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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT OPINION
ON DIFFERENT PROPOSALS
FOR THE ELECTION OF THE PRESIDENCY
OF BOSNIA AND HERZEGOVINA**

on the basis of comments by

Mr J. HELGESEN (Member, Norway)
Mr G. MALINVERNI (Member, Switzerland)
Mr J.-C. SCHOLSEM (Member, Belgium)
Mr K. TUORI (Member, Finland)

Introduction

1. By letter dated 2 March 2006 the Chairman of the Presidency of Bosnia and Herzegovina, Mr Sulejman Tihić, asked the Venice Commission to provide an Opinion on three different proposals for the election of the Presidency of this country. This request was made in the framework of negotiations on constitutional reform between the main political parties in Bosnia and Herzegovina. The issue of the election of the Presidency remains to be resolved in order to reach agreement on a comprehensive reform package.

2. The declared intention is to adopt a comprehensive constitutional reform sufficiently early to allow the forthcoming elections in October 2006 to take place on the basis of a revised Constitution which *inter alia* would no longer contain the discriminatory provisions pointed out in the Commission's Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (CDL-AD(2005)004). It is therefore urgent to quickly resolve the deadlock on the election of the Presidency and Mr Tihić asked the Venice Commission to provide its Opinion as soon as possible.

3. The draft Opinion, prepared under the responsibility of the rapporteurs, Messrs Helgesen (Norway), Malinverni (Switzerland), Scholsem (Belgium) and Tuori (Finland), was therefore sent to the authorities of Bosnia and Herzegovina on 7 March 2006. It will be submitted to the Commission for its formal endorsement at its 66th Plenary Session on 17 and 18 March 2006.

General comments

4. In its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative the Commission concludes that constitutional reform is indispensable since present arrangements are neither efficient nor rational and lack sufficient democratic content. While acknowledging that constitutional reform will have to take place in several stages, it identifies several issues which should be addressed with particular urgency, including the provisions on the composition and election of the Presidency.

5. The Commission therefore welcomes the fact that a process of constitutional reform was initiated so quickly following its Opinion and that proposals for a different way of electing the Presidency are now on the table.

6. With respect to the Presidency, the above-mentioned Opinion of the Commission concluded as follows:

“40. The best solution therefore would be to concentrate executive power within the Council of Ministers as a collegiate body in which all constituent peoples are represented. Then a single President as Head of State should be acceptable. Having regard to the multi-ethnic character of the country, an indirect election of the President by the Parliamentary Assembly with a majority ensuring that the President enjoys wide confidence within all peoples would seem preferable to direct elections. Rules on rotation providing that a newly elected President may not belong to the same constituent people as his predecessor may be added.”

7. None of the three proposals submitted to the Commission envisages a single President. All three proposals stick to a collective Presidency of three members. None of the proposals is

therefore ideal from the Commission's point of view. However, this does by no means exclude that a new rule on the election of a collective Presidency could constitute a step forward.

Comments on Proposal I

8. Proposal I would consist of maintaining the present rules on the election and composition of the Presidency, with one Bosniac and one Croat elected from the territory of the Federation and one Serb elected from the territory of Republika Srpska. In its above-mentioned Opinion the Commission raised serious concerns as to the compatibility with Protocol No. 12 to the European Convention of Human Rights of such a rule, which formally excludes Others as well as Bosniacs and Croats from Republika Srpska and Serbs from the Federation from being elected to the Presidency. Maintaining this rule as it stands should therefore be excluded and Proposal I be rejected.

Comments on Proposal II

9. Proposal II, which is not drafted as text to be included in the Constitution but as a summary of possible constitutional content, maintains the system of directly electing two members of the Presidency from the Federation and one from Republika Srpska, however without mentioning any ethnic criteria for the candidates. The *de jure* discrimination pointed out in the Venice Commission Opinion would therefore be removed and adoption of this proposal would constitute a step forward. The Proposal also includes a rotation of the President of the Presidency every 16 months. Within the logic of a collective Presidency, this appears as a rational solution.

10. By contrast, the Proposal lacks clarity as to the pluri-ethnic composition of the Presidency. The collective Presidency was introduced, and supposedly will now be maintained, in order to ensure that no single state organ is dominated by a representative of a single constituent people. As it stands, under the proposal it would be possible to, for example, elect two Bosniacs from the Federation to the Presidency. Legally, this drawback could be remedied in the framework of the Proposal by providing that not more than one member of the Presidency may belong at the same time to the same constituent people or the group of Others. It is the understanding of the Commission that the intention is indeed to include such a provision in the Constitution in case this proposal is adopted.

11. However, the problem would result of having to possibly exclude from the Presidency candidates who have received a higher number of votes. In the Federation it is quite possible that two Bosniacs would attain the highest number of votes. In this case, a candidate who obtained more votes would have to be barred from the Presidency in favour of a candidate who obtained fewer votes. These issues should be regulated clearly at the level of the Constitution and not be left to ordinary law.

12. As a further drawback, *de facto* Bosniacs and Croats from the Republika Srpska and Serbs from the Federation would also continue to have no realistic possibility to elect a candidate of their preference.

13. Furthermore, the election of the Head of State would continue to take place on an Entity basis while it would be desirable to move it to the State level as part of the overall approach of strengthening the State.

14. As a minor issue, the proposal would also allow members of the Presidency to hold a leadership position in a political party. This does not seem in line with the overall aim of constitutional reform of transforming the Presidency from an executive body into a (collective) Head of State.

15. To sum up, Proposal II is a clear improvement with respect to the present constitutional situation. However, it has a number of drawbacks, including the risk that candidates with less votes than others are elected and it does not contribute to the overall aims of the constitutional reform of moving power to the Council of Ministers and strengthening the State level.

Proposal III

16. Proposal III differs more markedly from the present constitutional situation by introducing a complicated procedure of indirect elections for the Presidency. As set forth above, the main preference of the Commission is for the indirect election of a single President with reduced powers. But also in the case of a collective Presidency, the Commission maintains its preference for indirect elections.

17. The reason is, first of all, that one of the main aims of the constitutional reform would be to reduce the powers of the Presidency and to concentrate executive power in the Council of Ministers. This change will be more difficult to bring about if the Presidency does have the legitimacy of a direct popular vote.

18. Moreover, in an indirect election it is easier to devise mechanisms ensuring the desired pluri-ethnic composition of the Presidency. It offers more possibilities for inter-ethnic co-operation and compromise while direct elections for *de facto* separate ethnic slots provide an incentive to vote for the person considered as the strongest advocate of the respective constituent people and not for the candidate best suited to defend the interests of the country as a whole.

19. Finally, the Proposal moves the election to the State parliament. It is indeed desirable and in line with the overall aim of strengthening the State to have the election of the Head of State at this level.

20. From the point of view of the overall approach, Proposal III therefore seems preferable. There are nevertheless some drawbacks.

21. First of all, the proposal seems complicated with too many steps and possibilities for stalemate. Nominations can be put forward by members of the House of Representatives or the House of Peoples, the selection of the candidates takes place by the three separate ethnic caucuses in the House of Peoples and thereafter the slate of candidates has to be confirmed both by the three caucuses in the House of Peoples and by the House of Representatives.

22. Within the parameters of the proposal, it would seem preferable to have a simpler procedure with more focus on the House of Representatives as the body having direct democratic legitimacy derived from the people as a whole. The possibility to nominate

candidates should be reserved to members of the House of Representatives, selection among these candidates could take place in the three separate ethnic caucuses of the House of Peoples to ensure that the interests of all three constituent peoples are respected and the slate of candidates would have to be confirmed by the majority of the composition of the House of Representatives, ensuring that all three members have legitimacy as representatives of the people of Bosnia and Herzegovina as a whole.

23. In addition, it should be clarified how the positions of the President and Vice- Presidents are to be distributed. As it stands, Proposal III leaves this important decision implicitly to back-room dealing between the three ethnic caucuses since a slate identifying President and Vice-Presidents has to be submitted to the House of Representatives, while no indication is provided on how this choice has to be made. This seems the worst possible solution and likely to lead to stalemate. The rotation envisaged by Proposal II seems more feasible.

24. There are also other aspects of Proposal III which are not in accordance with the preferences of the Venice Commission. In its above-mentioned Opinion, the Commission argued in favour of abolishing the House of Peoples. Giving it a strong role in the selection of the Presidency cannot therefore be considered a positive step. The role of ethnic caucuses makes the election of candidates not belonging to a constituent people extremely unlikely. This is however not peculiar to this Proposal but reflects the political situation. The proposal at least ensures that the representatives of the Others in the House of Representatives will take part in the vote and that Serbs from the Federation and Bosniacs and Croats from Republika Srpska are no longer disadvantaged since their representatives in the State parliament will be able to vote for the candidates of their choice.

25. Even in the framework of a collective Presidency, solutions for indirect elections could be devised, which would appear preferable. For example, within the House of Representatives, slates of three candidates not coming from the same constituent people or the group of Others could be nominated and the vote could take place between such slates. This would nevertheless be a different proposal and not an amendment to Proposal III.

26. To sum up, Proposal III is also a clear improvement with respect to the present situation. If it were to be adjusted as suggested in paragraphs 22 and 23, it would appear suitable as a solution (although not an ideal one) for the first stage of constitutional reform.

Conclusions

27. In conclusion, the Commission strongly welcomes that the political parties in Bosnia and Herzegovina have found the courage to try adopting a comprehensive constitutional reform before the forthcoming elections in October 2006. It acknowledges that a reform adopted at this stage can have an interim character only, as a step towards the comprehensive reform the country clearly needs.

28. With respect to the three proposals submitted to the Commission, adoption of the first proposal could only be regarded as a failure of constitutional reform on this issue and should be excluded. By contrast, both Proposal II and Proposal III deserve, subject to some additions and amendments, to be considered at the present stage as important steps forward, but by no means as ideal solutions.

29. Between Proposal II and Proposal III, the Commission would - though not without hesitation - give preference to Proposal III, subject to some adjustments as indicated above. An indirect election in line with the aim of the constitutional reform of reducing the powers of the Presidency makes it easier to ensure a balanced composition of the Presidency and thereby corresponds better to the *raison d'être* of this - unusual - institution. The Proposal also moves the election to the State level, in accordance with the overall aim to strengthen the State of Bosnia and Herzegovina. However, sight should not be lost of the ultimate aim of constitutional reform in this area: having in future a single President elected in a manner ensuring that he or she enjoys trust beyond the ethnic group to which he or she belongs.