witnesses live and work in Skopje (653). Bitola, the city with the second largest number of registered expert witnesses after Skopje only has 88 registered experts (see figure below). In total, there are 96 areas of expertise for which expert witnesses provide expert opinions, and for some of these areas there are only a few expert witnesses registered, all of which are based in Skopje. Engagement of those experts by the courts outside of Skopje inevitably leads to higher costs and impacts the overall duration of trials. Further, as mentioned above, there is a lack of diversity in the institutions that provide “super expertise” in trials.

**Figure 6. Number of Expert Witnesses in Selected Cities – North Macedonia<sup>97</sup>**



- c. In **Montenegro**, there are not enough experts in some fields while there are too many in others. In the fields where there is an inadequate number of experts, experts are overburdened with work which affects the overall quality of their opinions. This appears to be a critical issue. For instance, in one labor dispute the court revoked the decision to engage an expert witness because he was already engaged in 24 other court cases. The 2015 Civil Alliance Report<sup>98</sup> indicates that according to 52.9% of judges and 69.5% of PPOs the deficit of qualified experts in certain fields negatively influences the quality and efficiency of the trial.
- d. In **BiH**, judges report that there are very few skilled expert witnesses in fields relevant for commercial cases. There are many expert witnesses on the list of registered witnesses, but according to judges, few are adequately skilled and have the knowledge required to work on complex cases particularly in commercial disputes. Consequently, skilled expert witnesses end up being overburdened with work and this often causes delays in producing expert opinions. Also, the lack of expert witnesses in the following specific areas was particularly noted by BiH PPOs: banking-financial operations, hedge funds, money laundering, corporate management, stock exchange operations, the

<sup>97</sup> Based on the electronic registry kept by the Macedonian Ministry of Justice.

<sup>98</sup> Report on Opinion of Judges, Prosecutors and Citizens on the Judicial System, Civil Alliance and the Association of Judges and Prosecutors of Montenegro, 2015.

seizure of assets acquired through a criminal offense etc. Also, there is a serious lack of forensic experts.<sup>99</sup>

## Expertise of Expert Witnesses

### *Professional Examination of Experts*

54. **In Serbia and BD there are no exams for entry into the expert witness profession, which causes concerns about the quality of expert witnesses and a perception of a lack of integrity in the expert witness selection process.** Qualification criteria for appointment into the profession are set out in both jurisdictions<sup>100</sup> and require that expert witnesses have adequate knowledge in their field of expertise at the time of admission. Despite this requirement, the expertise of candidate expert witnesses in Serbia and BD is not checked prior to admission; in fact, there is no mechanism in place to verify their expertise.<sup>101</sup> It is therefore not surprising that new experts have no or limited knowledge of trial requirements and no other platform to learn, except through practice. This results in challenges and delays at trial and narrows down the selection pool of expert witnesses engaged by courts. Skilled expert witnesses with a good understanding and knowledge of trial requirements are more frequently engaged and are, therefore, overburdened with work which also leads to delays. At the same time, less skilled experts have limited opportunities to appear before the courts which in turn limits their scope to learn from experience and as a result are seldom engaged, if at all. Also, this complicated dynamic contributes to perceptions of lack of transparency in the selection of expert witnesses as some expert witnesses are consistently engaged more often than others.

55. **In North Macedonia and RS, certain individuals can obtain an expert witness license without having to take and pass the professional exam.** For example, a person who holds a PhD or a Master's degree in a certain field will be exempt from taking the exam that tests their knowledge in their area of expertise. Furthermore, such a person will also be exempt from taking the exam on trial requirements. Therefore, it is possible for a person without any practical experience in drafting expert witness reports and knowledge of trial processes to be admitted into the profession. Experience shows that, notwithstanding an expert's outstanding academic achievements, their expert opinion can end up being of little value to the court if the expert lacks knowledge of trial requirements and the specific needs of the court.

56. **In FBiH, rules on the examination to be taken by expert witnesses to enter the profession are unclear.** Candidate expert witness are required to pass a professional exam in their field of expertise. However, the rules are not clear on whether knowledge of trial requirements and processes is also tested at the time of admission. Vague rules leave room

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<sup>99</sup> USAID Analysis, p. 65.

<sup>100</sup> Article 6 of the Serbian LEW and Article 5 of the BD Rulebook.

<sup>101</sup> Please see the EGLE Guide, paras. 3.12 and 3.13. "With regard to registration on the list, the competent organization at European level, and national organizations insofar as it concerns them, must at the very least check the Expert's technical competence by seeing proof of (i) the Expert's qualifications, (ii) professional curriculum, (iii) knowledge of investigative techniques, (iv) his legal knowledge of the standards governing the exercise of his main activity and the rules relating to Experts' obligations and rights, as well as of the guiding principles of fair trial."

for discretionary application and insufficient control over the quality and competence of expert witnesses at the time of their admission into the profession. This, in turn, can have adverse effects on the overall efficiency of case processing. Without sufficient knowledge of trial processes and correct procedures for conducting expertise, expert witnesses can hardly be expected to produce opinions that are of practical value to the court, and instead of advancing the decision-making process, their engagement causes, or in some cases exacerbates, inefficiency.

57. **In RS/FBiH, members of the Commissions who conduct the examination of candidate expert witnesses are themselves not competent to undertake the task. As such, there is no guarantee that the best/most suitable or most skilled experts are being admitted into the profession.**<sup>102</sup> Associations of expert witnesses and the courts are not involved in the process of selecting or appointing members of the Commission who conduct the examination of candidate expert witnesses. Rather, expert members of the Commission are appointed by the MOJ. The MOJ is hardly competent to identify and select the appropriate persons to examine candidate expert witnesses as the MOJ neither employs nor uses expert witnesses in their day to day work (experts appear in trials before the courts and not before the MOJ).

58. **In North Macedonia, the licensing exam for expert witnesses can be improved through more adequate testing of candidates' knowledge of trial processes.** During the interviews conducted, many experts and other legal professionals noted that in its current form, the license exam does not adequately test the candidates' practical knowledge (proper and correct procedures for conducting the expertise and producing the expert opinion). The Macedonian Strategy for Reform of the Judicial Sector states that the examination for expert witnesses will be changed,<sup>103</sup> but it remains to be seen if the new structure will be more effective in assessing all the relevant knowledge and skills.

### *Entry Requirements*

59. **Compared to the other jurisdictions examined, expert witness entry requirements in FBiH are vague and leave room for discretionary appointment of expert witnesses into the profession.** The FBiH LEW does not stipulate specific licensing requirements in terms of education/prior professional experience of candidate expert witnesses. It merely stipulates that an expert witness must have adequate education, professional experience and expertise in a certain field to be appointed.<sup>104</sup> No definition of *adequate* is provided. A candidate expert witness is required to submit a biography, proof of adequate education, letters of recommendations and a list of the last ten cases in which he/she was engaged as an expert witness (if he/she already performed expert witness work).<sup>105</sup> However, rules in other examined jurisdictions specify what is deemed to be *adequate* in terms of education and experience. For instance, to be licensed as an expert witness, a person is required to have at least five years of work experience and an undergraduate or post-graduate degree.

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<sup>102</sup> USAID Analysis, p. 54.

<sup>103</sup> National Strategy for the Reform of the Justice Sector 2017-2022 page 44; Action Plan for the Implementation of the National Strategy for the Reform of the Justice Sector 2017-2022 page 20.

<sup>104</sup> Article 3 of the Law on Expert Witnesses of FBiH.

<sup>105</sup> Article 5 of the Law on Expert Witnesses of FBiH.

60. **There is little or no continuous training for expert witnesses in the jurisdictions examined<sup>106</sup>:**

- a. **In Serbia, BD and FBiH, there is no obligation for expert witnesses to regularly update their knowledge and skills.** Appointed expert witnesses are not required to undertake continuous training or demonstrate that they are maintaining the required level of knowledge and skills in their area of expertise and in trial processes. In **FBiH**, *once appointed*, expert witnesses undertake a once-off training<sup>107</sup> which includes lectures in their field of expertise and in trial requirements.<sup>108</sup> Expert witnesses who fail to attend this training will not have their license renewed<sup>109</sup>, but can still provide expertise for 6 years (validity period of their license). The FBiH Commission can organize additional training for expert witnesses if the relevant procedural laws are amended and/or there are developments in the specific areas of expertise.<sup>110</sup> However, the rules do not make this mandatory and do not envisage that additional training must be organized, nor do they stipulate that the training is mandatory for expert witnesses. Otherwise, the once-off training is the only training required for experts.
- b. **Although mandated by law, training for expert witnesses in North Macedonia, RS, FBiH and Montenegro is still not regularly organized in practice.** The Macedonian LEW prescribes mandatory continuous training of expert witnesses; however, the Chamber of Expert Witnesses does not have the capacity to provide regular training. Since its inception in 2013, the Chamber has only organized nine trainings across all 96 expert areas. Moreover, the Chamber does not publish any newsletters or other documents to keep its members abreast of new scientific or professional developments in fields relevant to their work. Further, experts report that in practice the Chamber membership fees are rarely paid by experts, which has negative implications on the Chamber's budget and capacity to organize training. In **RS** and **FBiH**, the Ministries of Justice have only recently started planning/organizing training for expert witnesses. As reported by the FBiH MOJ, the first mandatory training for expert witnesses was organized in the summer of 2018. In RS, the MOJ only started planning the training in October 2018 (although the RS LEW, which introduced training requirements, was adopted in 2017). Similarly, in Montenegro, steps to organize training for

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<sup>106</sup> According to the 2014 CEPEJ Study on the Role of Experts in Judicial Systems of the Council of Europe Member States, "[t]he majority of respondents have some degree of training for experts. Some pilot courts indicated a very high incidence of training. One of the German respondents indicated that experts who regularly attend court often seek out training sessions, which are often organized by various professional institutions. In Monaco, [courts] draw their experts from an official list from the French court of appeal in (Aix-en-Provence), and are usually part of an organization that arranges continuous training for them. For other respondents which indicated the lowest incidences of training, this could indicate a high level of trust in experts and their initial training and qualifications in their respective countries."

<sup>107</sup> Article 34 of the Law on Expert Witnesses of FBiH and Article 2 of the Rulebook on Expert Witness Training of FBiH.

<sup>108</sup> Article 3 of the Rulebook on Expert Witness Training of FBiH.

<sup>109</sup> Article 6 of the Rulebook on Expert Witness Training of FBiH.

<sup>110</sup> Article 5 of the Rulebook on Expert Witness Training of FBiH.

expert witnesses were taken only in late 2017. According to the webpage of the Montenegrin Association of Expert Witnesses, one training was organized in November 2017 with only 19 attendees.<sup>111</sup>

- c. **The pervasive lack of continuous training of expert witnesses in the Western Balkans is contrary to the practices recommended by CEPEJ Guidelines and the EGLE Guide.** According to the CEPEJ Guidelines, experts must keep up their knowledge not only concerning their expertise but also the principles guiding the expert's activity. It is further mentioned as a good practice example that, in certain countries, "experts also have the duty to undertake training on the rules of procedure concerning the expertise and the role of the expert, as well as on conditions of the expert's participation in hearings and presentation of his/her expert opinion."<sup>112</sup> Similar requirements exist in the EU. In the EU, training for expert witnesses can be organized by institutions in the public and private sector. In fact, this is encouraged by the EGLE Guide which stipulates that "[e]ach EU Member State should establish or appoint one or several judicial, administrative, or private body or bodies that meet the required criteria of independence [...], and which would deal with the transparency, the admissions, the training and the quality of Judicial Experts and judicial expertise."<sup>113</sup> As all the selected countries aspire to become members of the EU, they would certainly benefit from introducing provisions on training that would align their legal provisions and actual practice with EU requirements.

### Number of Experts Used in Trial

61. **In the countries examined, the regulatory frameworks do not cap the number of expert witnesses per case.** Civil and criminal procedure rules in all the jurisdictions examined allow the court to call as many expert witnesses as needed in a case. If two expert witnesses have opposing or contradictory opinions, the court is entitled to seek validation from a commission of expert witnesses (*supervestačenje/super-expertise*) which analyzes the findings of both experts. Even after calling for validation from the commission of experts, courts are still entitled to call more expert witnesses to analyze the same matter all over again. This is inconsistent with the guidance provided in the CEPEJ Guidelines, which indicate that hiring too many expert witnesses in one case overburdens the trial and leads to inefficiencies.<sup>114</sup> Formally, the only exception is BiH. According to RS, FBiH and BD civil procedure rules, only one expert witness can be engaged for one area of expertise. However, this does not prevent the court from dismissing that expert witness for a poor or untimely opinion and engaging another expert (or experts) to provide an expert opinion on the same matter.

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<sup>111</sup> Please see Study on Expert Witnesses in the Montenegrin Legal System, pp. 19 and 21. The Study is available only in local language, please see: [http://cemi.org.me/wp-content/uploads/2017/08/sudskivjes%CC%8Ctaci\\_analiza.pdf](http://cemi.org.me/wp-content/uploads/2017/08/sudskivjes%CC%8Ctaci_analiza.pdf). Also see webpage of the Montenegrin Association of Expert Witnesses, accessible at: <http://usvcg.me/novosti.html>.

<sup>112</sup> The CEPEJ Guidelines, para. 87.

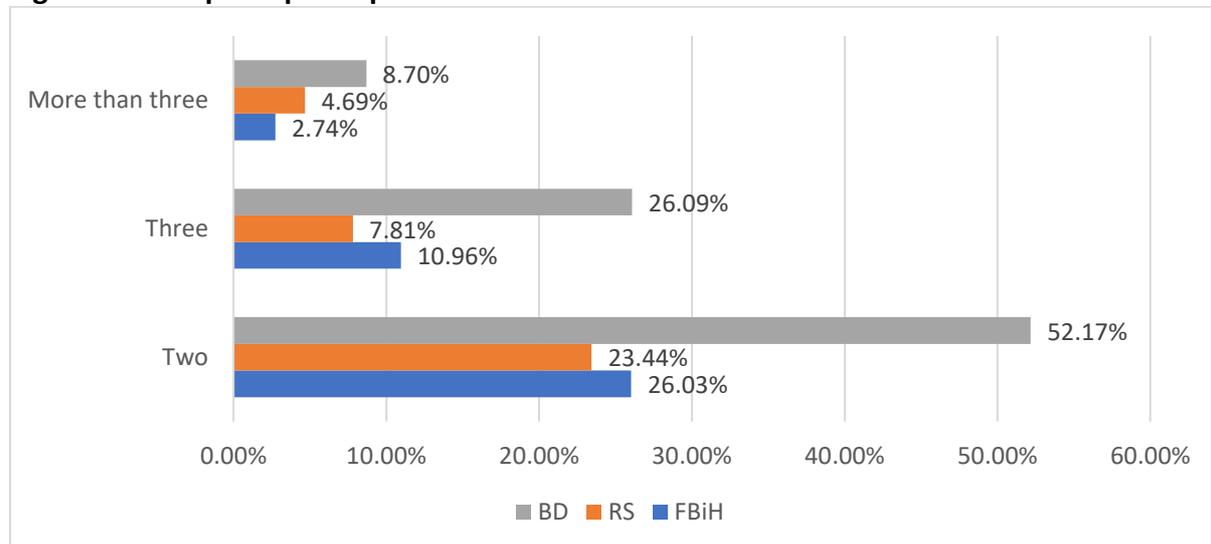
<sup>113</sup> Please see the EGLE Guide, paras. 7.23 - 7.26.

<sup>114</sup> The CEPEJ Guidelines report that "the number of expert appointed should remain manageable and not become too large, to avoid problems with clarity and simplicity. It should be limited to a certain number that depends on the complexity and expediency of the question under examination. This number should be defined by the court or by law." For more please see para 28 of the CEPEJ Guidelines.

62. In North Macedonia and Serbia, civil procedure rules allow for the expert opinion to be submitted along with the claim or response to the claim; this often leads to more than one expert witness being engaged in one trial. Macedonian civil procedure rules stipulate that expert opinions should be submitted by the parties. All evidence (expert opinions included) is to be submitted by the time that the preparatory hearing is held. As at such time (i.e. before the preparatory hearing) the disputed facts have not yet been identified, some expert opinions are prepared too early and then need to be amended. This creates additional work for the expert witnesses, results in additional costs for the parties and can sometimes delay the trial. In Serbia, parties can submit expert opinions to the court together with their initial claims. However, civil procedure judges reported by that this causes problems in practice, as opinions often contradict each other and require additional engagement of the court, expert witnesses and parties to reconcile opinions and establish relevant facts.

63. In Serbia and BiH, it is very common to have more than one expert witness opinion in criminal proceedings; in BiH, it is not uncommon to have multiple expert opinions for civil cases as well. Informal interviews with litigant lawyers specializing in criminal cases in Serbia revealed that having multiple expert witness opinions is commonplace.<sup>115</sup> Review of cases before BiH courts confirmed that several expert witnesses are usually engaged in a criminal case. The review also showed that more than one expert is often hired in civil cases before BiH courts. Statistics based on the reviewed case sample (Sample statistics) are presented in the figures below.

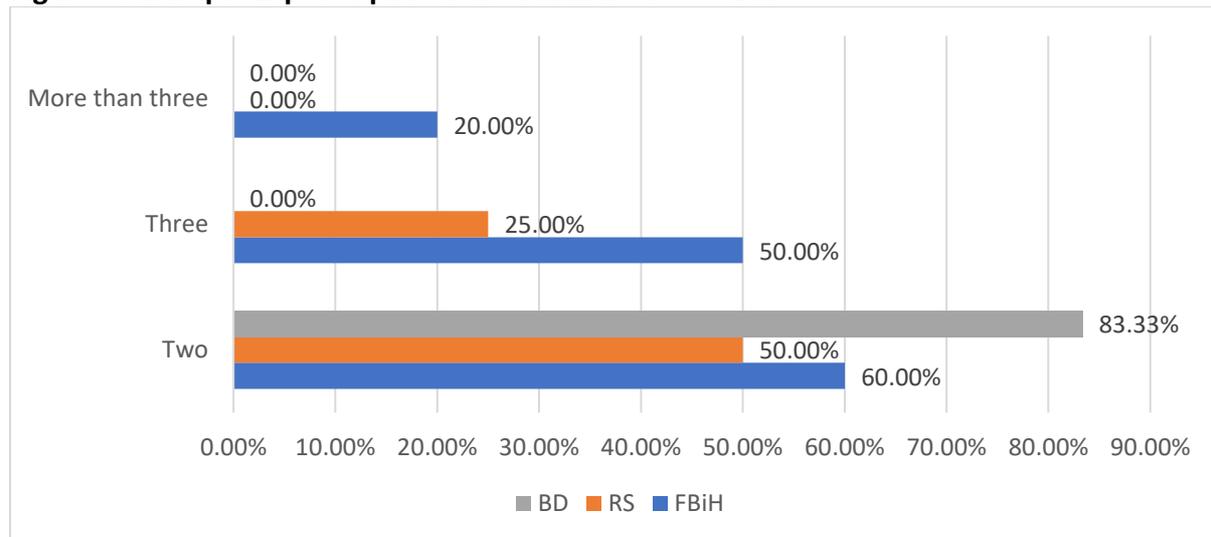
**Figure 7. Multiple Expert Opinions in Civil Cases – BiH<sup>116</sup>**



<sup>115</sup> For statistics on Serbia, please see the report *Examining the Experts – the Role of Expert Witnesses in Serbia, and How Reform Could Improve Efficiency and Quality of Justice*, pp. 22 and 23; available at: <http://www.mdtfjss.org.rs/archive//file/EW%20Report%20FINAL.PDF>;

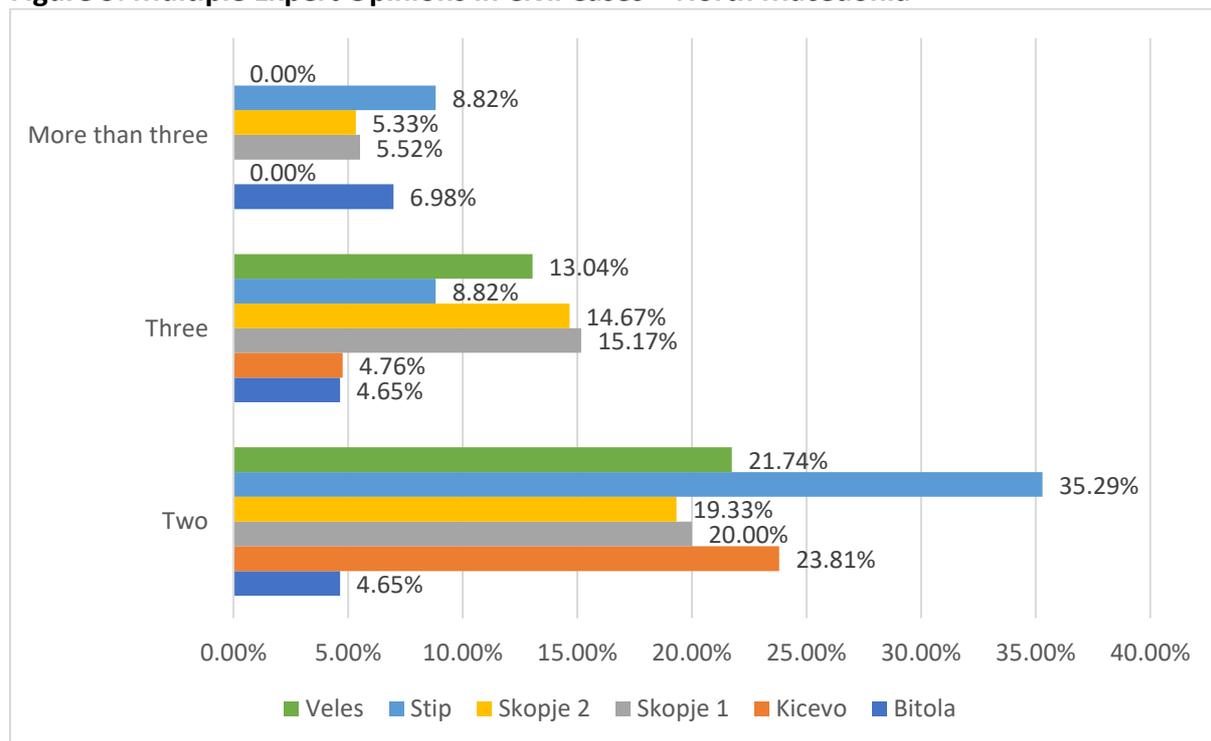
<sup>116</sup> Sample statistics.

**Figure 8. Multiple Expert Opinions in Criminal Cases – BiH<sup>117</sup>**



In North Macedonia, in 40% of civil cases, more than one expert opinion was used in one case (in as many as 18% of civil cases three or more expert opinions were submitted). In criminal cases, percentages are lower – in around 30% of all reviewed cases, more than one expert opinion was necessary to close the case.

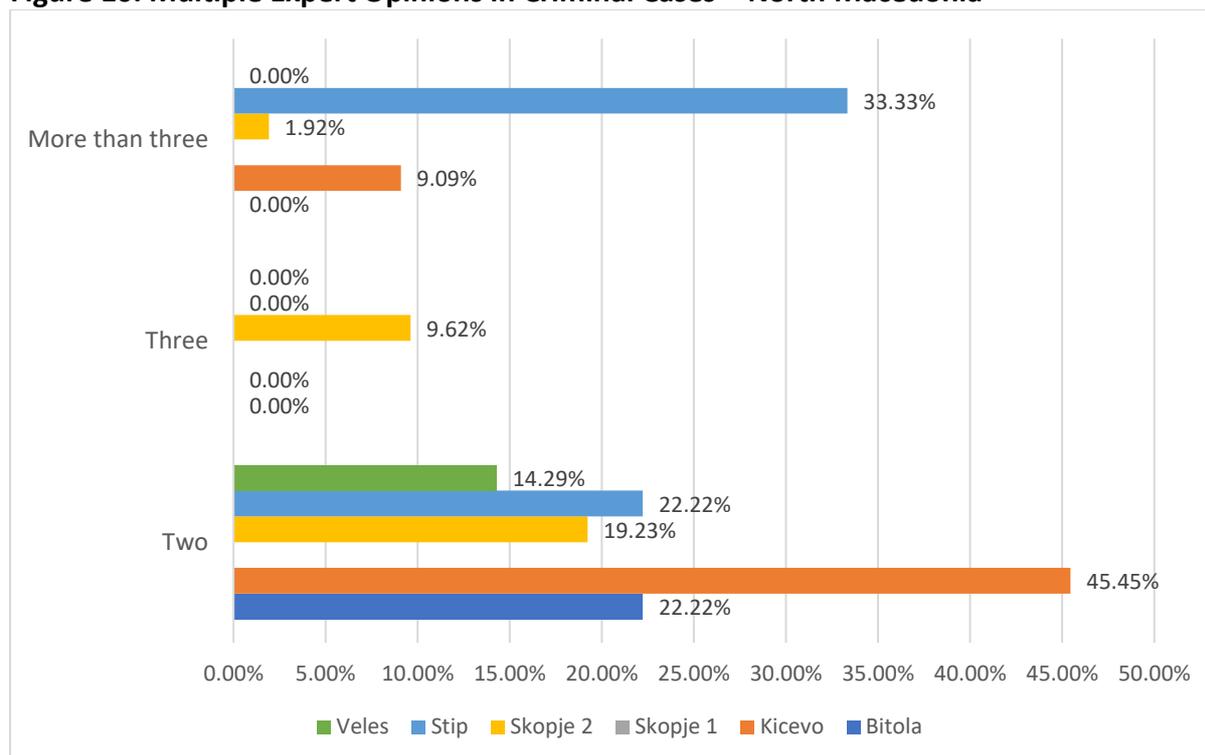
**Figure 9. Multiple Expert Opinions in Civil Cases – North Macedonia<sup>118</sup>**



<sup>117</sup> Sample statistics.

<sup>118</sup> Sample statistics.

**Figure 10. Multiple Expert Opinions in Criminal Cases – North Macedonia<sup>119</sup>**



## Selection of Expert Witnesses

### Appointment into the Profession

64. **The systems for the appointment of expert witnesses into the profession seem to be creating skills shortages in RS, Serbia and Montenegro.** RS LEW does not stipulate that a public call will/can be made at the request of the courts or prosecutors – the MOJ publishes a call for applications *ex officio* i.e. on its own discretion/initiative. However, without input from the courts/prosecutors, the MOJ can hardly make an informed decision on the need for expert witnesses in a certain field, since it neither employs nor uses expert witnesses in its day to day work. Experts appear before the courts/PPOs, so these authorities are best positioned to establish whether and in which area a shortage of experts exists. In Serbia<sup>120</sup> and Montenegro, rules on appointment into the profession stipulate that courts<sup>121</sup> supply the MOJ with information on whether there is a need for expert witnesses in a certain field. Yet, neither the Serbian nor Montenegrin MOJs are obliged to publish a call for appointment into the profession based on the information provided by courts and/or prosecutors. The Ministries, at their own discretion, publish a call for appointment of expert witnesses for a specific field of expertise.<sup>122</sup> This mechanism creates a disconnect between the need or demand for expert witnesses as determined by the courts and the supply in number and in

<sup>119</sup> Sample statistics.

<sup>120</sup> In Serbia, the last call into the profession was in 2014 and no call has been published since nor is there an open call at the time of writing of this Report. At the same time, courts during the analysis of implementation of legislation in practice have noted the lack of experts in some fields.

<sup>121</sup> First instance courts in Serbia. Court presidents and heads of prosecutors' offices/other authorities conducting proceedings in Montenegro.

<sup>122</sup> Article 11 of the LEW.

area of expertise of experts called for by the Ministries. More importantly, this approach is not in line with the CEPEJ Guidelines.<sup>123</sup> Among the countries examined, only FBiH LEW stipulates that the MOJ will publish the call for appointment into the profession when requested to do so by courts (see also paragraph 52 on shortages of qualified experts).

### **Selection of Expert Witnesses by the Parties and by the Trial Judge**

**65. The criminal procedure rules in RS, FBiH and BD stipulate that courts are not obliged to engage experts from the list of court experts.** According to the EGLE Guide – *due to the quality guarantees inherent to these lists, which are designed not as mere directories but as a public acknowledgement of competence, morality and reputation, the judge, who retains complete freedom of choice, would have to justify this choice when appointing an expert outside these lists.*<sup>124</sup> RS and FBiH laws governing expert witnesses explicitly stipulate that lists of permanent court experts are not binding for the court, unless it is stipulated otherwise in procedural laws. Also, RS, FBiH and BD criminal procedure rules do not stipulate that courts should select registered experts, nor do they stipulate criteria that the court should use in the selection process. On the other hand, in Serbia and Montenegro, laws on expert witnesses state that the court must take into account equal distribution of cases among expert witnesses and both civil and criminal procedure rules envisage that an expert outside of the list of permanent court experts can only be engaged if this is justified by exceptional circumstances.

**66. None of the jurisdictions examined have clear rules in place for the selection of expert witnesses by PPOs.** The selection of expert witnesses by PPOs is particularly relevant for the pre-investigation stage of criminal proceedings. Specifically, in all the jurisdictions examined, PPOs are the ones that call and appoint expert witnesses at this stage of proceedings. In **Serbia**, lawyers engaged in criminal cases indicated that there are no transparent rules for the selection of expert witnesses by PPOs, as did expert witnesses. Relatedly, the desk research conducted did not identify any rules that guide the PPOs in the selection of expert witnesses in the pre-investigation stage of criminal proceedings. The analysis of the implementation of legislation in practice by Serbian courts also showed that in the pre-investigation stage of criminal proceedings, expert witness selection, management and scheduling are not documented clearly and that the processes seem to lack transparency and clarity. Similarly, **BiH** PPOs reported that there are no pre-defined criteria for the selection of expert witnesses in the pre-investigation stage. Rather, the selection is *ad hoc*, and there is no evaluation of the work of expert witnesses hired by prosecutors.<sup>125</sup>

**67. In BiH and Serbia some expert witnesses are engaged much more frequently than others.** Informal interviews with expert witnesses, lawyers and judges showed that some expert witnesses are engaged more often by parties and courts than others. This was also confirmed by the statistics collected from courts.<sup>126</sup> For example, in BiH an assessment of all

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<sup>123</sup> Please see the Part 3.2.1 of the CEPEJ Guidelines, please also see the EGLE guide para 3.12.

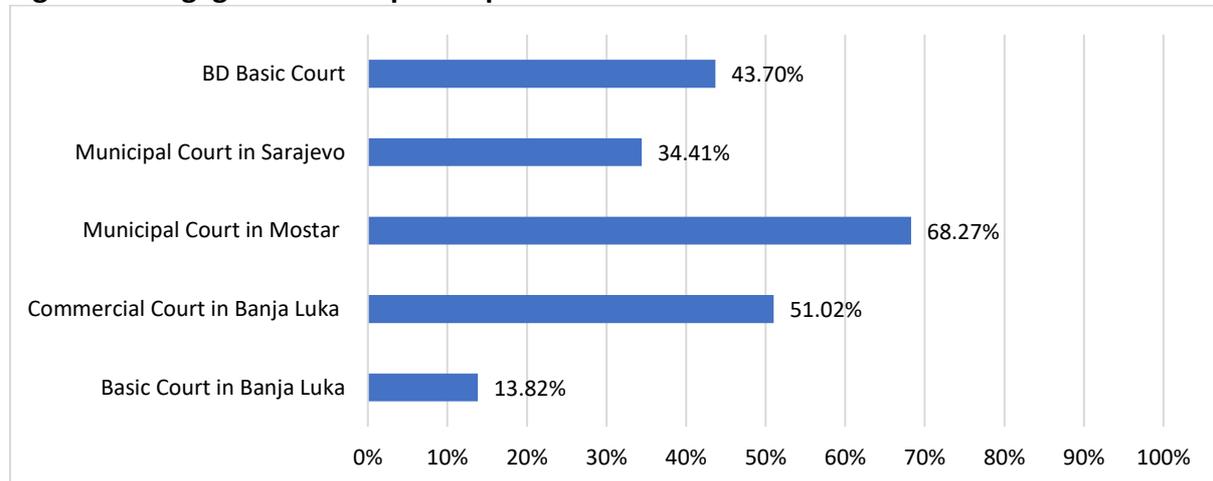
<sup>124</sup> Please see the EGLE guide, para 3.3.

<sup>125</sup> USAID Analysis, p. XIX.

<sup>126</sup> In Macedonia and Montenegro, statistical data on engagement of individual experts is not available. For Serbia, statistics are available in the report *Examining the Experts – the Role of Expert Witnesses in Serbia, and How Reform Could Improve*

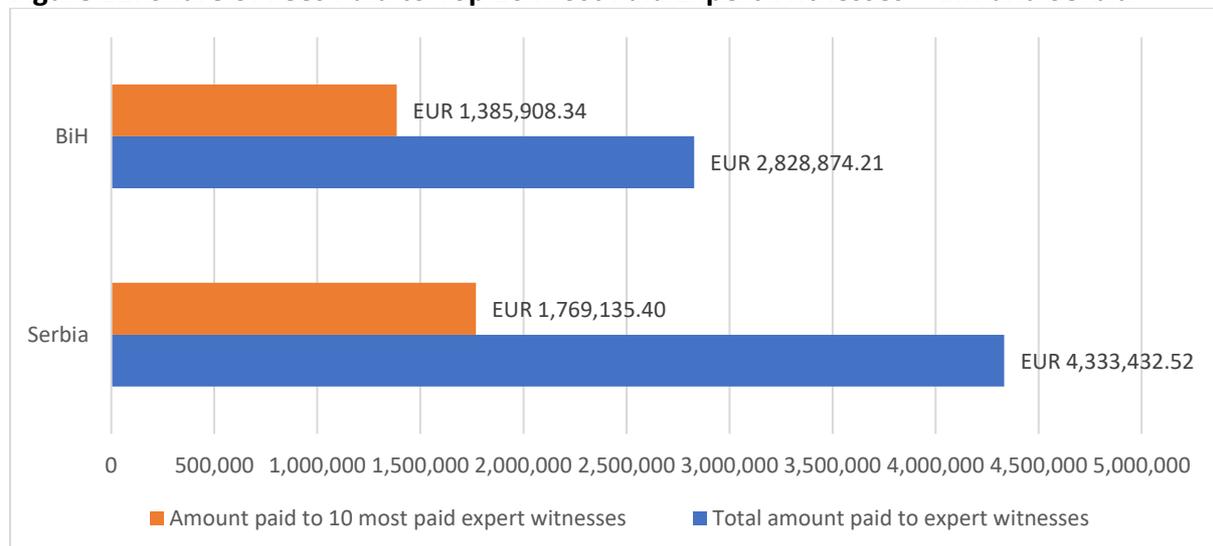
the first-instance courts reviewed shows that, the top 10 most commonly hired expert witnesses were engaged in around **40% of the cases** in which an expert opinion was needed. However, in some courts, such as the Municipal Court in Mostar, percentages are higher – the top 10 most frequently engaged expert witnesses were engaged in about **68%** of all cases involving expert witnesses.

**Figure 11. Engagement of Top 10 Expert Witnesses in All Courts – BiH<sup>127</sup>**



Heavy reliance on some expert witnesses in BiH and Serbia can also be inferred from the share of payments made to the top 10 most paid expert witnesses. In **Serbia**, out of EUR 4.3 million paid to expert witnesses by selected courts, EUR 1.7 million i.e. almost a half was paid to the top 10 most paid expert witnesses engaged by selected courts.

**Figure 12. Share of Fees Paid to Top 10 Most Paid Expert Witnesses – BiH and Serbia<sup>128</sup>**



*Efficiency and Quality of Justice*, pp. 24 and 25; available at: <http://www.mdtfjss.org.rs/archive//file/EW%20Report%20FINAL.PDF>.

<sup>127</sup> Statistics based on data obtained from courts.

<sup>128</sup> Data obtained from the courts.

68. **In Serbia, Montenegro and BiH, it is the high quality of work of some expert witnesses that leads to their frequent engagement.** Rather than poor selection rules or bias towards some expert witnesses, it seems that high quality work on the part of certain experts is the reason for their repeated selection by the courts and parties. Informal interviews with judges, prosecutors and lawyers, as well as the review of closed cases show that using an experienced expert witness with good knowledge of trial requirements supports court fact-finding and ensures that decisions are not overturned on appeal. Because of this, both courts and parties are reluctant to select expert witnesses that are unknown or inexperienced. For instance, in the Commercial Court in Podgorica (Montenegro), one financial expert is reported to be engaged repeatedly by the court as he always attends hearings, submits opinions timeously and has an impeccable record. However, in the long run, this practice can lead to delays, inefficiency and transparency issues. It can also cause independence concerns. Recurrent engagement of more experienced expert witnesses locks out other experts (e.g. one expert in Montenegro reported that he was not assigned a single case for three years) and *de facto* reduces the number of qualified experts available to courts and parties. Further, the more reliable an expert is and the more work he/she has, the higher is the risk of delays. This can become a serious issue as courts tend to be overly lenient to those expert witnesses whom they rely on the most and are reluctant to impose sanctions for delays. Also, the lack of adequate distribution of cases among experts can raise transparency concerns, as this leaves room for favoritism and corrupt behavior (especially in case of vague rules on remuneration of expert witnesses). Finally, according to the CEPEJ Guidelines<sup>129</sup>, the recurrent selection of the same expert for the same kind of questions and/or by the same court can have adverse effects on the factual and personal independence of that expert: “[c]ourts should also be vigilant as regards situations of monopoly of the expertise. The rotation of experts could be considered as a suitable means to avoid reciprocal dependence and improve experts’ independence vis-à-vis the court”.<sup>130</sup>

## Quality of Expertise and Requirements for the Preparation of the Expert Opinion

69. **Expert witness opinions, once prepared, undergo revisions; sample statistics show a considerable number of requests for supplements to the opinions.** In Montenegro, a judge ordered an expert witness to further supplement an expert opinion in 27% of all observed cases, while in BiH requests for clarification were made in 24% of the cases. Opinions are often revised for a variety of reasons. The most important and most common ones are: i) as a result of a lack of continuous training of expert witnesses in specific areas of expertise and knowledge of trial processes, experts do not produce an opinion that can be used to render an informed decision by the court (as explained in paragraph 59 above); ii) judges sometimes fail to give precise instructions to expert witnesses which often results in broad and unspecific opinions that end up being of little or no value to the court (as explained in paragraph 69 below); and iii) judges are sometimes reluctant to objectively review expert opinions, and

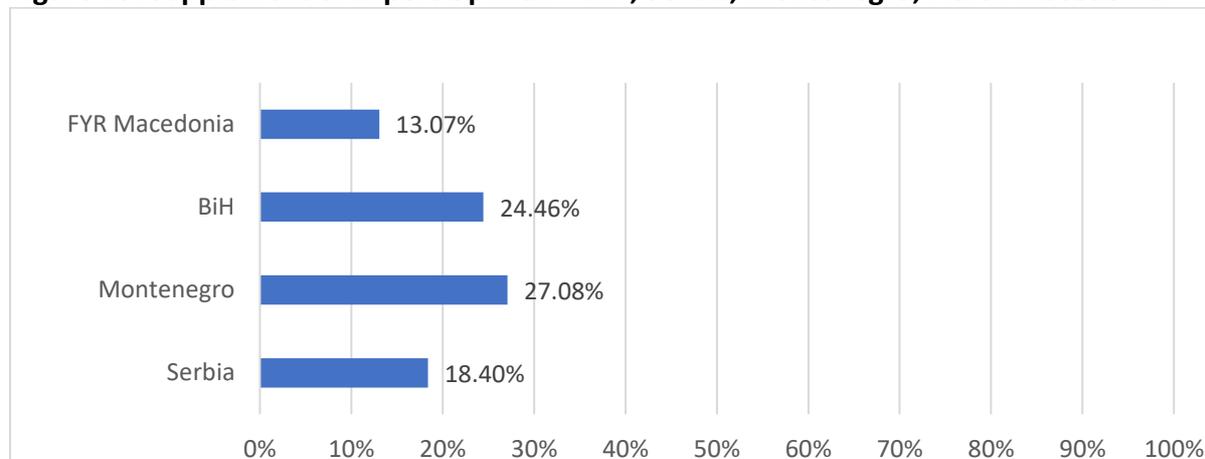
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<sup>129</sup> Please see CEPEJ Guidelines, para. 40. Also, CEPEJ Guidelines are clear that the selection of the expert cannot be made dependent on whether the expert has already had experience with judicial assessments.

<sup>130</sup> The EGLE Guide also states that “*the judge should ensure that there is an adequate number of Experts in each field and should try to avoid appointing the same expert again while excluding others who have the same qualifications*”.

instead allow the party to request supplements to the opinion, even when such requests are mere tactics to prolong trials and abuse court process (as explained in paragraph 72 below).

**Figure 13. Supplement of Expert Opinion – BiH, Serbia, Montenegro, North Macedonia<sup>131</sup>**



70. **In Serbia and BiH, judges often give unclear or even wrong instructions on the content of the expert witness opinion; in North Macedonia, the overall perception is that judges give adequate instructions to experts.** Judges often give unclear, overly wide or even wrong instructions to expert witnesses or fail to adequately scrutinize the opinions received. There seems to be a widespread practice to request expert witnesses to review the entire case file and give opinions on the credibility of submitted witness statements.<sup>132</sup> This practice causes trial delays and is inefficient as requests like this: i) go beyond the scope of what an expert witness is actually required to do (it is the court of law that has to review the credibility of submissions and the case file); ii) make it difficult (if not impossible) for the expert to perform a focused analysis and produce an opinion of practical value for the court; and iii) drains the resources of all the parties involved – the expert, who is then required to analyze a wide array of issues (even immaterial ones) and is often called later to specify or clarify the opinion; the court, which often has to request clarifications in order to make an informed decision based on the expert opinion; and the party which incurs costs of all these procedural activities. The USAID Analysis also reports that instructions to expert witnesses in BiH are often too vague, which impacts the efficiency of the trial or can even steer the investigation in the wrong direction and have adverse effects on the outcome of the trial.<sup>133</sup>

Box 6 – Issues with Judges’ Instructions Given to Expert Witnesses

**Examples of Inadequate Instructions in Serbia and BiH**

**Serbia<sup>134</sup>**

- Basic Court in Serbia – Accountant to establish whether the suspect has sold vehicles

<sup>131</sup> Sample statistics.

<sup>132</sup> For example, the EGLE Guide notes that “*The instructions must be defined as precisely as possible and as tailored as necessary to resolve the dispute.*”

<sup>133</sup> The USAID Analysis, p. 69.

<sup>134</sup> See also the report *Examining the Experts – the Role of Expert Witnesses in Serbia, and How Reform Could Improve Efficiency and Quality of Justice*, p. 27, available at: <http://www.mdtfjss.org.rs/archive//file/EW%20Report%20FINAL.PDF>.

In a criminal case, a judge ordered an expert witness who is an accountant to evaluate: (i) whether the sale of vehicles occurred, and the amounts paid and (ii) the total value of the tax evaded for the identified sales.

- Commercial Court in Serbia – Expert witness should determine all relevant facts

Instruction of the court to the expert witness in a commercial litigation was to determine the value of debt on the day the insolvency procedure was opened and all other facts relevant.

#### **BiH**

- Basic Court in BD – Expert Witness should provide an opinion on contents of the lawsuit/minutes of the preparatory hearing

An expert witness was required to examine and provide an expert opinion on circumstances set forth in the lawsuit and minutes of the preparatory hearing.

- Commercial Court in RS

An expert witness was required to review the entire financial documentation of one of the parties and provide an expert opinion.

- Basic Court in Banja Luka – Two different expert witnesses to determine the same set of facts

Two experts, one financial and one IT expert, were given the same task without specifying which expert should determine which fact/ set of facts.

**71. Poor instructions to expert witnesses are sometimes caused by a lack of specialized knowledge on the part of judges and PPOs to determine whether there is a need for an expert opinion and if so, the type of opinion required and its scope.** Commercial judges in **BiH** reported that they lack knowledge in fields of expertise common for commercial disputes, and as a result, they are unable to efficiently and effectively manage the work of expert witnesses. Without sufficient knowledge of issues that typically require expertise, judges are not able to properly assess proposals/requests for an expert opinion (in terms of whether or not they are superfluous), precisely determine the subject matter and scope of the expert opinion to be given, give clear instructions to expert witnesses, and critically examine the expert opinions. Even some of the more experienced judges stated that they lack knowledge in certain fields that usually require the engagement of an expert witness (banking and finance, intellectual property, etc.). Similarly, according to the USAID Analysis, the majority of **BiH** prosecutors lack adequate knowledge in the areas of finance and economics to enable them to give precise instructions to expert witnesses. In **Montenegro**, (sub)specialization of experts, particularly in some areas (architecture vs. construction, mechanical engineers vs. traffic specialists) is mixed and instructions provided by judges on the type of expertise needed are often wrong. Also, in **BiH, Montenegro and Serbia** there are issues with the qualifications of expert witnesses who provide expertise on the validity of signatures (graphology expertise). Namely, experts from different fields are licensed for this type of

expertise (chemists, psychologists and/or other experts) and judges are not certain who is best positioned to conduct this analysis in a quality manner.

**72. None of the countries examined have developed guidelines on the content and format of expert witness opinions.** As a result, the opinions submitted to the courts can differ significantly in the way they are structured, and in the amount of detail provided. This results in inconsistencies in the overall quality of expert witness reporting. Judges interviewed for this study in North Macedonia and BiH noted the difficulties they face dealing with expert reports that are incomprehensible and unsystematic. Such reports are difficult to understand, can be disputed more easily and require further revisions which can delay the resolution of the case.

**73. In Serbia, BiH and Montenegro, courts often accept the expert opinion as is, without critically examining it.**<sup>135</sup> This lack of scrutiny on the part of the courts is contrary to the CEPEJ Guidelines which provide that *the expert opinion is not binding on the court or on the parties. The court evaluates it freely. The court must verify and determine whether the expert opinion is objectively convincing.*<sup>136</sup> Different practices were recorded in the cases reviewed and informal interviews with judges in Serbia, BiH and Montenegro. In **Serbia**, there seems to be no scrutiny of expert witness opinions, particularly for *template cases* or for cases where the defendant is the state. Public defendants of cities, SOEs or state funds are often not interested nor proactive in reviewing received expert witness opinions. Sometimes the key constraint is that these offices do not have adequate expertise or staff that can review the expert's opinion and evaluate it effectively. Expert witnesses concede that they are aware of this and often do not produce high quality statements meeting all requirements when engaged in template cases or if the defendant is the state. In **BiH**, judges are reluctant to, or lack sufficient training or the requisite training to, critically examine expert opinions and assess whether these opinions are coherent and comprehensive. Instead, they accept them as is or allow parties to continuously provide comments on the opinions or allow new expert witnesses to validate the opinions provided. This, in turn, leads to undue trial delays and causes inefficiency as i) poor expert opinions can lead to decisions being overturned on appeal and cause new trials, ii) parties' comments are sometimes unfounded and serve only as a dilatory tactic, and iii) engagement of new experts is a drain on courts' and parties' resources. A Study on Expert Witnesses in the Montenegrin Legal System also reports that Montenegrin courts tend to accept expert opinions without examining them, mostly because they lack specialized knowledge.<sup>137</sup>

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<sup>135</sup> This was also identified as a challenge in Council of Europe Member States. According to the 2014 CEPEJ Study on the Role of Experts in Judicial Systems of the Council of Europe Member States: "*whilst judges may not be bound by law there may be a mental attachment of importance to expert reports when coming to a decision that reflects a high degree of trust of experts. There are of course, several other possible reasons for a high incidence of over-reliance. Firstly, it could reflect a lack of training in how to treat expert reports, especially for the more technical reports, leading judges to defer to the opinion of the expert(s). Secondly, it could reflect a lack of proper reasoning in judgments as to what value has been given to the experts' opinion, especially in relation to the facts and other evidence. This leads to the issue of the value of expert reports.*"

<sup>136</sup> Please see the Part 8.1 of the CEPEJ Guidelines.

<sup>137</sup> Study on Expert Witnesses in the Montenegrin Legal System, p. 16.

## Box 7 – Issues with Scrutiny of Expert Opinions

### Examples of Lack of Scrutiny

#### Serbia<sup>138</sup>

In a criminal case related to road safety, the reason for which the award was returned on appeal was deficiencies in the expert witness opinion. Namely, the first instance court did not call a traffic expert but only relied on the expertise provided by a medical doctor. The medical doctor indicated that a severe bodily injury occurred (which was within the scope of his/her engagement) but also opined on whether the car was speeding.

#### BiH

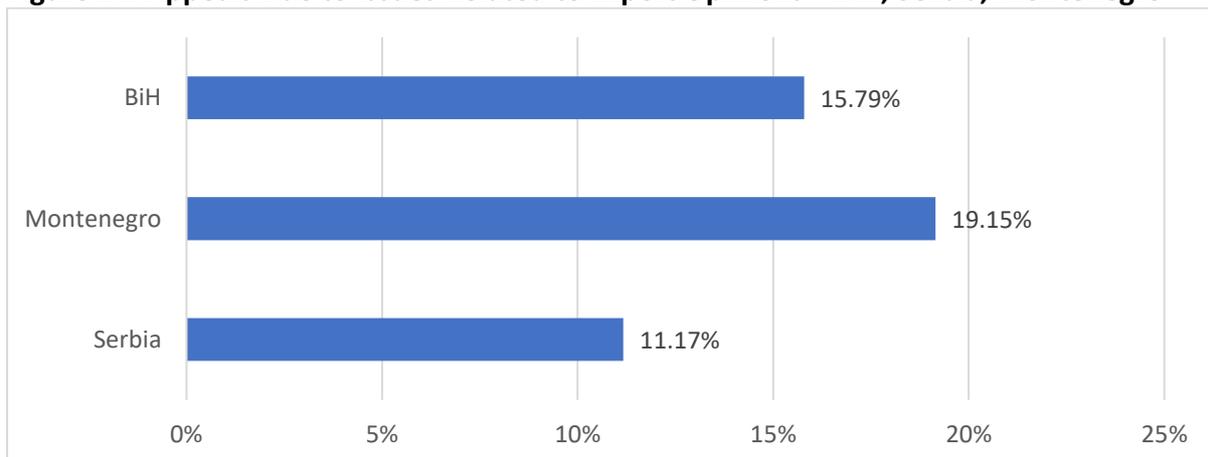
In two separate court cases held before the same judge, the same expert witness issued two conflicting opinions although the object of the analysis was the same.

#### Montenegro

In a number of cases, judgments were overturned *exclusively* because the expert opinion was inadequate, and the first instance court failed to properly examine the opinion and rectify identified issues.

74. In Serbia, BiH and Montenegro, the number of cases returned on appeal because of issues with the expert witness' opinion is noteworthy.<sup>139</sup> Statistics looked at the (i) total number of appealed cases in the reviewed sample (all appeals) and (ii) the number of cases where the appeal was successful, and the case was returned because of issues with the expert witness' opinion. In all three countries, over 10% of the appeals were successful because of issues with the expert witness' opinion (in Montenegro, the percentage was higher—19%). In some of the cases reviewed, judgments were overturned solely because of poor expertise.

Figure 14. Appeals Due to Issues Related to Expert Opinions – BiH, Serbia, Montenegro<sup>140</sup>



<sup>138</sup> See also the report *Examining the Experts – the Role of Expert Witnesses in Serbia, and How Reform Could Improve Efficiency and Quality of Justice*, p. 27, available at: <http://www.mdtfjss.org.rs/archive//file/EW%20Report%20FINAL.PDF>.

<sup>139</sup> Statistical data is not available for North Macedonia.

<sup>140</sup> Sample statistics.

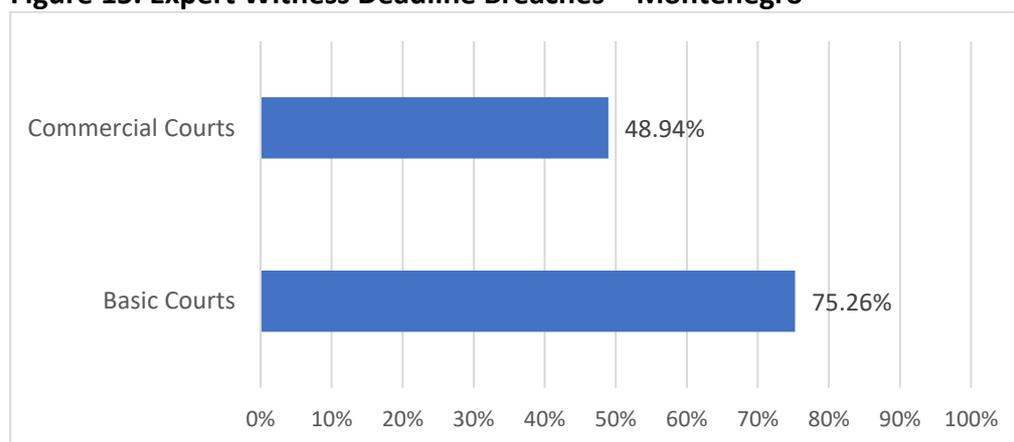
## Timing and Management of the Work of Expert Witnesses in a Trial

### Duty to Produce an Expert Witness Opinion on Time and Adhere to Trial Schedules

75. **Expert witnesses do not fully adhere to trial schedules in any of the jurisdictions examined.**

- a. In **Serbia**, the Judicial Functional Review indicates that expert witnesses are often late in submitting their opinion, which causes adjournments and delays. Also, hearings are sometimes cancelled or adjourned because expert witnesses do not appear before the court or for other reasons related to expert witnesses (e.g. poor coordination of work between courts and experts, delays in the receipt of expert opinions, allegations that expert witnesses are paid by parties to provide partial advice).<sup>141</sup> The sample statistics also confirmed this finding. Expert witnesses breached the deadline in over 50% of all the cases reviewed in Basic Courts and in over 40% of all the cases reviewed in Commercial Courts. Put differently, on average, the deadline was breached in every other case reviewed.
- b. In **Montenegro**, in both basic and commercial courts, there are cases with substantial delays. For example, in one case, an expert witness exceeded the deadline stipulated to submit his/her expert opinion by about three months. It is also very common for expert witnesses to not attend hearings even when they have been summoned by the court. Courts rarely sanction expert witnesses for failure to attend hearings, and if they do, they resort to pecuniary sanctions, but often, this is only after deadlines have been breached several times. Further, sample statistics show that expert witnesses breached the deadline in 75% of all the cases reviewed in Basic Courts and in 49% of all cases reviewed in Commercial Courts.

**Figure 15. Expert Witness Deadline Breaches – Montenegro<sup>142</sup>**

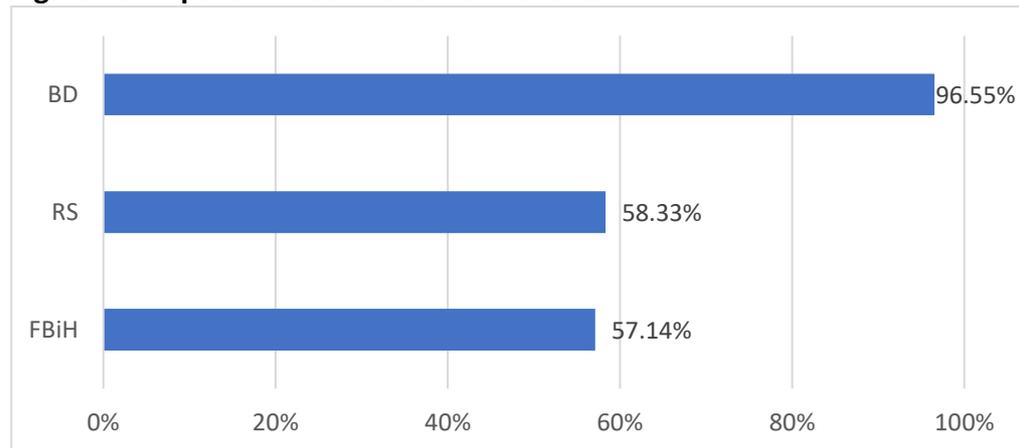


<sup>141</sup> See pp. 11 and 132 of the MDTF Functional Review. The same are the findings of the MDTF Survey: *Experiences and Perceptions of Justice in Serbia*. Based on this Survey available at: <http://www.mdtfjss.org.rs/archive//file/Experiences%20and%20Perceptions%20of%20Justice%20in%20Serbia%20-%20EN.pdf>, judges, prosecutors and lawyers share opinion that participants in procedure such as witnesses and court experts are often a reason for cancellation of hearings. Please see p. 30.

<sup>142</sup> Sample statistics.

In **BiH**, trials are frequently delayed because of the conduct of expert witnesses. In one case, the expert witness took more than 15 days to notify the court that he was unable to take on the assignment; in another case, an expert witness submitted the opinion two months after the deadline specified in the court’s order. Further, sample statistics show that expert witnesses breached the deadline in 96% of all cases reviewed in BD courts, 58% of all cases reviewed in RS courts and 57% of all cases reviewed in FBiH courts.

**Figure 16. Expert Witness Deadline Breaches – BiH<sup>143</sup>**



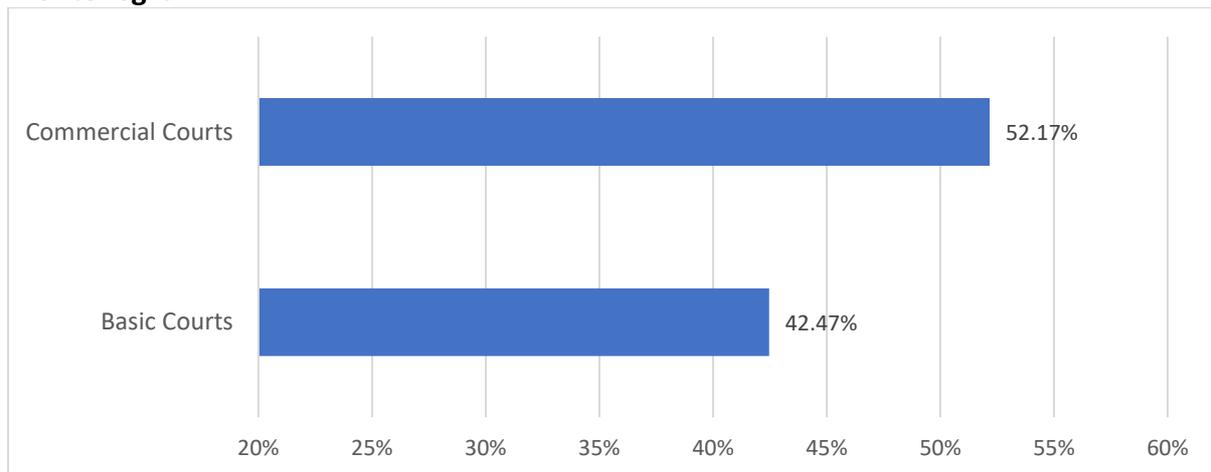
- c. In **North Macedonia**, the perception, which is likely informed by reality, is that delays occur often, especially in cases where “super-expertise” reports are required, and these are mostly produced by the BEW or the Medical Faculty.

**76. When expert witnesses breach deadlines, trials are adjourned, and this causes delays in the resolution of cases.** In Serbia, Montenegro and BiH, in over 19% of the cases observed, deadline breaches by expert witnesses caused the trial to be adjourned. In **Montenegro**, breaches of the deadline to submit the expert opinion resulted in adjournments in as many as 45% of the cases reviewed (42% of these cases were before the Basic Courts and 52% of these cases before Commercial Courts).<sup>144</sup>

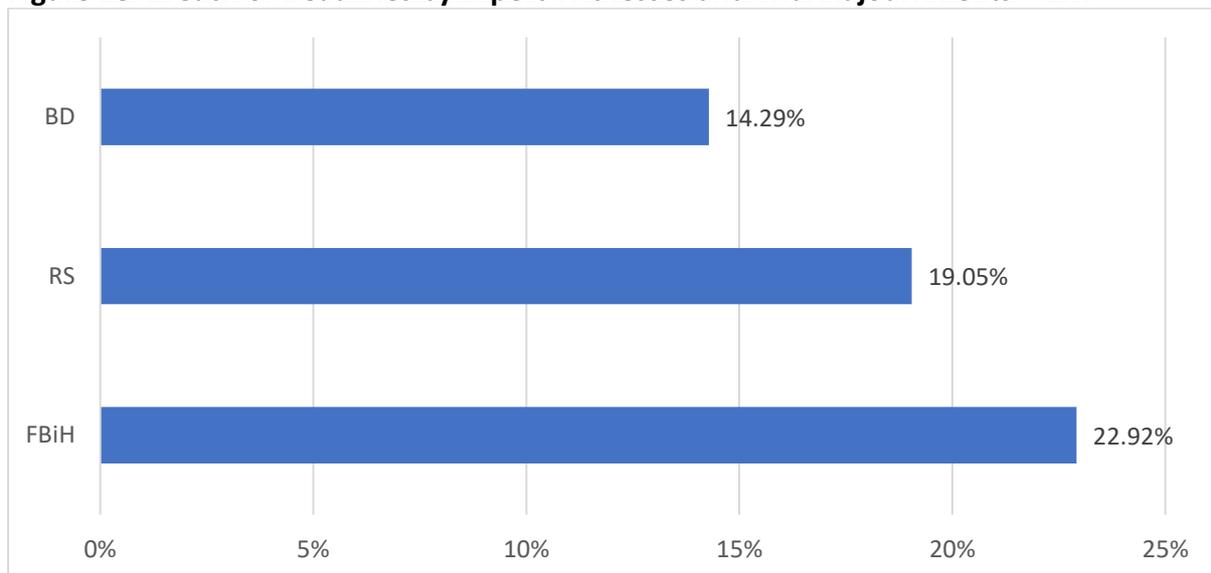
<sup>143</sup> Sample statistics.

<sup>144</sup> Statistical data is not available for North Macedonia.

**Figure 17. Breach of Deadlines by Expert Witnesses and Trial Adjournments – Montenegro<sup>145</sup>**



**Figure 18. Breach of Deadlines by Expert Witnesses and Trial Adjournments – BiH<sup>146</sup>**



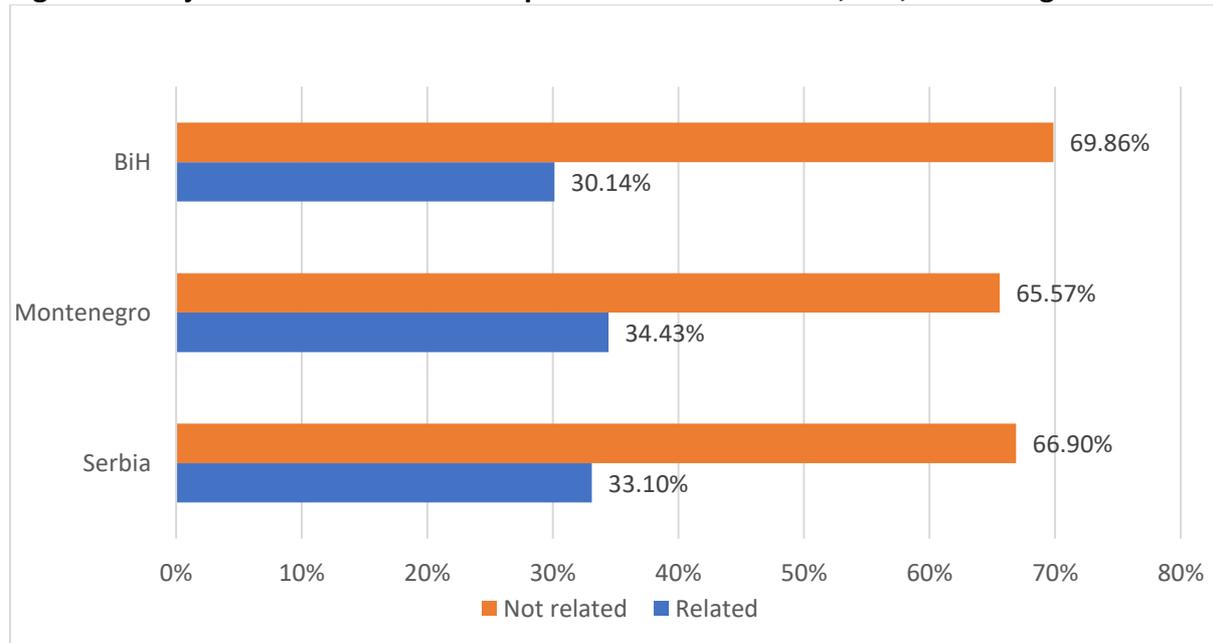
**77. In fact, approximately one third of all trial adjournments recorded are related to the work of expert witnesses; this is confirmed by the sample statistics collected in Serbia, BiH and Montenegro.** Various reasons lead to adjournments, including the breach of deadlines by expert witnesses, expert witness being absent from the hearing, requests for clarification of expert opinions and others.<sup>147</sup>

<sup>145</sup> Sample statistics.

<sup>146</sup> Sample statistics.

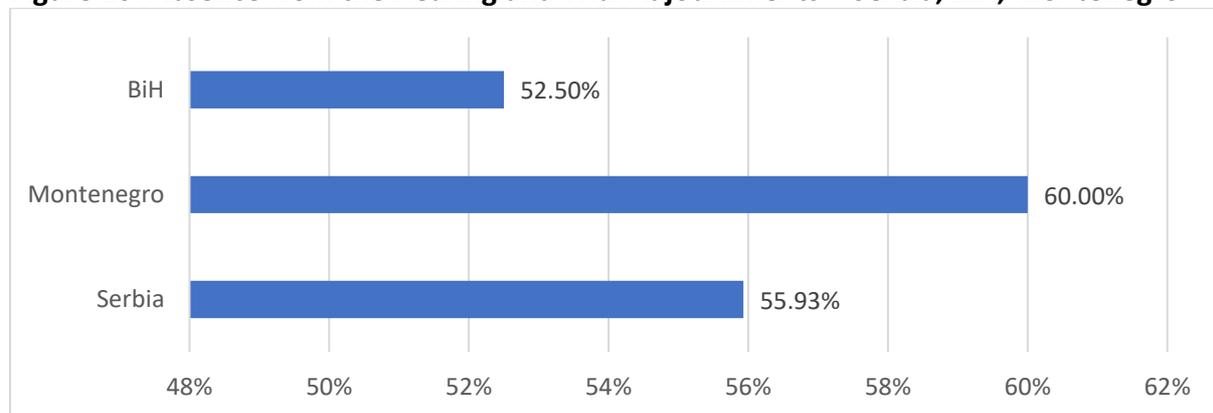
<sup>147</sup> According to the 2014 CEPEJ Study on the Role of Experts in Judicial Systems of the Council of Europe Member States: “it was also further asked what percentage of cases using experts experience undue delays in the jurisdiction of the pilot court. Twenty respondents had either no data available to them or gave no answer. However, some of these respondents gave an estimate based on their experience. Respondents from Germany estimated that in between 20-50% of their cases, experts caused the undue delay. Norway on the other hand estimated that ‘close to 0%’ of experts were responsible for undue delays. Lithuania was the only country with formal data available, where the respondent stated that “Of all delayed civil cases in 2012, from 17.2 to 25.6 percent of delays occurred because of prolonged expertise. In the yearly reports of National Court Administration, it is constantly mentioned as one of main reasons for prolonged judicial process.”

**Figure 19. Adjournments Related to Expert Witnesses – Serbia, BiH, Montenegro<sup>148</sup>**



78. **Expert witnesses not showing up for the hearing led to the trial being adjourned in every other case reviewed; this is confirmed by sample statistics collected in Serbia, BiH and Montenegro.** Expert witnesses’ duties do not end with the submission of their opinion. That is to say, experts are not only obliged to submit their opinion in time, but also to attend the hearing when summoned and clarify the opinion if needed. A delay in carrying out any one of these activities leads to adjournments and trial delays.

**Figure 20. Absence from the Hearing and Trial Adjournments – Serbia, BiH, Montenegro<sup>149</sup>**



79. **Expert witnesses that are frequently used in Serbia, RS and Montenegro sometimes refuse to take on cases or submit their opinions late using the fact that they are overburdened with work as justification.** In Serbia, frequently used expert witnesses have, at any given time, 50 or more expert witness engagements. Working alone and having to travel across the country to service the needs of many regions, and often having to appear at hearings multiple times (given frequent hearing adjournments), these experts claim that

<sup>148</sup> Sample statistics.

<sup>149</sup> Sample statistics.

delays are inevitable. They indicate that the only options available to them are to either delay or refuse cases; the latter, according to them, being “bad for business”. However, in **Montenegro** and **BiH**, it is common for experts to refuse to take on a case because they are overburdened with work. Either way; taking on a case and then failing to appear at the hearing when requested or refusing to take on a case ultimately delays the trial. For example, in a case before the Basic Court in Banja Luka, the court could not engage an expert witness and the trial was delayed for more than three months because expert witnesses refused to take on the assignment since, among other reasons, they were overburdened with work.

80. **In Montenegro and BiH, expert witnesses reported that delays in the submission of opinions are often caused by lack of cooperation from third parties who are in possession of documents needed for the expert opinion.** In **BiH**, expert witnesses often face problems accessing documentation needed to provide the expert opinion. In **Montenegro**, one of the key causes of delays in producing expert opinions (even up to a year) is lack of cooperation from the defendant or State bodies that are required to provide the necessary documentation for the expert opinion to be formulated. Usually, expert witnesses are unable to obtain the documentation themselves, therefore the court’s intervention is necessary for the documents to be delivered to the expert.

#### Sequencing of Activities Related to Production of Expert Witness Opinions

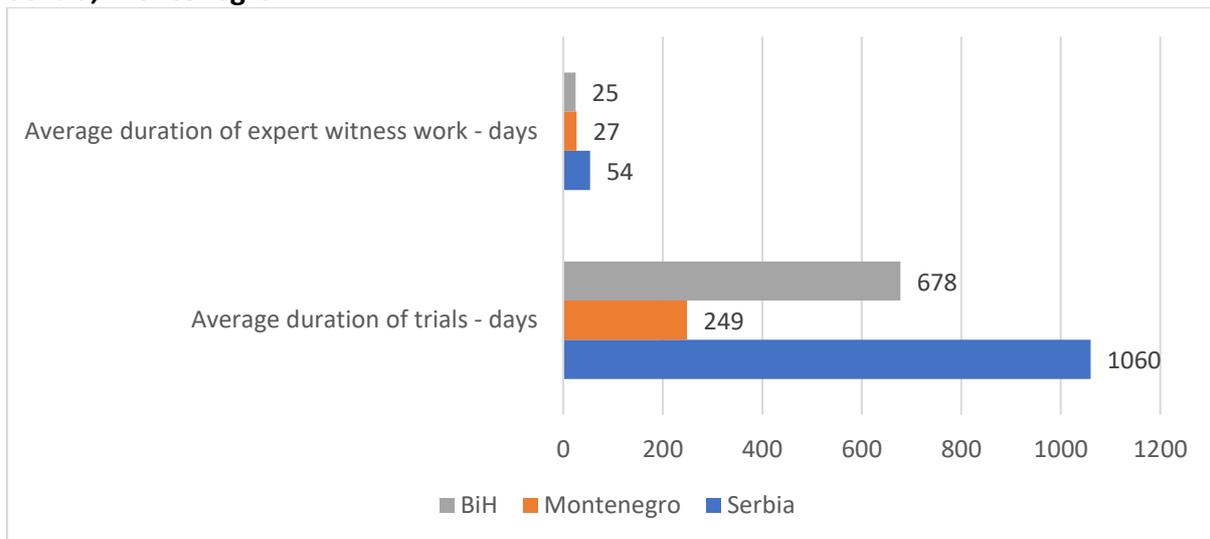
81. **Across all the jurisdictions examined, poor trial management on the part of courts rather than expert witness inefficiency causes weak trial discipline, adjournments and delays.** It seems that better sequencing of procedural steps and implementation of techniques for good trial management are required to improve efficiency of expert witnesses’ work and avoid delays. For example, scheduling times for parties to review the expert witness’ opinion should be improved. Also, courts should be less inert when it comes to managing the work of expert witnesses and sequencing of activities related to expert witnesses’ work.

82. **The above conclusion is reinforced by the sample statistics on the amount of time an expert takes to produce their opinion.** The data collected for Serbia, BiH and Montenegro shows that the time needed to produce the opinion is not so inordinate that it lengthens the trial. This is true for both civil and criminal cases. In the countries examined, the time needed to produce the expert opinion does not exceed 54 days in civil cases and 58 days in criminal cases.<sup>150</sup> If we compare the time that an expert witness takes to produce an opinion with the total trial time, in most cases the time to produce the opinion never takes more than 10% of the total trial time (often much less). This shows that delays related to expert witness work are primarily caused by poor management techniques on the part of courts.

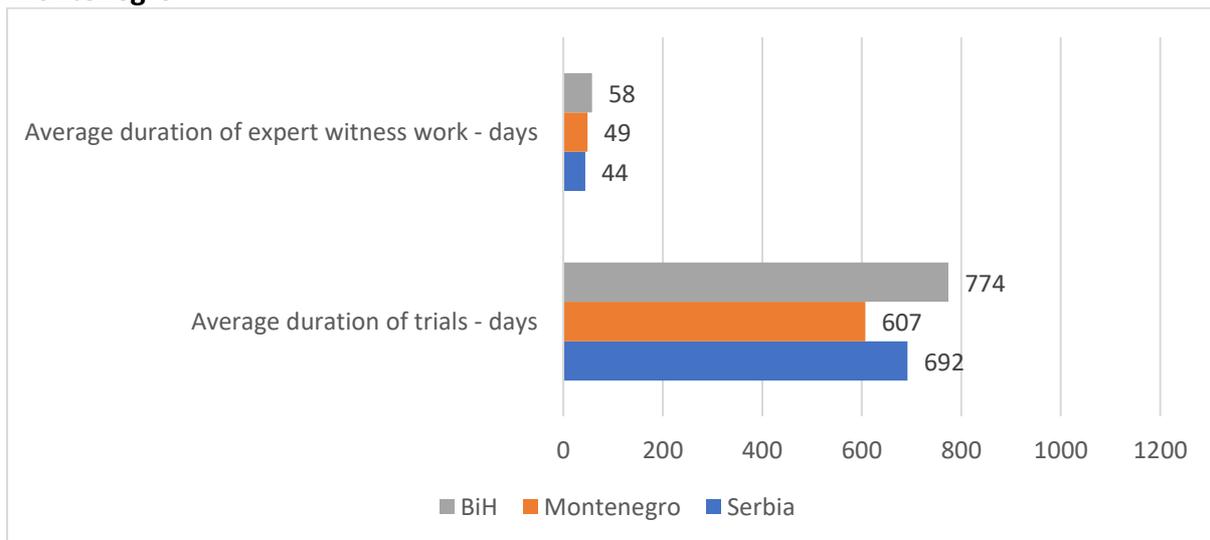
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<sup>150</sup> According to the 2014 CEPEJ Study on the Role of experts in Judicial Systems of the Council of Europe Member States “the respondents were asked to briefly describe the average duration required for experts used in court. Answers varied widely with a minimum of one month to twelve months. The type of case and expertise could affect the duration of the case: the respondent in Monaco described 2-3 months for medical expertise, 1-3 months for financial expertise, and 1-4 years for construction expertise. Many respondents did not actually have any formal data available.

**Figure 21. Average Duration of Trial and Expert Witness Work in Criminal Cases – BiH, Serbia, Montenegro<sup>151</sup>**



**Figure 22. Average Duration of Trial and Expert Witness Work in Civil Cases – BiH, Serbia, Montenegro<sup>152</sup>**



83. In BiH and Montenegro, courts often do not sufficiently specify the deadline for submission of the expert opinion. In Montenegro, court orders are often short and contain only the name of the expert witness and the description of needed expertise. In the majority of the cases reviewed, the deadline for submission of the expert opinion was not specified, but the expert witness was ordered to produce the report *as soon as possible* (although the Montenegrin CPC envisages that the deadline is to be determined in each case). In FBiH, it appears from reviewed cases that deadlines for expert opinions are often not precisely determined by the court. Expert witnesses are often required to submit the opinion as soon as possible, or *in time* to share the opinion with the parties before the scheduled hearing. In BD, sometimes, the deadline for submission of the expert opinion is not precisely determined

<sup>151</sup> Sample statistics.

<sup>152</sup> Sample statistics.

by the court or the prosecutor. For example, an expert witness can be ordered to submit the opinion *within a reasonable time*, taking into account time needed for the parties to review the opinion.

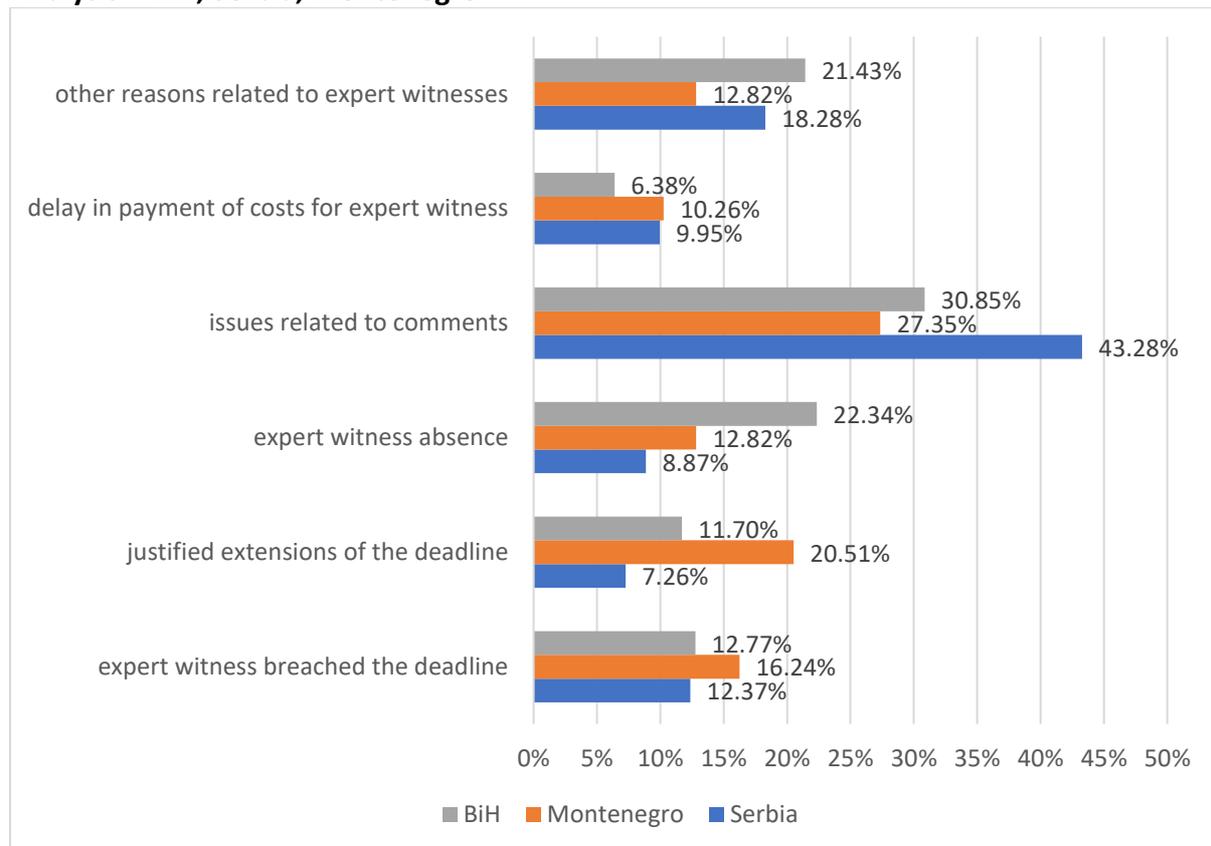
**84. In Serbia, BiH and Montenegro, there seems to be a practice that expert witnesses bring the opinion with them to the hearing rather than submit the opinion beforehand.** This practice is very common even though civil procedure rules in all the jurisdictions examined clearly indicate that the expert witness opinion should be submitted before the hearing, so as to leave sufficient time for the parties to examine the opinion and give comments.<sup>153</sup> This practice inevitably leads to frequent adjournments as parties have a justified reason to request postponement of the hearing in order to have time to review the opinion.

**85. In fact, sample statistics in Serbia, BiH and Montenegro show that poor management of the work of expert witnesses and sequencing of the time when the expert witness opinion is submitted to the parties for comments leads to adjournments in trials.** To determine which aspects of the work of expert witnesses causes the most adjournments, statistics looked at the i) the total number of adjournments related to the work of expert witnesses, and ii) the number of adjournments that can be attributed to particular issues related to the work of expert witnesses. Sample statistics show that requests for additional time to review expert witness opinions account for over 40% of all examined adjournments in Serbia, 25% of all examined adjournments in Montenegro and 30% of all examined adjournments in BiH.

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<sup>153</sup> Please see the CEPEJ Guidelines, para. 129.

**Figure 23. Adjournments Caused by Sequencing of Activities Related to Expert Witness Analysis – BiH, Serbia, Montenegro<sup>154</sup>**



**86. In Montenegro and Serbia, a party’s failure to make advance payments for services provided by expert witnesses also causes trial delays.** Delays in paying expert witnesses in advance caused adjournments in around 10% of the cases in Serbia and Montenegro. A review of the court cases indicated that judges are lenient with parties and allow hearings to be postponed if the advance is not paid, even in civil procedure cases. This, notwithstanding that civil procedure rules, allow the court to make a decision without an expert witness opinion if the advance is not paid.

Box 8 – Delays in Payment of an Advance Can Cause Serious Delays in Trial

**Failure to Give Advance Payment for Expertise**

**Serbia<sup>155</sup>**

In one civil litigation, the court ordered payment of an advance at a hearing which took place on May 5, 2014. The deadline for payment was eight days. Evidence of payment was not submitted. The court sent three warning notices on December 29, 2014, on March 3, 2015 and on May 7, 2015. Payment was made on May 28, 2015, a year later. The case processing was delayed during this time. The value of the advance was RSD 8,000 (approx. EUR 70).

**Montenegro**

<sup>154</sup> Sample statistics.

<sup>155</sup> See also the report *Examining the Experts – the Role of Expert Witnesses in Serbia, and How Reform Could Improve Efficiency and Quality of Justice*, p. 31, available at: <http://www.mdtfjss.org.rs/archive//file/EW%20Report%20FINAL.PDF>.

In one commercial litigation, the main hearing was postponed twice because the party failed to pay the advance payment for the proposed expertise; when it failed to do so the third time the court decided to revoke the decision on ordering expertise.

### Expert Witnesses' Duty to Return the Case Files to the Court

87. **In every jurisdiction except BD, expert witnesses are usually given the entire original court case file to be reviewed out of court. This is problematic from both an efficiency and an integrity perspective.** Courts keep a single original copy of the case file throughout the duration of the trial. If an expert witness opinion is needed, courts require the expert witness to collect the original case file from the court, review the file and return it once their opinion is completed. Allowing the original case file to leave the court creates opportunities for the file to be tampered with, or at least creates a perception that this is easily possible.<sup>156</sup> In addition, this is a common cause of inefficiency as no other trial activity can be undertaken until the expert witness completes his or her opinion and returns the case file to the court.

Box 9 – Case of the BD Basic Court - BiH

#### No Right of Experts to Take Case Files Out of the Court for Review

Pursuant to a recent development, in the BD Basic Court, expert witnesses are not allowed to take case files out of the court for review. Usually, the court order will specify that the expert witness can go through the case file and make copies at the court's premises. This practice was introduced due to confidentiality concerns and risks of corruption on the part of expert witnesses. Specifically, the court received an informal tip off that an expert witness was informing parties of opportunities to tamper with files he had access to. The Head of the filing office, however, reported that reviewing case files at the court's premises causes problems for expert witnesses and court staff as expert witnesses come to the court more than once to review and copy case files, often interrupting day-to-day filing office activities.

88. **In Serbia, statistics shows that expert witnesses breach their duty to collect and return case files, which causes trial delays.** In the case sample reviewed, approximately in 10% of the cases, experts breached their duty to orderly collect and return case files. Of great concern is the fact that if an expert witness decides not to return the case file for whatever reason the entire court process is halted. Anecdotal evidence indicates that there were instances where the police were engaged to facilitate the return of case files from non-responsive expert witnesses. In other jurisdictions, available statistics show that expert witnesses are more compliant with the duty to collect and return case files (5 instances of breach in approximately 150 cases in Montenegro and only one instance of breach in 184 cases reviewed in BiH).

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<sup>156</sup> It was confirmed in all visited courts that court regularly surrender the entire original case file to the expert witness without making a separate internal copy.

## Remuneration of Expert Witnesses

### 89. Issues with the remuneration of expert witnesses were reported in all the jurisdictions examined:

- a. In **Montenegro**, expert witnesses reported that their fees are not paid or are not paid regularly and that courts tend to reduce the requested fee. Further, expert witnesses noted that the court's decisions on expert witnesses' fees and costs are dilatory. In some cases, decisions on fees are so delayed that they are given after proceedings have been terminated, which can take years. Existing analytical texts note that current expert witness fees are deemed to be too low and that they should be increased to incentivize i) licensed experts to improve the quality of their work, and ii) new experts to enter the profession;<sup>157</sup>
- b. In **Serbia**, expert witnesses report that the provisions in the Rulebook on the Reimbursement of EW, which regulates the reimbursement of expert witnesses, are not applied in practice at all. According to expert witnesses, fees do not depend on the complexity of the case or the duration of the work but on what the parties, and in particular the judges, estimate would be an adequate amount for the expert witness to receive. In practice, judges make unilateral decisions on the value of the service provided by expert witnesses, and sometimes even on the expenses incurred, even going as far as ordering that an expert witness only be reimbursed for expenses incurred. It is very rare for judges to request that an expert witness provide a statement of expenses and specification of fees upon completion of their work, even though this is required by provisions in the Rulebook on the Reimbursement of EW. The outright disregard for this requirement exposes the reimbursement and payment process to corruption. Further, courts and PPOs significantly delay the reimbursement of expert witnesses in criminal proceedings and during the criminal investigation process. The reasons for the delays are two-fold. On one hand, there is a weak regulatory framework on the engagement of expert witnesses and remuneration for their services which causes uncertainty around when (i.e. at which point during the process) and how much expert witnesses will be paid. On the other, the budgets of courts and PPOs are constantly falling short of what is required to eliminate the arrears accumulated;<sup>158</sup>
- c. In **BiH**, expert witnesses claim that they are often paid less than they request. Further, rules on the remuneration of expert witnesses are either outdated (RS) or are not sufficiently clear (FBiH and BD). Judges and prosecutors noted that the FBiH Tariff of Fees and Expenses of Expert Witnesses is not sufficiently precise. It has three ranges of expert witness fees depending on the complexity of the expertise. The highest range, applicable to the most complex cases is

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<sup>157</sup> Study on Expert Witnesses in the Montenegrin Legal System, p.17.

<sup>158</sup> For detailed assessment of arrears in Serbian courts and PPOs please refer to *Analysis of Arrears of Courts in Serbia* available at: <http://www.mdtfiss.org.rs/archive//file/Serbia%20Court%20Arrears%20-%20draft%20May2018.pdf> ; and *Analysis of Arrears of Public Prosecutors Offices in Serbia*, available at: <http://documents.worldbank.org/curated/en/793961508178431209/Analysis-of-arrears-of-public-prosecutors-offices-in-Serbia>.

approximately EUR 150 to EUR 1,000 (depending on the complexity of expertise, and in cases where special expertise, knowledge and/or experience are required, the fee may be increased by 100%).<sup>159</sup> The level of complexity is determined by the court/PPO for each specific case and there is no set criteria to determine the amount.<sup>160</sup> The RS Tariff has not been updated since 1998 and does not reflect the actual and current value of work of expert witnesses. In BD, it is the court/PPO that determines expert witnesses' fees and costs at its own discretion;

- d. In **North Macedonia**, there is no unified and transparent fee scheme for expert witnesses across the country. Further, some institutions, such as the Medical Faculty of the University of Skopje and the Institute for Forensic Medicine in Skopje, are the only institutions in North Macedonia that can provide certain types of expertise. As a result, they can charge fees that are considerably higher compared to those mandated by the rules.

#### Box 10 – Expert Witness Fees – Macedonia

##### **Rules on Expert Witness Remuneration Are Not Applied in Practice**

In a case in North Macedonia the expert witness was a psychiatrist from the Faculty of Medicine at the University of Saints Cyril and Methodius in Skopje. Upon completion of the report, the expert witness submitted an invoice to the court where his fees were calculated based on the Decision for Determining the Amount of Compensation for the Member and Other Persons from the Medical Board at the Medical Faculty.

This calculation ended up being roughly 50% higher than the one based on the MOJ regulation on calculation of expert witness fees enacted in 2014. The court refused to pay the requested invoice amount and paid the MOJ prescribed amount. The Medical Faculty of Skopje challenged this in court.

Even though the ruling was in favor of the court, this was only one of many examples where courts challenged the public institutions that provide expertise at higher cost. In most cases, courts simply pay the requested fees in order to avoid the hassle of resolving the dispute in court and to maintain good professional relations.

90. **In Serbia, BiH and North Macedonia, it emerged that for the same type of expertise different expert witnesses charge different amounts.** The significant differences in fees charged by expert witnesses was reported in informant interviews with judges, lawyers and expert witnesses. These differences are reportedly influencing the selection of expert witnesses and the quality of their work. Some Serbian judges even reported that there are unofficial lists of 'cheap' and 'expensive' expert witnesses. In North Macedonia, because of imprecise rules on expert witness fees, there are huge discrepancies in fees charged by expert witnesses in different cities, that cannot be justified by the difference in costs and standards of living. The most glaring difference exists between the fees charged in Skopje which are

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<sup>159</sup> Article 3 of the Tariff of Fees and Expenses of Expert Witnesses of FBiH.

<sup>160</sup> Article 2 of the Tariff of Fees and Expenses of Expert Witnesses of FBiH.

twice as much as what is charged in other cities. Also, expert witnesses from Skopje always charge the maximum in the range set in the regulations.

91. **Statistical findings show that in Serbia and BiH variances exist in the average fees paid across different courts; variances are highest between Commercial Courts and Basic Courts.** For example, the average fee paid for expert witness work in the Basic Court in Užice is approximately EUR 90 while, on average, an expert opinion in the Commercial Court in Užice can cost over EUR 200. Similarly, the average fee paid for expert witness work in the Basic Court in Banja Luka is approximately EUR 150, while the average fee in the Commercial Court in Banja Luka exceeds EUR 250.

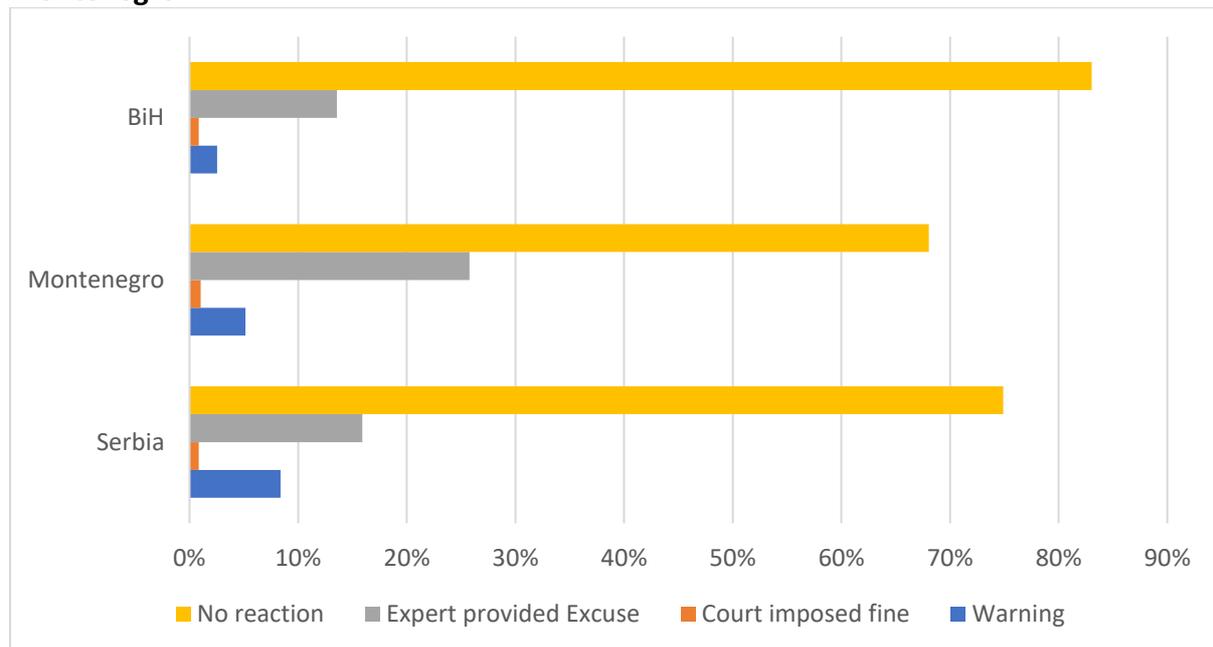
## Sanctions for Breach of Duty

92. **Across all the jurisdictions examined, there are rules that stipulate the sanctions for an expert witness' breach of duty.** Laws in each of the countries provide several types of sanctions for expert witnesses for breach of duty. Under both civil and criminal procedure rules, courts may fine expert witnesses for breach of discipline (not appearing when summoned, declining to provide the opinion etc.). In the event of a severe breach, competent bodies (MOJ, Commission) have the power to revoke an expert witness' license, especially if the expert witness is performing duties in an unethical, incompetent or inadequate manner. Also, if there is malperformance on the part of the expert witness, the party has the option to take action against the expert witness and seek damages under the standard damage rules. Finally, expert witnesses can be prosecuted for providing false expert opinions.

93. **However, sanctions stipulated in the laws are rarely applied in practice.** For example, when expert witnesses breach deadlines, the court does not sanction them. Warning notices and fines are only issued for severe and repeated breaches but are often not enforced. In the jurisdictions examined, judges and litigants who were interviewed reported that expert witnesses are rarely sanctioned for breaches. The sample statistics for courts in Serbia, BiH and Montenegro confirms that courts do not react or sanction expert witnesses for breach of deadline. Most breaches go unnoticed — around 70% of all recorded breaches (in BiH up to 83%).

Please see the comparative figure below on the percentage of fines imposed, warnings issued, and the court's reaction relative to the deadline breaches in the sample reviewed.

**Figure 24. Breach of Deadline by Expert Witness & Reaction of the Court – BiH, Serbia, Montenegro<sup>161</sup>**

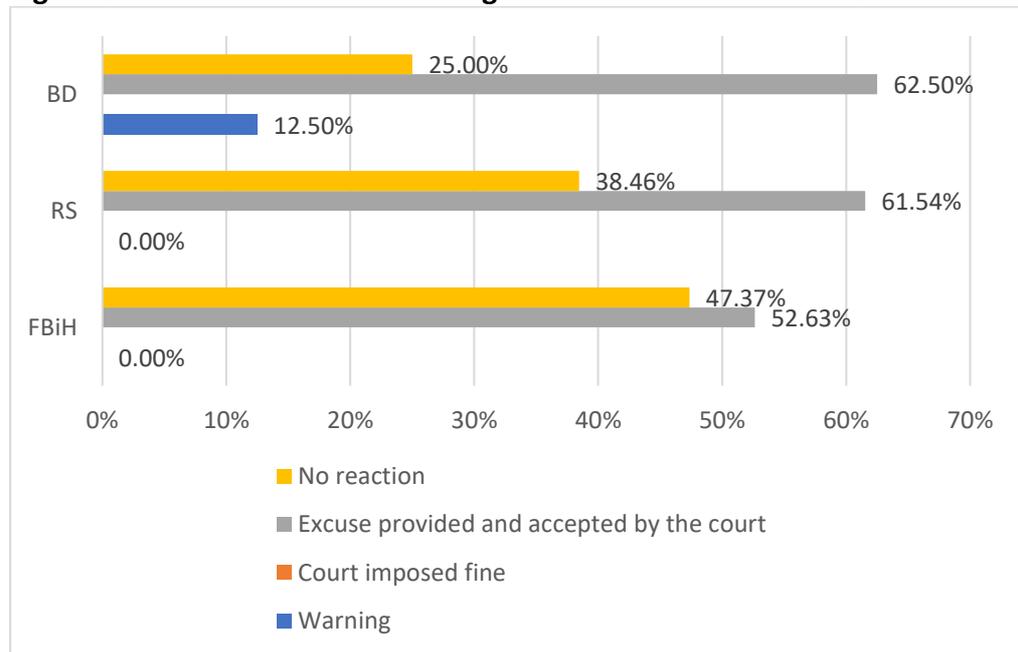


**94. The number of fines imposed on expert witnesses in all the jurisdictions examined is very low:**

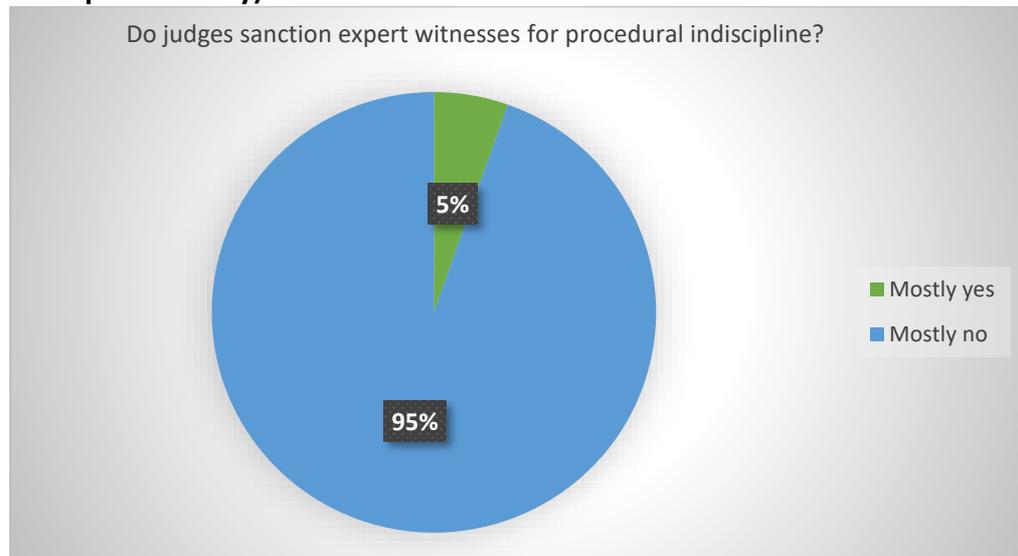
- a. In **Serbia**, according to the data made available by the MOJ, in 2016, courts imposed less than 20 fines on expert witnesses across Serbia. Given the hundreds of thousands of cases where expert witnesses appear per year in Serbia and the many trial deadlines which should be adhered to in each case, such a small number of fines indicates that courts do not monitor or sanction expert witnesses for breaches. In fact, during the informant interviews, judges noted that imposing fines creates an additional burden to the trial as, at a later stage, they will need to ensure that the fine imposed was indeed paid. The reason for such a small number of fines seems to be, in part, that judges are reluctant to sanction expert witnesses that they use frequently and depend on. Informant interviews with judges revealed that experts that are used frequently, refuse to work with certain judges or certain courts that have sanctioned them in the past. This creates a serious problem for a judge because, after sanctioning an expert, it is highly unlikely that that expert will agree to be engaged in another case adjudicated by that judge. So, because of a shortage of good experts, in a way, judges are dependent on and in some cases beholden to certain expert witnesses;
- b. In **BiH**, courts rarely sanction expert witnesses for failure to submit their opinions on time, or for being absent from hearings. This is confirmed by sample statistics and appears to be more of an issue in FBiH. This is also the overall perception of representatives of BiH’s legal and business community (Please see the Perception Survey figure below). No fines were imposed for any of the recorded instances where an expert witness was absent from court, while warnings were only issued in BD;

<sup>161</sup> Sample statistics.

**Figure 25. Absence from the Hearing & Reaction of the Court – BiH<sup>162</sup>**



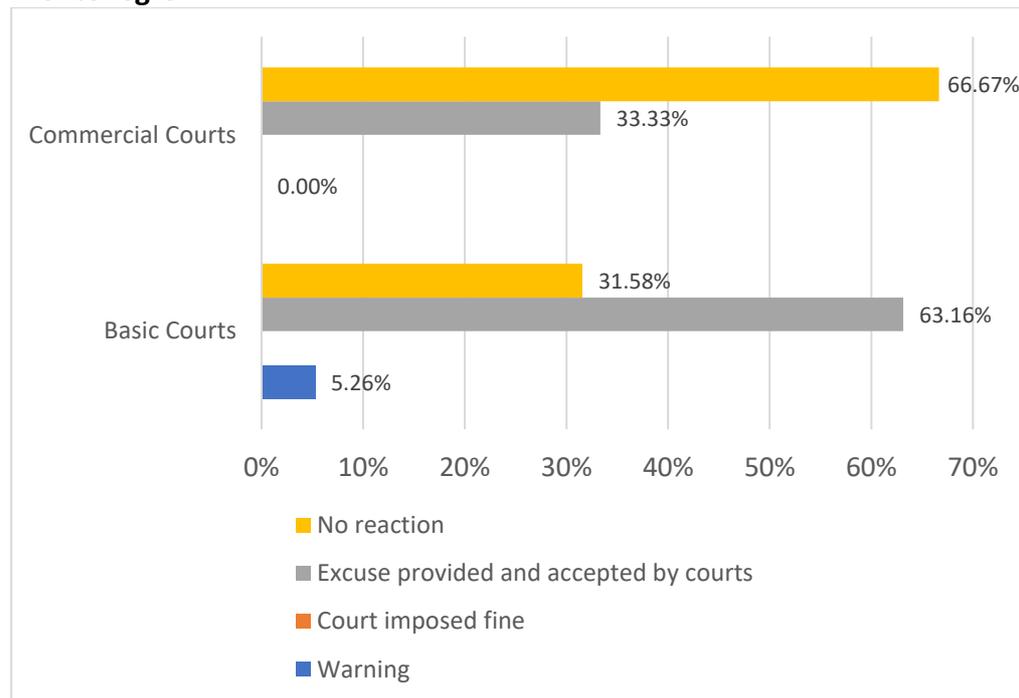
**Figure 26. Sanctioning of Expert Witnesses for Indiscipline in BiH (Source: BiH Perception Survey)**



- c. In **Montenegro**, it is common for expert witnesses to not attend hearings when summoned by the court. As reported by litigant lawyers, courts rarely sanction expert witnesses for failure to attend hearings. Only in cases where the breach becomes consistent, courts resort to pecuniary sanctions. Sample statistics show that courts did not impose a single fine on expert witnesses in the three-year period observed;

<sup>162</sup> Sample statistics.

**Figure 27. Absence from the Hearing & Reaction of the Court – Montenegro<sup>163</sup>**



- d. In **North Macedonia**, expert witnesses are rarely sanctioned for not abiding by the rules and obligations of their profession. Only one out of 482 expert witnesses who were hired in the cases reviewed for this study was fined for not responding to court summons. At the same time, several cases were recorded where the court ordered the police to bring the expert witness to the court. Interestingly, in these cases the judges still did not fine the expert witness. Also, the analysis showed that courts are very tolerant to delays in the submission of the super-expert reports, especially toward the BEW and the Medical Faculty. Provisions in the Macedonian LEW tie sanctions to the legal status of experts. Namely, according to the Macedonian LEW, if an expert witness receives three fines in a year, their license will be revoked.<sup>164</sup> However, given that expert witnesses are hardly ever sanctioned by the courts, this provision cannot be enforced. This also means that many expert witnesses have their licenses renewed, remain in the register, and can be re-hired by parties, even if they continuously submit their reports late or violate other rules of the profession.

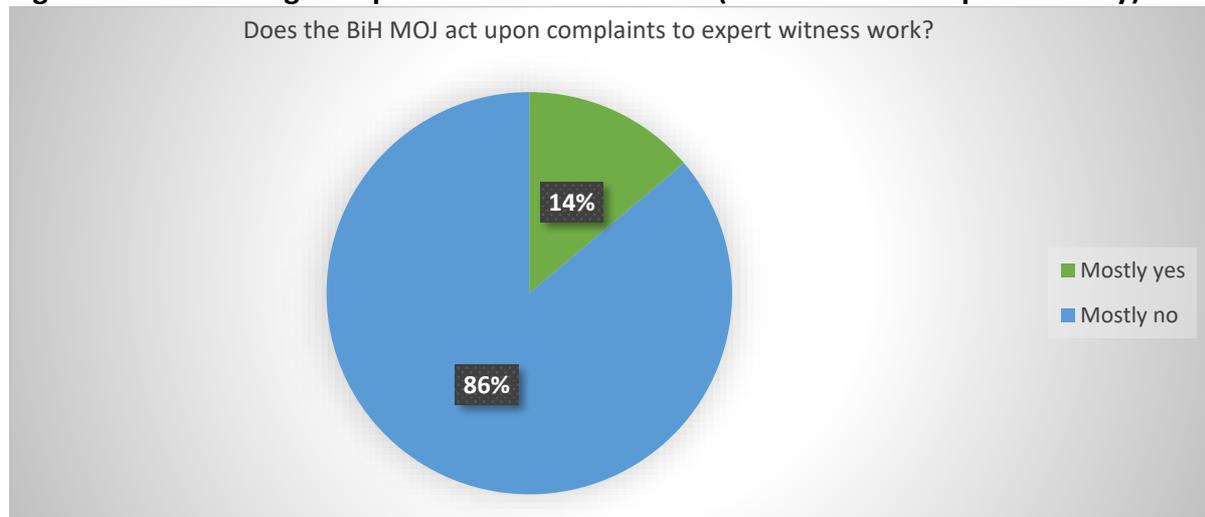
95. **In practice, competent bodies in Serbia, BiH and North Macedonia do not monitor the work of expert witnesses.** In **Serbia**, the MOJ does not keep systematized data on the number of expert witness licenses revoked for breaches — acting in an unethical, incompetent or inadequate manner. This could be explained by the fact that, the MOJ rarely revokes expert witnesses’ licenses on these grounds, if at all, so it’s likely that there is no data to collect and collate. The LEW stipulates that an expert witness’ license can be revoked if a court or a party submits a request to the MOJ to this effect. Data from the MOJ indicates that,

<sup>163</sup> Sample statistics.

<sup>164</sup> Article 26 of the Macedonian LEW.

in 2017, 65 complaints were made to the MOJ for unethical, incompetent or unprofessional work of expert witnesses. However, no licenses were revoked on these grounds. Unified and systemized data for previous years is not available. Expert witnesses in informant interviews also confirmed that no expert witness' license has ever been revoked on these grounds. The expert witnesses also noted that the MOJ does not have the expertise or adequate processes in place to evaluate their work and revoke their licenses, nor does the department/staff responsible for the evaluation of the work of expert witnesses. In **BiH**, more than 80% of the respondents to the Perception Survey were of the view that RS and FBiH Ministries of Justice do not act upon complaints on the work of expert witnesses. Further, as reported by the RS MOJ, only one written warning was issued since the new RS LEW was passed (almost two years) and no expert witness licenses were revoked.

**Figure 28. Monitoring of Expert Witness Work in BiH (Source: BiH Perception Survey)**



In **North Macedonia**, the Register of Expert Witnesses does not contain up-to-date information on expert witnesses, because the MOJ does not provide timely and consistent information on license revocation decisions. The Register is a public document that comprises of all issued, renewed, revoked and expired licenses. Amendments to the Macedonian LEW prescribe that the Register of Expert Witnesses is comprised of all expert witnesses who have passed the exam, received a license and paid the insurance for possible damage to third parties. However, the current Register still contains expert witnesses whose licenses have expired, those who were only supposed to keep their licenses provided they passed the exam within two years, but didn't, and expert witnesses who do not have adequate insurance. The fact that the MOJ is required to issue a formal decision to revoke licenses, instead of the process being automatized in the Register, remains a key challenge. Further, the LEW mandates that the MOJ and the State Administrative Inspectorate supervise the implementation of the LEW, yet the LEW does not explain how this oversight is to be implemented. As a result, there is no written evidence of any oversight visits to the Chamber of Expert Witness or any expert witness office.

## Recommendations and Next Steps

### Improving the Licensing Process of Expert Witnesses

96. **In Serbia, BiH and Montenegro, consideration might be given to revising laws on expert witnesses to introduce regular calls for applications and/or regular examination of candidates.** This would also facilitate the continuous update of the list of available experts and ensure that the supply of expert witnesses is adequate and in line with market availability. Appointing new expert witnesses would alleviate shortages, in particular shortages of new experts in rapidly developing fields (IT, telecom, etc.). In **Serbia**, consideration could be given to renewal of expert witness licenses every several years.<sup>165</sup> At the time of renewal, expert witnesses could be obliged to demonstrate that they have continuously updated their knowledge in line with stipulated training requirements.

97. **In the jurisdictions examined, it would be beneficial for laws on expert witnesses to link the appointment process with identified needs of courts/PPOs for additional experts (as is the case with FBiH courts).** The Ministry of Justice/BD Judicial Commission could be bound by the information provided by courts/PPOs on the needs for expertise in their regions. This mechanism would connect the demand for expert witnesses with the supply of experts as authorized by the Ministry of Justice/BD Judicial Commission through calls for applications. It is the courts/PPOs and not the Ministry/BD Judicial Commission that are more aware of the expertise needed most in their locality and when. Potentially, appellate courts could be the ones to decide on the needs and on whether a call into the profession should be published and they should keep a register of the expressed needs of the first instance courts within their territory.<sup>166</sup> This approach is also in line with the CEPEJ Guidelines.<sup>167</sup>

98. **In FBiH, the LEW can be amended to introduce clear requirements on who can become an expert witness and to include requirements on the specific degree and/or professional experience required for the appointment of expert witnesses (as is the case in other jurisdictions).** This would limit discretionary appointment of experts in FBiH and filter out those who do not have necessary education/experience in required fields.

99. **In North Macedonia, the licensing exam for expert witnesses could be improved to test candidates' knowledge of trial processes more adequately.** The license exam in its current form does not adequately test the candidates' practical knowledge, so a study could be conducted to a) identify the main weaknesses of the exam in how it measures the knowledge and skills necessary for the expert witness profession, and b) recommend key improvements to the exam to address these weaknesses.

100. **In North Macedonia, it would be advisable to remove the BEW's monopoly on the provision of expertise to all public institutions and state enterprises.** Moreover, since the sole mandate of the BEW is to provide such expertise, if the monopoly were done away with,

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<sup>165</sup> The EGLE Guide suggest a maximum of five years, para 3.11.

<sup>166</sup> Please also see the EGLE Guide para 3.21 which indicates that *"The judge should ensure that there is an adequate number of Experts in each field and should try to avoid appointing the same expert again while excluding others who have the same qualifications."*

<sup>167</sup> Please see the Part 3.2.1 of the CEPEJ Guidelines, please also see the EGLE guide para 3.12.

it would be useful to transfer BEW employees to other public or private institutions that provide expertise.

**101. In all the jurisdictions examined, it might be beneficial to amend laws on expert witnesses to introduce and clearly regulate the rights and duties of expert witness trainees, interns and associates.** The CEPEJ Guidelines advise that an expert witness should have staff that can not only do the preparatory work but also draft the expert witness opinion under the supervision of the expert witness.<sup>168</sup> This would increase the efficiency of expert witnesses' work in several ways:

- a. With more manpower there would be fewer trial delays. This is particularly important for the overburdened, more frequently used expert witnesses who produce high quality reports.
- b. Associates would be exposed to practice and would be able to learn from more experienced expert witnesses. This would, in the long term, help develop a crop of high-quality expert witnesses. Associates, should they later become independent expert witnesses themselves, would have both the expertise and experience needed for the profession and already be recognized by judges as suitable experts to take on engagements.

### **Improving the Selection Process of Expert Witnesses in Trial**

**102. It is highly recommended that each country examined in this study establishes clear rules on the method used by PPOs to select expert witnesses for trial.** Clear rules on selection of expert witnesses by PPOs would increase transparency. Also, to further ensure transparency, it would be beneficial to have the case files in criminal pre-investigation proceedings kept orderly and the manner, reason and method for the selection of an expert witness by PPOs properly documented in each case.

**103. Modelled on criminal procedure rules in other countries examined, BiH criminal procedure rules could require courts and PPOs to hire expert witnesses primarily from the list of permanent court experts.** In combination with an adequate licensing process and regular refreshment of the list of experts, this would ensure that only quality experts, those who have adequate skills and fulfill license requirements, are selected in trial.

**104. In North Macedonia, it is advisable to upgrade the system for random assignment of super-expertise in court cases.** The electronic system that is currently in place (ACCMIS) could be improved to allow for the random selection of entities that provide super-expertise, similar to the existing software application for the selection of trustees in bankruptcy cases. This would enable judges to randomly assign super-expertise so that they do not rely on a single entity, such as the BEW.

### **Improving the Quality of Expert Witness Work and Efficiency of Trial**

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<sup>168</sup> The CEPEJ Guidelines page 55.

105. **In all the jurisdictions examined, consideration might be given to introducing guidelines on the required format and minimum content of the expert opinion in the law.** As suggested both by the CEPEJ Guidelines and the EGLE Guide, an expert opinion should fulfill certain criteria in terms of its structure and contents.<sup>169</sup> The opinion should be expressed in a clear and concise way and be divided in subsections in a specific order, in order to make it easier for the judge to analyze reports from different sources. It must be absolutely clear from the expert report which matters are factual and what assumptions the expert has made in the assessment. To achieve this, both courts and expert witnesses would benefit from clear guidelines on the content and format in which expert witness reports should be drafted. The EGLE Guide elaborates on the structure of the written expert witness report and can be used as a basis for the development of national standards in the LEWs.<sup>170</sup>

106. **In all the jurisdictions examined, it would be advisable to amend laws on expert witnesses to introduce mandatory training on trial processes before admission into the profession.**<sup>171</sup> Entry training on trial processes before admission into the profession<sup>172</sup> would improve overall quality and efficiency of the work of expert witnesses and would enable them to conduct the expertise under proper and correct procedures, as required by the CEPEJ Guidelines.<sup>173</sup> Each expert witness could take training on procedural rules, trial requirements and processes, and drafting of expert witness opinions. Mock trials could be organized, and the role of expert witnesses explained and showcased to the new expert witnesses. Judges and senior experts would be best positioned to participate in the delivery of such training. Adequate training would give all expert witnesses knowledge of trial requirements which would enable them to compete on equal footing for engagements before courts. This would decrease the frequent engagement of the same expert witnesses time and time again and improve efficiency of the trials. Moreover, training would improve the overall quality of the work of expert witnesses.

107. **In Serbia, BD and FBiH, expert witnesses could be instructed to continuously update their knowledge on both (i) the expertise they provide and (ii) trial requirements.** The CEPEJ Guidelines state that an expert witness “should keep up his knowledge not only concerning his expertise but also the principles guiding the expert’s activity.”<sup>174</sup> Seminars/training may be organized on a biannual or other regular basis, and it would be optimal if attending training could be set as a pre-condition for the renewal of an expert witness’ license.<sup>175</sup>

108. **In all the jurisdictions examined, judges and prosecutors would benefit from taking training on some of the most common expertise used in trial.** Judges and prosecutors should

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<sup>169</sup> The CEPEJ Guidelines, para. 73 and the EGLE Guide, paras 5.4. and 5.5.

<sup>170</sup> The EGLE Guide, paras 5.5. and 5.6.

<sup>171</sup> For example, the EGLE Guide in Section III provides detailed information on quality insurance for expert witnesses. To be accredited as an expert witness one should particularly have the following skills: (i) knowledge and competence in the field of expertise; (ii) practical knowledge and competence; (iii) ethics and professional attitude and (iv) efficiency. The EGLE Guide goes on to explain the quality assurance system and national certification bodies which would deal with the transparency, the admissions, the training and the quality of experts.

<sup>172</sup> And not following the admission, as currently is the case in FBiH.

<sup>173</sup> The CEPEJ Guidelines, para. 89.

<sup>174</sup> The CEPEJ Guidelines, para. 87.

<sup>175</sup> The EGLE Guide in para 3.14 states that it should be “regularly ascertained, for example every five years, that the registered Expert still satisfies the criteria which allowed him to register, and check that he has fulfilled his obligation of continuous training both in his core profession as well as in his work as an Expert and in his judicial knowledge in terms of proceedings.”

have general knowledge on common areas of expertise likely to be used during a trial. For example, basic classes on reading financial statements or calculating the default interest rate would be useful for Commercial Court judges. This would give the judges and prosecutors an advantage in reviewing and identifying real issues in expert witness opinions. This would also improve the quality of trials and minimize courts' reliance on expert witness opinions.

109. **Training for judges and expert witnesses could be institutionalized and conducted by competent training centers (or other authorities/institutions in charge of organizing trainings/seminars, e.g. Association of Judges/BD Judicial Commission).** Training centers are best positioned, in cooperation with expert commissions/Ministries of Justice/BD Judicial Commission, to set a basic curriculum for the training.<sup>176</sup> To monitor training activities, attendance could be recorded and both expert witnesses and judges could receive attendance credits. Obtaining a certain number of credits would be a prerequisite for license renewal in the case of expert witnesses, while judges' scores would be taken into consideration in overall evaluation. In the case of expert witnesses, expert commissions/Ministries of Justice/BD Judicial Commission could keep track of training attendance, while in the case of judges, this should be done by court presidents.

110. **Long term, in all the jurisdictions examined, the promotion of private sector engagement in delivery of trainings for expert witnesses might be considered.** As recommended by the EGLE Guide, one private body or several bodies that meet the required criteria of independence could be established to deal with the training and the quality of experts and judicial expertise. These bodies would set the curriculum for training and procedures for assessment and re-assessment of court experts. Funds for their operation would be obtained from training fees paid by the experts.<sup>177</sup>

111. **Specifically, in North Macedonia, it would be advisable to introduce other fora for continuous specialization of expert witnesses.** For instance, attendance of seminars, conferences and training organized by other institutions (and not only by the Chamber of Expert Witnesses), or participating in training organized abroad, could also be considered as continuous upgrade of the expert witnesses' knowledge and expertise. Therefore, even if the Chamber cannot organize training in all areas of expertise, the expert witnesses can still be acknowledged for taking other steps to continue their professional development and be eligible for license renewal on account of such steps.

### **Eradicating Superfluous Expertise to Increase the Efficiency of Trials**

112. **Higher instance courts in all the jurisdictions examined might consider developing a decisional practice which would support lower instance courts in dismissing requests for expert witness opinions when expertise is superfluous.** In civil procedure, if a defendant (be it a state or another entity) objects to the claim, it should provide supporting evidence on the reasons for the objection, as laid down by the CPC. If the defendant merely objects to a claim but fails to provide evidence, courts of all instances could work to apply the burden of proof rules rather than support party proposals to seek superfluous expertise. First instance court

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<sup>176</sup> Please see the EGLE guide para 7.26.

<sup>177</sup> Please see the EGLE Guide, paras. 7.23 – 7.26.

decisions against a party that fails to provide adequate evidence should be supported by higher instance courts. The Supreme Courts could consider rendering an interpretive opinion to provide clarity on when a party's request to use an expert witness should be accepted and when it should be dismissed. Case examples of good practices could be disseminated at conferences and joint meetings between different instance judges and during judicial training.

**113. In the jurisdictions examined, it is recommended that the CrPC and CPC cap the number of expert witness opinions allowed in the determination of a specific issue at trial.** If a court decides to examine a question by ordering two experts and then also asks for validation from a commission of expert witnesses (*supervestačenje*) or from a third expert, it should, once this process is completed and sufficient material has been gathered, stop further analysis and decide on the matter. The same applies to BiH civil procedure – if the court dismisses one expert witness due to a poor opinion, and engages another one to examine the same issue, it should be able to make a decision once the repeated expertise is conducted (and all necessary clarifications are requested from hired experts). The material built after such a complex process of fact-finding usually suffices for a court to make an informed judgment. Any further review would only overburden the court and bring little value to resolution of the matter. The CEPEJ Guidelines are clear that the number of expert witnesses should be limited, and the limit should be defined by a court or in the law.<sup>178</sup>

### Strengthening the Accountability of Expert Witnesses

**114. In all jurisdictions, courts could do more to manage and support the work of expert witnesses.** Tools for the adequate management of expert witnesses' work are in place under procedural rules in examined jurisdictions. Yet, it seems that courts are not using the tools available to them. Simple trial management techniques and tools can be used to improve the efficiency of trials, strengthen the accountability of expert witnesses and assist and support experts in their work (as recommended in the CEPEJ Guidelines<sup>179</sup>). It would be highly beneficial if judges would:

- a. **Review proposals for expertise to assess whether the expertise is truly necessary.** For instance, if the defendant merely objects to a claim but fails to provide evidence, courts of all instances could work to apply the burden of proof rules rather than support a party's request to seek superfluous expertise.
- b. **Determine the subject matter and the scope of the expertise in every case.** Parties are the ones who request an expert witness, but the judge determines the scope and subject matter of the expertise. Clear instructions to expert witness would significantly contribute to increasing the efficiency of expert witnesses. This is confirmed by international standards in this field. The EGLE Guide states that: "[t]he instructions must be defined as precisely as possible and as tailored as necessary to resolve the dispute [...]. As often as possible, the instructions should be set as a (series of) question(s)."

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<sup>178</sup> The CEPEJ Guidelines para 28.

<sup>179</sup> The CEPEJ Guidelines para 109.

- c. **Set the exact date for the submission of the expert opinion taking into account scheduled trial activities.**<sup>180</sup> It is advisable for judges to specify the date by which the expert witness opinion should be produced, leaving sufficient time to review the opinion before sharing it with the parties (at least 8 days before the hearing), and, if needed, request clarification/supplements to the opinion prior to sharing the opinion with the parties.
- d. **Monitor adherence to deadlines and require justifications for delays.** Court staff (associates and judges) could be tasked with reviewing the case files before the scheduled hearing to keep track of the relevant activities of expert witnesses such as:
  - i. whether the expert witness notified the court of possible delays in developing his/her opinion;<sup>181</sup>
  - ii. whether the expert witness submitted a statement of reasons for which he/she was unable to complete the work, together with a brief overview of the actions undertaken, as well as a new deadline for the new opinion to be submitted;<sup>182</sup>
  - iii. whether, in the case of a more complex expertise where the initial deadline set by the court is rather long, the expert witness submits to the court monthly reports on the work performed etc. These pre-reports would also allow the parties enough time to phrase their observations before the final report is drafted.<sup>183</sup>
- e. **Sanction expert witnesses for failure to submit the expert opinion in time.**
- f. **Decline superfluous comments on the expert witness' opinion from the parties or unfounded requests for the opinion to be supplemented.** Instead, it would be beneficial for judges to first critically examine the opinion. After reviewing the opinion judge can, if needed, ask for clarifications before the hearing or at the main hearing (through focused and clear questions to the expert witness). If a judge determines that the opinion is structurally flawed, he/she could order that the opinion be supplemented.
- g. **Request the expert witness to clarify/supplement an incoherent/incomplete expert opinion prior to engaging a new expert witness.** The court could avoid appointing a new expert witness before hearing the expert witness who produced the opinion and requesting that the submitted opinion be supplemented/clarified. If the expert witness does not supplement and/or clarify the opinion, the court can appoint a new expert witness (and report the unprofessional conduct of the previous

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<sup>180</sup> The EGLE Guide, para 4.14.

<sup>181</sup> According to the EGLE Guide, "the Expert should be able to apply to the judge for an extension of his instructions where (i) in the course of the mission, he notices that the time frame will not be sufficient and/or (ii) when in the course of the investigations, due to technical reasons, additional investigative steps are needed or further technical questions should be examined."

<sup>182</sup> As stated in the EGLE Guide, "The expert also has the duty to conduct the assessment and prepare the expert opinion in a reasonable amount of time, at least by the specified deadline. He/she is obliged to inform the court of reasons for an expert opinion not being delivered on the date due. He/she must then also tell the court how long the preparation of the expert opinion will eventually take."

<sup>183</sup> The EGLE Guide, paras. 4.3 and 4.9.

expert witness to competent authorities). This approach would be in line with the CEPEJ Guidelines, which state that “the court or the parties must [...] insist upon the completion of the expert opinion. This is especially the case if the expert prepares an expert opinion which is incomplete, unclear, ambiguous and objectively incorrect, not up to date, without any scientific evidence, or if he or she fails to fulfil the instructions to produce an expert opinion or proves not to be competent.”<sup>184</sup>

- a. **Report expert witness wrongdoing to the competent body (e.g. Ministry of Justice, the Commission, BD Judicial Commission).** In case of delays in producing an expert opinion and/or submission of unclear or incomplete expert opinions, or other unprofessional or unethical behavior from the expert witness, it is recommended that the judge informs the competent body of said behavior and request sanctions against the expert witness.

115. **Courts and parties could be vested with more authority to monitor and sanction the work of expert witnesses.** The MOJ<sup>185</sup> is the authority that decides on the revocation of expert witness licenses. Yet, the MOJ staff does not have the capacity to review expert witness work and decide on expert witness competence. The CEPEJ Guidelines note that “*certain countries have found it useful to appoint judges who are specifically in charge of expertise-related matters, including matters relating to the selection of the experts, the failure of the experts to deliver and expert opinion meeting good quality standards, etc.*”<sup>186</sup> So, courts could be vested with the power to conduct proceedings against an expert witness and even revoke licenses. Parties would benefit from clear rights to report wrongdoings of expert witnesses to all relevant authorities, including the MOJ and the courts. Provisions in the CPC and CrPC or the LEW could be more specific so as to provide a clear right of damage claim action and criminal action for parties in cases of expert witness malpractice.

116. **It would be useful to task competent authorities with undertaking periodic assessments of the work of expert witnesses (as is the case in FBiH) and produce reports.** The authority responsible for monitoring expert witnesses in a specific country (usually Commission/MOJ) could on a regular basis, collect opinions on the work of expert witnesses (from courts<sup>187</sup>, Bar Associations, Chambers of Commerce, etc.), remarks and objections to the work of expert witnesses and details on training and imposed sanctions. This information could be used to produce regular reports on training conducted, areas of specialization, observations and sanctions imposed on expert witnesses, remarks by parties, courts and/or professional associations. This would be in line with internationally recognized standards on the engagement of expert witnesses. CEPEJ Guidelines are clear on the need to regularly monitor the status of expert witnesses to ensure that their expertise is maintained.<sup>188</sup>

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<sup>184</sup> The CEPEJ Guidelines, para. 121.

<sup>185</sup> In some jurisdictions, it is the Commission within the MOJ or the BD Judicial Commission that decides on revocation of expert witness licenses.

<sup>186</sup> Please see CEPEJ Guidelines, para 61.

<sup>187</sup> As stated in the EGLE Guide, the expert witness quality assurance system should “provide for a system of feedback from the courts to the Judicial Experts as proposed by a Working Group on Quality Assurance<sup>7</sup>. Thus, the judge deciding the case could provide a brief appraisal of the Expert’s work. In this appraisal, the judge should comment on his impression of the Expert’s knowledge, skills, ethics and professional conduct, as well as efficiency. After having been notified of this appraisal the Expert should have the opportunity to provide comments and explanations.”

<sup>188</sup> Please see CEPEJ Guidelines, para 52.

117. **It is highly recommended that the courts in all the jurisdictions examined keep a registry of fines imposed on expert witnesses and regularly report these fines to the MOJ, or any other competent body that has the power to revoke licenses.** This would entail the establishment of a steady channel of communication between the courts and the MOJ (or other supervising authorities) in order to obtain timely and accurate information on the work of expert witnesses and their performance during hearings/testimonials. The exchange of information would enable the supervising authority to perform its duty as a disciplinary body that has the mandate to improve the professional and ethical standards of the work of expert witnesses.

### **Resolving Issues with the Remuneration of Expert Witnesses**

118. **In Serbia, criminal procedure rules stipulate that the party requesting the expertise can be required to give an initial down payment for expert witness' fees and costs.** Other countries examined in this report would do well to follow this approach. This way, funds would be secured in advance and delays in paying experts would not be justified.

119. **It is advisable to revise rules on the reimbursement of expert witnesses in Serbia, FBiH and North Macedonia by introducing more specific criteria for the calculation of expert witness fees.** Based on the best practice examples given in the CEPEJ Guidelines and the EGLE Guide, remuneration of expert witnesses should primarily depend on the difficulty, duration and quality of the work carried out by the expert. Rules in Serbia and FBiH could be revised to include these criteria. It would also be beneficial if the rules in Serbia, FBiH and North Macedonia provided guidance on application of relevant criteria by judges/prosecutors in trials.

120. **It is highly recommended that new rules on the remuneration of expert witnesses are enacted in RS, BD and Montenegro.** The efficiency of expert witness work would be improved with new rules on the reimbursement of expert witnesses that would be current, consistent with market standards and based on specific criteria for the calculation of the expert witness' fee, such as the difficulty of the expert work, the time needed to conduct the expertise and the quality of work carried out by the expert. In line with the CEPEJ Guidelines, expert witness fees should be adjusted optimally to the quality and complexity of the assessment and the expenditure of time and effort for the specific task.<sup>189</sup>

121. **Soon after the expert witness has provided expertise, the judge/prosecutor could order payment to the account of expert witnesses; it would be beneficial to avoid making payments after proceedings have ended.** There is no reason for courts to accumulate arrears towards expert witnesses, especially in civil procedure as the funds should already be available in the court deposit accounts after the advance is paid. Therefore, very soon after the expert witnesses has supplied his/her opinion in the trial he/she could be paid. This would prevent the accumulation of arrears and backlog and increase the overall efficiency of expert witness work.

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<sup>189</sup> Please see CEPEJ Guidelines, para 100.

122. **Judges/prosecutors and parties could seek an estimate of costs and fees from the expert witness in advance.** As stated in the CEPEJ Guidelines, experts are required to let the court and the parties know, prior to the engagement, the foreseeable amount of costs for the expert opinion (and even inform them of any subsequent changes in the original estimate of costs).<sup>190</sup> This would ensure that there are no issues with payment later. This would also reveal upfront any issues, as a figure that is deemed to be too high or too low can be further examined by the court.<sup>191</sup> However, it should be taken into account that this additional trial activity could lead to efficiency issues should the courts not improve trial management practices first.

123. **In all the jurisdictions examined, judges and prosecutors would benefit from guidance on the application of rules on the reimbursement of expert witnesses.** Guidance could be given by higher instance courts to ensure uniform and adequate application of relevant criteria and reduce the differences between the amounts charged for the same type of expertise. Judges and prosecutors should be able to set the remuneration depending on the complexity and duration of the work carried out, the quality of the expert, their moral and professional conduct, and material liability incurred. Also, as suggested by the EGLE Guide, the court could use all reasonable efforts to ensure that the cost of the expertise remains proportionate to the value of the case.<sup>192</sup>

### **Proposed Prioritization of Select Reforms**

124. **To benefit fully from the proposed recommendations and leverage the role of expert witnesses in a way that will contribute to improving procedural efficiency,** the reforms proposed in this report would need to be adopted in line with country specific approaches. Furthermore, in order to see marked changes in the trial processes, concerted efforts to adopt and implement the full range of recommendations proposed for each country would be required, as the recommendations are interlinked. Country specific recommendations are provided in Tables 2 to 5.

125. **That said, it may not be possible or practical to implement all the reforms in one go.** Reform opportunities for the short, medium and long term that can be impactful include the following:

126. **Short term: Maintaining records on the work of expert witnesses could help authorities to establish a baseline to measure improvements and monitor progress of the reforms/ actions to improve the role and engagement of expert witnesses.** The records would include information on expert witnesses' licenses, training undertaken, breaches committed, and sanctions applied, etc. This would also provide a basis to increase transparency in the work of expert witnesses and create incentives for them to work in a more professional manner.

127. **Medium-term: Amending the relevant laws/bylaws to improve licensing process for expert witnesses and their remuneration.** Introducing mandatory entry training, establishing

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<sup>190</sup> The CEPEJ Guidelines, para. 91.

<sup>191</sup> Please also see the CEPEJ Guidelines para 83 point 3.

<sup>192</sup> These criteria are in line with the EGLE Guide, paras. 6.2 and 6.3.

clear requirements for entry into the profession, improving examination techniques, etc. would allow authorities to verify the competence of candidates in a structured manner. This would improve the caliber of expert witnesses who enter the profession. Clear rules on the remuneration of expert witnesses would incentivize candidates to enter into the profession and would also incentivize those already in the profession to deliver high quality work. **Amending relevant laws to provide parties to the trial and the courts with more authority to monitor and sanction the work of expert witnesses.** This would also help to build the capacity of the courts to effectively oversee the work of expert witnesses and introduce more scrutiny in the work of expert witnesses, which could also compel them to improve the quality of their work. Functional coordination among the various authorities and stakeholders that hold expert witnesses accountable; courts, expert Commissions, Ministries of Justice, parties etc. would raise the standard of accountability.

128. **Long-term: Promoting and introducing the training of expert witnesses through institutions in the private sector that meet the required criteria.** This would disburden relevant authorities and increase the effectiveness of the supervision process.

**Table 1 – Recommendations Overview**

Description:	Activity & Authority Responsible for Implementation:
<b>1. Improving Expert Witness Licensing / Selection Process</b>	
<p><u>Improve the Method of Appointment into the Expert Witness Profession in the following ways:</u></p> <ul style="list-style-type: none"> <li>• Decision by courts/PPOs on whether a call into the expert witness profession should be published;</li> <li>• Amendments to the LEW to require biannual or other regular calls into the profession or examination of candidates / admission to profession on request of experts (Serbia, BiH, Montenegro);</li> <li>• Clear requirements for admission to the profession (FBiH);</li> <li>• Improved licensing exam to better test candidates' practical knowledge (North Macedonia);</li> <li>• Removing the BEW's exclusive competence to provide expertise to State institutions/enterprises (North Macedonia);</li> <li>• Upgrading the system for random assignment of super-expertise in court cases (North Macedonia).</li> </ul> <p><u>Introduce Expert Witness Trainees and Associates:</u> The LEWs/BD Rulebook could be amended to clearly indicate rights and duties of expert witness trainees, interns and associates, such as the right to collect and return case files, to assist in drafting of the opinion and to attend the trial (please see CEPEJ Guidelines as well).</p> <p><u>Set out Clear and Transparent Rules on:</u></p> <ul style="list-style-type: none"> <li>• The method by which expert witnesses are selected in trial by PPOs;</li> <li>• Orderly keeping case files in criminal pre-investigation proceedings regarding expert witness work;</li> <li>• Engagement of expert witnesses from the list of permanent court experts (BiH).</li> </ul>	<p><b>Ministry of Justice/BD Judicial Commission</b> Draft amendments to the LEWs/BD Rulebook to:</p> <ul style="list-style-type: none"> <li>• Introduce regular calls into the expert witness profession or examination of candidates / admission to profession on request of experts;</li> <li>• Introduce calls for applications on request of courts/PPOs;</li> <li>• Introduce clear requirements for admission to profession (FBiH);</li> <li>• Introduce expert witness trainees, interns and associates and define their rights and duties in and out of trial;</li> <li>• Introduce new examination techniques (North Macedonia);</li> <li>• Remove BEW's exclusive competence to provide expertise to State institutions/enterprises (North Macedonia)</li> </ul> <p>Draft amendments to the CrPCs to require engagement of experts from the list of permanent court experts (RS, FBiH and BD).</p> <p>Upgrade the system for random assignment of super-expertise in court cases (North Macedonia);</p> <p><b>Public Prosecutors' Offices</b></p> <ul style="list-style-type: none"> <li>• Rendering rules/bylaws which would define the method of selection of expert witnesses in criminal cases by PPOs;</li> <li>• Rendering bylaws which would require the case files in criminal pre-investigation proceedings to be kept orderly.</li> </ul>
<b>2. Improving the Quality of Expert Witness Work and Efficiency of Trial</b>	
<p><u>Introduce Standards for Drafting of Expert Opinions</u> To ensure that the expert opinion is coherent, well-structured and comprehensible, both courts and expert witnesses would benefit from guidance on the structure, format and contents of the expert opinion.</p> <p><u>Set Up Training for Expert Witnesses</u> Consideration could be given to introducing several types of trainings as follows:</p> <ul style="list-style-type: none"> <li>• Entry training of expert witnesses on trial processes at the time of admission into the profession including training on the CPC and CrPC rules, trial requirements</li> </ul>	<p><b>Ministry of Justice/BD Judicial Commission</b> Draft amendments to the LEWs/BD Rulebook which would introduce:</p> <ul style="list-style-type: none"> <li>• Rules/standards for drafting of the expert opinion;</li> <li>• Mandatory training for expert witnesses prior to entry into the profession;</li> <li>• Mandatory continuous training of expert witnesses (Serbia, BD and FBiH);</li> <li>• (Long term) private sector engagement in delivery of trainings.</li> </ul>

and processes, drafting of expert witness opinions, and organized mock trials, with judges and experienced expert witnesses participating in delivery of training.

- Regular updates of expert witnesses’ knowledge on both expertise they provide and trial requirements (Serbia, BD and FBiH).

**Judicial Academy/Training Centers/BD Judicial Commission/Chamber of Expert Witnesses/ Academy for Judicial and Prosecutorial Training**

- Organize trainings for expert witnesses, judges and prosecutors.

Set Up Trainings for Judges and Prosecutors

Training could be focused on some of the most common expertise used in trial in connection with the needs of the particular judge/prosecutor.

Allow Private Sector Engagement in Delivery of Trainings

In all selected jurisdictions, private sector engagement in delivery of trainings could be allowed to secure additional fora for specialization of expert witnesses.

In North Macedonia, the LEW could be amended to introduce other fora for continuous specialization of expert witnesses apart from the Chamber of Expert Witnesses.

**3. Eradicating Superfluous Expertise to Increase Efficiency of Trials**

Support to Lower Instance Courts to Dismiss Requests for Expert Witness Opinions when Superfluous

First instance courts’ decisions on dismissing requests for expert witness opinions could be supported by higher instance courts when deciding on appeal.

The Supreme Courts could consider rendering an interpretive opinion to provide clarity on when a party’s request to use an expert witness should be adopted or dismissed.

Limit the Number of Expert Witness Opinions

It would be beneficial to set a limit on the number of expert witnesses that can be used to analyze a specific issue in trial.

**Higher Instance Courts**

- Develop a decisional practice which would support first instance courts in dismissing superfluous expertise proposals.

**Supreme Courts**

- Consider adopting an interpretative opinion which would provide clarity on when using expert witness statements as evidence is appropriate.

**Ministry of Justice/BD Judicial Commission**

- Develop amendments to the CPCs and CrPCs to limit the number of expert witnesses which could be used in trial to examine a specific issue.

**4. Strengthening the Accountability of Expert Witnesses**

Use of Trial Management Techniques to Improve Efficiency and Accountability of Expert Witnesses, particularly in:

- Determining whether expertise is needed, of what scope and subject;
- Setting out the exact date when the expert witness opinion should be submitted;
- Frequently reviewing case files outside of hearings to keep track that all required activities are conducted as scheduled;

**Ministry of Justice/BD Judicial Commission**

Draft amendments to LEWs/BD Rulebook which would introduce/regulate in more detail:

- Court competence to conduct proceedings against an expert witness and even revoke licenses;
- Processes in which parties can report wrongdoing of expert witnesses to all relevant authorities;
- Processes for damage claim lawsuits against expert witnesses;

- Monitoring adherence to deadlines and requiring justifications for breaches;
- Scheduling trial activities to allow enough time to review expert opinions;
- Surrendering only copies of the case files relevant for the analysis to expert witnesses;
- Sanctioning experts for failing to adhere to trial schedules;
- Reporting expert witness wrongdoing to competent authorities.

#### Courts / Parties Vested with More Authority to Monitor and Sanction the Work of Expert Witnesses

Courts could be vested with the power to conduct proceedings against an expert witness and even revoke licenses. Parties under the LEW could have clear rights to report wrongdoing of expert witnesses to all relevant authorities - both the MOJ (and the Commissions within) and courts.

#### Better Monitoring of Expert Witness Work

The authority in charge of monitoring expert witnesses could periodically obtain opinions on expert witness work (courts, Bar Associations, Chambers of Commerce etc.), remarks and objections to expert witness work, trainings and imposed sanctions.

The courts could keep a registry of fines imposed to expert witnesses and to regularly report these fines to the MOJ, or other body competent to revoke licenses.

- Monitoring the work of expert witnesses and maintaining records of their activities by competent bodies;
- Electronic register of complaints and processes on revocation of licenses on this basis.

#### **Ministry of Justice/BD Judicial Commission/Chamber of Expert Witnesses/Commission**

Obtaining opinions on expert witness work and producing regular reports.

#### **Judicial Academy/BiH Training Centers/BD Judicial Commission/Academy for Judicial and Prosecutorial Training**

- Include good trial management techniques into the curriculum for training of judges and prosecutors.

#### **Courts (Court Presidents)**

- Organize the work of court clerks to submit only (electronic) copies of documentation to expert witnesses,
- Organize the court staff to monitor cases out of hearings and signal delays to judges,
- Keep a registry of fines imposed to expert witnesses.

## **5. Resolving Issues on Remuneration of Expert Witnesses**

#### Increase Clarity on Time and Efficiency for Payments to Expert Witnesses

It would be more efficient if judges would order payment to the account of expert witnesses soon after the expert witness has provided its expertise. This would prevent accumulation of arrears and backlog.

#### Increase Predictability of Costs

Judges and parties could, in advance, seek an estimate of costs and fees from expert witnesses.

#### Allow Advance Payment for Expert Witness Fees and Costs

As it is the case in Serbia, criminal procedure rules in other jurisdictions could stipulate that the party proposing the expertise is to give an initial down payment for expert witness' fees and costs.

#### Introduce/revise rules on remuneration of expert witnesses

It would be beneficial to enact/revise rules on the reimbursement of expert witnesses so that these rules are consistent with market standards and based on specific

#### **Ministry of Justice/BD Judicial Commission**

Introduce (RS, BD, Montenegro) / Revise (Serbia, FBiH, North Macedonia) the rules on remuneration of expert witnesses to regulate in detail:

- Criteria for calculation of the expert witness' fees and their application;
- Exact deadlines and timing for payment of expert witnesses;
- Processes for submission of the invoice/statement of expenses and fees;
- Criteria under which judges review expert witness invoice/statement of expenses and fees and decide on final amounts;
- Define the rights to complain on awarded amounts.

Draft amendments to the CrPC to allow judges to request an initial down payment for an expert witness' fees and costs. (Montenegro, BiH, North Macedonia).

#### **Higher instance courts**

criteria for the calculation of the expert witness' fees, such as the difficulty of the expert work and time needed to conduct the expertise.

- Provide guidance on application of criteria for remuneration of expert witnesses.

Provide Guidance on Remuneration of Experts

Higher instance courts could provide guidance to lower level courts to ensure uniform and adequate application of relevant criteria on remuneration of expert witnesses.

**Table 2 – Serbia Recommendations Overview**

Activity & Authority Responsible for Implementation:
1. Improving Expert Witness Licensing / Selection Process
<p><b>Ministry of Justice</b> Draft amendments to the LEW which would introduce:</p> <ul style="list-style-type: none"> <li>• Regular calls into the expert witness profession or examination of candidates;</li> <li>• Regular update of the list of expert witnesses (e.g. renewal of the licence);</li> <li>• Calls for applications on request of courts/PPOs;</li> <li>• Expert witness trainees, interns and associates and define their rights and duties in and out of trial.</li> </ul> <p><b>Public Prosecutors' Offices</b></p> <ul style="list-style-type: none"> <li>• Render rules/bylaws which would define the method of selection of expert witnesses in criminal cases by PPOs;</li> <li>• Render bylaws which would require the case files in criminal pre-investigation proceedings to be kept orderly.</li> </ul>
2. Improving the Quality of Expert Witness Work and Efficiency of Trial
<p><b>Ministry of Justice</b> Draft amendments to the LEW which would introduce:</p> <ul style="list-style-type: none"> <li>• Rules/standards for drafting of the expert opinion;</li> <li>• Mandatory training for expert witnesses prior to entry into the profession;</li> <li>• Mandatory continuous training of expert witnesses on both expertise and trial requirements (optimally as a precondition for license renewal);</li> <li>• (Long term) private sector engagement in delivery of trainings.</li> </ul> <p><b>Judicial Academy</b></p> <ul style="list-style-type: none"> <li>• Organize trainings for expert witnesses, judges and prosecutors.</li> </ul>
3. Eradicating Superfluous Expertise to Increase Efficiency of Trials
<p><b>Higher Instance Courts</b></p> <ul style="list-style-type: none"> <li>• Develop a decisional practice which would support first instance courts in dismissing superfluous expertise.</li> </ul> <p><b>Supreme Cassation Court</b></p> <ul style="list-style-type: none"> <li>• Consider adopting an interpretative opinion which would provide clarity on when using expert witness statements as evidence is appropriate.</li> </ul> <p><b>Ministry of Justice</b></p> <ul style="list-style-type: none"> <li>• Develop amendments to the CPC and CrPC to limit the number of expert witnesses which could be used in trial to examine a specific issue (to e.g. three).</li> </ul>

<b>4. Strengthening Accountability of Expert Witnesses</b>
<p><b>Ministry of Justice</b> Draft amendments to the LEW which would introduce:</p> <ul style="list-style-type: none"> <li>• Court competence to conduct proceedings against an expert witness and even revoke licenses;</li> <li>• Processes in which parties can report wrongdoing of expert witnesses to all relevant authorities (courts, Ministry of Justice);</li> <li>• Processes for damage claim lawsuits against expert witnesses;</li> <li>• Monitoring of expert witness work by the Ministry of Justice;</li> <li>• Electronic register of complaints and processes on revocation of licences.</li> </ul> <p><b>Judicial Academy</b></p> <ul style="list-style-type: none"> <li>• Include good trial management techniques into the curriculum for training of judges and prosecutors.</li> </ul> <p><b>Courts (Court Presidents)</b></p> <ul style="list-style-type: none"> <li>• Organize the work of court clerks to allow submission of only (electronic) copies of documentation to expert witnesses;</li> <li>• Organize the court staff to monitor cases out of hearings and signal delays to judges;</li> <li>• Keep a registry of fines imposed to expert witnesses.</li> </ul>
<b>5. Resolving Issues on Remuneration of Expert Witnesses</b>
<p><b>Ministry of Justice</b> Revise the Rulebook on Reimbursement of Court Expenses to explain in greater detail:</p> <ul style="list-style-type: none"> <li>• Criteria for calculation of the expert witness' fees and their application;</li> <li>• Exact deadlines and timing for payment of expert witnesses;</li> <li>• Processes for submission of the invoice/statement of expenses and fees;</li> <li>• Criteria under which judges review expert witness invoice/statement of expenses and fees and decide on final amounts;</li> <li>• Rights to complain on awarded amounts.</li> </ul> <p><b>Higher instance courts</b></p> <ul style="list-style-type: none"> <li>• Provide guidance on application of criteria for remuneration of expert witnesses.</li> </ul>

**Table 3 – Montenegro Recommendations Overview**

<b>Activity &amp; Authority Responsible for Implementation:</b>
<b>1. Improving Expert Witness Licensing / Selection Process</b>

**Ministry of Justice**

Draft amendments to the LEW which would introduce:

- Regular calls into the expert witness profession or examination of candidates;
- Calls for applications on request of courts/PPOs;
- Expert witness trainees, interns and associates and define their rights and duties in and out of trial.

**Public Prosecutors' Offices**

- Render rules/bylaws which would define the method of selection of expert witnesses in criminal cases by PPOs;
- Render bylaws which would require the case files in criminal pre-investigation proceedings to be kept orderly.

**2. Improving the Quality of Expert Witness Work and Efficiency of Trial****Ministry of Justice**

Draft amendments to the LEW which would introduce:

- Rules/standards for drafting of the expert opinion;
- Mandatory training for expert witnesses prior to entry into the profession;
- (Long term) private sector engagement in delivery of trainings.

**Centre for Judicial and Prosecutorial Training**

- Organize trainings for expert witnesses, judges and prosecutors.

**3. Eradicating Superfluous Expertise to Increase Efficiency of Trials****Higher Instance Courts**

- Develop a decisional practice which would support first instance courts in dismissing superfluous expertise.

**Supreme Court**

- Consider adopting an interpretative opinion which would provide clarity on when using expert witness statements as evidence is appropriate.

**Ministry of Justice**

- Develop amendments to the CPC and CrPC to limit the number of expert witnesses which could be used in trial to examine a specific issue (to e.g. three).

**4. Strengthening Accountability of Expert Witnesses****Ministry of Justice**

Draft amendments to the LEW which would introduce/regulate in more detail:

- Court competence to conduct proceedings against an expert witness and even revoke licenses;
- Processes in which parties can report wrongdoing of expert witnesses to all relevant authorities (courts, Expert Commission, Ministry of Justice);
- Processes for damage claim lawsuits against expert witnesses;
- Monitoring of expert witness work by the Expert Commission;
- Electronic register of complaints and processes on revocation of licences.

**Centre for Judicial and Prosecutorial Training**

- Include good trial management techniques into the curriculum for training of judges and prosecutors.

**Courts (Court Presidents)**

- Organize the work of court clerks to allow submission of only (electronic) copies of documentation to expert witnesses;

- Organize the court staff to monitor cases out of hearings and signal delays to judges;
- Keep a registry of fines imposed to expert witnesses.

## 5. Resolving Issues on Remuneration of Expert Witnesses

### Ministry of Justice

Render the Tariff Fees and Expenses of Expert Witnesses to explain in detail:

- Criteria for calculation of the expert witness' fees and their application;
- Exact deadlines and timing for payment of expert witnesses;
- Processes for submission of the invoice/statement of expenses and fees;
- Criteria under which judges review expert witness invoice/statement of expenses and fees and decide on final amounts;
- Rights to complain on awarded amounts.

Draft amendments to the CrPC to allow judges to request initial down payment for expert witness' fees and costs.

### Higher instance courts

- Provide guidance on application of criteria for remuneration of expert witnesses.

**Table 4 – BiH Recommendations Overview**

### Activity & Authority Responsible for Implementation:

#### 1. Improving Expert Witness Licensing / Selection Process

##### RS/FBiH Ministries of Justice/BD Judicial Commission

Draft amendments to the RS/FBiH LEWs/BD Rulebook which would introduce:

- Regular calls into the expert witness profession or examination of candidates;
- Calls for applications on request of courts/PPOs;
- Expert witness trainees, interns and associates and define their rights and duties in and out of trial.

Draft amendments to the CrPCs to require engagement of experts from the list of permanent court experts.

##### Public Prosecutors' Offices

- Render rules/bylaws which would define the method of selection of expert witnesses in criminal cases by PPOs;
- Render bylaws which would require the case files in criminal pre-investigation proceedings to be kept orderly.

#### 2. Improving the Quality of Expert Witness Work and Efficiency of Trial

##### RS/FBiH Ministries of Justice/ BD Judicial Commission

Draft amendments to the RS/FBiH LEWs/BD Rulebook which would introduce:

- Rules/standards for drafting of the expert opinion;
- Mandatory training for expert witnesses prior to entry into the profession;
- Mandatory continuous training of expert witnesses (in FBiH and BD);
- Clear educational/professional requirements for admission of experts to the profession (in FBiH);
- (Long term) private sector engagement in delivery of trainings.

##### RS/FBiH Expert Commissions/ BD Judicial Commission

- Organize trainings for expert witnesses, judges and prosecutors.

### 3. Eradicating Superfluous Expertise to Increase Efficiency of Trials

#### RS/FBiH Higher Instance Courts/ BD Appellate Court

- Develop a decisional practice which would support first instance courts in dismissing superfluous expertise.

#### RS/FBiH Supreme Courts/ BD Appellate Court

- Consider adopting an interpretative opinion which would provide clarity on when using expert witness statements as evidence is appropriate.

#### RS/FBiH Ministries of Justice/ BD Judicial Commission

- Develop amendments to the CPC and CrPC to limit the number of expert witnesses which could be used in trial to examine a specific issue (to e.g. three).

### 4. Strengthening Accountability of Expert Witnesses

#### RS/FBiH Ministries of Justice/BD Judicial Commission

Draft amendments to the RS/FBiH LEWs/BD Rulebook which would introduce/govern in more detail:

- Court competence to conduct proceedings against an expert witness and even revoke licenses;
- Processes in which parties can report wrongdoing of expert witnesses to all relevant authorities (courts, Expert Commissions, Ministries of Justice/BD Judicial Commission);
- Processes for damage claim lawsuits against expert witnesses;
- Monitoring of expert witness work by the Expert Commission (in RS);
- Electronic register of complaints and processes on revocation of licences.

#### RS/FBiH Expert Commissions/BD Judicial Commission

- Include good trial management techniques into the curriculum for training of judges and prosecutors.

#### Courts (Court Presidents)

- Organize the work of court clerks to allow submission of only (electronic) copies of documentation to expert witnesses;
- Organize the court staff to monitor cases out of hearings and signal delays to judges;
- Keep a registry of fines imposed to expert witnesses.

### 5. Resolving Issues on Remuneration of Expert Witnesses

#### RS/FBiH Ministries of Justice/BD Judicial Commission

Render/revise the rules on remuneration of expert witnesses to explain in detail:

- Criteria for calculation of the expert witness' fees and their application;
- Exact deadlines and timing for payment of expert witnesses;
- Processes for submission of the invoice/statement of expenses and fees;
- Criteria under which judges review expert witness invoice/statement of expenses and fees and decide on final amounts;
- Rights to complain on awarded amounts.

Draft amendments to the CrPCs to allow judges to request initial down payment for expert witness' fees and costs.

#### RS/FBiH Higher Instance Courts / BD Appellate Court

- Provide guidance on application of criteria for remuneration of expert witnesses.

**Table 5 – North Macedonia Recommendations Overview**

Activity & Authority Responsible for Implementation:
<p style="text-align: center;"><b>1. Improving Expert Witness Licensing / Selection Process</b></p>
<p><b>Ministry of Justice</b> Draft amendments to the LEW which would:</p> <ul style="list-style-type: none"> <li>• Introduce regular calls into the expert witness profession;</li> <li>• Introduce calls for applications on request of courts/PPOs;</li> <li>• Introduce new examination techniques;</li> <li>• Introduce Expert witness trainees, interns and associates and define their rights and duties in and out of trial;</li> <li>• Remove BEW’s exclusive competence to provide expertise to State institutions/enterprises.</li> </ul> <p>Upgrade the system for random assignment of super-expertise in court cases.</p> <p><b>Public Prosecutors’ Offices</b></p> <ul style="list-style-type: none"> <li>• Render rules/bylaws which would define the method of selection of expert witnesses in criminal cases by PPOs;</li> <li>• Render bylaws which would require the case files in criminal pre-investigation proceedings to be kept orderly.</li> </ul>
<p style="text-align: center;"><b>2. Improving the Quality of Expert Witness Work and Efficiency of Trial</b></p>
<p><b>Ministry of Justice</b> Draft amendments to the LEW which would introduce:</p> <ul style="list-style-type: none"> <li>• Rules/standards for drafting of the expert opinion;</li> <li>• Mandatory training for expert witnesses prior to entry into the profession;</li> <li>• Other fora for continuous training of expert witnesses (apart from the Chamber of Expert Witnesses);</li> <li>• (Long term) private sector engagement in delivery of trainings.</li> </ul> <p><b>Chamber of Expert Witnesses/Academy for Judicial and Prosecutorial Training</b></p> <ul style="list-style-type: none"> <li>• Organize trainings for expert witnesses, judges and prosecutors.</li> </ul>
<p style="text-align: center;"><b>3. Eradicating Superfluous Expertise to Increase Efficiency of Trials</b></p>
<p><b>Higher Instance Courts</b></p> <ul style="list-style-type: none"> <li>• Develop a decisional practice which would support first instance courts in dismissing superfluous expertise.</li> </ul> <p><b>Supreme Court</b></p> <ul style="list-style-type: none"> <li>• Consider adopting an interpretative opinion which would provide clarity on when using expert witness statements as evidence is appropriate.</li> </ul> <p><b>Ministry of Justice</b></p> <ul style="list-style-type: none"> <li>• Develop amendments to the CPC and CrPC to limit the number of expert witnesses which could be used in trial to examine a specific issue (to e.g. three).</li> </ul>
<p style="text-align: center;"><b>4. Strengthening Accountability of Expert Witnesses</b></p>
<p><b>Ministry of Justice</b> Draft amendments to the LEW which would introduce:</p> <ul style="list-style-type: none"> <li>• Court competence to conduct proceedings against an expert witness and even revoke licenses;</li> </ul>

- Processes in which parties can report wrongdoing of expert witnesses to all relevant authorities (courts, Chamber of Expert Witnesses, Ministry of Justice);
- Processes for damage claim lawsuits against expert witnesses;
- Monitoring of expert witness work by the Chamber of Commerce or Ministry of Justice;
- Electronic register of complaints and processes on revocation of licences.

#### **Academy for Judicial and Prosecutorial Training**

- Include good trial management techniques into the curriculum for training of judges and prosecutors.

#### **Courts (Court Presidents)**

- Organize the work of court clerks to allow submission of only (electronic) copies of documentation to expert witnesses;
- Organize the court staff to monitor cases out of hearings and signal delays to judges;
- Keep a registry of fines imposed to expert witnesses.

### **5. Resolving Issues on Remuneration of Expert Witnesses**

#### **Ministry of Justice**

Revise the rules on fees and expenses of expert witnesses to explain in more detail:

- Criteria for calculation of the expert witness' fees and their application;
- Exact deadlines and timing for payment of expert witnesses;
- Processes for submission of the invoice/statement of expenses and fees;
- Criteria under which judges can review expert witness invoice/statement of expenses and fees and decide on final amounts;
- Rights to complain on awarded amounts.

Draft amendments to the CrPC to allow judges to request initial down payment for expert witness' fees and costs.

#### **Higher instance courts**

- Provide guidance on application of criteria for remuneration of expert witnesses.

## Annex 1 – Methodology

129. The Report documents the findings of a two-stage analytical process undertaken to examine the role of expert witnesses in Serbia, Montenegro, North Macedonia and BiH.

130. The first stage focused on desk research which included a review of publicly available documents, laws and regulations in the selected countries on the status of expert witnesses and any other aspects relevant to the assignment. This process was complemented by several informal interviews with litigant lawyers, judges and expert witnesses. The analysis was undertaken to examine the impact of expert witnesses on the efficiency and quality of trials and to identify areas for improvement. The research canvassed a range of areas including; access to the profession, selection procedures, remuneration, training of experts, as well as quality of expertise, sanctions (in the event of breach of duty) and procedural rules that regulate the work of expert witnesses during a trial.

131. The second stage focused on analyzing the implementation of legislation in practice. The analysis was conducted **in eight courts in Serbia** – four Commercial Courts and four Basic Courts in Belgrade, Niš, Subotica and Užice; **three courts in Montenegro** – Basic Court and Commercial Court in Podgorica, and Basic Court in Kotor; **five courts in BiH** – Basic Court and District Commercial Court in Banja Luka, Municipal Court in Sarajevo, Basic Court in Brčko District and Municipal Court in Mostar, and **six courts in North Macedonia** – Basic Court Skopje 1 (civil cases), Basic Court Skopje 2 (criminal cases), Basic Courts in Veles, Bitola, Štip and Kičevo. The geographical coverage ensured adequate regional representation and included small-medium and large cities/courts in selected jurisdictions.

132. Data for the analysis of the implementation of legislation in practice was collected in two ways—(i) through questionnaires circulated to the courts and through a (ii) review of a sample of closed cases in each court. First the World Bank developed a questionnaire that was to be filled out by the courts in all four countries. The questionnaire was used to collect court-wide statistics on the number of cases that involved expert witnesses, aggregate remuneration values, number of expert witnesses used, etc. The questionnaire is available in Annex 2 of this Report. Data was obtained from courts in Serbia and BiH in the requested form. In Montenegro and North Macedonia, courts provided partial data and/or internal statistical reports. Consequently, some data are either not available, or not entirely comparable for all four countries examined. The data obtained from courts were processed by the World Bank to provide information on issues such as, how often expert witness opinions were used in each court, the average value of an expert witness' opinion etc. (referred to as statistics in the Report). Second, the review of a sample of closed cases in each court was conducted by the World Bank team to fortify the analysis and examine issues that were not covered by the questionnaire. Through the review, data were collected on the duration of expert witnesses' opinions, adjournments for reasons related to expert witness work, etc. and was later processed to provide information on issues such as frequency of delays in providing expert witness opinions and adjournments and annulments as a result of the work of expert witnesses (referred to as sample statistics in the Report). The World Bank team reviewed a sample of approximately **1,100 cases** in the four countries examined. The sample only included cases in which expert witnesses were used. The sample consisted of civil

and criminal cases i.e. civil, labor, family, criminal cases, commercial cases. The sample included courts of different sizes in order to ensure adequate geographic coverage. Given the practical constraints associated with data collection, (availability of cases on site, time for review and similar) the sample cannot be said to be a statistically representative sample. The statistical data were collected over a three-year period: 2015, 2016 and 2017. During the review of cases, examples of past court decisions were also collected.

133. In BiH, a questionnaire<sup>193</sup> on procedural efficiency and the engagement of expert witness in commercial cases and potential areas for reform was shared with Bar Associations in RS and FBiH, RS and FBiH Chambers of Commerce, and the BiH Foreign Investors Council. The questionnaire served as an informal Perception Survey of Efficiency in the Processing of Commercial Cases and was informed by an ongoing World Bank technical assistance project to improve Commercial Justice in BiH. The questionnaire included questions related to the work of expert witnesses in order to seek the perspectives of lawyers and the business community (representatives of legal departments).

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<sup>193</sup> Questionnaire is attached as Annex 3 of this Report.

## Annex 2 – Questionnaires Related to Expert Witness Engagement

### ANNEX 1. INSTRUCTIONS RELATED TO THE DATA THAT IS TO BE COLLECTED THROUGH A CLOSED CASE REVIEW

For the purpose of closed case review in the court registration office, the World Bank Team will visit your court on **23 May 2018**.

We kindly ask you to prepare **cases in which a final judgment was issued in 2015, 2016, and 2017 and in which expert witnesses were hired**, for review. The cases should be prepared in a manner described in the table below:

Cases which will be reviewed by sampling			
Cases:	Number of cases to be prepared by year: <sup>194</sup>		
	2015	2016	2017
- commercial cases	X	X	X
- criminal cases	X	X	X
- civil cases	X	X	X
- labor disputes	X	X	X

### ANNEX 2. QUESTIONNAIRE RELATED TO THE DATA THAT IS TO BE COLLECTED BASED ON THE RECORDS KEPT BY THE COURT

According to the available information, courts have certain data on the work of expert witnesses, primarily based on the records on payments made to expert witnesses. Based on those records it is possible to collect the data on (a) the number of cases in which expert witnesses were engaged and (b) payments to expert witnesses per case. The data on fees paid to expert witnesses include the data on total amount of paid fees i.e. both expert witness fees and costs of expertise.

We kindly ask you to fill in the table below based on the subject records and submit the filled tables by **18 May 2018**.

We emphasize that the data are collected at the annual level for the previous three years – 2015, 2016 and 2017, both for pending and disposed cases. The data are collected as anonymous, that is, expert witnesses should not be identified by their personal names, or business names in case of legal entities. The data is collected with regard both to all expert witnesses and expert witnesses from the following fields of expertise: (a) finance and economics; (b) civil engineering and (c) medicine.

1. Data based on the court records
  - 1.1 Data on expert witness engagement in court proceedings: data on the total number of expert witnesses who/that acted before the court in the observed period.

Number of expert witnesses who/that acted before the court				
Year:	Total number of expert witnesses who/that acted before the court:	Total number of expert witnesses in the field of finance and economics who/that acted before the court:	Total number of expert witnesses in the field of civil engineering who/that acted before the court:	Total number of expert witnesses in the field of medicine who/that acted before the court:
2015				
2016				
2017				

<sup>194</sup> Individual courts were asked to prepare different number of cases for review.

- 1.2 Data on expert witness engagement in court proceedings: data on the total number of cases in which expert witnesses were engaged and data on the total number of cases in which expert witnesses in the identified fields of expertise were engaged during the observed period.

Engagement of expert witnesses in court proceedings				
Year:	Total number of cases in which expert witnesses were engaged:	Total number of cases in which expert witnesses in the field of finance and economics were engaged:	Total number of cases in which expert witnesses in the field of civil engineering were engaged:	Total number of cases in which expert witnesses in the field of medicine were engaged:
2015				
2016				
2017				

- 1.3 The data on frequency of engagement of the same expert witnesses in court proceedings: the data on ten expert witnesses who/that were most frequently engaged in trial regardless of the field of expertise and the data on ten expert witnesses in the identified fields of expertise who/that were most frequently engaged in trial.

Note: the data will be collected as anonymous, by rank and total number of cases (the first one by number of cases to the tenth one by number of cases).

Ten expert witnesses who/that were most frequently engaged in court proceedings						
	2015		2016		2017	
	Total number of cases	N/L <sup>195</sup>	Total number of cases	N/L	Total number of cases	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

Ten expert witnesses in the field of finance and economics who/that were most frequently engaged in court proceedings						
	2015		2016		2017	
	Total number of cases	N/L	Total number of cases	N/L	Total number of cases	N/L
1.						
2.						

<sup>195</sup> Please specify if the expert witness is a natural person (N) or a legal entity (L).

3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

<b>Ten experts in the field of civil engineering who/that were most frequently engaged in court proceedings</b>						
	<b>2015</b>		<b>2016</b>		<b>2017</b>	
	Total number of cases	N/L	Total number of cases	N/L	Total number of cases	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

<b>Ten expert witnesses in the field of medicine who/that were most frequently engaged in court proceedings</b>						
	<b>2015</b>		<b>2016</b>		<b>2017</b>	
	Total number of cases	N/L	Total number of cases	N/L	Total number of cases	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

1.4 Data on fees paid to expert witnesses – data on the total amount of fees paid to expert witnesses and the data on fees paid to expert witnesses within the identified fields of expertise.

<b>Fees paid to expert witnesses</b>				
Year:	Total amount of fees paid to expert witnesses who acted before the court:	Total amount of fees paid to expert witnesses in the field of finance and economics:	Total amount of fees paid to expert witnesses in the field of civil engineering:	Total amount of fees paid to expert witnesses in the field of medicine:
2015				

2016				
2017				

1.5 Data on highest paid expert witnesses

Note: Data will be collected as anonymous without identifying individual names, but by rank and amount (the first highest paid and the amount of paid fees to the 10<sup>th</sup> highest paid and the amount of paid fees).

Ten highest paid expert witnesses in all fields of expertise						
	2015		2016		2017	
	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

Ten highest paid expert witnesses / medicine						
	2015		2016		2017	
	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

Ten highest paid expert witnesses / civil engineering						
	2015		2016		2017	
	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						

8.						
9.						
10.						

Ten highest paid expert witnesses / finance and economics						
	2015		2016		2017	
	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L	Total amount of paid fees:	N/L
1.						
2.						
3.						
4.						
5.						
6.						
7.						
8.						
9.						
10.						

## Annex 3 – BiH Perception Survey on Commercial Case Processing Efficiency

### I. SERVICE OF PROCESS

1. According to your experience, how much time is it necessary to deliver a court document to the recipient within the same city (from the moment when the decision was made/order was issued to conduct the delivery until the delivery was duly made)?
  - a. Up to 7 days
  - b. From 7 to 15 days
  - c. More than 15 days
2. According to your experience, how much time is needed for intercity or inter-entity service of process (from the moment the decision was made/order was issued to serve the document until the delivery was duly made)?
  - a. Up to 7 days
  - b. from 7 to 15 days
  - c. from 15 to 30 days
  - d. more than 30 days
3. According to your experience, is service of process more efficient when it is performed via Post Office or via court couriers (in terms of the time it takes for the service of process to be done in accordance with civil procedure rules)?
  - a. Delivery via Post Office is more efficient
  - b. Delivery via court couriers is more efficient
4. Do post officers conduct service of process responsibly and in accordance with the provisions of the Civil Procedure Law (leaving a notice on a delivery attempt, affixing court letters on the door, etc.)?
  - a. Mostly yes
  - b. Mostly no
5. Do court couriers conduct service of process responsibly and in accordance with the provisions of the Civil Procedure Law (leaving a notice on a delivery attempt, affixing court letters on the door, etc.)?
  - c. Mostly yes
  - d. Mostly no
6. Do the courts apply the rules of the Civil Procedure Law with regard to service of process (to be conducted via notice board located in court premises, inviting parties to collect the decision, appointing a local agent to receive the documents, etc.)?
  - a. Mostly yes
  - b. Mostly no
7. Do you consider that the service of process causes significant delays in commercial case processing?
  - a. Yes
  - b. No

### II. CASE MANAGEMENT

1. Which of the following factors do you consider to have the greatest impact on the duration of court proceedings in commercial cases (considering the total duration of one dispute from the initial act to the final decision of a higher instance court)?
  - a. Parties contribute to trial delays by their behavior

- 
- b. Judges do not manage the procedure efficiently and in accordance with civil procedure rules
  - c. Poor organization in the court contributes to the long duration of proceedings (e.g. judges are overburdened with cases, there are large case backlogs)
2. Are hearings for commercial cases scheduled within the deadlines prescribed by the Civil Procedure Law?
- a. Mostly yes
  - b. Mostly no
3. Do you think that postponements/adjournments of hearings in commercial cases are caused for reasons that can primarily be attributed to the parties or court?
- a. Judges postpone hearings on their own initiative due to being overburdened with cases, due to other organizational reasons or due to personal reasons (sick leave, absence, etc.)
  - b. Judges postpone hearings mainly on request of the parties
4. Are hearings in one case being postponed for the same reason more than once (for example, efforts to reach settlement, inability to obtain certain evidence)?
- a. Mostly yes
  - b. Mostly no
5. Do judges ask for special explanations in order to adjourn/postpone hearings, or do they allow it for no reason?
- a. A justified reason is needed for the hearing to be adjourned/postponed
  - b. A reason is necessary, but it does not have to be justified or supported by evidence
  - c. There is no need for a special explanation for the hearing to be adjourned/postponed
6. How often do judges postpone taking procedural actions for no particular reason (for example taking the case on *evdencija* without any trial activity being scheduled or conducted)?
- a. Very often
  - b. Often
  - c. Sometimes
  - d. Never
7. Do you think that first instance courts allow presentation of superfluous evidence in commercial cases?
- a. Mostly yes
  - b. Mostly no

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### III. EXPERT WITNESSES

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1. Do the courts effectively manage work of expert witnesses (by determining the subject-matter of expertise, reviewing expert opinions, hearing expert witnesses)?
- a. Mostly yes
  - b. Mostly no
2. Do expert witnesses comply with deadlines for submission of the expert opinion?
- a. Mostly yes
  - b. Mostly no
3. Do judges sanction expert witnesses for procedural indiscipline (e.g. failure to submit expert opinion timely)?
- a. Mostly yes
  - b. Mostly no
4. Are expert witnesses competent enough to conduct expertise in commercial cases?
- a. Mostly yes
-

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b. Mostly no

5. Does the Ministry of Justice act upon complaints to expert witness work?

- a. Mostly yes
- b. Mostly no

6. Are there are enough expert witnesses in fields of expertise relevant for commercial cases?

- c. Mostly yes
- d. Mostly no

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#### **IV. BANKRUPTCY TRUSTEES**

1. Do bankruptcy trustees have the necessary knowledge/skills to manage companies in bankruptcy?

- a. Mostly yes
- b. Mostly no

2. In which fields should bankruptcy trustees attend additional training? (you may circle more than one answer)

- a. Business management
- b. Bankruptcy law and bankruptcy proceedings
- c. Law
- d. Economy
- e. I do not think that additional training for bankruptcy trustees is needed

3. Do bankruptcy judges supervise the work of bankruptcy trustees in an adequate manner?

- a. Mostly yes
- b. Mostly no

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#### **V. CASE MANAGEMENT SYSTEM (CMS)**

1. Is all relevant data about the case entered in CMS?

- a. Yes
- b. No (list which data is advisable to be entered in CMS)

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2. Do you think it is necessary to introduce additional functionalities in the existing CMS?

- a. Yes
- b. No (list which functionalities would be advisable to be introduced in CMS)

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#### **VI. CASE LAW DATABASE**

1. Do you think it is necessary to improve the case law data base of the HJPC Judicial Documentation Centre and how? (you may circle more than one response)

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- 
- a. Yes, by entering second-instance decisions into the case law database
  - b. Yes, by improving search engine
  - c. Yes, by entering Croatian, Serbian, Montenegrin higher courts' decisions into the case law database
  - d. I do not use the database, but I would use it if access was cheaper or free
  - e. There is no need to improve the database

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**VII. ADDITIONAL INFORMATION**

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- a. I filled in the questionnaire mostly on the basis of impressions on efficiency of commercial case processing in the Republika Srpska
- b. I filled in the questionnaire mostly on the basis of impressions on efficiency of commercial case processing in the Federation of Bosnia and Herzegovina
- c. There is no difference in efficiency of commercial case processing in the Federation of Bosnia and Herzegovina and in Republika Srpska

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