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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON THE DRAFT LAW ON INTERNAL AFFAIRS
OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

AND

ON THE DRAFT LAW ON INTERNAL AFFAIRS
OF THE CANTON OF SARAJEVO

On the basis of comments by

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I. Introduction

1. On 21 October 2011, the Venice Commission was seized by the authorities of the Federation of Bosnia and Herzegovina (FBiH), and those of the Canton of Sarajevo, on two draft laws on internal affairs (CDL-REF(2011)055, hereinafter the Federation Draft and the Sarajevo Canton Draft). Both drafts must replace two existing laws (one at the federal level, the other at the level of the Canton of Sarajevo) dealing with internal affairs. The text of the existing laws has been provided to the Venice Commission.

2. A working group of Rapporteurs was set up, composed of Messrs Iain Cameron, James Hamilton and Jean-Claude Scholsem.

3. *The present Opinion, which is based on the comments provided by the rapporteurs, was examined and adopted by the Venice Commission at its...th Plenary Session in Venice from ...*

A. Preliminary remarks

4. The Opinion is based on the assessment of an English translation of the two draft laws provided to the Venice Commission, which may not accurately reflect the original version on all points. Some of the issues raised in this Opinion may therefore find their cause in the quality of the translation rather than the substance of the provisions concerned.

5. The Opinion of the Commission was asked as a matter of urgency, therefore the task of the rapporteurs was not easy. Indeed, the two drafts under consideration are long texts of a highly technical nature (106 articles for the draft of the Federation, 80 articles for that of the Canton of Sarajevo). In addition, the drafts are not accompanied by any explanatory statement or other document that would present the main goals pursued by their drafters.

6. In view of the above-mentioned circumstances the present Opinion is limited in scope and should not be read as a comprehensive and detailed review of all the provisions of the two draft laws under consideration. Its purpose was to propose a general assessment of the legislative process aiming to provide the FBiH and the Canton of Sarajevo a modern and coherent legal framework in the field of policing, and to highlight challenges and issues of concern in terms of inter-relation between the two draft laws and their future implementation, if adopted. The Commission found appropriate to consider this legislative/policy-making process in the light the complex constitutional, institutional and legislative framework prevailing in Bosnia and Herzegovina (BiH) at the date of the preparation of its Opinion.

B. Background information

7. The problem of restructuring the police goes back to the very creation of the State of Bosnia and Herzegovina. The end of hostilities left three distinct police forces structured along ethnic lines. During the war, police functions were often similar to those of the army. A reform was therefore necessary and the international community had to play, based on Annex 11 of the Dayton Agreement, a considerable role in this process. In this framework were created the International Police Task Force (IPTF) and the European Union Police Mission (EUPM).

8. On the domestic level, the competences of the State of Bosnia and Herzegovina in the field of policing appear to be very limited. BiH is empowered to intervene in the field of "international and inter-Entity criminal law enforcement, including relations with Interpol" (Article III.1. g of the Constitution of BiH). This is a very small power in a country facing multiple challenges ranging from traffic to organized crime and gangs operation. In this context, the establishment of a State Border Service (SBS), an Interpol Service, a judicial police and of a State Investigation and Protection Agency (SIPA) should be welcomed. All these services, except the court Police, are managed since 2004 by the Ministry of Public Security.

9. Otherwise, police activities are assigned to the two Entities (and the Brcko District) and, within the Federation, to the cantons. This leads to a fragmentation of policing between 14 forces (BiH, the two Entities, Brcko District and the 10 cantons of the Federation). As a result, the police function involves disproportionate budgetary costs for the whole of Bosnia and Herzegovina and is not in itself sustainable. Its fragmentation favours neither its effectiveness nor its professionalism or independence.

10. On 5 October 2005, the authorities of BiH concluded a political Agreement Regarding Restructuring of Police Structures in BiH. This agreement was a precondition for the accession of Bosnia and Herzegovina to a Stabilisation and Association Agreement with the European Union. The Agreement of 5 October 2005 incorporated *inter alia* the three main requirements of the European Commission in policing, i.e.:

- *“All competencies for legislature and budget issues concerning the police must be vested at the state level;*
- *No political interference in the operational work of police;*
- *Functional local police areas must be determined by technical policing criteria, where operational command is exercised at the local level.”*

11. As agreed by BiH's main political forces in 2005, the aim of the police reform was the establishment of the necessary legislative and institutional framework for the police service functioning and operating in a single efficient and sustainable structure, capable of fulfilling its role in the enforcement of the rule of law.

12. The implementation of the three principles listed above would have required a considerable increase in the powers of the BiH police matters, either through cooperation agreements under the State Constitution (Article III. 5) or, a safer option in legal terms, through a revision of the Constitution.

13. As required by the 2005 Agreement, a Directorate for the Implementation of Police Restructuring - DIPR was established by the BiH Council of Ministers on 8 December 2005. The Directorate's main task was to explore options on how to make the implementation of the reform possible and acceptable to all the parties involved. In its 2006 Report, the DIPR the 2006 report reiterated the need for a thorough reform of the policing system in BiH, which it described as “too complicated, too expensive, and not sufficiently effective in combating crime”.

14. Despite efforts made in this field¹, the establishment of a modern, efficient and transparent policing system remains a considerable challenge for BiH today. As stated by the European Commission in 2010, “Bosnia and Herzegovina's preparations in the police field remain at an early stage. As part of the police reform, particular efforts are necessary to strengthen cooperation and exchange of information between police agencies. The successful completion of police reform requires the constructive involvement of all levels of government in Bosnia and Herzegovina”².

II. Applicable standards

15. There are considerable variations among Council of Europe states as regards organization of the police. The European Court of Human Rights (ECtHR) case law is of great importance to police powers, including complaints mechanisms. However, it says relatively little about how to go about organizing the police. It should be remembered that the ECtHR cannot take a holistic approach to police structure and accountability in the way a legislature can, laying down general rules as to the mandate of an organization, its powers, the necessary internal and external controls over these and the available remedies against abuse of power. The particular

¹ <http://www.delbih.ec.europa.eu/files/docs/2010progress2.pdf> (European Commission Progress Report 2010).

² Idem

facts of the case provide a strict procedural framework for the ECtHR. An allegedly unsatisfactory police law or practice must be “fitted in” to a specific human right or fundamental freedom protected under the European Convention on Human Rights (ECHR). This may concern in particular the right to life (Article 2) and the prohibition of torture (Article 3); the right to liberty and security (Article 5); the right to a fair trial (Article 6); the right to respect for private and family life (Article 8); the freedom of assembly and association (Article 11), the prohibition of discrimination (Article 14).

16. Thus, such vitally important aspects as training of police (designed to foster democratic sensibilities and “rights awareness”), dividing responsibility between different agencies and fiscal management can rarely, if ever, be the focus of Court scrutiny. The procedural restraints on the ECtHR mean that it is limited to examining police systems of control and accountability as indirect components of the requirements that a limitation on a given human right be for the “protection of public order/national security”, “in accordance with the law”, “necessary in a democratic society” and accompanied by “effective remedies”.

17. However, there are now a large number of accepted European and international standards which deal more generally with policing. Amongst these are:

- *The European Code of Police Ethics* adopted in 2001 by the Council of Europe Committee of Ministers in September, providing guidance for the governments of the member states of the Council of Europe regarding their internal legislation, practice and codes of conduct for their police³;
- *The OSCE Guidebook for Democratic Policing*⁴;
- *The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)*⁵;
- Recommendation No. R (87) 15 of the Committee of Ministers to member states of the Council of Europe regulating the use of personal data in the police sector⁶;
- ECRI’s General Policy Recommendation N°11: Combatting racism and racial discrimination in policing (2007)⁷ and further related recommendations (see http://www.coe.int/t/dghl/monitoring/ecri/activities/generalthemes_EN.asp);
- Opinion of the Commissioner for Human Rights, Thomas Hammarberg, concerning independent and effective determination of complaints against the police⁸;
- UN Code of Conduct for Law Enforcement Officials (1979)⁹;
- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials¹⁰
- UN ITPTF Commissioners guidance for democratic policing in the Federation of Bosnia-Herzegovina, 1996.

III. Analysis

A. Competence on policing- the balance between effectiveness and legitimacy

a. Introduction

18. No doubt that the history of the police forces in BiH, and in particular during the war in BiH, accounts *inter alia* for what now seems an over-elaborate arrangement, which can only lead to inefficiency and expense. It is presumably the intention of the drafts laws under consideration to

³ Recommendation Rec(2001)10 on the European Code of Police Ethics

⁴ Guidebook for Democratic Policing (2006)

⁵ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)

⁶ http://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/Rec_1987_15.pdf

⁷ <http://legislationline.org/documents/action/popup/id/8009>

⁸ http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N11/e-RPG%2011%20-%20A4.pdf

⁹ The Commissioner - CommDH(2009)4 / 12 March 2009

¹⁰ Code of Conduct for Law Enforcement Officials (1979)

¹⁰ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)
<http://legislationline.org/documents/action/popup/id/7787>

seek, through cooperation between the police forces at different levels, to minimize this as far as possible.

19. Indeed, the two drafts submitted to the Venice Commission do not reflect the centralizing perspective mentioned in the introductory part of this Opinion (see § 10), and this both in terms of legislation or budget of the police. They rely on existing law in the Federation of BH and can be seen as an effort to improve its functioning. The Draft of Sarajevo Canton could be seen as a model for other cantons aiming to establish the necessary conditions for a harmonious cooperation, on policing matters, between the cantons and the Federation, and between the cantons themselves.

20. Nevertheless, the limits of this approach, based on a spirit of collaboration, are easy to identify. It is far from certain that such an approach can effectively help reduce the exorbitant cost of the police function/service in the Federation, or that it will improve its efficiency. Different cantons have different and specific needs and capacities, including of financial nature. In addition, it is unlikely that all cantons within the Federation will decide to adopt such a detailed law on policing. Some might even wish to transfer this function to the Federation Police, as allowed by the Constitution of the Federation (Article V.2. (1) of the Constitution of the Federation).

b. The Federation Draft

21. Article 3 of the Federation draft strictly complies with the constitutional jurisdiction of the Federation in criminal matters (Article III.1 of the Constitution of the Federation). The internal affairs mainly cover “*prevention and detection of criminal offences of terrorism, inter-cantonal crime, drug trafficking, and organised crime, locating and capturing the perpetrators of these offences and bringing them before the competent bodies*” (Article 3, § 1, 1 of the Federation draft). Further competences include security of certain persons and buildings of the Federation, police training and the Federation citizenship. Other fields are covered by the joint jurisdiction of the Federation and the cantons (Article 3, § 2).

22. The jurisdiction of the Federation in policing is therefore described, in accordance with the Constitution, in terms of limitation. The Sarajevo Canton draft confirms this approach by ranking among the canton’s internal affairs the mission of “preventing and combating crime and other forms of unlawful conduct that are not within the exclusive jurisdiction of other police authorities in Bosnia-Herzegovina” (article 6. 2 of Sarajevo Canton’s draft).

23. The question is whether this division of competences can be effectively implemented and whether it can lead to an optimal functioning of the police apparatus. While it is likely that a relatively precise definition can be given to notions such as “organized crime”, “terrorism” and “trafficking of drugs”, the term “inter-cantonal crime” is much more difficult to grasp. “*Inter cantonal crime, in the terms of this Law, refers to a criminal offence where perpetrators and victims are living in different cantons, to offence committed on the territory of different cantons, offence initiated on the territory of one canton and completed on the territory of another canton, or an offence with damaging consequences which occurred on the territory of two or more cantons*” (article 4, § 1 of the Federation draft).

24. All these aspects of the inter-cantonal crime must be defined *a priori*, before the investigation starts. In the vast majority of cases, however, these aspects - such as, in a simple case, whether the crime perpetrator and the victim live in different cantons - can only be checked at a later stage. Also, one may be some way into an investigation when the inter-cantonal nature of a crime comes to light. Similarly, if for example it appears that the author did not live in a different canton, but in the other Entity (or in the Brcko District), it is very likely that the state of BiH itself would become competent (Article III.1.g of the Constitution of BiH: “international and inter-Entity criminal law enforcement”). The Venice Commission has not been provided with any information on how well transfers of investigation are working in practice, or how many such transfers occur each year. However, it seems evident that if responsibility for

the investigation is being handed over at a late stage then this will lead to delay and duplication of effort.

25. There can be other difficulties. For example, it may not be apparent at the start of an investigation that a crime has been carried out by an organized gang. Are ordinary crimes carried out by terrorist groups included in terrorism? Furthermore, what is the status of evidence gathered by one police force before it discovers that the other should have competence to investigate? There may be a need to provide that any actions carried out by the police reasonably believing that the investigation is within their competence are lawful. It would seem to make sense if the two police forces were empowered to agree to leave any investigation with the force which had started it.

26. It therefore seems that, in order for such a system to have a minimum efficiency, it should be based on extensive cooperation between all competent authorities. This cooperation is organized by articles 64 and following of the Federation draft. It should be noted in particular that the Minister of the Federation and the Police Administration (of the Federation) may request from the cantonal authorities all documents, information and other databases relevant to their duties (Article 65 § 2). These Federation authorities may also establish, in cooperation with the cantons' competent ministries in the field of internal affairs, a unique and functional computerized information system (Article 65 § 3). Moreover, the draft stipulates that, in case of prolonged inaction at the cantonal level, the Interior Minister of the Federation or the Police Administration may replace, after warning, the policing function of the cantonal authorities at fault (Article 66). Some form of repeated failure or refusal to cooperate on the part of the canton seems necessary before this can occur. It would appear that the cantonal policing force will continue to exist - it is simply temporarily superseded by federal policing. This mechanism thus gives rise to several unanswered questions. Still, in the view of the Venice Commission, some such mechanism for replacement seems necessary.

27. The Venice Commission sees another potential source of concern in the way the issue of pre-emption/taking over is set out in the Federation draft. This provision does not, apparently, provide for replacement in a particular operation, but a general replacement. An important part of policing in any federal system is that the federal police are able to pre-empt/take over local police investigations in specific cases where this is necessary for some reason. The question arises in the specific case of the relation between the FBiH and cantonal policing authorities whether Articles 65 and 66 are sufficient in this regard. There is also an ambiguity in the wording of Article 66¹¹, which may of course, be a simple translation error. It is stated that taking over is possible "If Federal Ministry *i.e.* Administration of Police" (our emphasis) determines this. This seems to indicate that the decision is that of the Administration of Police. However, this is unclear. It could be the Minister. Certainly, other articles (e.g. Article 67) refer to "Federal Ministry *and* Administration of Police" (our emphasis).

28. On the one hand, one can say that any decision to take-over will be controversial, which may argue for political sensitivity. On the other hand, it seems inappropriate from the perspective of effective policing to require the Director of Police to seek the advance approval of the Minister in making a determination that a canton is unable or unwilling effectively to prosecute a particular crime. Instead this should be a decision which the Director should make on the facts, and later, if need be, bear responsibility for before the Minister.

29. As regards duties of cooperation, according to Article 38 of the Federation draft, "[w]hile directly carrying out the tasks of prevention and detection of criminal offences of terrorism, drug trafficking, inter-cantonal and organised crime, the Administration of Police shall inform cantonal

¹¹ "If Federal Ministry *i.e.* Administration of Police determines that, even after warning, cantonal ministry does not enforce federal laws and/or regulations from the competence of Federal Ministry and Administration of Police, or, if the denial of execution of tasks could cause severe consequences to the interests of Federation or Bosnia and Herzegovina, Federation Ministry *i.e.* Administration of Police shall directly perform those tasks in accordance with provisions referred to in Articles 85 and 86 of the Law on Organization of Administration until cantonal ministries meet the conditions to perform those tasks".

ministry, on whose territory related measures and actions are taken, and, if needed, the competent body for internal affairs of Republic of Srpska, competent body of Brcko District, competent Prosecutors' offices, and other competent administrative bodies."

30. In addition, Article 39 of the Federation draft requires the Federal Administration of Police to inform the cantonal ministry of any evidence of criminal acts or preparations for the perpetration of such acts on their territory/ within their jurisdiction, so that the competent authorities take over procedure in relation to those offences. Similarly, *"the cantonal ministry must inform the Administration of Police when, while carrying out tasks under its competence, comes to knowledge of preparations for the perpetration of a criminal offence under the competence of Federation or that such criminal offence had been committed, as well on the measures and actions taken in order to prevent perpetration i.e. detection and capturing perpetrators of that criminal offence, so that the Administration of Police may directly take over procedure as to those offences"*.

31. The Venice Commission notes that, as stipulated by Article 6 § 1 of the Federation Draft, conflicts of jurisdiction raised by the exercise of joint powers shall be decided by the Constitutional Court of the FBiH. At the same time, Article 8.1 of the Sarajevo Canton draft stipulates, more generally, that *"the conflict of jurisdiction between the Federation Ministry and the Ministry and between the other cantonal ministries of interior and the Ministry shall be decided by the Federation BiH Supreme Court"*.

32. In emergency cases, in order to avoid harmful consequences, the decision of the Minister of Internal Affairs of the Federation temporarily prevails (Article 6 § 2). The Commission finds that this solution also goes in the right direction.

33. The Venice Commission considers that establishing a single state/Federation-wide police data system, at least for the crimes under state/Federation competence, is a necessary, but not sufficient, step to improve coordination and efficiency. Ideally, both specialist criminal intelligence officers in the cantons and the state/Federation level police should be able to file data, which should be searchable and accessible (subject to security restrictions). What there instead appears to be, at least if the Sarajevo canton draft of is taken as representative, is a duty to exchange data continuously (Article 68 of the draft cantonal law). Reciprocal duties to exchange data are better than nothing, but this is certainly not the same thing as a "single data system" in criminal intelligence for crimes within state/Federation level competence with both the cantons and the state level police feeding into it.

34. The Venice Commission is also of the opinion that the competence to deal with "inter-cantonal crime" provided by the Constitution of the FBiH¹² can be interpreted extensively if there is a political will to do this. If the Federation police is to use effectively its competence over inter-cantonal crime, it is doubtful whether it is enough to have an intelligence processing capability, totally reliant on the amount and quality of the criminal intelligence gathered at the cantonal level. Combating effectively inter-cantonal crime would require its own intelligence-gathering and investigative capability at the level of the cantons.

35. The same goes for tackling inter-Entity crime, which falls under the competence of the institutions of the State of BiH (see Constitution of BiH Article III.1.g). This would however involve increases in state police numbers, when the state as a whole already has a large amount of over-manning, unless cantonal and Entity police numbers are not correspondingly reduced.

36. The problem of over-manning of the police is addressed in the Federation draft, as in the existing law, by a provision requiring police levels to be harmonized with "European standards" (Article 20). However, the draft also provides that the number shall be defined in the "Book of rules" on the internal organization of the Federation Ministry of Internal Affairs (which in turn is

¹² Article 1.e ("It is in an exclusive competence of the Federation: [...] e) stamping out of terrorism, inter-canton crime, unauthorized drug dealing and organized crime").

to be enacted by the Minister, with the consent of the Federal Government (Article 19). This may be an improvement, but it is unclear whether this is a sufficient legislative base for the Minister to determine total manning levels. It does not seem to give competence to determine manning levels in particular police areas.

c. *The Sarajevo Canton Draft*

37. This strongly cooperative dimension of federalism in police matters is also highlighted by the draft law of the Canton of Sarajevo, which devotes its chapter IX to "Mutual relations and cooperation with the Ministry of Security, Other Ministries of Interior, police bodies and administrative bodies in BiH" (articles 58 to 74 of the Sarajevo Canton draft).

38. Article 58 states as a general principle that "*Mutual relations of the Ministry with administrative bodies at all levels of the government in Bosnia-Herzegovina shall be established on mutual cooperation, contacts, agreements, protocols, contracts, exchange of information of joint interest, in accordance with the Law*".

39. The following articles detail the various aspects of this collaboration. For example, the police authorities of Bosnia and Herzegovina, as well as the police authorities of the Federation, may exercise their law enforcement powers within in the territory of the canton (Article 69 of the Sarajevo Canton draft¹³).

40. As far as the police authorities of other cantons or the authorities of Republika Srpska (or the District of Brcko) are concerned, the establishment of specific conditions is required in order for them to be authorized to perform "certain tasks or duties" on the territory of the Sarajevo Canton (Article 70 of the Sarajevo Canton draft). The Commission notes with interest that Cantonal administration of Police may "directly" establish the above-mentioned conditions with the listed authorities. No role is provided in this respect by the Canton's draft to the Federation police authorities (see also Article 70 of the Federation draft¹⁴).

d. *Concluding remarks on competence*

41. In the view of the Venice Commission, the real issue is whether these different mechanisms of cooperation, under the two drafts, will be sufficient to lead to a fast, efficient and transparent police system, under acceptable financial conditions. Both drafts are in line with the current constitutional framework of Bosnia and Herzegovina and of the Federation. The key-question today is whether this framework can still function effectively or should be reviewed.

42. Admittedly, in any policing system a balance must be drawn between effectiveness and legitimacy. Diffusing police power among several police forces may well lead to inefficiency in combating crime, particularly organised crime, which can exploit the resulting competence gaps, "turf battles" and lack of communication. However, this price may be worth paying in terms of increased legitimacy in the community.

43. Nevertheless, another important part of legitimacy is achieving results. Other things being equal, a law which provides for an inefficient and costly system of policing which respects democratic standards and human rights is better than a law which provides for an inefficient and costly system of policing which does not respect democratic standards and human rights. The Venice Commission welcomes in this context the fact that the draft laws under consideration appear to be rooted in the applicable international standards¹⁵. This however

¹³"Police officials of the Directorate for Police Coordination in Bosnia and Herzegovina, State Investigation and Protection Agency, Border Police and Federation Administration of Police, shall perform tasks within their competence, keeping police powers, on the territory of the Canton".

¹⁴"Federation Ministry shall, with bodies competent for police matters in Republic of Srpska and Brcko District Police, determine conditions under which police officials may perform certain tasks and duties on the territory of Republic of Srpska and Brcko District i.e. conditions under which police officials of those bodies may perform certain tasks and duties on the territory of Federation".

¹⁵ See Sarajevo Canton's Draft, Article 3 on principles of Policing, and Federation Draft, Article 20.

does not alter the fact of the inefficiency and disproportionate costs, which continue to be a serious challenge for the police forces in BiH at the different levels¹⁶.

B. Police independence

44. If we leave to one side the essential question of the constitutional framework available for the establishment of an efficient and sustainable police, the two drafts - and especially that of the Federation, seem in general to respond to the second target set by the European Union: "No political interference in the operational work of police " (see § 10 before).

45. To this end, the Federation draft sets up quite detailed mechanisms aiming at ensuring maximum competence and independence of the police Director and his deputy. To this end, an "Independent Board" is established, attached to the parliament (see below § 56-58 for Parliamentary oversight) and involved in the appointment of the police chief and his deputy, in their removal (it considers Federal Parliament motions for removal) and in their activities' monitoring. The Independent Board, with its variety of functions (Article 53) is thus an attempt to interpose an independent element between politicians and the Director of Police. In addition to the Parliamentary control, citizens' control is provided through the creation of an instance of complaint ("Citizens Complaints Board", see Section F).

46. In the Commission's view, these measures are positive and should be commended. Nevertheless, the Commission wonders whether the draft is not going too far in the multiple constraints introduced (including constraints on advertising). The draft seems far too detailed with these long lists of obligations, which should no doubt grouped together and synthesized. The same could be done about the section on the Police Academy, which also goes into great detail. The Commission moreover considers that the control of the Police Academy by the police themselves would be more in keeping with functional independence than control by the Ministry.

47. In the opinion of the Venice Commission, one particular source of concern may arise from the relationship established by the draft of the Federation between the Minister of Internal Affairs and the police administration chief (the Director of Police). The competence of the Minister is set out in Article 13, and a non-exhaustive specific list is provided in Article 14. The competence of the Director of Police is similarly set out in Articles 31 and 32. Article 63 also states that "*Administration of Police shall autonomously perform tasks from its competences defined by this Law*". However, it goes on to state that the Minister shall have administrative oversight over the work of Administration of Police, which includes "*To determine execution of certain tasks from the competence of Administration of Police and time limits for their finalization*". This seems to give competence to give orders in operational matters. Is this the intention?

48. If it is not intended to provide the Minister with the power to intervene in operational matters - beyond certain specific matters, clearly set out in the Act, such as the list of people subject to special protection - it would be advisable to include an explicit prohibition on ministerial involvement in operational decisions, except where the law itself gives this specific authority. A safeguard which can further buttress police independence in operational matters is a requirement on the Minister to put all instructions to the Director of Police in writing. This would also facilitate subsequent parliamentary oversight of the "boundary lines" between policy issues - where the Minister may and should use his/her competence - and operational matters.

¹⁶ See Footnote 1; See also *Dominique Wisler, The Police Reform in Bosnia and Herzegovina*, http://www.bmlv.gv.at/pdf_pool/publikationen/10_wg12_psm_60.pdf; Brankica Radovanovic: *(Bosnia and Herzegovina), Police Restructuring In Bosnia And Herzegovina. Failure or Success?* http://www.sze.hu/blszk/Central_European.pdf (see pp 11-43); BOSNIA'S STALLED POLICE REFORM: NO PROGRESS, NO EU, Europe Report N°164-6 September 2005, http://www.crisisgroup.org/~media/Files/europe/164_bosnia_stalled_police_reform_no_progress_no_eu.ashx

49. Another provision which is unclear is Article 63 which gives the Minister power to decide on legal remedies in administrative proceedings concerning administrative acts 'enacted' by the Director of Police. It is not clear what the nature of the administrative acts in question is nor why this function is not assigned to an administrative court. No mention of subsequent court procedure is made by this article. These issues should be clarified.

50. As regards the appointment to the position of Police Director by the Federation Government (Article 47), it appears that, as it results from a combined reading of Articles 53 and 55 of the Draft, the selection of candidates is shared between Independent Board, which establishes the initial list, and the Minister of Internal Affairs, who proposes the Federation Government "at least two or more candidates from the list of Independent Board". While this solution may have some advantages in the special constitutional context of Bosnia and Herzegovina, it is not optimal from the perspective of establishing and maintaining police independence.

51. Under the Cantonal draft, while, following a public vacancy procedure, the Cantonal Assembly Selection and Appointment Commission submits a *list of candidates* to the Cantonal Ministry of Internal Affairs, the latter "submits to the Government of the Canton a reasoned proposal with the name of *one* candidate from the list" (Article 32.1 of the cantonal draft, emphasis added).

52. The Venice Commission notes in this context, as far as the managing administration of the police is concerned, that according to Article 42, § 3 of the Federation Draft, the "Director of Police and Minister cannot be from the same constituent people". No reference is made to the group of "Others". Would this mean that, in case of replacement of the minister by someone belonging to another constituent people, the entire hierarchy of the police (Director and Deputy Director) should be questioned?

C. Police Training

53. The Venice Commission recalls that, as stated in one of its previous reports, training must reflect the principles of democratic policing, "*which means, in an operational context, that the police should be trained in applying the law, police ethics (including those related to corruption), codes of conduct and human rights standards*"¹⁷. In addition, it is of particular importance, in the specific context of BiH, that police training includes training for policing in multicultural environments/communities and focuses, in this context, on issues such as cultural and religious awareness, mediation and community relation skills, problem-solving and partnership approaches, language training.

54. The Commission notes that, according to the Federation draft, the function of training and educating police officers rests with the Ministry. It is, of course, a question of policy whether this should be so. In the Commission's view, police themselves should be better equipped than the Ministry to determine the training needs of police. As recommended by the OSCE Guidebook for Democratic Policing, "[t]raining needs must be identified by operational personnel".

55. It is commendable that, at the level of the Canton, it is the responsibility of the Police Commissioner (the police chief) to "*identify the needs, define and implement programs of professional and advanced training for police officers of the Administration of Police*" (Sarajevo Canton draft, Article 17.j).

D. Oversight of legality

56. The Independent Board mentioned in § 45 before does not monitor the use, by the Minister of Internal Affairs, of his/her powers under the law. As stipulated by Articles 72-77 of the Federation draft, this is a matter for the parliament. The jurisdiction of the Federation Ministry of

¹⁷ See footnote 4.

Internal Affairs includes countering terrorism and countering organised crime (Article 3.1). As the Venice Commission has noted earlier in its opinion on Democratic Control of Internal Security Services¹⁸, parliaments experience particular difficulties in effectively supervising ministerial exercises of authority in security matters. For different reasons, parliamentary supervision of the Minister can be inadequate. It is usually necessary to have a dedicated (i.e. specialist) parliamentary and/or expert body, if oversight is to be meaningful. The Venice Commission notes in this respect that, as indicated by Article 73 of the Federation draft, parliamentary oversight shall be carried out, “by working bodies of houses of Federation Parliament competent for security”.

57. According to the Federation draft, parliamentary oversight is limited to the “legality of the work of the Federation Ministry and the Administration of Police” (Article 72). While this covers such issues explicitly set out in the draft, such as non-discrimination, it is unclear if “legality” extends to issues of “policy” as well as “proportionality” in the use of competences, matters which are in practice of crucial importance in policing. In any event, as already mentioned, the “legality” ground would also argue for including a clear prohibition in the draft law on ministerial involvement in operational matters, except where this is specifically provided for in the law.

58. Another requirement for meaningful oversight is that the oversight body should have some form of access to operational data. At the same time, the risk of leaking of sensitive data in dealing with terrorism or organised crime is obvious. The draft appears to deal with this problem, in that the ordinary form of oversight will be by the dedicated parliamentary body. Nevertheless, where operational data is needed, this can be obtained by an *ad hoc* investigative body, appointed by the parliamentary body for every specific case, and acting within the ring of secrecy, which then reports (presumably in an abridged form) to the parliamentary body (Article 75 of the Federation draft).

E. Accountability

59. According to Article 84 of the Federation draft, the only disciplinary sanctions that may be imposed on the Director of Police are fines or the end of his term (removal). This system is insufficiently nuanced. Other moderate sanctions (warning, reprimand, etc.) should undoubtedly be provided.

60. As far as the removal is concerned, the Federation Parliament can, in addition to the Independent Board, propose removal, although under Article 53.8, the Parliament’s proposal has to be processed by the Independent Board (which, it would appear, can reject this). It is not clear on what grounds the Parliament can propose removal of the Director.

61. The Minister can also submit a proposal for removal directly, bypassing the Independent Board. According to Article 58 of the Federation Draft, the Minister “*shall submit proposal, referred to in paragraph 1 of this Article, if Director of Police, incorrectly performs tasks referred to in Article 32 of this Law and fails to achieve appropriate results or fails to act in line with obligations referred to in Article 44, item 16 of this Law*”. The grounds for removal provide the Minister with a very large degree of discretion in proposing removal. The grounds applied by the Independent Board are very much narrower (if the Director is assessed with an “annul” mark - by the Board itself in its yearly evaluation - as well as cases “set forth for removal of Director of Police in the Law on Police Officials of Federation of Bosnia and Herzegovina”). According to Article 85 of the Federation Draft, the removal decision, “upon the Minister’s proposal and with the opinion of Independent Board”, belongs to the Federal Government.

62. In addition, there is a long list of disciplinary offences which can be committed by the Director of Police. These are set out in Article 82 of the Federation draft, in addition to breaches of the Law on Police Officials. Several different temporary bodies are invested with competence

¹⁸ See CDL-AD(2007)016 Report on the Democratic oversight of the Security Services adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007).

to determine disciplinary proceedings brought against the Director of Police (Article 83 - which refers to Article 82, and also, erroneously (?) Article 80). These comprise disciplinary prosecutors, and first and second instance disciplinary commissions. They are to be appointed by the Government on the proposal of the Minister and are to be civil servants. They are entitled to order either a fine or removal (Article 84). It is not clear why there is a need for four different kinds of disciplinary body or what type of case each should deal with. In the Venice Commission's view, it would be appropriate and in keeping with the functional independence of the Director of Police that all disciplinary complaints against him or her be dealt with by the Independent Board.

63. Furthermore, there is a complete absence of any detail, in the Federation draft, about how disciplinary proceedings are to be conducted. Who may initiate them? Are there to be public or private hearings? Who has right of audience? Is there a right to legal representation? Is there a right to call and examine witnesses? Is there an appeal to a court of law? Perhaps these matters are regulated elsewhere.

64. The Venice Commission regrets to note that an equally complex and complicated procedure, which involves also several disciplinary bodies, is established by the Canton of Sarajevo draft (Chapter VI, Articles 38-43).

F. Complaints mechanism / remedies

65. The complaints body established by the of the Federation draft appears to be independent and under duties to act promptly and to publicize its work in line with the European standards set out in the case law of the ECtHR and in other Council of Europe documents. However, the complaints body appears mainly to be intended to monitor the work of the (police) Unit for Professional Standards. It can disagree with the Unit, as regards whether sufficient evidence has been gathered, and – apparently – compel the Unit to bring disciplinary proceedings even in cases where the Unit does not propose this.

66. The Venice Commission is of the view that a complaints body must have a high degree of expertise, bearing in mind the fact that policing matters can have a long “learning curve”. It further considers that increased clarity should be provided with regard to the “working bodies” referred to in Article 86 which can propose nominees to the Citizens' Complaints Board. It is not clear either what procedures the Citizens Complaint Board are to follow. The draft indicates in Articles 90 and 91 that they are to pass the complaints on to supervisors and to the Unit for Professional Standards, but it says nothing about investigating them, or what procedures are to apply.

67. In most cases, one ought to be able to rely upon the investigation made by the Unit. However, here one can note that the complaints body established by the Federation Draft appears to lack its own residual investigative capability. It will thus be difficult for it in practice to disagree with the Unit's assessment of the evidence and to have any success in disciplinary proceedings it seeks to impose upon the Unit. As such, it may not satisfy the requirement of adequacy.

68. The Commission wishes to recall in this context that, in examining issues of alleged unlawful killing by the police (a violation of ECHR Article 2) the ECtHR has developed the investigation requirement in more detail. The ECtHR¹⁹ stresses the need to secure necessary

¹⁹See in particular *Giuliani and Gaggio v. Italy*, (Application no. 23458/02), Judgment of 24 March 2011; *Zavoloka v. Latvia*, no. 58447/00, 7 July 2009; *Kolevi v. Bulgaria*, no. 1108/02, 5 November 2009; *Ilhan v. Turkey* [GC], no. 22277/93, ECHR 2000-VII; *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII; and *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009; *Sagayev and others v. Russia*, (Application n° 4573/04), Judgment of 26 February 2009; *Varnava and other v. Turkey*, (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), Judgment, 18 September 2009; *McCann and others v United Kingdom* (Application no. 18984/91), Judgment of 27 September 1995.

evidence of wrongdoing and to take witness testimony, identify what has happened and who is responsible. The ECtHR has insisted on a "thorough and complete investigation" in such cases.

69. The Venice Commission furthermore notes that Articles 97 and 98 make it a criminal offence for the Director of Police or the Minister to fail to report to the public about events, topics and 'appearances' within their competence. It wonders whether it is appropriate to use criminal law in this way, for issues that seem to be essentially matters for political judgement rather than criminal law. The Commission is of the view that failure to comply with guidelines should not be a criminal offence and sees here the risk that such a law, if adopted, would be used to punish political opponents.

IV. Conclusions

70. The Venice Commission welcomes the efforts made by the authorities of the Federation of BiH and of the Canton of Sarajevo to improve, as part of a wider, longstanding process of reform of the Bosnian police system, the legal framework in place in this field, at the level of the Federation and of the Canton of Sarajevo. It finds commendable in particular that, in drafting amendments to the two laws in force, the authors of the two drafts have drawn on the available European and international standards and experiences.

71. The Commission notes at the same time that the two drafts still raise issues of feasibility/applicability, interrelations between the respective police forces, efficiency and costs in the specific context prevailing in BiH.

72. Additionally, the improvements proposed to the legislation already in force - which has not been subject of an assessment by the Commission in the present Opinion - do not solve the question whether the constitutional and institutional settings still in place in BiH constitute an adequate framework for an efficient and sustainable reform of the country's police system or should be reconsidered. This remains a particular challenge for the implementation of an efficient and sustainable reform of the police in Bosnia and Herzegovina.

73. The Venice Commission remains at the disposal of the Bosnian authorities, should any further assistance be necessary in this matter.