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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Opinion on the Draft Law on the Establishment of the Federation of Bosnia and Herzegovina Intelligence and Security Service

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I. Introduction

This opinion relates to the Draft Proposal by the „Federation of Bosnia and Herzegovina Government Working Group“ of a „Law on the Establishment of the Federation of Bosnia and Herzegovina Intelligence and Security Service“ (Sarajavo, May 2001). The opinion concentrates on the major constitutional issues of the draft. It therefore does not cover all possible legal aspects of the law. In particular, it does not address data protection aspects.

The establishment and operation of intelligence and security services poses special challenges in any country for the rule of law, democratic accountability and human rights. This has been recognized by the Parliamentary Assembly of the Council of Europe which in April 1999 has adopted Recommendation 1402 (1999) on the „Control of internal security services in Council of Europe member states“. This recommendation has been taken into account for this opinion.

The present draft raises a number of constitutional concerns. These are being dealt with in the order of the draft articles in which they appear. The basis for the constitutional assessment is the Constitution of the Federation of Bosnia and Herzegovina as amended and reprinted in Council of Europe Document CDL (2000) FBH-2 Engl. only.

II. Comments on specific articles

Article 2: According to Article 2 „the Service is an independent Federation institution, whose nature and way of organization require special organization“. This general principle is fleshed out in more detail in various other provisions in the draft. Although the draft provides for a number of powers of the government and parliament to determine (or decisively influence) the general rules of the service and to exercise *ex post facto* control, the draft seems to exclude (the possibility of) responsible direction and control by the government of specific activities of the Service as directed by its Director and its other officials. The present draft only provides that the government, and the Presidency, have the power to issue (or approve) general rules regarding the operation of the service. No rules are foressen which would give the Prime Minister or another minister the power to order the director to undertake (or not to undertake) certain specific operations. It is possible, however, that Article 23 no. 5 of the Draft („The Director of the Services has the responsibility to carry out tasks given it by the Technical Working Group on Intelligence Matters“) expresses the general power of the government to direct and control the Security Service also in specific matters. If that is the case, clarifications to that effect should be added to Articles 13 and 14 of the Draft.

If, however, it is the intention of the drafters to refuse the government direct day-to-day control of the Security Service because they conceive it as an independent institution, such a

set-up would be constitutionally problematic under a (largely) parliamentary constitutional system, such as the one of the Federation of Bosnia and Herzegovina. According to III. B. 3. Article 7 (c) (i) of the Constitution of the Federation of Bosnia and Herzegovina the Prime Minister shall be responsible for executing and enforcing Federation Government policies and laws. Accordingly, Guideline C. i. of Recommendation 1402 (1999) demands that „One minister should be assigned the political responsibility for controlling and supervising internal security services, and his office should have full access in order to make possible effective day-to-day control". The underlying reason for this requirement is the general principle of democratic (parlamentarian) responsibility of the executive. No. 6 of Recommendation 1402 (1999) postulates that „Effective democratic control of the internal security services, both a priori and ex post facto, by all three brances of power is especially vital in this regard". Since the Security Service is part of the executive and since the government is politically responsible before Parliament for the working of the executive, the government must have sufficient powers of control and direction over the executive in order to meaningfully exercise its responsibility.

Theoretically, there exist two possible justifications for conceiving the Security Service as an independent institution. The first is the American model of independent agencies, the second is functional necessity:

In the United States, the Supreme Court has recognized that the Parliament (Congress) can create certain agencies which are not subject to executive appointment and/or direction and control. Without going into the details of American constitutional law (see L. Tribe, American Constitutional Law, vol. 1, 3rd. ed. 2000, § 4-9 at pp. 703-717) it is clear that the justification for the possibility of setting up such agencies rests in the specific nature of the American Presidential system which is established by the US Constitution and in which the President is not immediately responsible before Parliament for the conduct of the executive. The President of the Federation of Bosnia and Herzegovina, on the other hand, is not conceived by the Constitution as directing operative governmental affairs (see also comment to Article 12 below).

Another possible justification for making an exception from the general rule of direction and control of the executive by the government is functional necessity. There exist certain independent executive institutions even in states with a parliamentary system which have been accepted. One example are Central Banks which are independent in order to prevent self-serving policies by the government of the day at the expense of general financial stability. Examples for such institutions, however, are rare and they are often legitimated by the constitution itself. They must be convincingly justified. It is not entirely excluded that there exist certain reasons in the Federation of Bosnia and Herzegovina which make it imperative to insulate the Security Service from direct governmental direction. Such reasons are, however, hardly conceivable. The specific „concordant" constitutional system of the Federation (which requires different organs and groups to cooperate in order to achieve a valid decision) seems to ensure that it is virtually impossible for one (ethnic or other) group

to govern alone and to abuse the possibilities of the Security Service for its own purposes. In addition, Recommendation 1402 (1999) states that „the risk of abuse of powers by internal security services, and thus the risk of serious human rights violations, rises when internal security services are organized in a specific fashion“, thereby indicating that they should be subject at least to the usual forms of governmental direction and control .

A number of Articles restrict the necessary powers of the government to direct and control the Security Service:

- Articles 13-15 provide for a ministerial committee and an administrative sub-committee which (ultimately) report to the Prime Minister. They give to the government only powers with respect to general rules for the Security Service and ex-post-facto control As mentioned above (see Article 2) the list of their powers is too restrictive and therefore seem to violate the rules concerning the parliamentary responsibility of the government. Since the „Permanent Federation Working Body“ reports to the Prime Minister it does not take away constitutional powers from the Prime Minister but merely assists in the preparation of their exercise (which may include delegation of certain powers). The same is true for the „Technical Working Group on Intelligence Matters“.

- Article 26 could be interpreted to give the Director and the Deputy Director of the Service an exclusive right to propose who will be appointed to the positions of Executive Director, Inspector General and Deputy Inspector-General. Such an interpretation would also violate the principle of governmental responsibility. For sake of clarity it is therefore suggested to exchange the words „based on a proposal“ for „taking into account a proposal“.

Article 3: According to Article 3 (2) the Security Service is to perform tasks with respect to narcotics trafficking and production. Guideline A. ii. of Recommendation 1402 (1999) demands that the sole task of the internal security services must be to protect national security (which is defined as combatting clear and present dangers to the democratic order of the state and its society). „Economic objectives, or the fight against organized crime per se should not be extended to the internal security services“.

Article 9: This provision tackles the important problem of wire-tapping. It requires approval from an investigative judge of the Supreme Court and it attempts to define the conditions under which wiretapping may be permissible. As a basic approach this is acceptabel. Guideline B. ii. a, b. and c. of Recommendation 1402 (1999), however, go a few steps further by specifying certain minimum requirements under which wiretapping may be undertaken: These minimum requirements are that:

a) „there is probable cause for belief that an individual is committing, has committed, or is about to commit an offence“. Article 9, on the other hand, only speaks of „unconstitutional activities under Article 3 of this law“ without a requirement of a specific offence being in question. This is an important difference for the principle of the

rule of law and for the protection of human rights. A judge is trained to evaluate whether a specific activity does or would constitute an offense and not whether it would be an „unconstitutional activity“ (a term which could also be interpreted in an unintended restrictive way: the Constitution does not declare „narcotics trafficking“ to be unconstitutional).

b) „there is probable cause for belief that particular communications or specific proof concerning that offence will be obtained through the proposed interception ...“. Article 9, on the other hand, contains no such requirement of a relationship between the intercepted communication and the „offence“ or the „unconstitutional activity“ concerned. Such a requirement appears to be necessary given the extraordinary gravity with which the fundamental right of privacy is affected by wiretapping.

c) „normal investigative procedures have been attempted but have failed or appear unlikely to succeed or be too dangerous“; such a requirement is not contained in the law. It is suggested that it be included.

Article 10: the translation contains an error. it should not read „measures under paragraph 9 of the law“ but „measures under Article 9 of the law“.

Article 12: This provision attributes certain responsibilities to the President and the Vice President of the Federation. IV. 3. Article 7 of the Constitution of the Federation of Bosnia and Herzegovina circumscribes the powers of the President of the Federation in the following terms: „Except as specifically provided in the Constitution (a) the President shall be responsible for ....(i) – vii)“. The powers of the President, as they are envisaged in this provision, do not include an authorization for the legislature to assign substantive tasks to the President. The Constitution does not specifically provide for responsibilities of the President in the area of Security Service or administrative oversight in general. Therefore, the President cannot be given such responsibilities by simple legislation as they are provided for in the Draft law. This would be unconstitutional.

The same considerations may not apply for the Vice-President as Article IV 3. (b) (iii) of the Constitution provides that the Vice-President „shall be carrying out such responsibilities assigned to him by the President or by legislation“. Article 12 would not make much sense anymore, however, if it would remain only insofar as it provides for responsibilities of the Vice-President. There may be an inconsistency here in the Constitution of the Federation of Bosnia and Herzegovina.

It is not lightly to be assumed, however, that it lies within the implied powers of the legislature to attribute additional responsibilites to the President. The Presidency under the Constitution of the Federation of Bosnia and Herzegovina is not similar to the one established by the US Constitution. The Presidency is limited to certain basic political acts but he has not powers to govern directly. This is the responsibility of the government (see Article IV. 3. § 7 (c) (e) and (f) of the Constitution). In any case, Article 12 (7) which provides that the

President and the Vice-President are responsible for „deciding about other issues important for Service work“ is too broad.

Articles 13-15: have been dealt with in the comments to Article 2 above.

Article 17 no. 2: It is problematic that the power of approving measures relating to the interruption, suspension or termination of the work (of the Service) should be given to a Parliamentary Committee. This would only make sense if the law provided for a duty of the Service to continue the respective work. Normally it is within the discretion of the Service to continue or to discontinue certain work. The draft provision is obviously designed to ensure that political or personal affiliations do not affect the proper working of the Service. This purpose, however, seems to be better served if the parliamentary oversight committee must merely be informed in such cases and then may exert (informal) political pressure. If it has a formal power of decision-making in this respect it must assume an operational responsibility which it reasonably cannot assume.

Article 18: It is difficult to see how the rules of work can be passed by „the Federation Parliament“. This Parliament consists of two chambers. They work together in a certain procedure to enact laws. No other procedures are provided for in the Constitution for the adoption of other legal acts. The Rules of Work, however, should not, according to the draft, be enacted in the form of a statute. They could equally not be enacted in the form of a joint resolution of both chambers since such a resolution would not have legally binding force. It is suggested that Article 18 spell out explicitly that the Rules of Work for this joint parliamentary committee be enacted in the form of a statute if these rules are supposed to be mandatory (that is: not subject to change by simple decision of both chambers).

Article 19: It is not clear what it means that „the Deputy Director shall share responsibility with the Director for carrying out this law ...“. Does it mean that the Deputy Director can veto any decision of the Director? If so, the occurrence of a situation as it is provided for in Article 20 would completely change the functioning of the Service since there is temporarily no counterweight. Or does it mean that both are in the same way politically responsible (and legally accountable) for actions of the Service? But how can a person be responsible for something which he or she could not have prevented?

Article 22: IV. 3. Article 7 of the Constitution of the Federation of Bosnia and Herzegovina gives the President only the power to appoint certain executive organs. To make appointments of positions in the Security Service is not among them. The power of appointment and dismissal must in this case therefore be vested in the government or in the responsible minister.

Article 23 nos. 8-10: See Comment on Article 12.

Article 24: See comment on Article 19

Article 26 could be interpreted to give the Director and the Deputy Director of the Service an exclusive right to propose who will be appointed to the positions of Executive Director, Inspector General and Deputy Inspector-General. Such an interpretation would violate the principle of governmental responsibility (see comment on Article 2 above). For sake of clarity it is therefore suggested to exchange the words „based on a proposal“ for „taking into account a proposal“.

Article 27: It is unclear whether this provision contains more than the usual aspects of administrative hierarchy (see Article 36 fo the Draft). If not, it is superfluous. If so, it should be spelled out more clearly what it means.

Article 31: See comment on Article 17 no. 2.

Article 42: It is suggested to clarify that the taking of disciplinarys measures does not exclude the pursuit of criminal investigations and trial.

Article 47 (3): The comment to Article 26 applies *mutatis mutandis*

Article 48: It should be clarified that the funds can only be spent if this accords with the plan which is passed by the Director in co-operation with the Deputy Director. Therefore, the word „and“ should be deleted.

Article 51 (5): The reference to the census of 1991 is an inappropriately strict standard. It does not seem to leave sufficient room for considerations of merit which should play a most important role.

Article 54: Taking into account the complicated procedure of appointment the time-limit of 7 days appears too short.

III. Additional comments:

Judicial Review: Attention is drawn to Guideline C. iii of Recommendation 1402 (1999) according to which the judiciary should be authorized to exercise extensive a priori and ex post facto control. The draft provides for judicial review in the important field of wire-tapping (Article 9) but does not contain a general reference to judicial review. According to the Recommendation „the overriding principle for ex post facto control should be that persons who feel that their rights have been violated by acts (or omissions) of security organs should in general be able to seek redress before courts of law or other judicial bodies. These courts should have jurisdiction to determine whether the actions complained of were within the power and function of the internal security services as established by law. Thus, the court

should have the right to determine whether there was undue harassment of the individual or abuse of discretionary powers in his or her regard“.

Ombudman: II. B. Article 5 of the Constitution of the Federation of Bosnia and Herzegovina gives the Ombudsman the right to examine the activities of any institution of the Federation. Perhaps there should be a reference to the constitutional powers of the Ombudsman in the Draft to make it clear that these powers also apply with respect to the Security Service. Guideline C. iv. of Recommendation 1402 (1999) goes in the same direction

Right of access to information: Guideline C. v. of Recommendation 1402 (1999) suggests that individuals should be given a general right of access to information gathered and stored by internal security services. , with exceptions to this right in the interest of national security clearly defined by law. It would also be desirable that all disputes concerning an internal security service‘s power to bar discosure on information be subject to judicial review.