Strasbourg, 26 November 2004

**Restricted**
**CDL(2004)122**
Engl. only

**Opinion 321/2004**

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# DRAFT OPINION ON THE PROPOSED REFORM OF THE EXECUTIVE AND LEGISLATIVE BODIES OF THE SUBJECTS OF THE RUSSIAN FEDERATION

**on the basis of comments by**

**Mr G. MALINVERNI (Member, Switzerland)**
**Mr G. NOLTE (Substitute member, Germany)**
**Mr J.-C. SCHOLSEM (Member, Belgium)**
**Mr A. FOGELKLOU (Expert, Sweden)**
**Mr M. LESAGE (Expert, France)**

***Introduction***

1. At its session on 25-26 October 2004, the Monitoring Committee of the Parliamentary Assembly decided to ask the Venice Commission to prepare an opinion on whether the draft law of the Russian Federation "Amending the Federal Law 'On general principles governing the organisation of legislative (representative) and executive state authorities of constituent entities of the Russian Federation' and the Federal Law 'On fundamental guarantees of Russian Federation citizens' electoral rights and right to participate in a referendum' ", in the version submitted to the Duma by the President of the Russian Federation on 28 September 2004, "conforms with the Russian Constitution and European standards applicable in federal states".

2. Messrs Malinverni. Nolte and Scholsem were, together with two outside experts on Russian constitutional law, Messrs Fogelklou and Lesage, appointed to act as reporting members. The present draft opinion was prepared on the basis of their comments and is submitted to the Venice Commission for adoption at its 61st Plenary Session in Venice on 3 to 4 December.

***Scope and aim of the draft law***

3. It is mainly proposed to change the law on the "general principles governing the organisation of legislative (representative) and executive state authorities of constituent entities of the Russian Federation" of 1999, last amended on 4 July 2003 (hereinafter referred to as "law on organisation"). The following four points appear to be essential:

- the highest executive official in a subject of the Russian Federation would no longer be elected by popular vote (now Art. 18 (1) of the law on organisation). Instead, Articles 5 (3) (a)[1] and 18 of the law as amended by the draft law would provide for his or her election by the respective local representative (legislative) bodies upon the proposal of the President of the Federation. Should the local representative (legislative) body fail to elect the candidate, the President would designate an interim official.

- the right of the President of the Federation to dissolve the local representative (legislative) body of a subject of the Russian Federation would be enhanced. Thus, should the local representative (legislative) body of a subject of the Federation twice reject the President's candidate for highest executive official, this body itself would be subject to dissolution by the President (Art. 9 (4) of the law on organisation as amended by the draft law). In addition, the position of the President of the Federation would be strengthened insofar as the President would acquire the right to dissolve the local representative (legislative) body of a subject of the Federation upon a finding, after following a certain procedure, that it has breached constitutional or federal law[1]. So far, this right belongs to the Duma (see Art. 9 (4) of the present law).

- the responsibility of the highest executive official towards the local representative (legislative) body of the subjects of the Federation is diminished. Articles 19 (1) (b), (2), (3), (4), and (5) of the law as it stands give the local representative (legislative) bodies the right of a no confidence vote. The Draft reduces this right to a preliminary vote of no

[1] Which has to be confirmed by a "competent tribunal" beforehand. This decision has to be followed by a warning procedure, where the President gives the subject in question three months' time to comply with the judicial decision. These procedural preliminaries remain unchanged.

confidence which is subject to examination and final decision by the President of the Federation (Art. 19 (5) as amended by the draft law).

- the strengthening of the power of the President of the Federation to dismiss the highest executive official. So far, the President only has this power when the highest executive official has violated federal law (Art. 29.1 (3) of the Law). The proposed new Art. 29.1 (3)[1] adds a right of dismissal for a situation in which the President loses confidence in this highest executive official.

4. Apart from these four main points, other proposed changes concern:

- the suspension of the highest executive official in case of criminal investigations. So far, Art. 29.1 (4) of the Law stipulates that such a step is possible upon a request by the Prosecutor-General when there is the suspicion that a grave crime has been committed by the highest executive official. The proposed new Art. 29.1 (4) removes the condition that there must be the suspicion of a grave crime and considers the suspicion of any crime committed to be sufficient.

- the maximum time of office for the highest executive official, which is to be reduced from two periods of five years to one term of five years in total (cf. Art. 18 (5) of the Draft).

5. The stated purpose of the proposed reform of the federal system is to strengthen the unity of the Russian Federation. The need to strengthen the federal level was linked to the fight against terrorism. The tragedy of Beslan was invoked to prove the necessity of the proposed reform. The need to fight corruption at the regional and local levels and to ensure compliance by the subjects of the Federation with federal law were also stressed as the main aims of the reform. Indeed, most Russian and international experts seem to agree that the problem of ineffective, abusive and corrupt government at regional and local levels does exist in Russia.

***The constitutional background in the Russian Federation***

6. The basic rule on federal relations within the Russian Constitution is provided by Art. 5(3) which reads as follows:

> *"Federative relations within the Russian Federation shall be built on the basis of state unity, unity of the state power system, separation of the terms of reference and authorities between the bodies of state power of the Russian Federation and the bodies of state power of the subjects of the Russian Federation, and equality of rights and self-determination of peoples within the Russian Federation."*

This provision combines an emphasis on the unity of the state and the state power system with an emphasis on the separation of the terms of reference and authorities between the Federal level and the subjects.

7. Some constitutional provisions reflect the tension between a more centralising and a more federal tendency:

a) The unity of the system of state power in the Russian Federation (Art. 5(3), Art. 77(2), Art. 78(2)) can be contrasted with the rights of the federal units to establish

their system in conformity with the foundations of the constitutional system of the Russian Federation and with the general principles relating to the organisation of the system of representative and executive bodies of power established by federal law (Art.77(1)).

b) The principle of the equality of the subjects of the Federation (art. 5(1)) may be contrasted with the fact that the subjects are of different kinds and have different names (Art. 65, Art. 66 and Art. 68 (2)).

8. These different and competing provisions provide for a relatively broad scope of possible interpretation of the constitutional rules on federalism. This fairly broad scope and the resulting uncertainty have been narrowed down by the decisions of the Russian Constitutional Court and federal legislation. Both sources, but especially federal legislation, clearly point in a centralising direction. However, it should also be noted that, when the Constitution entered into force and until 1995, the governors were appointed. This was changed only by the law of 5 December 1995 on the establishment of the Council of the Federation. This law provided that the governors were to be ex officio members of the Council of the Federation, and therefore the law provided for the election of the governors to be carried out by December 1996.

9. A main instrument for strengthening central authority has been the federal law on organisation of 1999, which is now to be amended by the draft law. It implements Art. 77 (1) of the Constitution according to which the system of state bodies of the subjects of the Federation has to comply with the foundations of the constitutional system of the Federation and with general principles to be established by Federal law. Of special importance is Art. 77 (2) which prescribes that with respect to areas within the jurisdiction of the Russian Federation or within joint jurisdiction of the Federation and its constituent entities (Articles 71 and 72), executive power shall form a *single system of executive authority*. This provision can be used and has been used to strengthen central authority and diminish the independence of the regions.

10. A number of steps strengthening the central authority can be mentioned:

a) A Presidential decree of 13 May 2000 subordinated Russia's 89 regions to a new Presidential control organ (*federalnyi okrug*).[2] Seven such federal districts have been created, and each federal district is under the control of an Authorised Representative of the President.

b) Following negotiations with the Council of the Federation the Duma decided on 19 July 2000 that the federal units should be represented in this Council not by their heads of the executive and the chairpersons of their legislative assemblies but by officials of a lower level.[3] The Council of the Federation has thereby lost some of its political influence and force.

c) The Duma overruled the Council of the Federation adopting in 2000 changes to the law on organisation of 1999, granting to the President the possibility of dismissing and removing regional leaders if they have adopted decisions which violate the Federal Constitution or Federal laws or have refused to implement Federal legislation or court decisions or if they have been found guilty of having committed crimes [4]. In a decision of 4 April 2002, the Constitutional Court of the Russian Federation found that these

[2] *Rossiiskaya Gazeta*, 14 May, 2000.

[3] *Sobranie zakonodatelsva Rossiiskoi Federatsii*, 2000 No. 32, item 3336.

[4] *Sobranie zakonodatelsva Rossiiskoi Federatsii*, 2000 No. 31, item 3205.

amendments did not contradict the Russian Constitution. The Court stated that the obligations and duties of the Federation and its constituent entities had to be balanced. The impact of federal influence must be balanced *(sorazmernyi*) and the President of the Russian Federation as the guarantor of the Constitution (Art. 80 (2)) had to see to it that the constituent entities followed the Constitution and Federal law. Consequently, the Court did not find the amendments to be in contradiction with the Russian Constitution.

d) The President has also introduced an advisory State Council as a complement to or substitute for the Council of the Federation in which regional governors and the legislature are no longer directly represented. The governors should be represented in this body.[5] The Council has only advisory functions.

11. These changes point in a centralising direction but they have been made through federal legislation and not through constitutional amendments[6]. The ambiguities in the Russian Constitution mentioned above have been used to strengthen central authority. The draft law examined in the present opinion is a further major step in this direction.

***Constitutionality of the draft law***

12. The Parliamentary Assembly first of all asked the Venice Commission to provide an opinion on the constitutionality of the draft law. The Commission would first of all like to point out that only the Constitutional Court of the Russian Federation can authoritatively decide on the constitutionality of a law and may well do so once it has entered into force. It is not up to the Venice Commission to pre-empt such a decision by the Constitutional Court by giving its own opinion unless the result of a decision by the Court were to appear obvious. With respect to the constitutionality of the draft law the Venice Commission can therefore not arrive at a clear conclusion but only provide the Parliamentary Assembly with elements to be taken into account when assessing the constitutionality.

13. As regards constitutionality, it could first of all be questioned whether the draft law is compatible with the federal character of the state or principles of democracy or the rule of law set forth in the Constitution. This will have to be assessed by the Russian Constitutional Court, if the matter comes before it. The Commission in this respect can only refer to the considerations set forth below on European standards applicable in federal states. In the end, the Constitutional Court will have to decide, following its decision of 4 April 2002, whether the draft maintains a sufficient balance between Federal and entity powers and interests.

14. As regards the textual interpretation of the Russian Constitution, Art. 77(1) seems the most pertinent provision. It provides that "the system of bodies of state authorities (...) shall be established by the subjects of the Russian Federation *independently*", but "in conformity with the foundations of the constitutional system of the Russian Federation and with the general principles relating to the organisation of the system of representative and executive bodies of power established by *federal law*." Thus, Art. 77.1 on the one hand leaves it to federal legislation how the bodies of state authority in the subjects of the Russian Federation are

[5] See Statute (*Polozhenie*) on the State Council of the Russian Federation, *Sobranie zakonodatelsva Rossiiskoi Federatsii*, 2000 No. 36, item 3633.

[6] A constitutional amendment is not necessary; it would however be desirable in order for the constitution to be transparent and show inasmuch as possible the real power relations.

constituted, but on the other hand, requires that this federal legislation should leave to the subjects of the Federation some degree of independence.

15. According to general rules of constitutional interpretation, the required degree of independence must be determined in the light of other pertinent provisions. In this context it is worth noting that Art. 77(2) of the Russian Constitution envisages a "*single system of executive authority* in the Russian Federation", although only "within the jurisdiction and joint jurisdiction of the Federation". While this provision obviously has a limited area of application, it indicates that closely interconnected relations between the Federal executive and the executives of the subjects of the Federation are not ruled out in the first place. In addition, Art. 5(2) of the Russian Constitution provides that "a Republic (State) – a subject of the Federation – shall have its own Constitution and legislation". This seems to indirectly confirm that a fully independent executive of the subjects of the Federation is not among the first priorities of the Russian constitution but that there have to be independent legislative bodies. Art. 5(2) has special importance within the Russian Constitution since it forms part of the first Chapter whose provisions "shall be firm fundamentals of the constitutional system of the Russian Federation" (Art. 16(1)) and which are superior to other provisions of the Constitution (cf. Art. 16(2)). Thus, Russian federalism appears to be characterised by an emphasis on local legislatures, and not so much on local executives.

16. To sum up, there is a constitutional basis for interference by the Federal level especially with respect to the executive branch of the Entities. It will be up to the Constitutional Court, if the matter comes before it, to decide whether the very wide-ranging possibilities for interference by the President as provided for in the draft have sufficient basis in the Constitution, maintain an adequate balance between federal and subject interests and are compatible with the understanding of federalism in the Russian Constitution.

***Compatibility with European standards applicable in federal states***

17. The Parliamentary Assembly also asked the Venice Commission to examine the compatibility of the draft law with "European standards applicable in Federal states". Most European states are not federal and a centralised state structure is compatible with being a Council of Europe member state. A move from a federal to a centralised system in a Council of Europe member state therefore could not be regarded as violation of European standards. If the constitutional order in Russia following adoption of the draft law could no longer be considered as in line with "European standards applicable in federal states", this would not therefore mean that it would be in violation of European standard. A State may also combine federal and centralist elements. However, such a combination may not, or should not, lead to a system of government which contains inconsistencies or dysfunctional elements. Such elements could raise concerns arising from the principle of the rule of law, and in particular the principle of separation of powers.

18. It also has to be born in mind that there is no document authoritatively defining European federal standards as is done by the European Convention on Human Rights in the field of human rights. The draft law obviously greatly reduces the power of the subjects of the Federation to autonomously form their own organs of government. However, this is only one aspect of federalism. The character of the constitutional system as federal can only be queried if the draft impinges on the essence of autonomous responsibilities of the subjects,

transforming their character from autonomous units expressing the will of the local population to bodies basically implementing federal policies.

19. Moreover, control by and intervention by the federal level in the entities is by no means excluded in a federal system. A number of European federal and regional states have provisions on federal control of acts of entities. In Germany, if a Land fails to comply with its obligations under the Basic Law or other laws, according to Art. 37 of the Basic Law the Federal Government with the consent of the *Bundesrat* may take the necessary steps to compel the Land to comply with its duties. Art. 155 of the Spanish Constitution contains a similar rule. In Belgium such possibilities for federal action exist only if Communities or Regions do not comply with international or supranational obligations of the country. Italy, as a regional state, provides for stronger central control over the regions. According to Art. 126 of the Constitution, the President of the Republic may, following consultation of the Joint Committee on Regional Affairs of the Chamber of Deputies and the Senate, dissolve a regional council and remove from office the chairman of a regional executive "for the commission of acts contrary to the Constitution or serious offences against the law".

20. These measures of control and coercion have in common that their aim is to ensure respect for legality and that they cannot be taken by the executive branch without involvement of the legislature. The aim of the provisions on Federal intervention contained in the law on organisation as it stands now is also to ensure respect for legality. If they are more stringent than in other European federal states, this may be explained by the fact that in Russia respect for the rule of law in the entities is less developed than in older democracies.

21. The draft law goes beyond such measures of control and enables the federal President to influence the composition of the organs of the subjects also in cases where no violation of the law has been established. This contrasts with the usual practice in European federal states that the organs of the federated entities are formed by these entities autonomously without interference from the federal level.

22. If the draft law provides for an indirect instead of a direct election of the highest executive official, this reflects the practice in other federal European states where the head of the executive is elected by the regional assembly. However, in other federations this decision remains within the discretion of the federated entities.

23. It is, however, unusual that the draft law makes it impossible for any candidate to be elected head of the executive of a subject of the Federation without having been proposed by the President of the Federation. This seems difficult to reconcile with the principle of federal organisation of the state. As set forth above, in the Russian Federation there is a constitutional basis for federal interference in the forming, especially of the executive organs, of the federated entities. Moreover, a federal element is maintained since the election remains the task of the assembly of the subject.

24. However, it has to be noted that the balance in the text as it stands is tilted very much towards the federal level. There is no requirement that the person to be appointed has to live on the territory of the federated entity, that the President has to propose a candidate on the basis of consultations with the assembly of the entity or to choose a candidate from a list drawn up by this assembly. Since the assembly is under threat of dissolution if it refuses to accept the presidential nominee, its position is weak. The President can also appoint an interim head of the executive without any involvement of a body of the subject. In this

respect, the Commission notes that the draft law examined by it is not a final draft and that the legislative process should provide opportunities to insert conditions for the presidential nominee safeguarding the influence of the assembly of the subject of the Federation.

25. If the draft law provides that only persons proposed by the President of the Federation can be elected as head of the executive of a subject, it also enables the President to dismiss the head at any moment if he no longer has confidence in the official. No involvement of the legislative body of the entity is required although this very assembly elected the head of the executive in the first place. If the legislative assembly votes no confidence in the head, the President of the Federation shall be entitled but is not obliged to dismiss the highest official. The head of the executive politically therefore has a double responsibility both to the President of the Federation and to the assembly of the subject. He or she will simultaneously have the role of a *préfet* responsible for implementing federal law and policy and of elected head of an autonomous government responsible before the elected assembly. This will be difficult to reconcile.

26. Moreover, the President can not only dismiss the head of the executive but also dissolve the assembly if it twice rejects a candidate for head of the executive proposed by him. This right has quite a different character from the right to dissolve the legislature if it refuses to comply with federal law. A conflict of legitimacy may arise if the newly elected assembly continues to reject the nominees of the President. Moreover, the subject seems to remain without any elected assembly until the newly elected assembly is constituted.

27. To sum up in this respect, the draft law clearly disregards a principle followed in other European federal countries such as Germany, Austria, Switzerland, Belgium and Spain that the federated entities are autonomous in determining the composition of their executive and legislative powers. By contrast, it provides for a direct involvement of the President of the Federation in these matters and for a preponderant role of the President in the election and dismissal of the head of the regional executive without any involvement of a parliamentary body at Federal level. This involvement of the federal president seems to not easily be compatible with the spirit of co-operation between the different levels of authority required in a federal state.

***Consequences of the draft for the Council of the Federation***

28. The most important problem which is raised by the reform project concerns the constitutional role of the Council of the Federation, Russia's upper house and part of the Federal Assembly. The Council of the Federation consists of two representatives from each subject of the Russian Federation: one from the representative (legislative) and one from the executive bodies of state power (cf. Art. 95.2 of the Constitution). The procedure for forming the upper house is regulated in the Federal law "on the procedure for Forming the Council of the Federation of the Federal Assembly of the Russian Federation" of July 2000. Art. 4 of this Law provides that the representative of the executive of a subject of the Federation in the Council of the Federation shall be appointed by the highest executive official of the respective entity. Should the draft law become law, the existing legal framework concerning the Council of the Federation will result in the Council fundamentally changing its character and thereby losing its capacity to meaningfully perform its function.

29. According to Articles 101(5) and 102 of the Russian Constitution, the main tasks of the Council of the Federation are to monitor and control the performance of the Federal government and, in particular, the President. These tasks include, *inter alia*, to monitor the federal budget (Art. 101(5)); to decide on the removal of the President of the Federation from office (cf. Arts. 93(1), 102(1)(f)); to decide on the appointment of judges of the Constitutional Court (Art. 102(1)(g)); and to decide on the approval of decrees of the President imposing martial law or a state of emergency (Art. 102(1)(b) and (c)). Such tasks can only be fulfilled by deputies who are not themselves dependent on the Federal government, and in particular on the President. However, if half of the deputies in the Council of the Federation are appointed by the highest executive official of a subject of the Federation, and if this official is himself nominated by the President and can be dismissed by the President at any time when the President has lost confidence in him, then it is impossible to conceive these members of the Council of the Federation appointed by the executive as being sufficiently independent to meaningfully monitor or control the Federal government, and the President.

30. Consequently, if the draft law were to be adopted, the question of the compatibility of this composition with the principle of the separation of powers recognised in Art. 10 of the Russian Constitution[7] would clearly arise.

31. Should the proposed draft legislation be further pursued, it would therefore be necessary to simultaneously change the rules on the composition of the Council of the Federation. One possible option would be to provide that half of its members continue to be elected by the local representative (legislative) bodies, while the other half would be directly elected by the citizens of the respective subject of the Federation.

***Conclusions***

32. The Commission is aware that the text examined is a draft which may still be subject to amendments during the legislative process. Such amendments could make the draft more balanced, especially with regard to the choice of candidates for head of the executive in the subjects of the Federation. In any case, the draft law will however significantly reduce the autonomy of the subjects of the Federation in the forming of their own institutions.

33. The Russian Constitution provides a legal basis for limiting the autonomy of the subjects of the Federation especially as regards the forming of executive institutions, and it will be up to the Constitutional Court to decide whether the draft law remains within the limits of this constitutional basis and in line with the Federal character of the state as defined in the Constitution. There has been a consistent tendency in Russia to strengthen central power without changing the text of the Constitution. The risk of such constitutional development outside the text of the constitution is that in the end the normative force of the Constitution may be diminished.

34. With respect to the compatibility of the draft law with European standards applicable in federal states, the Commission would wish to recall that Council of Europe member states are free to decide on a federal or unitary state structure. If the proposed reform is in contrast with the practice in other federal states, it does not mean that it violates European standards. It only

[7] "The state power in the Russian Federation shall be exercised through separation of the legislative, executive und judicial powers. The bodies of the legislative, executive and judicial powers shall be independent."

means that the reform certainly goes to the utmost limit of what can still be regarded as a federal model.

35. Finally, the Commission wishes to stress that the draft law raises significant issues of the separation of powers at the Federal level. It grants to the President substantial powers of interference in the affairs of the subjects of the Federation without providing for any involvement of the Federal Assembly. Moreover, and of particular concern, the draft would make the composition of one-half of one of the chambers of the Federal Assembly, the Council of the Federation, dependent on people who owe their position largely to having been proposed as candidates by the President of the Russian Federation and whose position depends on the continued confidence of the President of the Russian Federation. A reform of the composition of the Council of the Federation would therefore seem essential if the draft law were to be adopted.